



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/06014/2012

THE IMMIGRATION ACTS

**Heard at Field House
On 25 July 2013**

**Determination
Promulgated
On 26 July 2013**

Before

Upper Tribunal Judge Kekić

Between

FOA

And

**Entry Clearance Officer
Lagos**

Appellant

Respondent

Determination and Reasons

Representation

For the appellant:

Unrepresented

For the respondent: Mr L Tarlow, Senior Home Office Presenting Officer

1. An anonymity order was issued by the First-tier Tribunal and I have therefore continued to apply it.
2. This appeal comes before me following the hearing on 13 June when I found an error of law in the determination of the First-tier Tribunal Judge.

That decision sets out the background and issues and I therefore reproduce it below:

1. *This appeal comes before me following the grant of permission to appeal by Upper Tribunal Judge P Lane on 11 April 2013.*

2. *The appellant is a citizen of Nigeria born on 29 October 1970. He entered the UK illegally in December 2003 having spent three months in France, remained here unlawfully and then appears to have returned to Nigeria in late 2008. He seeks entry clearance as the spouse of the sponsor, JF, a British national whom he met whilst he was in the UK and whom he married in Nigeria on 11 February 2009. His application was refused by the ECO on 17 January 2012 under paragraphs 281 (i)(a)(ii-vi) and 320(11). The ECO was not satisfied that the appellant had the necessary English language test certificate, that the marriage was genuine and subsisting with the intentions of both parties to live together permanently and that adequate maintenance and accommodation would be available. It was also considered that the appellant had contrived in a significant way to frustrate the intentions of the rules by entering the UK illegally, living and working here with a false identity and then failing to disclose this conduct on an earlier entry clearance application.*

3. *The appeal came before First-tier Tribunal Judge Behan at Hatton Cross on 14 January 2013. It was dismissed under the rules and on Article 8 grounds by way of a determination promulgated on 2 February 2013.*

4. *There have been two earlier entry clearance applications refused on 29 June 2009 and 5 October 2009. The first was not appealed but the second was and it was heard and dismissed by Immigration Judge Martineau in March 2010 (OA/58502/2009 refers; the Tribunal file has since been destroyed although a copy of the determination is on the present file).*

Error of Law

5. *The matter first came before me at a Case Management Review hearing on 9 May 2013 when the sponsor attended with her father. The procedure and issues were explained and the documentary evidence on file was checked, sorted out and copies for the respondent. The matter then resumed on 13 June. I heard from Mr Tarlow and from the sponsor who was assisted by Mr Cady, a Mackenzie friend. At the conclusions of the hearing I indicated that I had found an error of law in the judge's Article 8 assessment but not with respect to her decision under the rules. I now give reasons for that decision.*

6. *With regard to the challenge under the Immigration Rules, I find that the judge was wrong to say the sponsor had been "evasive" in her evidence and had not provided documentary evidence, as she claimed to have done, to confirm an offer of accommodation from her parents. In fact this letter had been sent to the Tribunal and was either overlooked*

by the judge or not linked to the file in time. As a result, the judge found adequate accommodation was not available. I do not however find that this error undermines the conclusion that the appellant cannot succeed under the rules. I say this for three reasons. First, as an out of country appeal I am only permitted to take account of evidence relating to facts in existence at the date of the decision. When the appellant made his application the information he provided to the ECO was that he would be living with the sponsor at her property. There was no suggestion that they would live with her parents. Therefore even if the letter offering accommodation had been seen, it would not have assisted the appellant as far as the refusal on accommodation was concerned. Second, the appellant did not have the required English language certificate (indeed he appears to have done nothing since with respect to obtaining it). Third, the sponsor is unemployed and is on benefits. The judge considered the letter offering employment to the appellant but found that it did not specify whether the employment would be full time or permanent and gave no indication of salary. As such her finding that it could not be relied upon to meet the maintenance requirements was sound. For these reasons, as the appellant cannot meet the requirements of the rules in any event, the judge's mistaken assessment of the sponsor does not impact upon her decision to dismiss the appeal on paragraph 281 grounds.

7. With regard to paragraph 320(11), the judge was required to take the previous determination as her starting point as this is what she did. There is no dispute that the appellant entered, lived and worked here without leave and that he used a false identity. Whether this identity belonged to a friend or a relative or to a complete stranger is neither here nor there. He acted fraudulently and despite the sponsor's protestations that this was only so he could support himself and his family in Nigeria, it is dishonest behaviour. The matter was properly considered by Judge Martineau and challenges to his determination were unsuccessful. In the circumstances Judge Behan was entitled to rely upon it in the way that she did. No error of law has been shown in that respect.

8. That leaves Article 8. the judge did not find there was family life between the appellant and the sponsor because she did not accept that the appellant was sincere in his intentions however she did nevertheless proceed to consider the matter in the alternative, that is to say on the basis that the relationship was genuine. She applied the Razgar steps and considered proportionality. That is where she fell into error.

9. At paragraph 25 she found that it would be reasonable to expect the sponsor to relocate to Nigeria. She reaches this decision without any analysis of the sponsor's personal circumstances and ties to this country. The sponsor is a troubled lady who has spent many years of her life in an abusive marriage, dealing with the after affects of an unpleasant divorce (the financial settlement aspect of which remains ongoing) and coping with a brutal rape and its after-effects. On top of that she has had a host

of medical problems which were not diagnosed early as they were passed off as stress related. She continues to be under the care of the hospital and remains on medication. She has a close relationship with her children and with her parents. She is white, British born as is her family and has never lived outside the UK. Previous visits to Nigeria have left her feeling vulnerable due to the difficulties she experienced there. To complicate matters further, the man who raped her is Nigerian, known to the appellant and due to be deported once he has served his prison sentence. Not surprisingly, she is fearful that if she travelled to Nigeria to live or to visit, she would be placing herself in a situation where it would be easy for him to find her. The judge's finding that such a woman could reasonably locate to Nigeria either to live or for visits should have been made only after all these matters were taken into account. As this was not done, the judge erred in reaching that conclusion.

10. The judge then proceeded to consider whether family life could continue if the sponsor did not relocate to Nigeria. She found at paragraph 26 that it could because visits could be made. Again, however, the judge erred in not taking account of the circumstances referred to above. The evidence before her was that the sponsor did not feel safe visiting Nigeria and so the finding that family life could continue in this way was flawed. Her decision should have focused on whether family life could continue without visits and whether the decision remained proportionate even if it meant the marriage would effectively end. These matters were not properly considered.

11. For these reasons I find that the judge's decision on Article 8 has to be set aside and remade.

12. Although the sponsor was anxious for the matter to be dealt with immediately without a further hearing, after consultation with Mr Cady she agreed to a resumed hearing and to obtain documentary evidence from the appellant addressing his intentions and past conduct. A date for 25 July has been agreed. Notwithstanding Mr Cady's help and support, the appellant may consider it helpful to find legal representation to assist the sponsor at the next hearing.

Decision

13. The decision of the First-tier Tribunal to dismiss the appeal under the Immigration Rules contains no errors of law and that part of the determination is to stand. The decision on Article 8 does however contain errors of law and is set aside in its entirety. It shall be remade at a hearing on 25 July.

Directions

14. All further documentary evidence must be served upon the Tribunal and the respondent no later than 15 July 2013. The following matters are in issue:

- Whether there is family life between the appellant and sponsor*
- Whether the appellant has a private life in the UK*

Whether the decision to refuse entry clearance is a proportionate response when the rights of the appellant and sponsor and any other affected parties are taken into account.

Appeal hearing

3. Prior to the hearing I received a lengthy witness statement from the appellant along with a print out of visits to a gym made by himself and the sponsor in 2008 and 2009. They show numerous overlapping visits.
4. The sponsor attended alone. She explained that Mr Cady had been stuck in an elevator and therefore had been unable to attend. She was, nevertheless, content to proceed. It was agreed that the only live issue was Article 8.
5. The sponsor gave oral evidence. She confirmed that the appellant was her husband; they had married in Nigeria in 2009 after he had left the UK in 2008. He had left voluntarily. Mr Tarlow was able to confirm at this stage that no enforcement action had been taken against him and he later confirmed that no charges had brought by the police for his use of a false identity.
6. The sponsor said that they met in the UK on 21 August 2007 and had started dating immediately. At first the relationship was casual but it soon grew serious. She would go and stay with him at his place as he was unable to come to hers (her former marital home under ongoing dispute with her ex-husband). She said that she had visited Nigeria on six occasions; four times in 2009, once in 2010 and once in 2011. Evidence in the form of her passport is on the Tribunal file and endorsements to support that may be seen. She stated that they stayed in touch via telephone calls and emails. Evidence of calls and emails is before me.
7. The sponsor said that the appellant had been working for T mobile before he left. He still had an offer of employment open to him; additionally he had been given an offer of employment on a farm in Holland and she would be prepared to stay there with him during the periods where extra work was needed there.
8. In response to Mr Tarlow's questions, the sponsor said that she and the appellant frequented go to the gym together; it used to be an Esporta Club but had been taken over by Virgin Active. She said she had not been aware of his lack of immigration status initially but he had later disclosed this to her. She said she had been so overwhelmed by what had been going on in her life at the time that this meant little to her; additionally

she had no experience of immigration matters. She had also been aware that he was using a false name to work but he had used his real name for all his other dealings.

9. The sponsor confirmed that she had read the appellant's statement. She confirmed she had visited Nigeria six times. She confirmed that the appellant had told her he had worked in order to support his family. She had met many of them but he had a large family and she did not know them all. He was one of eight children and his siblings also had children. She said that some of them worked as traders on the streets.
10. The sponsor was asked whether she would be able to continue her marriage by way of visits as she had been doing. She said she would not. She would be afraid to go to Nigeria. She described having to hide in the car when she went out so that they were not stopped by the police looking for large bribes. She said her parents and her children would also be worried if she went there. Additionally there were financial concerns. The appellant had been paying for half the travel costs and she had been paying the rest out of her compensation funds but he needed to keep his cash for use when he came here and her funds were dwindling. She said it was not safe for her to walk the streets there; someone had to be with her constantly. She would be an easy target for abduction and she would be held for ransom. She acknowledged that she had not felt this way on her earlier visits but she soon found out what it was like there. Nevertheless she had continued to go because she wanted to be with the appellant.
11. The sponsor stated that since the attack on her in 2010, she had developed excruciating pains in her head, pins and needles in her arms and feelings of dizziness. She was on medication but it was not helping her. She had not had these problems on the pre 2011 visits and on the last visit although she had suffered she had used alcohol to deaden the pain. The situation was now worse.
12. That completed the oral evidence. I then heard submissions. Mr Tarlow relied on refusal letter and submitted that the appellant had been doubly deceitful; first, in using a false identity to work here and second, in failing to disclose his unlawful status when making his visa application. He submitted that deception had to be taken into account when the Article 8 assessment was undertaken. He submitted that whilst it was not reasonable to expect the sponsor to relocate to Nigeria to live, it was reasonable to expect her to visit and the marriage could be continued as it had been the last few years by way of electronic communication, telephone calls and visits. He acknowledged that was difficult but submitted that was the price to be paid for dishonesty. The appellant should not be permitted to return until the ECO changed his mind.
13. The sponsor responded. She submitted that she had never been dishonest. The appellant had, but he was sorry for what he had done. He

had done his best to make amends and to put things right by returning to Nigeria in order to sort the problem out. They had been in regular contact ever since. She had known his true identity. They had been apart for so many years. Her attacker had now completed his sentence but the appellant who had committed a lesser crime was still being punished. They did not know what could be done to make it right.

14. That concluded the hearing. I reserved my determination which I now give.

Findings and Conclusions

15. The issue before me is whether the decision interferes with the appellant's private and family life in such a way as to make it disproportionate. In assessing this, I have regard to the circumstances and facts that prevail as at the date of hearing. I would state at the outset that I have found JF to be a wholly impressive and persuasive witness. She has been truthful throughout the proceedings, spontaneous and coherent in giving her testimony despite her many medical difficulties and I accept her evidence in its entirety.
16. I accept that the appellant and sponsor have established family life. I note Mr Tarlow did not seek to dispute that their relationship was genuine and subsisting. I accept the sponsor's evidence, corroborated by the appellant's statement, that they met in 2007, developed a relationship and that it soon became serious. I find that the sponsor was in a particularly vulnerable situation at that time, having just been through an abusive marriage and that this escalated the relationship with the appellant into something serious faster than she would have otherwise intended. I also note that although the ECO noted the documentary evidence to show ongoing contact had been lacking when the application was made, there is substantial evidence before me to show that the couple have been in touch over the years by way of telephone calls, emails and by the sponsor's six visits. The real issue in this case is the proportionality of the decision.
17. I accept that the appellant who had been here unlawfully decided to return to Nigeria voluntarily in order to resolve his immigration status and to make an application to live with the sponsor in the proper way. Three such applications have been made. I note that no enforcement action was taken against the appellant and that he chose to leave voluntarily. He could have stayed and pursued his Article 8 claim from the UK but, to his credit, he did the decent thing and returned. I also note that the police did not press charges against him for the use of a false identity. It is unfortunate that having returned to Nigeria to do things the right way, the appellant then took bad advice and sought to conceal his previous presence in the UK when he made his first entry clearance application. Had he come clean at that stage, these proceedings may

well have been shorter. Instead he attempted to conceal his wrongdoing thereby compounding the difficulty in which he had he placed himself.

18. I have read with care his lengthy witness statement in which he accepts his past misdeeds and asks for a chance to put the past behind him and make good his promises to his wife. It has to be said that she needs him desperately. I will not set out the details of all her trials over the last few years; these are touched upon in the error of law decision inserted in the first part of this determination. Suffice to say, despite her many and serious problems, she has stood by him throughout, never faltering and adamant that she will fight until he is able to join her. It cannot have been easy for her to manage on her own through these many difficult years. Although she has had support from her parents, I can appreciate that it is the appellant whom she really needs by her side.
19. There is no question that the appellant behaved dishonestly. He also behaved stupidly, if I may say so, by trying to cover up that fact when he applied for entry clearance. I accept, however, he did so out of desperation to be reunited with his wife and on the very bad advice of an agent. I can understand why the sponsor was so furious with him when she found out (Judge Martineau's determination refers). Nevertheless, as the sponsor says, the appellant has paid the price. His punishment has been to be separated from the sponsor since 2008. I asked Mr Tarlow when he made his submissions whether it was the case that someone in the appellant's position should have to 'pay the price' indefinitely and his response was that he should, until the ECO changed his mind.
20. I have considered the ECO's decision, upon which Mr Tarlow placed reliance. However, I note that the ECO did not consider Article 8 at all. He should have done. I also take account of the fact that the appellant was not charged with any crime. Whilst I am not condoning in any way his use of a false identity in order to take employment, I note that he was not involved in any drug related or violent activity. I take the view that there must come a time when an immigration offender has 'done his time' and when continued separation from a spouse becomes disproportionate. It cannot be said that this depends on when an ECO changes his mind given that this matter was not considered by him at all in the first place.
21. I have considered Mr Tarlow's proposition that the marriage can continue as it has done over the last few years by way of visits, emails and telephone calls. That, however, can never be a true marriage. Whilst it may be tolerable for a limited period, it cannot be a substitute for a relationship where the parties can physically be together. I consider that there are cases where an appellant's conduct is such that separation may have to be permanent or indefinite however I do not consider that to be the case here and, of course, this is not a deportation appeal. I have considered with care whether the sponsor can be expected to continue her marriage in this way and indeed whether the appellant can also be expected to be satisfied with the status quo. It may be somewhat easier

for the appellant who has no health issues and is surrounded by close family. The same cannot be said for the sponsor who lives alone and has been struggling to cope with her ill health, ongoing acrimonious dispute over finances with her ex-husband as well as the aftermath of a vicious rape in 2010. I accept her evidence that despite her six visits to Nigeria, she does not feel able to go there any more. I note that her health has rapidly deteriorated after the incident in 2010 and I accept that she does not feel safe there and that her parents and her children are worried for her safety should she return there. Circumstances change and whilst the sponsor may have been fit enough to make the long journey there in previous years, she does not appear to be anywhere near well enough to manage that now. The substantial documentary evidence on file in respect of her ill health and ongoing pain makes for very depressing reading.

22. I accept the evidence that the appellant would have employment upon arrival. I have no reason to impugn the contents of the letter offering him work as a security guard. Even if that offer were not on the table, I have no reason to find that he would not be able to find work particularly as he had managed to work the entire time he was here before. I also consider that the appellant's presence here would be of great assistance to the sponsor and may get her off benefits; a fact which would be in the public interest. Additionally, there is evidence to show that the appellant has sold a plot of land and intends to bring the proceeds of that sale to the UK.
23. In conclusion then, the appeal comes down to this: does the appellant's past conduct justify his continued exclusion from the UK? In other words, is the public interest in keeping the appellant from the UK for his past misconduct of greater weight in the balancing exercise than his right and the right of his wife to enjoy a family life together. Given the time that has passed since the appellant's misconduct, the long separation from his wife which has been punishment in itself, her specific and compelling need to have him with her on a permanent rather than a temporary basis, his ability to find employment so as to assist with his wife's financial situation and the fact that his statement discloses genuine regret and remorse on his part, I conclude that the scales are tipped in favour of the appellant.
24. I would say in conclusion that this has been a difficult case to determine and that the appellant is fortunate to have such a steadfast and devoted wife as it has surely been her doggedness to fight on his behalf that has assisted him to succeed in this appeal.

Decision

25. The First-tier Tribunal made errors of law in respect of Article 8 and that part of the determination is set aside. The appeal is allowed on Article 8 grounds.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

26 July 2013