



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27435/2014

THE IMMIGRATION ACTS

Heard at Field House
On 16 April 2015

Decision and Reasons Promulgated
On 20 April 2015

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr ALUWATOBI SOLOMON AKIODE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondent: Mr O Jibowla, Counsel (instructed by M J Solomon & Partners)

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge PJM Hollingworth on 6 February 2015 against the decision and reasons of First-tier Tribunal Judge Hanley who had allowed the Respondent's appeal

against the Appellant's decision dated 18 June 2014 to refuse to grant the Respondent leave to remain on Article 8 ECHR family and private life grounds outside the Immigration Rules and to remove him from the United Kingdom. The decision and reasons was promulgated on 17 December 2014.

2. The Respondent is a national of Nigeria. His date of birth was given as 16 November 1979. He had entered the United Kingdom as a student on 25 August 2004, which leave had been extended until 31 October 2007. His next application was out of time and was refused. An attempted appeal was struck out on 4 February 2010. On 12 June 2014 the Respondent made his application for leave to remain outside the Immigration Rules. This was refused on 18 June 2014 when Removal Directions were made.
3. Judge Hanley found that the Respondent met the relationship requirements of Appendix FM through his wife Mrs Katie Akiode ("Mrs Akiode"), a British Citizen. He considered that EX.1 applied and that there were insurmountable obstacles to the continuation of family life between the spouses in Nigeria because of Mrs Akiode's deep ties to the United Kingdom: see [41] of the decision and reasons. He allowed the appeal under the Immigration Rules and under Article 8 ECHR.
4. Permission to appeal to the Upper Tribunal as sought by the Appellant was granted by Judge Hollingworth because he considered that it was arguable that the judge had failed to consider Sabir (Appendix FM - EX.1 not free standing) [2014] UKUT 00063 (IAC), nor had he considered whether it would be proportionate to require the Respondent to return to Nigeria to make an entry clearance application from there.
5. Standard directions were made by the Upper Tribunal.

Submissions – error of law

6. Mr Duffy for the Secretary of State submitted that this was a clear case of legal error in relation to Appendix FM and also the Article 8 ECHR claim, as the grant of permission to appeal by the First-tier Tribunal indicated. There was no undue hardship in the Respondent's making an entry clearance application in the usual way after returning to Nigeria. No exceptional circumstances had been identified by the judge which made that an onerous or

superfluous requirement. The judge had not considered VW (Uganda) [2009] EWCA Civ 5 and the level of seriousness test, merely matters of choice or inconvenience. His decision and reasons should be set aside and remade. (The procedural unfairness allegations made in the application for permission to appeal were not pursued.)

7. Mr Jibowla for the Respondent submitted that the judge's findings had been open to him and were based on the proportionality assessment which remained a requirement. The proposed disruption to the family life of the Respondent and his British Citizen wife which would result from his removal was disproportionate because there was no public interest in requiring the Respondent to return to Nigeria to make an entry clearance application. The judge had found that there would be no charge on public funds. Chikwamba [2008] UKHL 40 applied. The decision and reasons should stand.

The error of law finding

8. At the conclusion of submissions, the tribunal indicated that it found that the judge had fallen into material error of law, for the reasons succinctly indicated in the grant of permission to appeal by the First-tier Tribunal. The judge had found, correctly that the Respondent had been an overstayer since 2007. Indeed he was not impressed by the Respondent's evidence as to his immigration history: see [35] of the decision and reasons. The judge found as fact that that the Respondent's wife had known that the Respondent had no basis of stay at the outset of their relationship, i.e., that the relationship had been formed in full knowledge of the probable consequences of the absence of leave to remain. There was no evidence that the Respondent faced any risk on return to Nigeria or would, for example, be unable to practise his religion.
9. In the light of the judge's plain findings, it is not easy to see why the judge gave no consideration at all to the obvious possibility that the Respondent (without or without his wife) could return to Nigeria to seek entry clearance as a spouse from there. While the judge was entitled to find that Mrs Akiode could not be expected to live in Nigeria against her wishes, it was necessary to examine all of the practical possibilities. The judge omitted to identify any matter which justified a departure from the Immigration Rules. No case for special treatment of the Respondent and sponsor was identified.

Indeed, on the facts as found by him, none existed. The judge was not entitled to proceed further.

10. Sabir (above) should have been cited to the judge, which would have avoided the misapplication of EX.1. The claim under Appendix FM had already failed and was not saved by EX.1. The proportionality analysis was faulty because no undue hardship would result from compliance with Appendix FM. The decision of the First-tier Tribunal was set aside for material error of law. The decision had therefore to be remade. Both parties were willing for the rehearing to proceed immediately.

The rehearing

11. Since the Immigration Rules could not be met, the only live issue was Article 8 ECHR. The claim needed to be reheard on the basis of the facts as at the date of the rehearing before the Upper Tribunal, although for these purposes there had been no material changes since the hearing in the First-tier Tribunal. Sections 117 A-D of the Nationality, Immigration and Asylum Act 2002 applied. For clarity the tribunal will now refer to the parties by their designations in the First-tier Tribunal.
12. No additional submissions were needed as all relevant points had been discussed earlier.

Discussion and fresh decision

13. There was no significant dispute of fact in this appeal and it was accepted that the Appellant and his wife enjoy family life together. The tribunal finds that the Appellant and his wife are living together and that Mrs Akiode is able to satisfy the financial requirements of Appendix FM. The problem is that the Appellant is unable to satisfy the Immigration Rules because he is a long term overstayer who has refused to leave the United Kingdom despite the absence of any leave to remain.
14. Nasim and Others (Article 8) [2014] UKUT 00025 (IAC) applies to the Appellant's limited private life in the United Kingdom. His intention as a student was to return to Nigeria and it was only meeting his fiancée/wife which changed that. There was no factor in the Appellant's private life which the tribunal considers was

such as to require the Secretary of State to consider the exercise of her discretion outside the Immigration Rules, as the Appellant can practise his religion in Nigeria.

15. The fact that the Appellant meets some of the factors listed in section 117B of the Nationality, Immigration and Asylum Act 2002 does not create a right for him to stay in the United Kingdom. They are merely factors which must be taken into consideration, and the tribunal has done so. It is plain that the Appellant's family life was created at a time when he had no status in the United Kingdom, i.e., was "precarious". There is no need for the tribunal to refer the Appellant's claim back to the Secretary of State in order to consider whether there are exceptional circumstances which might require the grant of leave to remain outside the Immigration Rules, because there is nothing which has such potential, as will be explained further below.
16. While it would in theory be possible for the Appellant's wife to accompany him to Nigeria, since there would be no risk of harm to either of them and it may be safely inferred that there would be support available from the Appellant's family, if any such stay were prolonged, the wife's work would be interrupted. She would be separated from her family, although obviously the Appellant would be separated from his if he settles in the United Kingdom. There would, however, be little if any difficulty in the wife's accompanying the Appellant to Nigeria for a visit.
17. It was argued that the temporary separation of the couple would be unduly or unjustifiably harsh and thus an exceptional circumstance. The tribunal disagrees. If the Appellant chooses to return to Nigeria alone they can maintain contact through the usual means, including email, Skype and SMS texts.
18. If that were a mistaken or incomplete view for any reason, the live issue applying the Razgar [2004] UKHL 27 tests is proportionality. The legitimate objective is immigration control, which embraces many related matters. An important aspect of immigration control for the purposes of the present appeal is that the decision as to which non citizens are permitted to settle in the United Kingdom is not a matter of private choice, whether or not there will be any measurable cost or indeed potential economic benefit from such settlement. There has to be a rule, democratically determined, which applies to all. Those rules, already strict, were made far

stricter by parliament from 9 July 2012 onwards, a process which continues.

19. Chikwamba [2008] UKHL 40 is inapplicable, because the Appellant is unable to meet the Immigration Rules and faces no difficulties in Nigeria. He has no right to be in the United Kingdom. The requirement for him to leave the United Kingdom is not an arid bureaucratic exercise.
20. In the tribunal's view, the proportionality balance is against the Appellant. He is simply being required to meet the Immigration Rules which apply to everyone. His removal to his home country cannot be regarded as unreasonable nor will it create consequences which can sensibly be considered as unduly harsh for him or for his British Citizen spouse.
21. Thus, however the Appellant's appeal is analysed, it must fail.
22. There was no application for an anonymity direction and the tribunal sees no need for one.

DECISION

The making of the previous decision involved the making of an error on a point of law. The tribunal allows the onwards appeal to the Upper Tribunal, sets aside the original decision and remakes the original decision as follows:

The appeal is dismissed

Signed

Dated

Deputy Upper Tribunal Judge Manuell

TO THE RESPONDENT **FEE AWARD**

The appeal was dismissed and so there can be no fee award

Signed

Dated

Deputy Upper Tribunal Judge Manuell