



IAC-FH-AR-V1

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

Appeal Number: IA/45727/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 15 April 2016**

**Decision &  
Promulgated**

**On 28 April 2016**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHANA**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ODUNAYO AYODEJI IBITOYE  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: Miss E King, Counsel, instructed by Trinity Solicitors

**DECISION AND REASONS**

1. The appellant in this appeal is the Secretary of State for the Home Department. The appellant is a citizen of Nigeria, born on 22 July 1974. However, for the sake of convenience I shall refer to the parties as they

were referred to in the proceedings before the first-tier Tribunal. The appellant appealed against the decision of the respondent to refuse him further leave to remain as a spouse of a Tier 1 Points-Based Migrant. First-tier Tribunal Judge Owens allowed the appellant's appeal under Article 8 of the European Convention on Human Rights.

2. The respondent appealed against the decision and First-tier Tribunal Judge Nicholson granted the respondent permission to appeal stating that it is arguable that the judge erred in placing significant weight on private life because the judge was bound by Section 117B of the 2002 Act as amended to place little weight on a private life established at a time when the appellant's immigration status was precarious. It is therefore arguable that the weight attached to the appellant's private life had a material bearing on the overall outcome of the decision.
3. The First-tier Tribunal Judge made the following findings in her determination dated 29 September 2015. She notes the immigration history of the appellant at paragraph 23 which is that he entered the United Kingdom on 4 November 2010 as the dependant spouse of a Tier 1 Points Based Migrant and he was granted leave until 17 May 2015. On 8 May 2014 he submitted an application for indefinite leave to remain at the same time as his wife as the spouse of a Tier 1 Migrant and this application was refused on 22 October.
4. The judge noted that it is not in dispute that the appellant is in a genuine relationship with his wife on whom he is dependent. She stated that the appellant married his wife on 18 August 2001 in Nigeria and the couple lived in Lagos together prior to coming to the United Kingdom. They have been married for fourteen years and the appellant was granted leave to enter the UK as the dependant of his wife who was a work permit holder. At all times the appellant has remained lawfully in the United Kingdom as her dependant and they continue to cohabit. They have two children both born in Nigeria, the first born on 23 July 2003 who is almost 12 years and in year 7 at school, the second child born on 17 May 2005 who is now 10 years old and in year 5.
5. The appellant does not meet the requirements of the Immigration Rules because his application stands for refusal under paragraph 319E of the Immigration Rules because of a caution which was given to the appellant for assault.
6. The judge then considered the appellant's appeal under Article 8 of the European Convention on Human Rights and considered **Razgar [2004] UKHL 27** and stated that the appellant has established private life in the United Kingdom because he has been in this country for five years and has worked here. She found that his wife also has private life in the United Kingdom and accepts that the eldest two children have also established their own private life in this country. She found that they have a secure

home life in the United Kingdom and have established social networks in the United Kingdom and their workplace, school and community.

6. The judge concluded that the appellant's removal will interfere with the appellant's family and private life. The judge considered at paragraph 51 the public aim to be achieved with reference to Section 117A and 117B of the Nationality, Immigration and Asylum Act 2002 as amended by Section 19 of the Immigration Act 2014 and took those into account. She took into account **ZH (Tanzania)** and Section 55 of the Borders, Citizenship and Immigration Act 2009. The judge concluded at paragraph 54:

"I find that it would not be reasonable for family life to take place abroad. I find that the appellant's wife and his two children have all been granted indefinite leave to remain in the United Kingdom in recognition of their ties to the UK. I find that the two children are now rooted in the UK as they have remained here for the last four and a half years since they were young children. They are settled into school and the eldest child is now at secondary school. The appellant's wife is employed and able to support the two children and she is receiving ongoing treatment in respect of her mental health issues. It would be difficult for the family to find a home and employment initially and the disruption would cause them considerable hardship and interfere significantly with the two children's education and the appellant's wife's mental wellbeing. On this basis I find that in these circumstances that it would not be reasonable for the family to relocate as a whole to Nigeria."

7. The judge went on to consider the interests of the children as a distinct and separate enquiry under Section 55 and said that they have lived in this country for almost five years and their best interests are to be brought up by both parents. It is important for these two children to have their father present because he is their main carer when their mother becomes ill and their mother suffers from bipolar relapses and can become extremely unwell.
8. The judge then considered the issue of proportionality and the caution given to the appellant for assault and said that the appellant had satisfied all the substantive requirements of the immigration rules but pursuant to paragraph 319E he stands for refusal because of this caution which was given to him by the police because the appellant assaulted his wife. In that respect he also considered the explanation provided by the appellant that this caution was given at a time when his wife was having a bipolar relapse. The judge allowed the appellant's appeal.
9. The grounds of appeal state that at paragraph 54 of the determination the judge finds that it would not be reasonable for the family to relocate to Nigeria as a whole. The judge finds that the appellant's wife is bipolar but there is no evidence that treatment is unavailable in Nigeria. There is no evidence that the appellant and his family would face harsh conditions in

Nigeria and there is no evidence that the appellant and his wife would be unable to find employment in order to support their family financially upon return. They are both currently employed in the United Kingdom and there is no evidence that the appellant and his wife have any family in Nigeria and if they do, whether that would be unable to support them upon return.

10. The appellant and his wife would be returning to conditions that are no different to that experienced by every other Nigerian family. The judge has failed to identify any circumstances which would lead to an unjustifiably harsh outcome for the appellant and his family. The judge made a material error of law when she did not take into account that little weight should be given to a private life established when a person's immigration status is precarious or unlawful and therefore little weight should be given to their private life as in the case of **AM (Section 117B) Malawi [2015] UKUT 0260 (IAC)** where Parliament has drawn a sharp distinction between any period of time during which a person has been in the United Kingdom unlawfully and any period of time when the person's immigration status in the UK were merely precarious.
11. At the hearing I heard submissions from both parties as to whether there is an error of law in the decision. Mr Melvin relied on his grounds of appeal and said that the judge has not considered why the appellant's circumstances are exceptional that she should be granted leave under Article 8.
12. Miss King stated that the judge saw that this is a family life case and took the best interests of the children into account. She has also considered Section 117B and concluded that it is an old deportation case and the judge was entitled to reach the findings that she did. The judge found there would be unjustifiably harsh outcomes. The test is unjustifiably harsh outcome. It is not necessarily compelling.
13. The judge focused on the appellant's wife's mental health and has clearly dealt with the caution issued to the appellant for his assault. The wife should not be punished further by being required to leave the United Kingdom and return to Nigeria with her husband and children.
14. Mr Melvin replied that there has been no consideration that this family are Nigeria citizens and **ZH (Tanzania)** applies to British citizens.

### **My Findings as to whether there is an Error of Law in the Determination**

15. There is no dispute that the judge correctly found that the appellant does not meet the requirements of the Immigration Rules in that he stands for refusal under paragraph 319E(a) due to the caution that he received after he assaulted his wife.

16. The judge when considering Article 8 of the European Convention on Human Rights stated that it would be unreasonable for the family life to take place outside of the United Kingdom. The judge did not give adequate reasons as to why it would be unreasonable for the appellant's family life to continue to take place in Nigeria. Nowhere in the determination is there recognition that the appellants are Nigerian citizens and not citizens of the United Kingdom.
17. The judge was bound to consider whether there are any exceptional circumstances in this case which are not covered by the Immigration Rules which have been found to be Article 8 compliant. She failed to identify the gap that possibly exists between where the Immigration Rules end and Article 8 begins. There was no discussion or evidence in the determination in respect of what family the appellants have in Nigeria and whether this family might be able to support them in Nigeria, initially when they return. The judge found that both appellants are working and the appellant's wife's bipolar condition can be treated in Nigeria.
18. I therefore find that the judge has not considered this appeal within the law and the jurisprudence in that there must be something more preventing the appellants to return to their home country other than the choice of the appellants as to where they want to live. If the judge was to find that it would be unreasonably harsh for them to return to Nigeria, the judge must identify evidence to support that finding. The mere fact that the appellant's wife has bipolar condition is not sufficient in itself for her to be granted protection in this country. There was no evidence before the judge that this condition cannot be treated in Nigeria.
19. In respect of the children they are not British citizens, they are citizens of Nigeria and came to this country sometime after they were born. They have not lived here for seven years and therefore the judge did not explain why these children's private lives cannot be replicated in Nigeria and the community and schools in that country.
20. I find that there is a material error of law in the determination by the judge's failure to detail the evidence upon which she made the finding that it would not be reasonable for family life to take place in Nigeria.
21. I therefore set aside the determination and remake it. I therefore find that I have been informed by Miss King that the appellant was not represented at the First-tier Tribunal and therefore he should have an opportunity for the evidence to be adduced about his and his wife's circumstances in Nigeria and any other evidence for this matter to be considered again.

### **Notice of Decision**

22. I therefore direct that the appeal be heard by the First-tier Tribunal by a judge other than Judge Owens at the first convenient date.

23. No anonymity direction is made.

Signed Mrs S Chana

Date 26<sup>th</sup> day of April 2016

Deputy Upper Tribunal Judge Chana

**TO THE RESPONDENT**  
**FEE AWARD**

There can be no fee award.

Signed

Date 26<sup>th</sup> day of April 2016

Deputy Upper Tribunal Judge Chana