



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07462/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14 December 2017

Decision & Reasons Promulgated
On 28 December 2017

Before

THE HONOURABLE LADY RAE
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE BLUM

Between

OLUFEMI OLOWOLAFE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Mustafa, Counsel, instructed by Reliance Solicitors

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a remade decision following the identification of a material error of law in the decision of Judge of the First-tier Tribunal Eldridge (the FtJ), promulgated on 13 April 2017, allowing the appellant's appeal against the respondent's refusal, dated 4 March 2016, of his human rights claim.

2. The error of law in the First-tier Tribunal decision was identified in a decision of the Upper Tribunal issued on 12 July 2017. A resumed hearing on 1 September 2017 was adjourned to enable the respondent to obtain information from HMRC relating to the economic activity of the appellant's ex-partner. This information was served by the respondent on the appellant's representatives and the Upper Tribunal in an email sent on 16 November 2017.

Background

3. The appellant is a national of Nigeria, date of birth 15 June 1965. He entered the UK on the 10 January 2000 from the Republic of Ireland. The respondent's decision of 4 February 2016 states that, on the 31 July 2010, the appellant applied for 'leave to remain' as a partner of an EEA national and that he was granted 'leave to remain' valid from 30 November 2010 to 30 November 2015. If the appellant was the family member or partner of an EEA national the immigration rules would not have applied to him. In the absence of any clear evidence to the contrary we regard the reference to the grant of 'leave to remain' to mean that the appellant was issued an EEA residence card.
4. On 5 November 2015 the appellant applied for leave to remain on the basis of his relationship with Mrs Nanna Grace Johnson, a Nigerian national present in the UK with Indefinite Leave to Remain (ILR). The respondent was not satisfied that the appellant and Mrs Johnson were in a genuine and subsisting relationship. The respondent noted that the appellant had provided a Learning Resource Network certificate to show that he had completed an Entry Level certificate in ESOL Skills for life (Speaking and Listening) level 3. The certificate was not however included in Appendix O of the immigration rules and was not included in the Common European Framework of Reference for Languages (CEFRL) with a provider approved by the Secretary of State. The appellant therefore failed to meet the relevant English language requirement. The respondent did not go on to make any specific finding as to whether the appellant met the financial requirements under the five-year route to settlement contained in Appendix FM and Appendix FM-SE.
5. The respondent proceeded to consider whether the appellant met the requirements for a grant of leave under the 10-year route in Appendix-FM. Having found that the appellant and Mrs Johnson were not in a genuine relationship the respondent concluded that EX.1 of Appendix-FM did not apply. The respondent then considered whether the appellant met the requirements of leave to remain under paragraph 276ADE of the immigration rules but concluded that he did not. Finally, the respondent considered whether there were any exceptional circumstances outside of the immigration rules, consistent with the right to respect for family life contained in article 8 ECHR, that might warrant a grant of leave to remain outside of the immigration rules. The application did not however raise any such exceptional circumstances.

The First-tier Tribunal decision

6. At the First-tier Tribunal hearing the appellant served a large bundle of documents including financial evidence. The FtJ heard evidence from both the appellant and his wife and the Presenting Officer accepted that the relationship between the appellant and Mrs Johnson was genuine and subsisting. The FtJ found, and it is not in dispute, that the appellant had not provided the specific evidence to meet the English language test as required in the immigration rules. The appellant needed to show that he had passed an English language test to Level A1 of the CEFRL with an approved provider or that he had obtained a relevant academic qualification. He could not meet either of these requirements and could not therefore succeed under the five-year route under Appendix FM.
7. The FtJ proceeded to consider whether the appellant could meet the requirements under Appendix-FM for a grant of leave to remain under the 10-year route. To do so the appellant was required to show, pursuant to EX.1 and EX.2 of Appendix FM, that there were “insurmountable obstacles” preventing him and Ms Johnson from continuing their family life outside the UK.
8. In assessing the existence of insurmountable obstacles, the FtJ made the following factual findings. The relationship between the appellant and Mrs Johnson began in November 2012, they began living together in February 2013, and were married on 4 September 2015. The appellant’s previous marriage had broken down by 2012. The appellant and Mrs Johnson had no formal tenancy agreement (their tenure was wholly informal). They paid rent totalling £620 per month. Before the appellant came to the UK he lived in Lagos, in rented accommodation, and sold second-hand cars. He visited Nigeria in 2013 following the death of his sister. Mrs Johnson came to the UK in 1988 from Nigeria where she had been living in Lagos with her parents. When she entered the UK, she was about 25 years old. She had travelled to Nigeria both in 2013 and 2015 to attend family matters. She was in full-time regular employment earning approximately £23,000 gross per year. The appellant had some difficulties with his eyesight in his right eye. He was nevertheless able to work and wished to work if permitted to do so. He had friends in Nigeria but had no close relations living there; nor did his wife. He had recently worked and the couple were earning between £35,000 and £40,000 per annum.
9. The FtJ was satisfied, because of his wife’s employment, that the appellant met the financial requirements of the rules. The FtJ did not however undertake any detailed evaluation to determine whether the financial and evidential requirements of both Appendix FM and Appendix FM-SE were met as of the date of the application for leave to remain, or as of the date of the appeal hearing.
10. The FtJ noted that the appellant had lived in the UK for 17 years and that he gave his evidence in fluent English. The FtJ found there was no reason to suppose that the appellant would be unable to obtain the basic low-level

English language qualifications required by the immigration rules. The FtJ was satisfied that there was every prospect that the appellant would be able to make a successful application for entry clearance as a spouse, and there was no reason, from a practical point of view, why his wife would need to leave either her work (she worked as a nurse in the NHS) or accommodation in the UK. On the other hand, the FtJ observed that the appellant could not meet the requirements of the immigration rules unless it was shown that there were 'insurmountable obstacles' to the couple enjoying family life outside the UK.

11. The FtJ noted that there were no very significant obstacles preventing the appellant's integration in Nigeria. The FtJ noted that Ms Johnson was a Nigerian national who had visited Nigeria twice within the last 3 or 4 years, and was married to a Nigerian national. There was nothing to indicate that she did not retain good knowledge of the languages and cultures of that country. The FtJ concluded that, although there would be considerable difficulties were she to return to Nigeria in order to continue her relationship with her husband, there were no 'insurmountable obstacles' as understood in EX.1, with reference to EX.2.
12. The FtJ then considered the appeal outside the immigration rules on article 8 grounds. He took account of the factors in s.117B of the Nationality, Immigration and Asylum Act 2002, noting in particular that the relationship was forged while the appellant was in the UK lawfully. The FtJ then considered whether it was proportionate to require the appellant to leave the UK and make an entry clearance application from Nigeria. The FtJ set out an extract from Lord Reid's judgment in *Agyarko* [2017] UKSC 11 indicating, with respect to individuals who were not foreign criminals, that even if they were residing unlawfully, if they were otherwise certain to be granted leave to enter in respect of an application made overseas there 'might' be no public interest in their removal. The judge considered that the present appeal was a *Chikwamba* [2008] UKHL 40 type situation and that the normally very strong public interest in removal was outweighed given the nature of the relationship, the firm roots established by the appellant and his wife, and the 'most realistic prospect' of a successful application from abroad. The appeal was allowed on the basis that the decision breached section 6 of the Human Rights Act 1998.

The 'error of law' decision

13. In the 'error of law' decision promulgated on 12 July 2017 the Upper Tribunal was satisfied that the FtJ was entitled to form a view as to the appellant's proficiency in English and that there was nothing in the evidence before the First-tier Tribunal capable of undermining the FtJ's conclusion that the appellant spoke English fluently. The Upper Tribunal noted however that the appellant did not have the mandatory English language qualification when he made his application for leave to remain, and he did not have the requisite qualification even at the First-tier Tribunal hearing. Unlike the situation in *Chikwamba* [2008] UKHL 40, it had not been accepted by the Secretary of State

that all the requirements for entry clearance as a spouse had been met bar that relating to appellant's presence inside the UK and his need to make an entry clearance application as a partner. A mandatory document necessary for a grant of entry clearance remained missing. While the appellant may well be capable of obtaining the requisite English Language Certificate he did not have the required evidence in the required form. There was therefore some degree of speculation as to whether the appropriate English language certificate would be provided, as opposed to the certainty referred to in the extract from *Agyarko* [2017] UKSC 11.

14. The Upper Tribunal was additionally concerned that, in her decision letter, the respondent gave no formal consideration to whether the appellant met the financial and evidential requirements of both Appendix FM and Appendix FM-SE. In these circumstances, the Upper Tribunal did not consider that the respondent's silence on this point could be considered as synonymous with an acceptance by her that an application for entry clearance would succeed based on the financial and evidential requirements of the immigration rules. There was no indication in the FtJ's decision that any detailed consideration had been given to the evidential requirements of Appendix FM-SE, and no indication that the respondent, through her Presenting Officer, ever formally conceded that the financial and evidential requirements had been met. In purporting to apply the *Chikwamba* principal the FtJ should have considered whether all the financial and evidential requirements for entry clearance were met, or confirmed with the respondent that she considered that they were met.
15. Even if the FtJ was satisfied that all of the requirements necessary for a notional grant of entry clearance were met it was still incumbent on him to consider whether the requirement to make the appellant return to Nigeria and make an entry clearance application would have caused significant interference with his and his partner's family life by reason of the temporary removal (see *R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality)* IJR [2015] UKUT 00189 (IAC), at [39]. There was however little assessment, other than by reference to the nature of the relationship and the firm roots established by the appellant and his partner, as to why a temporary separation would cause a breach of article 8 in respect of their relationship. There were no children involved, no evidence that Mrs Johnson suffered from any particular physical or mental health ailments, no evidence that they could not remain in contact whilst an entry clearance application was being made, and no evidence as to how long such an entry clearance application would normally take. The Upper Tribunal was consequently satisfied that the FtJ materially erred in law.
16. The matter was adjourned to enable the parties to provide further evidence, to be served no later than 7 days prior to the adjourned hearing, relating to whether the appellant did meet the evidential and financial requirements of Appendix FM and Appendix FM-SE, the length of time that an entry clearance

application is likely to take, and any other relevant evidence relating to nature of any interference with family life caused by a temporary separation.

The resumed hearing

17. In additional to the bundle of documents prepared for the First-tier Tribunal hearing, a further bundle of documents was served by the appellant's representatives containing, *inter alia*, wage slips relating to Mrs Johnson's employment from April to December 2015, her bank account statements from March to December 2015, her P60s for the tax years ending April 2015, April 2016 and April 2017 (in respect of Pulse Healthcare Ltd), a CEFR Level A1 'Entry Examination in Spoken English, issued on 21 August 2017, and a statement from the appellant dated 30 August 2017. At the hearing Mr Mustafa provided a copy of a further P60 for the tax year ending April 2017 relating to Mrs Johnson's employment with 'Imperial College Healthcare Trust, a partial photocopy of the appellant's ex-partner's P45 relating to employment in 2006, and some further wage slips relating to Ms Johnson's employment going up to July 2017. In addition to the two page HMRC document served on 16 November 2017, Mr Jarvis provided a skeleton argument.
18. We ascertained from Mr Mustafa that no evidence of Ms Johnson's wage slips or bank account statements covering the 6-month period up to the date of the resumed hearing had been provided. Mr Mustafa sought an adjournment to provide this evidence. We declined to grant the adjournment. The appellant was on notice from the directions issued by the Upper Tribunal on 12 July 2017 that any further evidence upon which he wished to rely would need to be provided no later than 7 days prior to the resumed hearing. The appellant was aware that the question whether he could notionally meet the requirements of a grant of entry clearance was in issue, and that the relevant date was the date of the resumed hearing. Mr Mustafa accepted that the further evidence should have been provided and that there was no good explanation for the failure to provide this evidence. In refusing the adjournment we noted that the application was not made until the hearing, despite the history of the appeal. We additionally noted the absence of any letter from Mrs Johnson's employer confirming the details of her employment (Appendix FM-SE (2)(b)). We considered the overriding principles enunciated in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and the principles identified in *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC), and satisfied ourselves that the refusal of the adjournment did not deprive the appellant of a fair hearing.
19. We heard submissions from Mr Mustafa in respect of the HMRC document. He submitted that the partner was never a burden on public funds and that this distinguished the appeal from *Lawrie-Blum v Land Baden-Wurtemberg, Case 66/85* [1986] ECR 2121. In the alternative, he submitted that the HMRC document indicated that the ex-partner's employment history had not been fully disclosed. With respect to article 8, Mr Mustafa submitted that paragraph

276ADE(vi) was at variance with s.117B and that the 'very significant obstacles' in paragraph 276ADE was more apt to apply to foreign criminals by reference to s.117C(4)(c). The fact that the appellant now had an English language certificate was also relevant to the proportionality assessment. We were referred to Mrs Johnson's combined income of over £60,000, and to the appellant's statement dated 30 August 2017.

20. Mr Jarvis adopted his skeleton argument and noted the absence of any challenge before the hearing to the HMRC document. He submitted it was an accurate rendering of the ex-partner's employment records. The appellant did not come anywhere close to demonstrating that he met the requirements of the immigration rules for a grant of entry clearance. Any challenge to the *vires* of the immigration rules should normally be commenced in the High Court, and, in any event, there was no clash between s.117B and paragraph 276ADE(vi) as the former was looking at the private life established by a person in the UK while the matter was directed to the private life established by a person outside the UK.

Discussion

21. The resumed hearing listed for 1 September 2017 was adjourned as an issue arose on the day whether the appellant may have a permanent right of residence in the UK through his relationship with his ex-partner. In order to determine this issue an 'Amos' direction was issued, pursuant to *Amos & Anor v Secretary of State for the Home Department* [2011] EWCA Civ 552, requiring the respondent to contact HMRC to obtain from their records any information relating to the employment of the appellant's former spouse covering the period 01 January 2003 to 12 May 2015.
22. The respondent provided a witness statement from an Officer of HMRC, dated 23 October 2017, outlining how she examined the HMRC computer records as specified in the respondent's request, which included the name of the appellant's ex-partner [AK] (previous name [AO]), her date of birth, and her NIN ([-]). This NIN was not linked to the ex-partner on the HMRC records, and another NIN was given for her. The document indicated that no HMRC Self-Assessment Tax records were held for the ex-partner, and that there were no PAYE Employment records for her in the tax years 2015 - 2016 and 2017 - 2018. The document set out the ex-partner's gross pay/income for the various tax years from 2011-2012 to 2014-2015. In the absence of a Government Issued NIN it was not possible to trace employment history for the period 01 January 2003 to 05 April 2011.
23. Given that the appellant was issued with a residence card on 30 November 2010 as the family member of a qualified person, as defined in the Immigration (European Economic Area) Regulations 2006, there must have been sufficient evidence that, at the date the residence card was issued, his ex-partner was exercising Treaty rights. There is however no evidence as to how long the

appellant's ex-partner was exercising Treaty rights prior to the grant of the residence card. The HMRC evidence states that the NIN provided by the appellant and relating to the ex-partner did not link with the information contained on the HMRC systems. As a result, there was no employment history for the ex-partner from 01 January 2003 to 4 April 2011.

24. The HMRC evidence suggests that the ex-partner was not exercising Treaty rights in the tax years 2011 to 2012, and 2012 to 2013 as her total income was on such a small scale as to be regarded as purely marginal (her total income in the tax year 2011 to 2012 was £1,010.64, and her total income in the tax year 2012 to 2013 was £870.14). On the principles established in *Lawrie-Blum v Land Baden-Wurtemberg, Case 66/85* [1986] ECR 2121, we find that the appellant has not demonstrated that his ex-partner was exercising treaty rights from the end of the tax year 2011 to the end of the tax year 2014. There is no evidence that the appellant was the family member of a qualified person for a continuous period of 5 years. He cannot therefore establish that he has attained a right of permanent residence through his relationship with his ex-partner.
25. Nor is it apparent from the HMRC evidence that the appellant's ex-partner was residing in the UK in accordance with the 2006 Regulations at the date of the termination of the marriage (12 May 2015). The HMRC evidence indicates that the appellant's ex-partner received an income of £1,850 in the tax year 2014 to 2015). Based on *Lawrie-Blum*, this amount is too small to amount to meaningful employment. In any event, the evidence only goes up to the end of the 2015 tax year, which is 5 April 2015. There are no PAYE Employment records held for the appellant's ex-wife for the tax year 2015 to 2016, or indeed for 2017 to 2018. There is therefore no evidence that the ex-partner was a qualified person on 12 May 2015 as required by the 2006 Regulations in respect of retained rights of residence.
26. Mr Mustafa submitted that, as the NIN number provided to HMRC was not linked to the ex-partner, her employment history had not been fully disclosed. The appellant's solicitors did not however raise any issue in respect of the reliability of the HMRC evidence, despite being in receipt of the evidence since 16 November 2017, and no application was made to obtain further clarification in respect of the ex-partner's NIN, or to serve a witness summons for the ex-partner. While Mr Mustafa provided a partial photocopy of what is said to be the ex-partner's P45, relating to employment that she left in October 2006, the right-hand side of the document was missing, including the issue date. Given that the P45 document is only a partial photocopy, and in the absence of any suggestion that HMRC records are in any way inaccurate, we find we can attach little weight to the P45 as it is not a reliable document.
27. Mr Mustafa submitted that the 'very significant obstacles' threshold in paragraph 276ADE(vi) is equivalent to the proportionality threshold in respect of foreign criminals under s.117C of the 2002 Act, and that there is an 'inconsistency' between primary legislation and the immigration rules. We

profess to having some difficulty in following his argument. He appeared to be contending that the immigration rules were *ultra vires* so far as they related to paragraph 276ADE(vi). We have no hesitation in rejecting this argument. Although paragraph 276ADE is an attempt to incorporate article 8 considerations within the immigration rules, the rules remain a statement by the Secretary of State of how she will exercise powers of control over immigration. In *Ahmed Mahad v ECO* [2009] UKSC 16 the Supreme Court stated, at paragraph [10]:

“There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffman said in *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230, 1233 (paragraph 4):

‘Further, like any other question of construction, this [whether a Rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the Rule, construed against the relevant background. That involves a consideration of the Immigration Rules as a whole and the function which they serve in the administration of immigration policy.’”

28. And in *AM (Ethiopia) v SSHD* [2008] EWCA Civ 1082 Laws LJ at [38] stated:

“The whole of [the Immigration Rules] meaning is, so to speak, worn on their sleeve.”

29. We find there is no inconsistency between the requirement in paragraph 276ADE(vi) that there must be ‘very significant obstacles’ to an applicant’s integration in their home country, and a similar requirement in s.117C(4)(c). The latter is only one of 3 threshold requirements under s.117C(4) in respect of a foreign criminal, the other two being lawful residence in the UK for most of that person’s life, and their need to be socially and culturally integrated. The overlap of one requirement does not render paragraph 276ADE *ultra vires*.

30. The appellant maintains that it would be disproportionate to require him to return to Nigeria to make an entry clearance application as he meets the principles established in *Chikwamba* [2008] UKHL 40. For the appellant to succeed in his appeal in reliance on *Chikwamba* he would need to show that, in a notional entry clearance application, considered at the date of the hearing, he would be bound to be granted entry clearance. In *Agyarko* [2017] UKSC 11 Lord Reed stated, at [51],

“Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant – even if residing in the UK unlawfully – was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The

point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*."

31. It is clear that there must be certainty that an entry clearance application would be granted. Appendix FM-SE sets out the evidential requirements that must be met in an entry clearance application as a spouse. The evidential requirements in Appendix FM-SE are as important as those in Appendix FM (*SSHD v SS (Congo) & Ors* [2015] EWCA Civ 387).
32. In a statutory appeal, the date of the hearing is the most appropriate chronological fixed point to determine whether a future entry clearance application would succeed as it is likely to be closest to the actual date of a future entry clearance application, and any other date (such as the date of an application for leave to remain) would only indicate whether, as a historical fact, the appellant met the requirements.
33. Adapting the requirements of Appendix FM-SE, the appellant would need to provide his partner's payslips and bank account statements covering a period of 6 months prior to the date of the hearing. These requirements are not met. While payslips and bank account statements covering a 6 months period in 2015 have been provided, and some further wage slips up to July 2017, the specified evidence relating to wage slips and bank account details is absent. While we accept that Mrs Johnson is likely to still be employed, and earning in excess of the minimum financial requirement in Appendix-FM, we are unable to conclude that the requirements of Appendix FM-SE are met.
34. In any event, the appellant has not produced a letter from Mrs Johnson's employer confirming her employment and gross annual salary, the length of her employment, the period over which she has been paid the level of salary relied on in the notional entry clearance application, and her type of employment, as required by Appendix FM-SE(2)(b). The omission of this letter would alone, and quite independently of the absence of the relevant payslips and bank account statements, prevent the appellant from meeting the entry clearance requirements.
35. We therefore conclude that the appellant cannot avail himself of the *Chikwamba* principles as there is no certainty, in the absence of the specified evidence, that he would be granted entry clearance.
36. The FtJ concluded that there would be no insurmountable obstacles to Mrs Johnson relocating to Nigeria in order to maintain her family life relationship (see paragraph 11 of this judgment). The appellant did not challenge this aspect of the First-tier Tribunal's decision. We are, in any event, independently satisfied that there would be no insurmountable obstacles, as understood in EX.1 and EX.2 of Appendix-FM. In arriving at this conclusion, we note that, although Mrs Johnson has lived in the UK since 1988 (she entered the UK aged about 25), and that she is in permanent employment, she retains her Nigerian nationality, she spent the formative years of her life in Nigeria and has recently

visited the country, she would have the support of her husband in reintegrating, and is in good health. The appellant previously worked selling cars and there is no reason why he and his wife could not seek employment.

37. We have additionally considered whether it would be disproportionate under article 8, considered outside the immigration rules, to either require the appellant to return to Nigeria and make an entry clearance application. We take account of the factors in s.117B of the 2002 Act and note that the appellant does speak English and that he is capable of being financially independent, and that the relationship appears to have been entered into when he was lawfully present, and that he is likely to meet the financial requirements of the immigration rules. We are not however satisfied that the consequences of disruption to the family life enjoyed by the appellant and his wife, by what is likely to be only a short and temporary separation, are sufficient to render his removal disproportionate. In reaching this conclusion we have considered the statement from the appellant dated 30 August 2017 and the 'Visa application Processing Times' download indicating that 92% of settlement applications are decided within 60 days, and 100% decided within 90 days. While the appellant claims that his wife would be financially unable to support him in Nigeria while he makes an entry clearance application and herself, her combined income of over £60,000 belies this claim. The medical evidence provided by the appellant relating to his eye does not suggest that a temporary separation would adversely affect his eyesight, and there is no evidence that he would be unable to obtain the necessary treatment or medication in Nigeria. Nor is there any independent medical or other evidence indicating that the impact of a temporary separation would have a significant adverse impact on the mental health or emotional wellbeing of either the appellant or Mrs Johnson.
38. We conclude, for the reasons given, that the refusal of the appellant's human rights claim does not constitute a disproportionate interference with article 8 and dismiss the appeal.

Notice of Decision

The appeal against the refusal of appellant's human rights claim is dismissed



22 December 2017

Signed
Upper Tribunal Judge Blum

Date