



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14046/2019

THE IMMIGRATION ACTS

Heard at Field House
by Microsoft Teams
On 22 July 2021

Decision & Reasons Promulgated
On 04 August 2021

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

RAHIM KEHINDE TESILIMI-LAYEMI
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Oluwale Adebayo of Counsel, solicitor at David & Vine Solicitors

For the respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 6 August 2019 to refuse him leave to remain in the United Kingdom on human rights grounds. The appellant is a citizen of Nigeria.
2. **Mode of hearing.** The hearing today took place remotely by Microsoft Teams. There were no technical difficulties. I am satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.

Background

3. The appellant has an unedifying immigration history. He came to the United Kingdom from Nigeria on 25 December 2003 on a 2-year visit visa, then moved to student visas as a student nurse. He had valid leave on that basis until 31 October 2008. He has had no leave since then.
4. On 31 October 2008, the appellant applied to renew his student visa. He was refused, with an in-country right of appeal on which he was appeal rights exhausted on 18 September 2009. The appellant did not embark for Nigeria, but remained in the United Kingdom without leave.
5. Over the succeeding years, the appellant made a total of 13 further applications for leave. He made six Tier 4 (General) Student Migrant applications, all of which were refused. On 31 August 2011, he applied for leave to remain outside the Rules, which was refused. On 28 March 2012, he made a Tier 1 Highly Skilled Migrant application, which was refused. On 28 March 2012, he also made an application for leave to remain on the 10-year private and family life route, which was refused.
6. During this time, the appellant had begun a relationship with the woman who is now his wife, a British citizen of Nigerian origin. Fertility investigations at a private clinic began in 2012. The parties married on 24 July 2013.
7. On 2 October 2013, the appellant made an Article 8 ECHR application which was refused with an in-country right of appeal, which he exercised. He was appeal rights exhausted on that appeal on 2 March 2015.
8. On 1 May 2015, the appellant made another application on the 10-year route, which was refused with an in-country right of appeal on which he was appeal rights exhausted on 8 January 2019.
9. In 2018, the appellant and his wife began in-vitro fertilisation treatment to enable them to start a family. On 16 May 2019, the appellant made an application to remain as his wife's spouse, which was refused on 6 August 2019. That is the decision under challenge.
10. In her refusal letter, the respondent accepted that the couple are in a genuine and subsisting relationship and that the appellant's wife is a British citizen. However, she did not consider that the couple's attempts to become parents amounted to exceptional circumstances. The only other exceptional circumstances advanced were the wife's student loan: she is working as a nurse in order to repay it. The respondent was not satisfied that there would be very significant obstacles in the appellant reintegrating in Nigeria, where he still had relatives and had lived until he was 21 years old.
11. The appellant appealed to the First-tier Tribunal.

First-tier Judge O’Keeffe’s decision (14 January 2019)

12. First-tier Judge O’Keeffe’s decision is the *Devaseelan* starting point for this appeal. That decision was a remittal for hearing afresh, after an appeal to the Upper Tribunal. The Tribunal accepted that the appellant and his spouse had a genuine and subsisting marital relationship and that the appellant met the suitability requirements of Appendix FM of the Rules.
13. The question was whether he met the requirements of paragraph EX.1 of that Appendix, that is to say, whether there were insurmountable obstacles to family life continuing between the parties outside the United Kingdom. Paragraph EX.2 defines insurmountable obstacles as ‘very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK which could not be overcome, or would entail very serious hardship for the applicant or their partner’.
14. Judge O’Keeffe found as a fact that the appellant has his mother, two sisters and a brother in Nigeria still. He was in contact with his mother approximately once a month. His mother still lived at the address where the appellant lived before coming to the United Kingdom: the judge found that although he would prefer not to return to live there, it was an option for him.
15. The appellant had not worked before leaving Nigeria but he had obtained good qualifications in the United Kingdom which would help him get a job in Nigeria. The judge found that the appellant would have access to family support and accommodation on return.
16. His wife had been born in Nigeria, where she lived until she was 13 years old and had returned for visits, at least in November 2017 and June 2018. Her parents in the United Kingdom provided her brother in Nigeria with some support. She was working two jobs in the United Kingdom.
17. The couple had supported themselves without access to public funds. They had been receiving fertility treatment here for at least 7 years (that is to say, since 2012), and were about to begin in-vitro fertilisation treatment at the Zita West Clinic. They had already paid £7000 towards the treatment, which was expected to take up to three months. Fertility treatment was available in Nigeria: the appellant asserted that it was very expensive and the success rate was not good, but he had produced no corroborative evidence.
18. The judge found that the appellant did not meet the exacting requirements of paragraph EX.1 of Appendix FM or paragraph 276ADE. In considering the proportionality of return, the judge had regard to section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) and to the decision of the Court of Appeal in *TZ (Pakistan) and PG (India) v Secretary of State for the Home Department* [2018] EWCA Civ 1109 at [25] in the judgment of Sir Ernest Ryder, Senior President of Tribunals, with whom Lord Justice Longmore and Lord Justice Moylan agreed:

“25. The settled jurisprudence of the ECtHR is that it is likely to be only in an exceptional case that article 8 will necessitate a grant of leave to remain where a non-settled migrant has commenced family life in the UK at a time when his or her immigration status is precarious (see, for example *Jeunesse v Netherlands* (2016) 60 EHRR 17 at [100] and [114]). That general principle applies to any consideration of the Rules which involves engaging with a requirement or requirements that possess an article 8 element (often wrongly described as an article 8 consideration within the Rules) and to the consideration of article 8 outside the Rules. Where precariousness exists it affects the weight to be attached to family life in the balancing exercise. That is because article 8 does not guarantee a right to choose one's country of residence. Both the unlawful overstayer and the temporary migrant have no right to remain in the UK simply because they enter into a relationship with a British citizen during their unlawful or temporary stay. The principle was accepted in *Agyarko* at [49] to [54] leading to a statement of general principle at [57]:

"In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control."

19. The judge also considered *Chikwamba*, as interpreted in *Chen, R (on the application of) v Secretary of State for the Home Department* ((*Appendix FM – Chikwamba – temporary separation – proportionality*) (IJR) [2015] UKUT 189 (IAC) (24 March 2015) and *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11, He was not satisfied that it was unreasonable to expect the appellant to return to Nigeria and make an entry clearance application from there. The proportionality balance was in favour of refusal and he dismissed the appeal.

First-tier Judge Kainth's decision (21 January 2020)

20. First-tier Judge Kainth also dismissed the appeal. She took as her starting point the earlier decision of First-tier Judge O'Keeffe, made just a year earlier. She was not satisfied that there were insurmountable obstacles to reintegration. She noted that the parties' relationship had begun when the appellant's immigration status was precarious (in fact, he had no leave at all).
21. The judge concluded her decision thus:

“42. It is trite law that I am precluded for [sic] finding in favour of the appellant on the basis he cannot meet a requirement of the Immigration Rules. The law requires me to consider whether his personal circumstances, which include those of other family members, are enough to outweigh the public interest considerations that justify maintaining the decision.

43. The fact that I have found that family life exists is not enough to dispel the public interest considerations. I must still assess the public interest concerns which are set out in statute.

44. There are no exceptional or compelling circumstances in this case which will outweigh the need for immigration control. “

22. The First-tier Judge dismissed the appeal and the appellant appealed to the Upper Tribunal.

Permission to appeal

23. Permission to appeal was granted by First-tier Judge Keane in the following rather generous terms:

“The grounds amounted to no more than a disagreement with the findings of the judge, an attempt to reargue the appeal and they did not disclose an arguable error or errors of law but for which the outcome of the appeal might have been different.

I have, however, considered the judge’s decision in order to ascertain whether it disclosed a *Robinson* obvious concern. In considering whether there were exceptional circumstances which justified the grant of leave outside the Immigration Rules the judge arguably should have taken into consideration facts seemingly accepted by the judge, namely that the appellant was party to a genuine and subsisting relationship with his spouse (paragraph 9), that his spouse is a British citizen by naturalisation and midway through a nursing course (paragraph 11), has a student loan to repay and is currently undergoing in-vitro fertilisation treatment (paragraph 2 of the grounds).

Such were arguably relevant considerations for the judge to take into account when deciding whether the appellant established exceptional circumstances and the judge arguably did not take into account such considerations when finding that exceptional circumstances were not present.

At any hearing before the Upper Tribunal the appellant by her representatives should be able to establish the factual contentions made out at paragraph 2 of the grounds (as to which the judge did not make explicit findings), namely that the appellant’s spouse had a student loan to repay and was currently undergoing in-vitro fertilisation treatment.”

24. Triage orders having been made, the appellant’s solicitor filed a document headed Further Submissions wherein she said that she would rely on the grounds of appeal and that there were no disputes on issues of fact. The Further Submissions confirm that:

“5. The appellant in fact mentioned the issue of his spouse’s indebtedness to the Student Loans Company. The statement of what the appellant’s spouse owes is enclosed for the attention of the Court, for the period of 30 June-13 May 2019 and she owes an outstanding of £61469.62. This is to shed further light on the appellant’s and spouse’s circumstances.”

Rule 24 Reply

25. There was no Rule 24 Reply or response to triage directions on behalf of the respondent.
26. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

27. There was very little difference in the factual matrix between the O'Keeffe and Kainth decisions. The appellant had been able to obtain a BSc degree in Communication Systems and Computing, a course which he followed at the University of West London from 2009-2012, despite having no leave to do so, and indeed, no leave to remain at all. It was not clear whether he had paid the relevant level of fees.
28. The appellant had been compliant with the restrictions which his lack of leave imposed, and had signed on regularly, without omission, since 2010. He recognised the need to regularise his immigration situation and was doing everything in his power to regularise his position, short of returning to Nigeria and making a proper out of country application for leave to enter as a spouse, or on some other appropriate basis.
29. The wife's student loan repayments were £378 per annum in 2019, or just over £1 a day. She was studying a 3-year nursing degree at Bucks New University which would be completed in December 2021.
30. Mr Adebayo confirmed that the couple had been undergoing privately funded fertility treatment for 9 years now. In-vitro fertilisation had not continued during the Covid period (February 2020 onwards) and accordingly, there was no new evidence about that. There had been complications when the treatment began and the couple had not been able to continue with it during Covid. The appellant's wife had become pregnant, presumably naturally, in early 2021, but had unfortunately suffered a miscarriage.
31. For the respondent, Mr Tufan relied on *AZ (error of law: jurisdiction; PTA practice)* [2018] UKUT 245 (IAC) (5 July 2018) which allowed the Upper Tribunal to go behind the grant of permission. As the judicial headnote states, that is a power to be exercised only in very exceptional cases: see Practice Direction 3.7.
32. Mr Tufan accepted that the sponsor's income had now reached a level which would enable her to sponsor the appellant for entry as her spouse.
33. Mr Tufan relied on the decision of the Upper Tribunal in *Younas (section 117B (6) (b); Chikwamba; Zambrano) Pakistan* [2020] UKUT 129 (IAC) (24 March 2020), and in particular, on (1) of the judicial headnote:

(1) An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest". Reliance on Chikwamba v SSHD [2008] UKHL 40 does not obviate the need to do this.
34. There was no material error of law in this decision and the Upper Tribunal should dismiss the appeal

35. In a brief response, Mr Adebayo said that the fees paid by the appellant for his degree were irrelevant. He had paid them privately and they had not been an issue in this appeal. No evidence had been given or sought and the Tribunal should disregard this submission and allow the appeal.

Analysis

36. In granting permission but raising a *Robinson* obvious issue, First-tier Judge Keane erred. The appellant is not an unrepresented person: he has been represented by David & Vine throughout these proceedings. Further, First-tier Judge Keane does not seem to have had regard to the *Devaseelan* starting point, the O'Keeffe decision. It was not in the bundle, but it is clear that First-tier Judge Kainth was aware of it.
37. The First-tier Judge was entitled to treat the O'Keeffe decision as the *Devaseelan* starting point. There is no difference of substance between the facts in 2019 and those in 2020, save for the interruption of the sponsor's in-vitro fertilisation treatment by the Covid pandemic and the pregnancy which resulted in a miscarriage this year. I have been provided with a copy of the O'Keeffe decision, which has enabled me to understand the point from which the present decision is required to start. I do not seek to go behind the grant of permission, but this is not a strong case for substantive remaking of the decision of the First-tier Judge.
38. I remind myself of the provisions of section 117B(4)(b) and (5):
- “117B. ... (4) Little weight should be given to –
- (a) a private life, or
- (b) a relationship formed with a qualifying partner,
- that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.”
39. In this appeal, the entire relationship between the appellant and sponsor took place when he was in the United Kingdom unlawfully and the First-tier Judge was required to give it little weight. The couple, despite 9 years of trying, do not have children and are both of Nigerian origin. The sponsor's payments on her student loan are not onerous and there is no evidence before me as to how that would be affected should she choose to live with the appellant in Nigeria, where they both have family members.
40. It is unsurprising that the outcome of this second appeal was the same as that of Judge O'Keeffe. Both judges concluded that there were no exceptional, compelling or compassionate circumstances for which leave to remain should be given either within or outwith the Rules.

41. The grounds of appeal disclose no properly arguable error of law, still less one which would have been material to the outcome of this appeal.
42. The appeal is dismissed.

DECISION

43. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of no error on a point of law
I do not set aside the decision but order that it shall stand.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 26 July 2021