



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16523/2019 (V)

THE IMMIGRATION ACTS

Heard remotely at Field House
On 8th February 2021

Decision & Reasons Promulgated
On 10th March 2021

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KABIRU OLALEKAN YEKINNI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms S Cunha, Home Office Presenting Officer

For the Respondent: Mr I Khan, ICS Legal

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in the bundles on the court file, the contents of which I have recorded. The order made is described at the end of these reasons.

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Nigeria born on 23 January 1989. His appeal against the refusal of his human rights claim was allowed by First-tier Tribunal Judge T Lawrence in a decision, promulgated on 3 April 2020.
2. The Appellant came to the UK as a visitor in 2013 and overstayed. He was served with liability of notice of removal in 2014. He began a relationship with a British citizen [LPL] in 2016 and they have been living together since June 2016. The Appellant applied for leave to remain on 12 February 2019. This application was refused on 30 September 2019 and is the subject of this appeal.
3. The judge concluded that there were no insurmountable obstacles to family life continuing in Nigeria and no very significant obstacles to the Appellant's re-integration. The judge found that the Appellant enjoyed family life with LPL and the refusal of leave amounted to an interference with their family life. He found that the interference was in accordance with the law and went on to consider whether the interference was necessary and justified, having regard to the public interest and sections 117A and 117B of the 2002 Act.
4. The judge considered the public interest in requiring the Appellant to return to Nigeria to seek entry clearance. He relied on Chikwamba v SSHD [2008] UKHL 40 at [44], Heshim Ali (Iraq) v SSHD [2016] UKSC 60 at [34] and R (Agyarko and Ikuga) v SSHD [2017] UKSC 11 at [51]. The Respondent accepted the Appellant had a good chance of succeeding in an application for entry clearance because LPL earned more than the minimum income threshold. The judge found that although the Appellant had overstayed his visit visa, there were no aggravating factors which would result in a refusal under paragraph 320(11). The judge concluded that "the Appellant's removal or requiring him to leave the UK would be disproportionate, and would not be justified."
5. The Secretary of State appealed on the grounds that the judge misdirected himself in law. There were no compelling Article 8 factors which would make it difficult for the Appellant and his partner to return Nigeria. Having found there were no insurmountable obstacles to family life continuing outside the UK, there was no reasons why LPL could not return to Nigeria with the Appellant. Her present job lasted for just a year and there was no significant reason why she could not leave her employment. The Appellant formed his relationship whilst his leave was precarious. He had family in Nigeria who could support him in his application for entry clearance. The refusal of leave to remain did not breach Article 8.
6. Permission to appeal was granted by First-tier Tribunal Judge Kelly on 13 August 2020 on the grounds that, having found that the Appellant could not satisfy the Immigration Rules, the judge failed to adequately explain why the consequences of removal would be unjustifiably harsh for the purposes of GEN 3.2 of Appendix FM.

Submissions

7. Ms Cunha submitted the judge's reasons were inadequate. There were no children to consider and no unjustifiably harsh consequences. The Appellant formed his relationship after his leave had expired and he could not meet the requirements of the immigration rules. The judge had failed to consider this as part of the balancing act advocated in Heshim Ali. The Appellant's family life was not exceptional. There was nothing over and above the factors in the immigration rules to take into account. On the facts, the interference was not disproportionate. There was no reason why the Appellant could not return to Nigeria and obtain entry clearance. This case was not comparable to the situation in Chikwamba. The judge failed to properly apply section 117B(4). The Appellant's family and private life could not outweigh the public interest in maintaining immigration control.
8. Mr Khan relied on a skeleton argument and submitted the decision should be upheld. The facts set out in detail at [9] of the decision were capable of supporting the judge's finding that the refusal of leave to remain was disproportionate. LPL was a British citizen and all her family lived in the UK. She had never been to Nigeria. The judge considered R (Chen) v SSHD [2015] UKUT 189 (IAC) and Chikwamba at [23]. At the time of the application was made, LPL had a full time job. The judge took into account all relevant matters and gave appropriate weight to the Appellant's relationship and the public interest at [42]. There was no dispute the income threshold was met and therefore it would be disproportionate to remove the Appellant. The only issue against the Appellant was his unlawful residence. There was no public interest in removal because the Appellant could meet the requirements for entry clearance. Removal would disproportionately interfere with family life because of the prolonged delay. The decision was well structured and well balanced.
9. Ms Cunha submitted that, having found there were no insurmountable obstacles to family life continuing outside the UK, there could be no unjustifiably harsh consequences for the Appellant to return and obtain entry clearance. The Appellant did not bring himself within Chikwamba. The Appellant's appeal should be dismissed following Agyarko. There were no unjustifiably harsh consequences and the Respondent was entitled to enforce immigration control. Any interference with family and private life was temporary. There was nothing exceptional in this case.

Conclusion and Reasons

10. The Appellant came to the UK as a visitor and has remained without leave since October 2013. He was aware of his liability to removal in April 2014. He did not leave the UK and remained in the UK unlawfully. During this time, he formed a relationship with a British citizen, LPL. Section 117B(4) makes it clear that little weight should be attached to this relationship and to the Appellant's private life formed when his presence in the UK was precarious or unlawful.

11. There was no challenge to the judge's finding that there were no insurmountable obstacles to family life continuing outside the UK and no very significant obstacles to integration. The Appellant could not meet the requirements of Appendix FM or paragraph 276ADE of the immigration rules. The failure to meet the immigration rules informs the weight to be attached to the public interest in maintaining immigration control.
12. This was not a case where the Appellant was certain to be granted leave to enter if an application was made from outside the UK. Although the Appellant's ability to satisfy the entry clearance requirements was relevant, it was not a determining factor and the judge erred in law in treating it as such. The weight to be attached to the public interest because of the Appellant's lengthy period of unlawful residence and his failure to satisfy the immigration rules outweighed his right to family and private life applying section 117B (4), notwithstanding the Appellant had a good chance of succeeding on an application for entry clearance at the date of the decision of the First-tier Tribunal.
13. I find that the judge erred in law in failing to consider paragraph GEN 3.2 of the immigration rules. There were no unjustifiably harsh consequences identified in the decision or apparent from facts found by the judge. Further, the judge failed to properly apply section 117B(4) and failed to properly carry out the balancing exercise, attaching appropriate weight to the public interest given the Appellant's unlawful presence in the UK for seven years and his failure to satisfy Appendix FM and paragraph 276ADE.
14. In R (Chen), the Upper Tribunal found at [43]:

“Against all this was the fact that the applicant's leave had expired well before she and Mr Cheung began their relationship. They were married in the full knowledge that the applicant did not have leave and that her immigration status was precarious. There was no evidence of the length of the disruption to family life (if family life was indeed disrupted) if the applicant returned to China to apply for entry clearance. Weighing all of the factors in the balancing exercise, there was plainly only one answer, on any legitimate view.
15. On the facts, the Appellant has not shown that there would be significant interference with his family life by his temporary removal if he returned to Nigeria to obtain entry clearance. He would have the support of family and friends and there was insufficient evidence to show that LPL's employment or ties to her family would prevent her from joining him if she wished.
16. At the conclusion of the hearing, I asked the parties for submissions on the future conduct of the appeal should an error of law be found. It was not argued that the position had materially changed save for the passage of time. On the facts of the Appellant's case, taken at its highest, the refusal of leave to remain would not breach Article 8.

17. I find the First-tier Tribunal judge erred in law and I set aside his decision dated 3 April 2020 and remake it. The Appellant's appeal against the refusal of leave to remain is dismissed on human rights grounds.

Notice of decision

The Respondent's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside and remade.

The Appellant's appeal against the refusal of leave to remain is dismissed on human rights grounds.

No anonymity order is made

J Frances

Signed
Upper Tribunal Judge Frances

Date: 8 March 2021

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 8 March 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is “sent” is that appearing on the covering letter or covering email.