



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/14054/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 26<sup>th</sup> June 2014  
Prepared on 3<sup>rd</sup> July 2014

Determination Promulgated  
On 23<sup>rd</sup> July 2014

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

**Between**

**MR IDEMUDIA BOB ALGBOMIAN  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: The Appellant did not appear and was not represented  
For the Respondent: Mr T. Wilding, Home Office Presenting Officer

**DETERMINATION AND REASONS**

**The Appellant**

1. The Appellant is a citizen of Nigeria born on 14<sup>th</sup> July 1984. He appeals against the decision of the Respondent dated 27 March 2013 to refuse to grant him leave to remain as the spouse of a person present and settled in the United Kingdom. The Appellant's wished to reside with his wife Sonia Elaine Algbomian born 5<sup>th</sup> December 1964, a United Kingdom citizen ("the Sponsor"). The Appellant was granted entry clearance as a student on 4<sup>th</sup> August 2009 valid until 31<sup>st</sup> October 2012

entering the United Kingdom on 18<sup>th</sup> August 2009. He and the Sponsor first met in September 2010. They married and began living together on 3<sup>rd</sup> December 2011. On 2<sup>nd</sup> November 2012 the Appellant applied for leave to remain on the basis of his marriage to the Sponsor

2. The Respondent refused the application under Appendix FM and paragraph 276ADE of the Immigration Rules because the Appellant had not shown sufficient evidence that he could meet the financial requirements contained in Section E-LTRP3.1 and 3.2, could not demonstrate that exception EX.1 applied and could not demonstrate that there were insurmountable obstacles to family life with the Sponsor continuing outside the United Kingdom. He did not meet the requirements of paragraph 276ADE in respect of private life given the length of time he had been in this country and he had not shown that he had no ties including social, cultural or family with Nigeria.

### **The First Appeal**

3. The Appellant's appeal against that decision came on the papers before First-tier Tribunal Judge Pickup sitting at Manchester Piccadilly Hearing Centre on 3<sup>rd</sup> October 2013. The Appellant argued that although the couple did not have much by way of savings their joint earnings amounted to more than the income support level although the Appellant accepted that he could not meet the higher financial requirements of Appendix FM. The Sponsor worked full-time earning £10,800 per annum as a cleaner and the Appellant worked part-time earned £6,000 per annum in a previous employment which he had had in the twelve month period preceding the application. The Appellant could not therefore meet the figure of £18,600. The Appellant stressed the fact that he was married to a British citizen and that the marriage was genuine and subsisting.
4. The Sponsor had two children by a previous marriage one of whom was thus the Appellant's stepdaughter. A handwritten letter from the stepdaughter stated that she had met the Appellant in 2010 and could talk to him about anything as he always listened. She had never seen her own father and regarded the Appellant as her father as he had done so much for her. She did not want to lose such a caring man.
5. The Judge held that the Appellant could not meet the requirements of either Appendix FM or paragraph 276ADE or bring himself within the exception to those requirements contained in EX.1. The Appellant had stated in the papers that he had a child 2 years of age but the child did not live with the Appellant. The Judge also found at paragraph 19 of the determination that there were no insurmountable obstacles to family life with the Sponsor continuing outside the United Kingdom even though the Sponsor's two children were both British citizens and she would wish to continue her relationship with them in the United Kingdom. The Appellant could not demonstrate he had no ties to Nigeria.
6. The Judge proceeded to consider the matter under Article 8. After directing himself on the step-by-step approach required by the case of **Razgar [2004] UKHL 27** he found that there was a family and private life between the Appellant, the Sponsor

and her two children. He described the letter from the Appellant's stepdaughter which I have summarised above as "written movingly [about] her relationship with the Appellant". The Judge also had before him letters from friends and neighbours of the Appellant which he found demonstrated that the Appellant was integrated into the community. At paragraph 28 the Judge found it would not be reasonable to separate the Appellant from his family or to expect them to relocate to Nigeria with him (which appears to be in conflict with what the Judge had earlier said at paragraph 19) The Tribunal had to balance the legitimate interest of the state in controlling immigration to protect the economic welfare of the United Kingdom against the rights of the Appellant and what he referred to as the Appellant's "adopted family". He found that it was disproportionate to require the Appellant's removal and allowed the appeal under Article 8 making a full fee award.

7. The Respondent appealed against that decision. Permission to appeal was granted on the basis that it was arguable that the Judge had failed to give adequate reasons for his decision on proportionality bearing in mind the Appellant's inability to satisfy the Immigration Rules. The appeal came before Deputy Upper Tribunal Judge Wilson on 20<sup>th</sup> December 2013 when the Appellant had again asked for the matter to be determined on the papers. The Learned Deputy was concerned that a number of documents prepared by the Appellant had been in front of the Judge but because the Appellant had asked for the matter to be determined on the papers those documents had not reached the Respondent. Judge Wilson found that the matter had not been fairly determined in the First-tier and set aside Judge Pickup's decision and remitted it back to the First-tier to be heard again this time orally.

### **The Second Appeal**

8. The matter was again listed in the First-tier this time at Birmingham on 16<sup>th</sup> April 2014 when it came before First-tier Tribunal Judge Camp. The Appellant attended that hearing unrepresented while the Respondent was represented by a Presenting Officer. Judge Camp noted that at no stage had any party requested an oral hearing but the Appellant would require an interpreter as his English was not sufficient to enable him to conduct the hearing. The Judge recorded at paragraph 11 of his determination that the Appellant and the Sponsor "were content for the appeal to be determined without oral evidence". At paragraph 13 Judge Camp wrote "I entertain doubts as to whether it is open to the Upper Tribunal to direct an oral hearing if neither party wants an oral hearing".
9. He proceeded to deal with the matter on the papers noting that the stepdaughter who had written the letter in support of the Appellant was at least 18. He noted the reference to another child of the Appellant but the Appellant's relationship with that other child was not of significance to the appeal. There were no insurmountable obstacles which would prevent family life continuing between the Appellant and the Sponsor outside the United Kingdom. The Judge took into account that the Appellant could not meet the Immigration Rules when assessing the proportionality of the interference with the Appellant's family life. He found that there were no compelling circumstances insufficiently recognised under the Rules and dismissed the appeal.

Article 8 was not as the Judge put it “a bypass to the requirements of the Immigration Rules”.

10. The Appellant in turn appealed this decision taking issue with the claim that he could not speak English. He said he had completed his English test in October 2012 and passed. It was unfair to require him to leave the Sponsor behind and return to Nigeria. Whilst he appreciated he did not have an income of £18,600 he had married the Sponsor for love. His family in Nigeria were expecting the couple to visit. The case was having a bad effect on the Sponsor who was now on anti-depressants and was unable to sleep. He was worrying about what would become of her if he was returned to Nigeria. It was unfair for the Respondent to expect every Applicant to be rich. The appeal should be allowed.
11. The Appellant’s onward appeal came on the papers before Designated Judge Shaerf on 19<sup>th</sup> May 2014. He granted permission noting that the First-tier Tribunal has a discretion to proceed without a hearing which may be exercised only if it is the view of the Judge concerned that the appeal can be justly and fairly determined without a hearing. Where a Judge has ordered an oral hearing when the Appellant has requested a determination on the papers no additional fee is payable because the hearing is not the Appellant’s choice but because of a judicial direction. It was immediately evident why Deputy Upper Tribunal Judge Wilson had directed an oral hearing. As the Appellant had attended it was incumbent upon Judge Camp to conduct an oral hearing. Designated Judge Shaerf wrote:

“Had he done so he might have ascertained the nationality of the Appellant’s elder child in the United Kingdom and details of the frequency, manner and quality of the contact between the Appellant and his elder child”.

The nationality of the Appellant’s elder child might be crucially relevant for the engagement of the Immigration Rules.

12. Following that decision directions were issued by Principal Resident Judge Southern that the parties should prepare for the forthcoming hearing on the basis that if the Upper Tribunal decided to set aside the determination of the First-tier Tribunal any further evidence including supplementary oral evidence that the Upper Tribunal may need to consider if it decides to remake the decision could be considered at that hearing.
13. In response to the grant of permission the Respondent wrote to the Tribunal on 4<sup>th</sup> June 2014 accepting that there was an error of law in Judge Camp’s determination. It would be a matter for the Upper Tribunal to decide whether the case was to be remitted once more to the First-tier Tribunal or to be kept in the Upper Tribunal. Notice of the hearing at Field House fixed for Thursday 26<sup>th</sup> June 2014 at 10 a.m. was sent by first class post to the Appellant on 28<sup>th</sup> May 2014.
14. On 21<sup>st</sup> May 2014 Police Constable Day of the Lincolnshire Police Force sent an email to the Customer Service Department of the Immigration and Asylum Chamber which stated:

"I have recently had dealing with a male called Idemudia Bob Algbomian date of birth 14<sup>th</sup> July 1984. He used to live at:

5 Fen Road, Dowsby, Bourne, Lincolnshire, PE10 0TR

I am told by his wife Sonia Algbomian that his appeal to stay in the UK has failed. He is currently not living at the Dowsby address and has taken to living with various other persons in the nearby village of Billingborough. His wife states that he is trying to raise funds to travel to London because he is aware that he is due to be removed. We have attended for a couple of domestic related incidents and Sonia is very agitated about his presence in the area as they have separated".

### **The Hearing Before Me**

15. When the matter came before me, on 26<sup>th</sup> June 2014 the Appellant did not attend. The first matter I had to decide was whether to proceed with the hearing at all in the absence of the Appellant or to adjourn it to a further date. In considering whether to adjourn the appeal I bore in mind the Court of Appeal decision in **SH Afghanistan [2011] EWCA Civ 1284** that the test is one of fairness.
16. The Appellant had been served with notice of the hearing at his last known address. The onward appeal against the decision of Judge Camp was his appeal and it was therefore incumbent upon him to prosecute that appeal with reasonable diligence. That would mean informing the Upper Tribunal if his address in Lincolnshire was no longer appropriate for him to receive correspondence. He had not done that. The notice of hearing sent to the Appellant's last known address had not been returned by the Post Office. The Appellant was aware that he was likely to have an appeal hearing in relation to his onward appeal. I was satisfied that he had been served and no reasonable explanation had been provided for his absence. In those circumstances I indicated to the Presenting Officer that I would proceed to deal with the matter and not adjourn it.
17. That being so the first issue I had to decide was whether there was an error of law in Judge Camp's determination. The Respondent had conceded that there was. It was evidently an error for Judge Camp to proceed to deal with the matter on the papers when he had been specifically directed by a Deputy of the Upper Tribunal to hear the matter orally. The Appellant had thus been deprived of a fair hearing and I therefore set aside the determination of Judge Camp.
18. The next matter was whether having set the determination aside and bearing in mind the standard directions issued by the Principal Resident Judge I could proceed to rehear the appeal or whether I too should remit the matter back to the First-tier such that it would be back before the First-tier for a third time. I considered the President's direction. Had it been the case that the Appellant had shown some interest in engaging in this appeal I may well have decided to remit the matter back to be heard. It is clear from what the officer says that the Appellant was well aware that as a result of the breakdown of his marriage to the Sponsor he would have no

right to remain in this country and decided to disengage himself from proceedings which he had begun. Although this case has an unfortunate history, I consider that I am best placed to make a final decision in relation to the Appellant's appeal against the Respondent's decision.

19. I was conscious that the case had been proceeding for several months and yet the Appellant now appeared to have little interest in the proceedings. I therefore indicated that I would proceed to rehear the matter. I heard brief submissions from the Respondent who observed that the Appellant could not meet the Immigration Rules. The Appellant's claim under Article 8, that he had a relationship with the Sponsor and his stepdaughter now fell away because he had separated from the Sponsor. There was no longer a basis for the Appellant's Article 8 claim. I reserved my decision.

### **Findings**

20. The Appellant's claim is to remain in the United Kingdom on a basis outside the Immigration Rules which he otherwise cannot satisfy. As his relationship with the Sponsor has now broken down and he has separated from her, her earnings are irrelevant. The Appellant no longer has a claim for family life. He has never provided any evidence of any significance in relation to a child he may have in the United Kingdom outside his relationship with the Sponsor. Although Judge Shaerf referred in his grant of permission to appeal to "an elder child" implying that such a child might be older than the Sponsor's children, this cannot be right given the relatively short period of time the Appellant has been in the United Kingdom. The Appellant has provided next to no evidence of a relationship with a child of his own that would engage the Immigration Rules including EX.1.
21. When the Appellant applied for leave to remain he was asked at question 10.1 whether he had any criminal convictions in the United Kingdom. He replied that he had been cautioned by the police for assault upon the Sponsor which he described as arising from a joke but she was not in the mood at the time and it was a misunderstanding. There has evidently been more than one such incident judging by the report of the Police Officer who states that the police have attended on at least two occasions when the Sponsor has complained about the Appellant's behaviour. Also of concern is that the Sponsor is described as being "very agitated" about the fact that the Appellant is still in the vicinity of the matrimonial home. It would appear that the officer is suggesting that the Sponsor is very much concerned for her own safety. It is unfortunate that the Judges previously examining this matter did not place more significance on the Appellant's admission of a criminal caution when deciding on the extent and nature of family life in this case. (I appreciate recent authority has indicated that failure to disclose a caution is not of itself deception). The Appellant's desire to have this case decided on the papers becomes more understandable.
22. The Appellant's case would have to be that he should be allowed to remain in the United Kingdom on the basis that his private life in this country would be

proportionally interfered with by requiring him to return to Nigeria. Judge Pickup who dealt with the matter first of all on the papers considered that the Appellant did have a circle of friends and acquaintances and was involved in the community. However the Appellant was not working at the time he put in his application and I have seen no evidence that he is currently working. None of his friends who had previously written letters of support were willing to attend court to give evidence on his behalf. Judge Pickup's determination was set aside because much of the evidence he relied upon had not been seen by the Respondent. I must therefore re-evaluate it. Given the relatively short period of time the Appellant has been in the United Kingdom even taking the documents at face value the claim under Article 8 is a weak one.

23. The refusal of the Appellant's application for further leave to remain is pursuant to the legitimate aim of immigration control. Given the relatively light weight I ascribe to the evidence of a private life against the weight to be afforded to the legitimate aim pursued the interference is proportionate. The Appellant cannot satisfy the Immigration Rules, he has no claim under Article 8 for family or private life. I therefore dismiss the appeal under both the Immigration Rules and Article 8. As I have dismissed the appeal I make no fee award, the original fee award made by Judge Pickup having been set aside as the result of the decision of Deputy Upper Tribunal Judge Wilson.

### **Decision**

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have remade the decision by dismissing the Appellant's appeal.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy interest in so doing.

Signed this 22nd day of July 2014

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Deputy Upper Tribunal Judge Woodcraft