



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

Appeal Number: IA/18164/2014

THE IMMIGRATION ACTS

Heard at Field House

On 5th February 2015

**Decision & Reasons
Promulgated
On 5th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

**MR FLOYD ADEGBOYEGA BABAYEMI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Malhotra
For the Respondent: Ms J Isherwood

DECISION AND REASONS

1. The appellant appeals against the dismissal of his appeal by First-tier Tribunal Judge Chohan ("the judge") against decisions made by the Secretary of State to refuse to vary his leave and to remove him.
2. Salient features of the appellant's case are that he claims to have arrived here in 1984, with only two brief absences from the country since then, that he has a genuine and subsisting parental relationship with two British children, who live with his former wife and that he has genuine and subsisting relationships with his current wife, who has indefinite leave to remain and who has applied to naturalise as a British citizen, and their

young child. The appellant's first marriage took place in 1990, the year in which he was arrested as an overstayer and then bailed. He was given leave by the Secretary of State, valid between February 2011 to February 2014, in the light of his parental relationships with British citizen children.

3. The judge concluded that EX.1, contained in Appendix FM to the rules, did not assist the appellant. He found that the best interests of the older children were to remain with their mother and that the appellant could continue to maintain contact with them, following his return to Nigeria. His current wife and young child could accompany him there, although the appellant's wife has not returned there since she first came to the United Kingdom some seven years ago. The judge took into account section 117B of the 2014 Act and found that the maintenance of effective immigration control was in the public interest and that any interference with the appellant's and his family members' private life ties was justified. At the end of the determination, he concluded in the light of guidance given in Gulshan that there were no compelling circumstances in the case and so it was not necessary to consider Article 8 outside the rules.
4. Permission to appeal was granted on the basis that the judge may have erred in failing to take into account the years the appellant has been present in the United Kingdom and in relation to the private life and family life he enjoys with the two older children and may also have erred in failing to make an assessment outside the rules. In a brief rule 24 response, the Secretary of State opposed the appeal on the basis that the judge explained his findings and applied the law correctly.

Submissions on Error of Law

5. Ms Malhotra said that the judge accepted that the appellant had been present in the United Kingdom since at least 1990 but failed to engage with paragraph 276ADE of the rules. The appellant had a strong private life case. Although the judge did consider relationships between the appellant and his children, he did not assess the position under the rules in this context. So far as EX.1 was concerned, the Secretary of State appeared not to accept that a genuine and subsisting relationship existed between the appellant and his older children. The judge made a favourable finding here. The critical issue was whether it was reasonable to expect the children to leave the United Kingdom, the test identified at EX.1(a)(ii). The judge also failed to properly engage with EX.1(b), in relation to the relationship the appellant enjoyed with his partner, who was settled here. The test was whether there were insurmountable obstacles to family life continuing abroad.
6. The determination showed that the judge had made no Article 8 assessment outside the rules, ending the decision rather abruptly with Gulshan. Guidance from the Court of Appeal in MM (Lebanon) was in the public domain by October 2014. Similarly, the judge did not engage with section 117B(6) of the 2002 Act.

7. Ms Isherwood said that the Secretary of State had not accepted the appellant's claim to have arrived in 1984 or to have lived here continuously since then. The judge found at paragraph 14 that there was no evidence showing that the appellant had been here since 1984 and he was correct to observe that the appellant had no legitimate expectation that he would get more leave, following the three years' discretionary leave granted to him. The appellant's wife was given indefinite leave in June or August 2014. The finding made by the judge in paragraph 16 of the determination, regarding the appellant's ties to Nigeria, was unaffected by any error. The judge accepted that the appellant, his wife and young child would face some difficulties on return but concluded that they did not amount to insurmountable obstacles. He took into account the relationship with all the children. The photographic evidence appeared to show that the older children saw the appellant during school holidays. The judge was entitled to find that such contact or communication could continue although there would be an absence of physical contact. On the other hand, the older children had made a visit to Nigeria. It was clear from paragraph 20 that the judge did take into account section 117B of the 2002 Act and, in that context, his finding that the older children had a stronger relationship with their mother was open to him. The judge balanced the competing interests appropriately.
8. In a brief response, Ms Malhotra said that the judge had been perfectly entitled to consider the relationships but there was a primary obligation to apply the relevant law and paragraph 19 suggested that he accepted that the older children could not reasonably return to Nigeria.

Decision on Error of Law

9. With very great respect to the experienced judge who prepared the determination, I conclude that the decision contains material errors of law. The Secretary of State's case, contained in the letter giving reasons for the adverse immigration decisions, shows that she considered paragraph 276ADE of the rules, concluding that the evidence did not show continuous residence for at least twenty years. The judge does not appear to have engaged with this aspect of the case and the determination contains no assessment at all in this context.
10. Similarly, EX.1 formed a major part of the Secretary of State's case in refusing the appellant's application for more leave. The determination does not show that the judge fully engaged with this aspect and the decision contains no express finding regarding the reasonableness of expecting any of the children to leave the United Kingdom. There is a suggestion, in paragraph 19, that the judge accepts that the older children could not reasonably return to Nigeria but there is no clear finding to this effect. Finally, section 117B(6) of the 2002 Act was required to be taken into account in assessing the weight to be given to the public interest in maintaining immigration control. The proper focus here was on the

parental relationships. Although the judge did weigh the evidence in this context, the only mention of section 117B occurs at the end of the determination, in paragraph 20 but more reasons were required in support of the conclusion that the maintenance of immigration control outweighed the appellant's interests and justified interference with his and his family members' Article 8 rights, in the light of that express statutory provision.

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

Remaking the Decision

12. Ms Malhotra said that the appellant's case could be largely put by means of submissions although there was a need for some further evidence. The appellant's current wife had been approved for naturalisation and would attend a ceremony on 21st February 2015.
13. Ms Folake Florence Olumi gave evidence. She said that she had the paperwork showing approval for naturalisation and she would attend a ceremony to formally become a British citizen on 21st February 2015.
14. The appellant then gave evidence. He adopted the witness statement which was before the First-tier Tribunal. He said that he first entered the United Kingdom in 1984 as a visitor. He returned to Nigeria in 2005 to attend his father's burial, for about a month and made a second visit in January 2014, spending about four days there. These were the only visits to Nigeria since his arrival.
15. So far as his first marriage was concerned, the divorce papers showed that this was entered into in Slough in June 1990. When the appellant first made an application for leave, he gave his solicitors school documents and papers regarding his attendance at North London Polytechnic. They were sent to the Home Office. He was not sure why they did not appear in the current bundle. So far as employment was concerned, the appellant worked as a cook but now owned a business, a barbecue company. He had done so since 2007. He obtained a national insurance number about four years ago and has paid tax and national insurance contributions since. He was paid cash in hand before that and did not pay tax on his earnings.
16. In answer to questions from Ms Isherwood, the appellant said that his last grant of leave in 2011 was based on his children and the relationships he had with them. There was no consideration of his years spent in the United Kingdom. The evidence he provided regarding entry in 1984 included bank statements, voter registration forms and payslips. These were given to his solicitor and went in with the application he made for further leave. They were not in his current bundle. The appellant accepted that he had overstayed and worked illegally here. Ms Isherwood asked why the Tribunal should believe the appellant, as he had broken the law in the past. He replied that he was given the right to remain and had

complied with due process ever since. He was a good father and had genuine relationships with his children. He accepted that he made a decision to stay but he was afraid of being sent back and losing his relationship with his first wife, at the time. She was a British citizen. The two older children had dual British and American citizenship. They were born in America. The appellant had never been there. Their mother went when she was pregnant, spending about three months there. The two oldest children were with him every holiday but he did not go to see them in Scotland very often. They spent the whole of the summer and Christmas holidays with him. Last year they were with him from mid-July to September and at Christmas they spent time with him in December and January, and this had been the arrangement ever since he divorced his first wife. They would not be able to see him in Nigeria because the family could not afford it.

17. There was no re-examination.
18. Ms Isherwood said that the evidence did not show continuous residence since the appellant's claimed entry in 1984. The documents in his bundle focussed on events from 2012. As the appellant was willing to deceive the authorities by choosing not to regularise his stay, he might not be willing to tell the truth. His first wife's statement concentrated on his role as a father, rather than the years spent here. There was insufficient evidence to show twenty years' residence, for the purposes of paragraph 276ADE. There was evidence that the appellant and his first wife were able to travel abroad. The First-tier Judge had made unchallenged findings that the appellant maintained ties to Nigeria. He and his partner could return.
19. So far as EX.1 was concerned, the appellant's current wife had not naturalised yet and there were no insurmountable obstacles to the family's return to Nigeria. The two oldest children were resident with their mother and the appellant's relationship with them was less strong. He could return to Nigeria and run his business there. There was little evidence of integration.
20. Ms Malhotra said that the evidence did, in fact, show at least twenty years' residence here. So far as EX.1 was concerned, the two older children were British citizens aged 16 and 11 and it was not reasonable to expect them to return to Nigeria. The appellant could show that he met the requirements of EX.1(a). Similarly, he could show that the requirement of subparagraph (b) was met as there were insurmountable obstacles to family life with his current wife and child being continued in Nigeria. Finally, section 117B(6) was of application as the appellant was a parent of a British child and it was not reasonable for the children, the older ones at least, to return.
21. Ms Malhotra said that an Article 8 assessment outside the rules would show that removal of the appellant would be disproportionate. He was now a taxpayer and had fully integrated. He had three children, two of

whom were already British. His family life would be interfered with by his removal. Taking into account the length of his time here, his involvement with his children and all the evidence, and the absence of any aggravating features, it was clear that there was no public interest in his removal.

Findings and Conclusions

22. In this appeal, the burden lies with the appellant to prove the facts and matters he relies upon and the standard of proof is that of a balance of probabilities.
23. I gave brief reasons for allowing the appeal, at the conclusion of the hearing. Having heard the appellant give evidence, and taking into account the documentary evidence, I find that he falls within paragraph 276ADE of the rules. The documentary evidence includes a copy of a decree absolute recording the appellant's first marriage in 1990 and it is not in dispute that he was arrested in that year as an overstayer. The appellant was candid in his evidence about unlawful employment before he obtained a national insurance number and I accept his evidence that, at least since 1990, he has made only two short returns to Nigeria, in 2005 and 2014. He falls within paragraph 276ADE(1)(iii). Turning to the suitability requirements, these appear in section S-LTR of Appendix FM. I find in the light of the evidence that none of the particular categories applies, so as to show that the appellant is not suitable for a grant of leave to remain. There is no evidence of any convictions or offending behaviour and nothing to show that his character, associations or other reasons make it undesirable to allow him to remain in the United Kingdom and nothing to show that his presence is not conducive to the public good because of his conduct. He made a full disclosure of his immigration history in his application for further leave and has not failed to disclose material facts. He has shown that the requirements of the rules are met in this context.
24. Secondly, EX.1 applies in his favour, in the light of the genuine and subsisting parental relationships with his two older children, who are British. They are now aged 16 and 11 and, although it appears that they have made a visit to Nigeria, the extent of their ties here is such that it would not be reasonable to expect them to leave the United Kingdom. They have not resided in any other country and are currently being educated. They live with their mother in Scotland.
25. It is also clear that section 117B(6) of the 2002 Act applies in this case. The appellant is not liable to deportation and has a genuine and subsisting parental relationship with qualifying children (his two British citizen children). It would not be reasonable to expect those children to leave the United Kingdom. Again, they have only ever lived here, save for their location at the time of their births, which appears to have been the United States. Leaving the United Kingdom would disrupt their settled family life with their British citizen mother, their social relationships and interrupt

their education. In these circumstances, section 117B(6) provides that the public interest does not require the appellant's removal.

26. The evidence also shows that the Secretary of State has not, in the past, been particularly concerned to remove the appellant. As noted earlier, he was arrested in 1990 and then bailed, apparently to give him an opportunity to continue his studies. In 2011, he was given discretionary leave, in the light of his relationships with his children. Inevitably, those ties deepened even though the appellant himself had no legitimate expectation that he would be given more leave. Overall, the evidence shows that the appellant has fully integrated into British society, having been married here, having acted as a parent to his children and having over the past four years or so, worked lawfully and established a business.
27. The appellant has succeeded in showing that the requirements of the rules in paragraph 276ADE and in relation to EX.1 are met. The state's case that he should be removed is weakened by section 117B(6) of the 2002 Act, which provides that there is no public interest in removal in his particular circumstances. There would appear to be no need to go further and make an Article 8 assessment outside the rules but if there were, the evidence clearly shows that the appellant's removal would be disproportionate in the light of his family and private life ties here and his success in showing that the requirements of the rules have been met. The appeal is allowed.

Decision

The decision of the First-tier Tribunal having been set aside, it is remade as follows: the appeal is allowed.

Anonymity

There has been no application for anonymity and I make no direction on this occasion.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal, and noting that all the salient features of the appellant's case were identified in his application for leave to remain, I make a fee award in respect of any fee that has been paid or is payable in these proceedings.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell