



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

Appeal Number: IA/45312/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 21 August 2015**

**Decision & Reasons Promulgated
On 7 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

MR SUNDAY UCHENNA AJAEGBU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Bajwa, counsel instructed by A Bajwa & Co Solicitors

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a decision of FTTJ J McIntosh, promulgated on 15 December 2014.

Background

2. The appellant was granted limited leave to enter the United Kingdom as a Tier 4 migrant until 23 September 2013. On 20 September 2013 he sought leave to remain on the basis of his relationship with his partner, a Ghanaian national who is settled in the United Kingdom. That

application was refused on 15 October 2013 because the respondent considered there were no insurmountable obstacles to family life being continued outside the United Kingdom. It was also considered there were no exceptional circumstances involved.

3. In his grounds of appeal, the appellant argued that he could not live with his partner in Nigeria because she was granted indefinite leave to remain in the United Kingdom on the basis of long residence in the United Kingdom. Furthermore, his partner had an adult daughter who was living in the United Kingdom.

The hearing before the FTTJ

4. The appellant and his partner gave evidence before the FTTJ, who heard the appeal on 31 October 2014. It was conceded by the respondent that the parties lived together in a genuine and subsisting relationship. The FTTJ found that it was possible for the appellant to return to Nigeria and for his partner to join him there, notwithstanding that they were shortly expecting a child. In terms of Article 8 outside the Rules, the FTTJ considered that any interference with the appellant's private life was proportionate.

Error of law

5. The grounds of appeal argue that the FTTJ misdirected himself because the appellant's partner was from Ghana and not Nigeria and they were expecting a baby. The renewed grounds added that the child had now been born and was a British citizen.
6. FTTJ Chamberlain granted permission, finding there to be an arguable error of law for the FTTJ not to consider the appellant's family life with his wife outside the Rules and also not to consider section 117B of the 2002 Act (as amended). FTTJ Chamberlain was disinclined to reject the other grounds but noted that the birth of the child post-dated the hearing.
7. The Secretary of State's response of 23 June 2015 stated that the respondent opposed the appellant's application. The reply argued that the FTTJ considered the appellant's circumstances in some detail in the decision and rejected the appellant's assertions that it would not be possible for the couple to live in Lagos. The FTTJ also noted that the adult child of the sponsor was pursuing a degree and living independently of her mother. It was also said that the FTTJ noted the absence of any exceptional grounds; that the conclusion was one open to the FTTJ that the grounds were no more than a mere disagreement with the FTTJ's findings.

The hearing

8. Mr Bajwa relied upon the grounds of the appellant's application and the grant of permission. He argued that the five-step process in Razgar was still required and that section 117B of the 2002 Act did not materially alter the position. He submitted that the appellant's partner should not

have to abandon her life in the United Kingdom and take her adult daughter and infant son to Ghana in order to sponsor the appellant from Nigeria. Nor should the appellant have to return to Nigeria and sponsor his wife and her daughter to join him there.

9. Mr Duffy agreed that the proportionality assessment did not include consideration of family life. However, he argued that all the issues had been considered at paragraph 21 of the decision, where the FTTJ had found there to be no insurmountable obstacles to family life taking place elsewhere. Mr Duffy made the point that there was freedom of movement between ECOWAS countries such as Nigeria and Ghana and there were therefore no immigration concerns with each party living in each other's country of origin.
10. In reply, Mr Bajwa stressed that the respondent had conceded that the appellant and sponsor were in a genuine and subsisting marriage. He argued that the family life would suffer "*complete devastation*" were the appellant required to leave the United Kingdom. I invited Mr Bajwa to identify any compelling circumstances why the FTTJ ought to have proceeded to consider the appellant's family life outside the Rules. He replied that those circumstances were that the appellant's child was an infant; that the appellant being permitted to remain would mean that in the near future the partner would "*come off benefits*" and that the partner would be likely to remain on benefits were the appellant removed.
11. The only issue of substance before the FTTJ was whether there were insurmountable obstacles to family life continuing between the appellant and his partner outside the United Kingdom. The FTTJ considered that issue in detail at [20-23] of the decision. The FTTJ took into consideration the differing nationalities and ethnicities of the appellant and his partner; the fact that the partner's daughter was an adult in full-time further education who lived independently from her mother; that the partner was expecting a child; that she would not be able to travel abroad immediately owing to her advanced pregnancy but that she could do so after the birth of their child and be reunited with the appellant abroad; that the partner could support a settlement application in the future and that both parties had qualifications and experience which would enable them to find employment in Nigeria. After considering these matters, the FTTJ concluded that they did not amount to insurmountable obstacles as defined in EX.2 of Appendix FM to the Rules.
12. Mr Bajwa's complaint is that the FTTJ stopped consideration of the appellant's family life without proceeding to consider the proportionality of his removal. I find that there was no material error in the FTTJ declining to carry out such an assessment in the circumstances of this case.
13. I am guided by what was said in R (oao Nagre) v SSHD [2013] EWHC 720 (Admin) at [43]

“...the gap between the test for leave to remain under EX.b(1) and the result one would arrive at by direction consideration of Article 8 in the precarious family life class of case is likely to be small. In the majority of such cases, if the applicant for leave to remain cannot show that there are insurmountable obstacles to relocation of a spouse or partner to his or her country of origin so as to meet that part of the test laid down in EX.b(1), they will not be able to show that their removal is disproportionate.”

14. All the relevant evidence was considered by the FTTJ during her consideration of the Rules and in view of those findings, any consideration of the Razgar steps could not have gone beyond the second step, in that the FTTJ's findings indicate that there would be no interference with the appellant's family life caused by the respondent's decision to remove him because family life could be continued elsewhere.
15. The grant of permission refers to the absence of any consideration of section 117B of the 2002 Act. While Mr Bajwa relied on the said grant, he did not develop this point before me. Indeed, Mr Bajwa's submission was that section 117B did not materially affect the appellant's position.
16. In relation to section 117B of the 2002 Act, I note that the appellant's family life was established when his immigration status was precarious and when it was known that his partner would be unable to meet the financial requirements because she worked part-time and was in receipt of public funds. The aforementioned factors would not have added weight to the appellant's case had the FTTJ referred to the factors set out in section 117B, given the public interest considerations in section 117B (1), (3) and (4).
17. I have also had regard to what is said in SSHD v SS (Congo) & Ors [2015] EWCA Civ 387 as to “good reason” needing to be shown as to why a particular applicant, who cannot meet the requirements of the Rules, was entitled to preferential treatment over other applicants. Mr Bajwa's submission amounted to speculation that the appellant and his partner could not live in each other's countries; that the partner would remain on benefits if the appellant was removed and that she would no longer claim benefits if the appellant were permitted to remain. I do not find that those particular Article 8 arguments amount to good reason for considering let alone allowing an appeal outside the Rules. While it might have been preferable for the FTTJ to consider the Article 8 claim outside the Rules, for the sake of completeness, I find that the FTTJ cannot be said to have materially erred in law in declining to carry out an Article 8 assessment outside the Rules in the particular circumstances of the appellant's case.

Conclusion

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I uphold the decision of the FTTJ.

No anonymity direction was made by the FTTJ and I am aware of no reasons for making such a direction now.

Signed

Date: 30 August 2015

Deputy Upper Tribunal Judge Kamara