



IAC-FH-AR-V1

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

Appeal Number: IA/19413/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 26 November 2015**

**Decision & Reasons Promulgated
On 13 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

**MJO
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

The Appellant did not appear and was not represented

For the Respondent: Miss M Savage, Home Office Presenting Officer

DECISION AND REASONS

1. This case was listed today for 10 am and it now well past 11.00 am. I put this matter to the end of my morning list and no one has appeared in respect of the appeal. Appleby Shaw Solicitors are on record as acting for the appellant. I have had a member of the court staff go to the waiting area to make enquiries and he has established that there is still no one present.

2. I was satisfied that it was in the interest of justice to proceed with the appeal. I concluded that the appeal should be dismissed and I now give my brief reasons.
3. The appeal brought against a decision of First-Tier Tribunal Judge Pygott promulgated on 24 February 2015 pursuant to a grant of leave given by Upper Tribunal Judge Canavan on 8 July 2015.
4. The appellant is a citizen of Nigeria. His appeal to the Judge was from a removal decision made by the Respondent on 17 April 2014. This followed a previous refusal on 13 December 2012 of an application made under human rights grounds. The appellant's immigration history is fully set out in paragraph 2 of the Judge's decision and I need not repeat it.
5. The appellant's case was that he had formed a stable relationship with a Nigerian who had indefinite leave to remain and with whom he previously had two sons, although paternity had only been established relatively recently. He claimed that they started to live together in May or June 2012 and had formed a close familial bond. A third child, a daughter, was born in November 2014.
6. The Judge's decision is detailed and lengthy. The Judge concluded that the appellant did not come within the category of a parent within Appendix FM of the Immigration Rules and this conclusion is not challenged.
7. The Judge also found that the appellant did not meet the conditions under paragraph 276ADE and similarly there is no appeal against this finding.
8. The Judge then went on to consider the appellant's human rights claim under Article 8 which was classified, correctly, as an issue of proportionality (para 46). The Judge's balanced analysis in paragraph 47 of the appellant's personal circumstances and those of his partner with the legitimate aim of maintaining immigration control is perfectly proper and is not the subject of criticism.
9. The Judge's discussion of the circumstances concerning the two young sons and the baby daughter, each of whom the Judge found has dual British and Nigerian nationality, is at paragraph 48. The Judge concludes that the best interests of all three children are to remain in the United Kingdom.
10. The Judge found (para 50) that it would not be unreasonable for the appellant to return to Nigeria to make an application for entry clearance. The Judge further found (para 51) that there was nothing exceptional in the appellant's circumstances in relation to his private life and given his immigration history to indicate that his removal to Nigeria would be unreasonable.
11. This Judge had earlier (para 49) distinguished the appellant's situation from the factual circumstances in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40. In the grant of permission to appeal, it

was noted (i) that it is at least arguable that the judge failed to make clear findings on the length and impact on the children of the familial separation while entry clearance was sought by the appellant from overseas; (ii) that it is at least arguable that the Judge may have erred in requiring the appellant to show an invincible Article 8 case before the *Chikwamba* principles would be engaged; and (iii) that it is at least arguable that some further consideration should have been given to the impact of separation on the family: *R(on the application of Chen) v Secretary of State for the Home Department (Appendix FM - Chikwamba - temporary separation - proportionality)* IJR [2015] UKUT 189.

12. I have considered these particular matters together with the more expansive Grounds of Appeal settled by counsel. I have reviewed the evidence which was before the First-Tier Tribunal and the findings which were made by the Judge. I remind myself of the principle, expressed in the headnote of *Chen* as follows:

“There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning **Chikwamba v SSHD [2008] UKHL 40.**”

13. Having reviewed the entirety of the case, but particularly those matters identified as arguable errors of law when permission to appeal was granted, I reject the assertion in paragraph 5 of the Grounds that ‘there was a wholesale failure by the Judge to carry out a proper assessment under Article 8’. On the contrary, both in the specific paragraphs which I have identified above and elsewhere in the detailed decision, it is clear that the Judge has carried out a delicate balancing exercise to inform both the proportionality analysis and unjustifiable harshness. The Judge took into account all relevant features including the impact of separation on the children, the established bonds with their father, and whether or not having to make an application for entry clearance from Nigeria would be disproportionate. Little if any material was placed before the Secretary of State or the Judge on this latter point notwithstanding the requirement on the appellant to supply such evidence.
14. Having had the advantage of giving the matter fuller consideration than is possible at the permission stage, I am of the opinion that the decision does not reveal an error of law. The Judge did take fully into account all relevant features and came to a decision balancing all relevant features in a complex case. The Judge was entitled to give weight to the appellant’s immigration history as part of the overall Article 8 assessment. On any account, his immigration history was appalling as the Judge recorded and I do not need to repeat. Whilst the appellant may not agree with the Judge’s assessment, it fell within the legitimate range of the Judge’s discretion and the Upper Tribunal is not permitted to interfere with the discretion exercised by the First-Tier Tribunal in the absence of an error of law.

15. In all the circumstances, this appeal must be dismissed.

Notice of Decision

The appeal on human rights grounds is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Mark Hill*

Date 11 December 2015

Deputy Upper Tribunal Judge Hill QC

TO THE RESPONDENT
FEE AWARD

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

Signed *Mark Hill*

Date 11 December 2015

Deputy Upper Tribunal Judge Hill QC