



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/24452/2015

THE IMMIGRATION ACTS

Heard at Field House
On 29th October 2018

Decision sent to parties on
On 9th November 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

C B U
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Benjamin Hawkin, Counsel instructed by Alcott Solicitors
For the Respondent: Mr Paul Duffy, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity

The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the

original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Hanes who on 16th February 2018 dismissed his appeal under the Immigration Rules and on human rights grounds, making an anonymity direction. The appellant is a Nigerian citizen.

Background

2. The appellant's account of his history, and that given by his wife, are not disputed. Mr McVeety did not seek to cross-examine either of them.
3. The appellant came to the United Kingdom in 2002 as a 19-year old student and studied here, with leave, until June 2008. He played rugby for his university and was a member of the student union executive and the NUS committee. He joined Hackney Rugby Club after university and trained as an officer cadet with the British Army. On 16 September 2004, the appellant was convicted of common assault following an altercation after a football (presumably rugby football) match and of using a used or partly used ticket on the railways. He has no subsequent convictions.
4. After university, the appellant worked as a financial analyst and in investment banking, achieving the Professional Certificate of the Chartered Institute for Securities and Investment in 2011, and working for Goldman Sachs for 9 months in 2015, as well as for Lloyds Banking Group, Barclays Investment Bank and Citibank NA, all in London.
5. From May 2011 – May 2016, the appellant benefited from an EEA residence card based on his relationship with an EEA national, Ms Hauge, which continued until 1 April 2015, when she was redeployed by her employer to a position in Norway, and he did not accompany her. The appellant's EEA residence card granted in May 2011 was due to expire in May 2016, but the circumstances of which it was evidence had ceased to exist.
6. Immediately after his former partner left to go to Norway, on or about 2 April 2015 the appellant made an application for leave to remain in the United Kingdom outside the Rules on human rights grounds (private life only at that stage). He did not disclose his conviction in 2004. In her refusal letter on 18 June 2015, the respondent had regard to that omission, and the conviction, on character grounds. The appellant could not bring himself within the requirements of the Immigration Rules with regard to paragraph 276ADE, R-LTRP1.1 and D-LTRP.1.3 and the respondent was not made aware of any relationship with a partner in the United Kingdom or any other exceptional circumstances. The respondent did not consider that there would be any significant obstacles to his integration in Nigeria, where he had lived for the first 19 years of his life (he is 35 now).
7. The appellant appealed to the First-tier Tribunal.

8. In June 2015, around the date of the refusal letter, the appellant began a relationship with [VK], a British citizen of Polish heritage, whom he had known since 2012 as a friend, and has now married. His wife is a child psychotherapist, earning £34000 per annum and is studying for a PhD in Psychology at the University of Leicester. They have supported each other through serious personal stresses during their relationship. They have also enjoyed outings together, holidays, and taken up hobbies (walking in the countryside, exploring National Heritage sites and fencing). They have an active social life and a large circle of mutual friends. They have been trying to start a family but unfortunately the sponsor miscarried their first child.
9. While he has been in the United Kingdom, the appellant's two younger brothers (both living in Turkey), his aunts, his uncles and both his grandparents have died. The appellant's parents still live in Nigeria, though they spend most of their time with his surviving siblings in Turkey. The appellant remains liable for National Youth Service in Nigeria (one year) which he would have to complete before he could begin to work there.
10. In December 2016, the couple notified the Home Office of their intention to marry and on 16 August 2017, they attended a marriage interview at Lewisham Registry Office. Following approval by the local Council and the Home Office, they married on 30 January 2018 and on 4 September 2018, they purchased a property together as their matrimonial home. The appellant intends to continue to support himself and not to depend on public funds. They still do not have children: although they continue to try, they have now had the misfortune to suffer two miscarriages.

Procedural history

11. First-tier Judge Colvin dismissed the appellant's appeal against the refusal of leave to remain on family and private life grounds, holding that the appellant's marriage was a new matter on which he did not have jurisdiction. The appellant appealed to the Upper Tribunal and DUTJ Norton-Taylor remitted the appeal to the First-tier Tribunal, on the basis that the relationship between the appellant and his wife was not, properly understood, a new matter. The respondent did not challenge that decision.
12. On remittal, First-tier Judge Hanes dismissed the appeal again, on the basis that the marriage was a 'new matter', without, it appears, having canvassed that question with the parties at the hearing. The appellant appealed to the Upper Tribunal again and the appeal came before me in July 2018.
13. At that hearing, pursuant to Section 85(5), the Home Office Presenting Officer (Mr Paul Duffy) indicated that the respondent consented to the new matter being dealt with in these proceedings. That consent was recorded in writing in a letter received by the Upper Tribunal the same day:

"With regard to the Upper Tribunal hearing this afternoon: this is to confirm that pursuant to section 85(5) of the Nationality, Immigration and Asylum Act 2002, as amended by the Immigration Act 2014, the Secretary of State gives his consent to the

Tribunal to consider the 'new matter' of the appellant's new relationship (now marriage) raised before the First-tier Tribunal."

14. By a decision served on 9 August 2018, I set aside the decision of the First-tier Tribunal as it related to the new matter of the family and private life between the appellant and his wife, to be remade, limited to the new matter, in the Upper Tribunal on a date to be fixed.
15. I gave the following directions for the future conduct of this appeal:-
 - (1) Witness statements limited to the new matter issue are to be served and filed within three weeks from the sending out of this decision.
 - (2) The Secretary of State shall indicate in writing within two weeks thereafter whether he wishes to cross-examine on any and if so on which of the witness statements served upon him and if he does not wish to cross-examine the matter shall proceed on submissions alone.
 - (3) If the appeal should proceed to a further hearing no additional documents other than the witness statements are to be served without the leave of the Tribunal and each party may file a skeleton argument if so advised, to be limited to four A4 pages.

The witness statements were served but the Secretary of State did not indicate within the time limited whether he wished to cross-examine the parties.

16. The appellant did not comply with the 'no additional documents' order and filed a bundle of 35 documents on 22 October 2018, just a week before the hearing. There was no application to the Upper Tribunal to admit these documents but Mr McVeety, who appears for the respondent, did not object to my considering them and I have done so.
17. At the hearing today, Mr McVeety indicated that he did not wish to cross-examine. The evidence of the appellant and his wife therefore stands unchallenged. Mr McVeety indicated that he did not feel able to concede the appeal, but that the respondent's challenge to the genuineness of the marriage and that the relationship was subsisting was no longer maintained.
18. I reserved my decision, which I now give.

Analysis

19. The appellant has lived in the United Kingdom for 16 years. He cannot therefore bring himself within paragraph 276ADE of the Rules. His private life must be given little weight since it has always been precarious or unlawful.
20. However, the appellant also has family life with his wife and his friendship with her was established in 2009 when he did have leave. His relationship with her as a partner was established in 2015, when the appellant still had the benefit of an EEA

residence card and had, properly, notified the respondent of his change of circumstances and made a prompt application for leave to remain on human rights grounds outside the Rules. On that basis, the little weight provisions of section 117B(4)(b) do not bite as the appellant was in the United Kingdom lawfully when he entered into this relationship.

21. I take into account that, apart from the appellant's conviction in 2004, there is nothing in the facts of this appeal which indicates that were the appellant to leave the United Kingdom and apply to be readmitted as his wife's spouse, that application would be refused. Both of them are professionals earning good salaries and his wife's salary comfortably exceeds the £18600 minimum for a spouse application. Mr McVeety having withdrawn the respondent's objection to this application, I approach it on the basis that the 2004 conviction, now some 14 years ago, would not result in the respondent exercising discretion against him if he were to make an out of country application for permission to appeal as his wife's spouse.
22. I have regard to the line of decisions flowing from the decision of the House of Lords in *Chikwamba v SSHD* [2008] UKHL 40. I am satisfied that this is a *Chikwamba* type of case and given the lack of opposition from the respondent, that it is appropriate to allow the appeal outside the Rules.

Signed: *Judith A J C Gleeson*
Upper Tribunal Judge Gleeson

Date: 31 October 2018