IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003497
First-tier Tribunal Nos:
HU/52882/2022
LH/00823/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

Callista Enekole Eshareturi
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Roberts (Counsel)
For the Respondent: Mr Tan (Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 4 October 2023

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Hollings-Tennant, promulgated on 3rd May 2023, following a hearing at Manchester Piccadilly on 4th April 2023. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Nigeria, born on 14th October 1984, and is a female. She appealed against the decision of the Respondent dated 26th April 2022 refusing her application for leave to remain in the United Kingdom on the basis of her family life with her partner and her newly born child.

The Appellant's Claim

3. The Appellant claims that she is in a genuine and subsisting relationship with her husband, Mr Cyril Eshareturi, who is a British citizen settled in the UK. They were married in August 2021 in Abuja, in Nigeria, and subsequently travelled to the United Kingdom. The Appellant herself had a multi-entry visitor's visa which is valid until January 2027. She came to the UK on a visitor's visa. Having done so, the Appellant then applied, two months after her arrival, to remain in the UK in a different capacity on the basis of her family life with her husband. She claims that although her intention was to reside permanently with her husband she had no idea that she could not apply for leave to remain as a spouse while she was in the United Kingdom as a visitor.

4. In any event, if a decision on her application for leave to remain had been made within the eight week service standard, she would have been able to return to Nigeria, in order to seek entry clearance to enter the UK as the spouse of her husband. However, by the time she did receive the decision, she was 33 weeks pregnant and was advised not to travel back to Nigeria. Thereafter, on 17th August 2022, her mother-in-law visited from Nigeria and was taken ill in the United Kingdom, having suffered a serious spinal stroke. This has left her paralysed from the neck down. Although her husband is responsible for coordinating her mother's care and liaising with the clinical team who are treating her as an in-patient in hospital, she cannot return to Nigeria to seek entry clearance because she needs to stay with her husband in order to be able to support him. If he were to return to Nigeria in these circumstances this would result in untoward distress for him and their 8 month old daughter. In the circumstances the public interest does not require that the Appellant leave the UK in order to apply for a spouse's visa to enter the UK for the purposes of residing with her husband who, it is accepted, she is in a genuine and subsisting relationship with.

The Judge's Findings

5. The judge held that because the Appellant had applied within six months of entry as a visitor, her leave was extended under Section 3C of the Immigration Act 1971 (paragraph 19), but that in order to fall within the exceptions set out in EX.1.(b) the Appellant would have to demonstrate that there were insurmountable obstacles to family life with her husband continuing outside the United Kingdom. What that meant was that there would be "very significant difficulties for the Applicant or their partner in continuing their family life together outside the United Kingdom", and that although "Mr Eshareturi's mother is currently unwell and being treated in this country, this did not in itself amount to insurmountable obstacles to family life continuing abroad" (paragraph 20). The judge did go on to consider Article 8 of the ECHR outside the Rules and held that "There is a public interest in removing the Appellant or expecting her to leave so as to make the appropriate entry clearance application from abroad as required" (paragraph 24). The judge also added that "Section 117B of the 2002 Act makes

clear that the maintenance of effective immigration control is in the public interest …" (paragraph 25).

Grounds of Application

6. The grounds of application state that the judge was wrong in law to have stated that the Appellant, having made an in-time application to remain in the UK whilst still being here as a visitor, now had a "Section 3C leave", because what she had done was to have made a human rights application outside the Immigration Rules. This excluded the Appellant from a legal provision critical to her case with the result that no detailed consideration was given to EX.1. Second, the judge wrongly stated that because the Appellant was a holder of a multi-entry visit visa, she could make an entry clearance application from Nigeria for a spouse's visa, before returning to the United Kingdom "as a visitor pending the outcome of that application" (paragraph 31). This would only serve to disclose a "contradictory intention" on the part of the Appellant so that it would inevitably lead to refusal because she would be deemed not to be a genuine visitor. Third, the judge held that the likelihood of being granted entry clearance under the **Chikwamba** principle did not preclude the need to make the case for leave to remain presently, but then went on wrongly to fall into the error of speculating on the likelihood of such a grant.

7. Permission to appeal was granted by the First-tier Tribunal on 3rd August 2023 on the basis that the judge arguably erred in law in stating that the Appellant was excluded from the benefit of paragraph EX.1 in the present circumstances of this appeal.

Submissions

8. At the hearing before me on 4th October 2023, Mr Roberts, submitted that the judge should have carried out an EX.1 analysis given that the Appellant was the mother of a "qualifying child", born in the UK with British citizenship. He submitted that the government's own guidance, "family life (as a partner or parent) and exceptional circumstances" (version 19.0), makes it clear that it is not normally in the child's best interests to leave the United Kingdom if the child is a qualifying child. Whilst the child is a qualifying child, then a consideration as to whether it is reasonable to expect the child to leave, is required, and in this case the judge never got to that point.

9. For his part, Mr Tan submitted that if the application by the Appellant was made "outside the Rules", as Mr Roberts has now intimated, then EX.1 would not be applicable anyway. Second, the judge does give consideration to matters of hardship (at paragraph 20) and concludes that there would not be any insurmountable obstacles in any case. Third, it is clear from E-LTRP.2.1 that the applicant must not be in the UK as a visitor if he or she is to have the benefit of EX.1.

10. In reply, Mr Roberts submitted that EX.1 is not entirely excluded and that one has to look at the issue of proportionality, because the test is not whether the British born qualifying child can leave for a short period of time, but whether the child should be required to leave at all, and the judge gave undue weight to this question, when deciding that an entry clearance application is bound to succeed.

That, however, whilst being a dubious supposition, was not the question before the judge at all. The question was one of proportionality of removal.

11. Mr Tan, nevertheless, returned to say that the judge did make an alternative finding (at paragraph 20) and in doing so did factor in the proportionality argument. Moreover, the health condition of the mother was also looked at. Ultimately, this was a question of the degree of "weight" to be given to the respective interests, and the fact that the judge gave weight to the interests of immigration control did not make the decision an irrational one. There was no error.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law. I say this notwithstanding the very careful and sensitively crafted determination of Judge Hollings-Tennant below. Whereas it is the case that the judge has systematically gone through each one of the points that he had to consider the policy considerations in favour of a "qualifying child" is a matter that should have been absolutely at the forefront of the judge's mind. This is because the government's own guidance in family life (as a partner or parent) and exceptional circumstances (version 19.0) makes it clear that, "The starting point is that we would not normally expect a qualifying child to leave the UK" and that "It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parents or primary carer of the child will also not be expected to leave". (See page 52 of 83). The guidance also refers to the Supreme Court decision in **KO (Nigeria) [2018] UKSC 53**, where the court made it clear that the issue of "reasonableness" is to be considered in the real world context in which a child finds itself. The "real world" context here is that the Appellant, the child's mother, did not overstay her leave. She was not in the UK illegally. She applied whilst she still had extant leave. Therefore, the suggestion that she had "Section 3C leave" is not correct. The government's own guidance goes on to say that the required assessment "must take into account the child's best interest as a primary consideration" (see page 52 of 83). The child's best interests lie in having a parental contact with both her parents, including her British citizen father.

13. Second, in this case, I find that there is substance in Mr Roberts' submission that the issue for the judge was not whether the Appellant mother can return to Nigeria and then apply in the different capacity of a spouse in order to re-enter. The issue was whether the decision that she return be imposed in the first place. The way that the judge has tackled this is to say that because the Appellant currently holds a multi-entry visitor's visa which is valid until January 2027, "there is nothing to preclude her from making an entry clearance application as a spouse and returning to the United Kingdom as a visitor pending the outcome of that application, as the Respondent explicitly suggests in her RFRL" (paragraph 31). The judge surmises that, "it would not be appropriate for entry to be refused on the basis that she was not a genuine visitor if she took the action expected of her and then sought to enter as a visitor pending the outcome of an out of country application as a spouse" (paragraph 31). However, this is speculation given that the Appellant would thereby have compromised herself in the eyes of the Respondent, who will take the view in all probability that the Appellant's application to enter as a visitor is likely to be seen as lacking *bona fides* intent.

14. Third, it is important in such cases, where the application was made within two months of arrival, but the decision from the Secretary of State did not transpire until after the eight weeks service standard, during which time she was 33 weeks pregnant and advised not to travel, that government policy is not inflexibly applied. As the recent decision in **Alam v SSHD [2023] EWCA Civ 30** makes clear, "In *Chikwamba*, the Secretary of State met a very strong article 8 case by relying on an inappropriately inflexible policy" (paragraph 106). Had a child not been born, the situation would have been quite different. As it is, the presence of a "qualifying child" who would be separated from a British citizen father, in circumstances where all the Appellant can do is to return and apply for a spouse's visa in circumstances where she has a strong basis on which to succeed (but a less realistic prospect of being able to enter on a visitor's visa) given that a legitimate doubt will be raised about her true intentions), the balance of public interest considerations falls in her favour.

15. Given that the Respondent's guidance makes it clear that it would be unreasonable to expect the Appellant's child in normal circumstances to leave the UK; that family life exists between the Appellant, her husband, and her child; the Respondent's decision interferes with Article 8 family life; I find that the decision is disproportionate. There is accordingly no real public interest in the Appellant's removal, either in terms of the principles set out in **Chikwamba** or under Section 117B of the 2002 Act. The decisions in **TZ (Pakistan) [2018] EWCA Civ 1109** and in **Patel [2020] UKUT 351** also suggests that this appeal should be allowed on the basis that requiring this Appellant to return to Nigeria would be disproportionate having regard to the public interest and the other reasons that I have given above.

Remaking the Decision:

16. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. This appeal is allowed.

Notice of Decision

17. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

Satvinder S. Juss

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18th October 2023