IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21963/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 August 2015	**On 21 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FAJUYI ODARO IBIE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Mr P Collins, Counsel

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State but for the purposes of this decision I will refer to the parties as they were described before the First-tier Tribunal that is the Secretary of State as the respondent and Mr Ibie as the appellant. The appellant is a citizen of Nigeria born on 21 May 1979 and he appealed against a decision dated 20 April 2014 to refuse him further leave to remain

and to remove him from the United Kingdom further to Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The background to this appeal is that the appellant had lived in Nigeria until 2007. He studied and undertook national service and again came to the UK entering on 23 September 2007 as a student and was awarded an MSc degree in Information Systems and Management by the London South Bank University.

3. In 2008 he met, and subsequently married in 2010, a British national named Stephanie Ann-Marie Francois. He stated he was the victim of domestic violence but did not claim under the Immigration Rules.

4. On 21 March 2011 he was granted leave to remain in the United Kingdom until 23 March 2014. On 17 March 2014 he made an application for leave to remain on the basis that he believed a reconciliation was still possible and his then wife was then named as a partner in that application. According to the appellant, unbeknown to him on 16 January 2014 a decree absolute had already been granted.

5. The reasons for refusal letter refused the appellant's application on the basis of his private life and further to paragraph 276ADE and under Appendix FM, in particular paragraph D-LTRP 1.3 and R-LTRP 1.1(c) and (d). He was also served with a Section 120 notice under the Nationality Immigration and Asylum Act 2002.

6. In his grounds of appeal the appellant stated that there was a new relationship between him and a British national by birth, Miss Adesuwa Erinmwioghae. At the date of the decision she was pregnant with the unborn child of the couple. It was recorded at paragraph 8 that the appellant and his now partner, had been in a relationship since February 2013.

7. Judge of the First-tier Tribunal Freer made a finding of fact at paragraph 39 that the appellant was the father of the unborn child carried by Ms Erinmwioghae and there was a relevant pregnancy. He found some slight inconsistency about future plans but nonetheless found that at [51]:

> "The appellant's position is stronger than in such an outline [50] (sic) since he has lawful entry rights, his partner has family in the UK, and his family life will be significantly disrupted if he has to send any time at all overseas while his partner is pregnant"

and further the judge recorded:

> "Further the appellant would already satisfy the two year relationship rule when he reached Nigeria so it would be a favourable climate for such an application. His partner's payslips in the bundle show that she is paid almost £2,000 gross in each payslip so the couple do meet the £18,600 earnings threshold more than comfortably."

8. At [59] the judge found that "there were no difficulties for this appellant found in Section 117B. There are a number of positive factors".

9. An application for permission to appeal was made on the basis that there were perverse findings to the degree that they were irrational. It was irrational to find the relationship to be one which was genuine and subsisting when the evidence before the judge was that the application under appeal was one that related to the appellant's *ex-wife* not the claimed partner on which the judge had found favour on Article 8.

10. At paragraph 8 of his determination Judge Freer recorded that it was only in the grounds of appeal that the appellant raised the fact that he wished to rely on this new relationship and that it had been subsisting for two years. It was perverse to accept that the initial application was put in good faith as despite separation the appellant hoped for a reconciliation with his wife and was unaware at that point that the decree absolute had been granted in January 2014. It was submitted that the appellant could not have it both ways. It was irrational to conclude that he was making attempts to reconcile with his wife and therefore submitted a genuine application whilst at the same time as having a qualified relationship with his alleged new partner.

11. It was also submitted that this should have been weighed in the balance when considering the public interest factors within Section 117B and specifically the maintenance of effective immigration controls. The positive finding that the appellant had always resided legally in the United Kingdom was clearly in doubt given the fact that divorce proceedings, even if uncontested normally take a couple of months at the very latest, and would indicate that they had commenced in October 2013 but he did not make his application until March 2014 by which time the marriage was dissolved.

12. It was further submitted that the judge had failed to identify what about this case was exceptional and why it was necessary to consider the case outside those Rules.

13. Permission to appeal was granted by First-tier Tribunal Judge Frankish who confirmed that arguably Section 120 of the Nationality, Immigration and Asylum Act 2002 had been over-extended to include a totally new case the remedy for which was a new application.

14. At the hearing Mr Avery submitted that the appellant had discretionary leave to remain on the basis of a marriage and he had made an application on the basis of his marriage in March 2014. However at paragraph 8 of the determination it is recorded that he was in a relationship with someone else from February 2013. Even the notice of appeal appeared to be based on the relationship with his ex-wife. The judge failed to take that into account on a credibility finding. There is no mention of a new relationship in the grounds of appeal. This was a significant factor and it was perverse that there was a lack of reasoning.

15. There was no reason to look at **Chikwamba v SSHD [2008] UKHL 40** because this appeal was made on the basis it was to be considered outside the Rules. There was a failure to show how **Chikwamba** was relevant on the face of reading the decision.

16. As such the public interest had not been given adequate consideration and there was a failure to make relevant findings under Section 117.

17. Mr Collins referred to the judge's finding at paragraph 56 that the evidence disclosed compelling circumstances and there was reference to Section 117B of the Nationality, Immigration and Asylum Act 2002 albeit that there was not a detailed exploration. The case was never run on the basis that it was inside the Immigration Rules. The judge had both parties in front of him and any questions could have been asked by the Home Office Presenting Officer. The judge was not prevented from taking into account new evidence. Indeed it is clear he took into account the whole of the history of the appellant.

18. In conclusion I am not persuaded that the judge was perverse but there was, inadequate reasoning as to why when it was recorded at paragraph 6 of the determination that there was an application made on 17 March 2014 for further leave to remain as a spouse of his wife, and then at paragraph 8 a record that there was a further claim that there had been a relationship established since February 2013 and, as the judge recorded, very nearly two years at the date of the hearing. The judge did not give any reasoning as to the apparent discrepancies and the impact on the credibility of the application and the credibility of the appellant.

19. There also appeared to be a contradiction in the decision when there was reference to **Chikwamba** albeit that the judge had accepted that the Immigration Rules could not be fulfilled. This was not just a question of a formal application from abroad. The appellant was not married and could not make an application on the basis of a two year relationship because the application had not been founded on the basis of the relationship with his partner but on the relationship with his ex-wife.

20. I also note that with reference to Section 117 that the judge found there were "a number of positive factors". As it is these positive factors were not strictly identified save that he had a Masters Degree and earned £2,000 gross per month. Section 117B does not convey "positive factors" in the light of the public interest consideration **AM (S 117B) Malawi [2015] UKUT 0260 (IAC)** and a review of the case law can be found in **R (on the application of Zermani) [2015] EWHC 1226 (Admin)**. The case law indicates that factors put forward such as value to the community should be considered as they might affect the weight to be attached to the Secretary of State's position, however, it would make a difference in relatively few cases. It is clear that the Home Office position was that the appellant had clearly made a misleading application and this was evident from the face of the decision because the application had been made at a time when the appellant was in the UK on the basis of a relationship with someone when he was having a relationship with someone else.

21. In the light of these difficulties with the decision I found there is a material error of law particularly with the fundamental facts of the credibility of the relationship and both representatives agreed that the matter should be remitted to the First-tier Tribunal in view of the nature and extent of the findings to be made.

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed Date 18th September 2015

Deputy Upper Tribunal Judge Rimington