Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11470/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 23 March 2016	**On 6 April 2016**

Before

Deputy Upper Tribunal Judge Pickup
Between

Secretary of State for the Home Department

Appellant

and

Olumide Johnson Williams
[No anonymity direction made]

Claimant

Representation:

For the claimant: Ms Asfaw, instructed by MR Solicitors
For the appellant: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Rowlands promulgated 16.9.15, allowing on both immigration and human rights grounds the claimant's appeal against the decision of the Secretary of State, dated 9.3.15, to refuse leave to remain and to remove him from the UK. The Judge heard the appeal on 28.7.15.

2. First-tier Tribunal Judge Hollingworth granted permission to appeal on 28.1.16.

3. Thus the matter came before me on 23.3.16 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out below I find such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Rowlands to be set aside.

5. The relevant background can be summarised briefly as follows. The claimant asserts that he entered the UK unlawfully in 1997 as a victim of trafficking, but he has never pursued an asylum claim on that basis. In 2010 he applied for leave to remain on the basis of 10 years residency. The application was refused and refused again following a request for reconsideration. In 2012 he married Omoloda Sarumi, who has limited leave to remain in the UK to 2018. In 2013 he made an application for leave to remain in the UK on compassionate grounds outside the Rules, refused and a request for reconsideration rejected. In March 2014 his application for Judicial Review was withdrawn on the Home Office agreeing to consider his application under article 8 ECHR. He appealed the subsequent refusal decision.

6. Judge Rowlands allowed the appeal, finding at §19 that there would be "significant obstacles to his integration in Nigeria," relying on the finding that he has little work experience or transferable skills; no support network; no financial backup; and that his wife has no family in Nigeria, as they are all in the UK; and that she has difficulties in her pregnancy; and that in the judge's view she is likely to get indefinite leave to remain in the UK should she apply for it in 2018. "I am satisfied that the totality of the evidence of their circumstances are such that they amount to significant obstacles to his integration and that he does fulfil the paragraph 276ADE."

7. In the alternative, the judge found it "arguable" that his private and family life circumstances are so exceptional that they would merit the grant of leave outside the Rules. The judge did not accept that removal would be proportionate.

8. In granting permission to appeal, Judge Hollingworth noted that it is unclear to what extent the judge has attached weight to the claimant's wife's discretionary leave and the speculative outcome of the grant of indefinite leave. "In analysing Article 8 the judge has not set out how he has applied the criteria in section 117. The appeal has also been allowed on human rights grounds in addition to being allowed under the Immigration Rules."

9. There appears to be a factual inaccuracy in the decision of the First-tier Tribunal. At §16 the judge suggested that other than his claim to have been trafficked to the UK, there was little issue with his factual claim and that it does not appear to be challenged that he has been in the UK since 1997. His length of residence is relevant to the issue as to whether there are compelling circumstances sufficient to justify granting leave to remain outside the Rules under article 8 ECHR, but it is clear from §5, §24 and §30 of the refusal decision that the claim to have been in the UK since 1997 was not accepted, the claimant having produced no evidence in support. At the very least, there is no concession on the part of the Secretary of State as to his length of residence in the UK.

10. I find that the judge's consideration of paragraph 276ADE was flawed. Although the judge appears to have been aware of the test of "very significant obstacles" to his

integration in Nigeria, as outlined above, at §19 the judge referred only to "significant obstacles." It is not clear that the judge has applied the correct test. Further, the reasoning justifying such a conclusion is inadequate. In particular, the grounds of appeal highlight the absence of explanation as to why a healthy 35 year old Nigeria man with no family in either the UK or Nigeria would require a "support network" in Nigeria. His evidence was that he has been supporting himself in the UK for several years. The fact that his wife has discretionary leave to remain in the UK and was pregnant is not relevant to a consideration of whether there would be very significant obstacles to his integration on return to Nigeria. The judge's speculation that his wife would be given indefinite leave to remain was also inappropriate.

11. It is clear that the claimant could not meet the requirements of Appendix FM for leave to remain on the basis of family life. As Appendix FM is the Secretary of State's balanced response to family life claims, that the claimant does not meet those requirements is highly relevant and must be brought into any article 8 assessment; the Rules are not just a starting point for article 8 assessment.

12. I also find the judge's consideration of private and family life outside the Rules on the basis of article 8 ECHR flawed and in error of law. The article 8 considerations are extremely brief, contained in two short paragraphs at the end of the decision. First, pursuant to SS (Congo) [2015] EWCA Civ 387, the judge failed to adequately identify compelling circumstances to justify granting leave to remain outside the Rules. At §20 the judge stated only, "I believe that it is arguable that the circumstances behind his private and family life in the UK are so exceptional that they would merit the grant of leave outside the Immigration Rules." The judge failed to state why or in what way those circumstances are exceptional. The judge simply moved on in the next sentence to find that removal would not be proportionate in light of the significant time he had been in the UK and his wife's pregnancy. This too is a flawed assessment, failing to consider why the claimant's wife could not also return to Nigeria, she having no settled status in the UK.

13. Further, the judge's assessment of exceptional or compelling circumstances is absence any consideration of the claimant's precarious immigration status and thus the known precariousness of his presence, as well as her presence, when they chose to establish family life in the UK. In Agyarko [2015] EWCA Civ 440, the Court of Appeal considered the case of an unlawful immigrant who formed a relationship with a British citizen and where there were no insurmountable obstacles under Appendix FM to continuing family life outside the UK. At §31 of that decision the Court held that in a case involving precarious family life it would be necessary to establish that there were exceptional circumstances to warrant a conclusion that article 8 required leave to remain to be granted outside the Rules. As Ms Brocklesby-Weller submitted, the present case is even weaker than that of Agyarko, as the claimant's wife has no settled status, is Nigerian, and could also return to Nigeria with him.

14. In the circumstances, it is not clear that the judge was entitled to proceed to consider article 8 ECHR outside the Rules at all.

15. Even if the judge was entitled to consider private and family life outside the Rules on the basis of article 8 ECHR, having allowed the appeal on immigration grounds, the judge did not need and should not have also allowed the appeal under article 8 ECHR outside the Rules.

16. Further, s the grounds assert and Judge Hollingworth noted, the judge failed to explain how the criteria in section 117B of the 2002 Act have been applied. Whilst the judge made reference to section 117A and 117B at §21 of the decision, I am not satisfied that the relevant public interest factors were addressed at all. The judge does no more than recite the requirement for the Tribunal to have regard to the considerations in section 117B. For example, there is no mention that immigration control is in the public interest. Neither is there any reference to the unlawful and precarious nature of the claimant's status in the UK.

17. Ms Asfaw sought to argue that because section 117B(4)(b) states that little weight should be given to a relationship formed with a "qualifying partner" established by a person at a time when the person's immigration status is precarious, refers only to 'qualifying partner,' defined as being either a British citizen or a person settled in the UK, it does not apply to the claimant's relationship with his wife, since she does not meet the definition of 'qualifying partner.' In effect, Ms Asfaw was suggesting that the claimant's family life has greater protection against the countervailing public interest because she has no settled status in the UK. I reject that argument as entirely illogical and inconsistent with established jurisprudence. Ms Asfaw's interpretation would render the application of the provision perverse. If anything, that the claimant's wife is not a 'qualifying partner' would suggest there is little or even less weight to counterbalance the public interest in removal than there may be for a 'qualifying partner.'

18. In Rajendran (s117B – family life) [2016] UKUT 138 (IAC), the Upper Tribunal cited established jurisprudence that precariousness is a criterion of relevance to family life as well as private life cases. Whilst the 'little weight' provisions of section 117B(4)(a) and (5) are confined to private life, a court or Tribunal should not disregard precarious family life criteria set out in established article 8 jurisprudence. At §39 of that decision the Upper Tribunal held that given ss117A-D considerations are not exhaustive, it may be an error of law for a court or Tribunal to disregard such criteria. The Upper Tribunal Tribunal cited, amongst other authorities, Jeunesse v Netherlands 12738/10 3 October 2014, where the Grand Chamber reaffirmed that "Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well-established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8." In the present case, the immigration status of both the claimant and his wife was precarious, making it even more difficult for the claimant to establish exceptional or compelling circumstances.

19. I accept that the judge does not have spell out or address each and every section 117B factor, provided it is clear from a reading of the decision as a whole that the relevant factors have been brought into account in the proportionality assessment. The decision does not demonstrate that they have.

20. In all the circumstances, the decision is in error of law and cannot stand and I thus allow the appeal of the Secretary of State.

21. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

22. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the parties of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

23. For the reasons set out above I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be made afresh in the First-tier Tribunal in accordance with the attached directions.

Signed
Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

24. The appeal is to be relisted to be made afresh, with no findings of fact preserved, in the First-tier Tribunal sitting at Taylor House;

25. The appeal may be relisted before any First-tier Tribunal Judge other than Judge Rowlands or Judge Hollingworth;

26. The estimate length of hearing is 2 hours;

27. No interpreter is required;

28. Not later than 15 working days before the relisted hearing, the claimant must lodge with the Tribunal and serve on the Secretary of State a revised, single, consolidated, paginated and indexed bundle of all subjective and objective materials relied on, together with copies of any case authorities and skeleton argument. The Tribunal will not accept materials submitted on the day of hearing.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

Signed

Deputy Upper Tribunal Judge Pickup

Dated