Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16236/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th November 2014 and on written submissions	**5th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MR ENUWOKO MOFE TONWEH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr M Iqbal, Counsel instructed by Augustine Clement

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 1st August 1979 and the husband of Ms Temituokpe Tonweh, a British citizen born on 6th February 1983, and he applied for entry clearance to come to the United Kingdom for settlement as the spouse of the sponsor.

2. The application was made on 7th May 2013 and the respondent refused the appellant's application on 14th August 2013.

3. The issue of the relationship was conceded by the Home Office Presenting Officer at the hearing on 11th August 2014 before Judge of the First-tier Tribunal Aujla who allowed the appeal finding that the sponsor had shown sufficient income to meet the financial requirements in paragraphs E-ECP.3.2. to E-ECP.3.4. of Appendix FM which requires an income threshold of £18,600 for a partner to be met. Following an application for permission to appeal by the Secretary of State the decision of Judge Aujla was set aside and the decision was remade. For reasons given in the previous decision promulgated on 23rd December 2015 the matter was dismissed under the Immigration Rules. However, Judge Aujla had not addressed the issue in relation to Human Rights which had been included in the grounds of appeal before the First Tier Tribunal.

4. In the absence of any objections written representations were invited by the parties on the human rights issues alone. Axiomatic to the decision which dismissed the appellant's appeal, was that the maintenance requirements of the Immigration Rules were not met.

5. In the written submissions the appellant's representative, Mr Iqbal, asserted that the matter should be considered on an 'old style' human rights basis, applying the five stage **Razgar v SSHD [2004] UKHL 27** approach. There is no intermediate test **R (MM& Othrs) v SSHD** [2014] EWCA Civ 985 and it was clear that there was a need to look at the evidence to see if there was anything which had not already been adequately considered. **Izuazu (Article 8 new rules) Nigeria** [2013] UKUT 45 confirmed that the requirement for exceptional circumstances or insurmountable obstacles had been authoritatively declared to be erroneous one in the Article 8 Immigration context by the House of Lords (now the Supreme Court) (**Huang** [2007] UKHL **EB Kosovo** [2008] UKHL 41 and by the Court of Appeal in **VW (Uganda)** [2009] EWCA Civ 5.

6. It was submitted that the sponsor is now pregnant and had provided ample evidence of her visits to the respondent in Nigeria. There was no suggestion that family life did not exist. The fourth question was that there was no issue about the interests of national security public safety, prevention of crime, the protection of health or morals or for the protection of the rights and freedoms of others. With regards to economic wellbeing of the country, the appellant's sponsor is in gainful employment. It was only a technical point that the Sponsor fell short of meeting the Immigration Rules.

7. Ms Isherwood on behalf of the Secretary of State submitted a chronology. This showed that the appellant had entered the UK as a visitor in 2005, remained as an overstayer and in 2010 applied for leave to remain on humanitarian and compassionate grounds. That application was refused on 13th December 2010 and was unchallenged. On 17th September 2011 the appellant and sponsor were married and on 11th June 2012 the appellant applied for leave to remain as a spouse of a settled person. That application was refused and a further application on the same grounds was found to be invalid. The appellant was served with a notice of liability for removal and left the UK voluntarily on 30th April 2013 and made an application

for entry clearance which was refused on 14th August 2013 and is the subject of this appeal.

Conclusions

8. The date for the purposes of my decision on human rights is 14th August 2013, **AS Somalia v ECO Addis Ababa** [2009] EWCA Civ 149. It is the circumstances appertaining at that date which should be considered. Appendix FM is specifically designed to incorporate issues under Article 8 and I considered whether there were any facts which had not been addressed, as at that date, by the Secretary of State.

9. I note that the issue of the genuineness of the relationship was conceded by the Home Office Presenting Officer at the hearing before Judge Aujla. This was not a matter which was taken into account when the decision by the Entry Clearance Officer was made and following **Singh v SSHD [2015] EWCA Civ 74,** I consider the matter with all the relevant circumstances, and apply the five stage Razgar test.

10. I accept that there is family life between the appellant and sponsor and that the threshold for the engagement of such rights is low. **Shahzad (Art 8: legitimate aim)** [2014] UKUT 00085 (IAC) confirms that maintenance of immigration control is not a legitimate end in itself but can be construed as an aspect of the economic well being of the country. This is clearly relevant in this case, as the appellant cannot fulfil the financial requirements of the immigration rules and despite stiff challenge were not held to be unlawful by the Court of Appeal in **R (MM & Others) v SSHD [2014] EWCA Civ 985**. It is a requirement that I give weight to the position of the respondent as expressed through the Immigration rules. The fact is that the appellant could not show the relevant income to meet the required income set out under the Immigration rules. I do not accept that the failure to meet those requirements was merely a technicality as the appellant had to show the sponsor could demonstrate sufficient income in the six months prior to the decision made and could not. I therefore turn to the assessment of proportionality.

11. In relation to the proportionality and balancing exercise, I must also take into account Section 117 of the Nationality Immigration and Asylum Act 2002 which applies to those seeking entry clearance. Under Section 117B the public interest considerations applicable in all cases in relation to Article 8 are as follows:

> (1)The maintenance of effective immigration controls is in the public interest.
>
> (2)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a)are less of a burden on taxpayers, and
>
> (b)are better able to integrate into society.
>
> (3)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a)are not a burden on taxpayers, and

(b)are better able to integrate into society.

(4)Little weight should be given to—

(a)a private life, or

(b)a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5)Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

12. Although I accept that the appellant and sponsor have a genuine relationship, it is clear that the relationship was formed at a time when the appellant was in the UK on a precarious basis as he entered as a visitor and subsequently overstayed. The appellant made an application on 9th November 2010 for leave to remain, but this was refused on 13th December 2010, and was unchallenged. On 17th September 2011 when the appellant and sponsor were married, the appellant was clearly in the United Kingdom unlawfully.

13. On the evidence presented I am not persuaded that the appellant would not be a burden on the taxpayers for the reasons given above (failure to fulfil the Immigration Rules financial requirements) . I note that the sponsor is a British citizen and the judgment of **Sanade (British children – Zambrano – Dereci)** [2012] UKUT 00048 (IAC) but **Izuazu (Article 8 - New Rules)** [2013] UKUT 00045 (IAC) a panel comprising the President, Lord Bannatyne and UT Judge Storey clarified that although the respondent continued to accept that EU law prevents the state requiring an EU citizen, which the sponsor is, to leave the UK nevertheless the respondent "contends with good reason that this is to be distinguished from a case where an independent adult can choose between continued residence in the UK or continued cohabitation abroad."

14. It is open to the appellant to make a further application to enter the UK or alternatively, if they wish, to relocate abroad. It is clear that the appellant has family in Nigeria and no reason was shown as to the difficulties which would present regarding relocation.

15. **EB Kosovo v SSHD [2008] UKHL 41** confirmed that each case was fact sensitive and it would be rarely proportionate to order removal of a spouse 'if there is a close and genuine bond with the other spouse' or sever a relationship between parent and child. However, this is not a decision ordering removal and secondly at the date of the decision there was no child. Parties to a marriage cannot necessarily choose where to establish family life and it is open to a state to regulate entry to within its borders. The sponsor continues to visit the appellant in Nigeria.

16. Following **Huang v SSHD [2007] UKHL 11**

'In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the

refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality'.

17. For the reasons given above I find that neither the family nor the private life, (indeed the matter was presented on the basis of family life and following **Patel and ors v SSHD** [2013] UKSC 72 that Article 8 is not a general dispensing power), of the appellant is prejudiced in a manner sufficiently serious to amount to a breach of human rights.

Notice of Decision

The appellant's appeal is dismissed on human rights grounds.

Signed Date 30th April 2015

Deputy Upper Tribunal Judge Rimington