Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/22446/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th October 2017	**On 18th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

OLAREWAJU SAMUEL OLUKAYODE IRAWOOSAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Heybroek, Counsel instructed by Universe Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge R H Walters promulgated on 18th July 2016 in which Judge Walters dismissed the Appellant's appeal both under the Immigration Rules and on human rights grounds.

2. The Appellant has now sought to appeal against that decision for the reasons set out within the Grounds of Appeal. Those grounds are a matter of record and therefore I do not intend to repeat them verbatim here. However, in summary within the first Ground of Appeal it is argued that the judge has misdirected himself in law in terms

of his findings at paragraph 41 that the Appellant had not been living in a relationship akin to marriage with Ms Ayoola, as he remained married to Mrs Adenuga. It is argued that the judge erred in that regard and the fact that someone can be in a relationship akin to marriage, even if they are not actually divorced and that all that is required is that the previous relationship of the Applicant and their previous partner has permanently broken down.

3. Within the second Ground of Appeal the judge's findings in respect of paragraph 276ADE are challenged as to whether or not the Appellant had been continuously resident in the UK for at least twenty years for a period between 1st April 1995 and 1st April 2015. It is argued within the Grounds of Appeal that the judge had not accepted that the Appellant had lived continuously in the UK for that period. It is stated the Tribunal had not accepted that the witnesses who gave evidence in support had been seeing the Appellant sufficiently regularly over the period to be able to support a finding that he had been in the UK since the 1990s. A schedule of documentary evidence was attached to show the gaps in the period of time when the Appellant had been out of the UK and it is argued that the Tribunal has failed to give any or any adequate reasons as to why the evidence of Mr Olowoyo was not accepted, who said that he had seen the Appellant on average every two weeks.

4. Within the third Ground of Appeal it is argued that there is a flawed assessment under Article 8 of the ECHR on the basis that the judge has not considered whether or not it is proportionate to expect Ms Ayoola to accompany the Appellant to Nigeria or whether or not it is reasonable in fact to require him to make an application for entry clearance from Nigeria as a spouse/fiancé of Ms Ayoola, once he has divorced Mrs Adenuga. It is argued there was no consideration as to the effect that would have on Ms Ayoola.

5. In the fourth Ground of Appeal it is argued that the judge made an erroneous finding in regards to paragraph 322 of the Immigration Rules regarding a previous finding from Deputy Upper Tribunal Judge Parkes. The Appellant has previously submitted false documents in connection with an immigration application and the judge's finding under paragraph 322 still applied to the present appeal such that the Appellant's application should have been refused.

6. Permission to appeal in this case had been granted by First-tier Tribunal Judge Farrelly on 25th July 2017 who found that there was an arguable error of law in relation to the judge's conclusion at paragraph 41 that the Appellant was not in a relationship akin to marriage as he remained married to another person. He goes on to say that the challenge to the judge's findings regarding the 20 years residence was arguable.

7. I am also grateful to the oral submissions of Ms Heybroek of Counsel and also the oral submissions of Mr Tufan, Senior Home Office Presenting Officer on behalf of the Secretary of State.

8. In respect of the first Ground of Appeal, looking at the decision of the Learned First-tier Tribunal Judge at paragraph 41 he found specifically that the Appellant had not been living in a relationship akin to marriage with Ms Ayoola as he remained

married to Mrs Adenuga. In his findings previously the judge stated that the Appellant had first met Ms Ayoola in 1998 in his oral evidence when he was here on a visit visa and subsequently returned to Nigeria, but Ms Ayoola became pregnant and then he returned to the UK after a short period in Nigeria and stated that he had lost contact with Ms Ayoola until they met again in 1989, by which time she had already given birth to their son Solomon. That is at paragraph 32 of the judgment.

9. The judge went on to note in paragraph 33 that on 26th October 1990 the Appellant had married Mrs Adenuga in the Hackney Marriage Registry Office and that he and Mrs Adenuga had actually then separated some time in 1995 and goes on to find that in 1999 the Appellant reunited with Ms Ayoola and moved in with her at [ ], having lived with her and their child S in those premises and all three of them then moved to [ ], which was then said to be their present address. The judge noted that the present application was made on 1st April 2015 and the Appellant had to prove that he had lived with Ms Ayoola in a relationship akin to marriage between 1st April 2013 and 1st April 2015. The judge at paragraph 38 found that medical records for the relevant period showed that the Appellant was residing at [ ] and there being also copies of medical records showing the Appellant's address from 2012 said to be shown as [ ]. He also noted there was said to be a letter regarding an NHS eye test sent to him at [ ]. From that documentary evidence the judge accepted that during this period he had been living at [ ].

10. However, the judge went on to make his finding at paragraph 41 he did not accept that he had been living with Ms Ayoola in a relationship akin to marriage because he remained married to Mrs Adenuga. In paragraph 42 he stated that the Appellant's evidence was that Mrs Adenuga and their child are now at some unknown place in Nigeria, so the Appellant cannot therefore divorce her.

11. In that regard Mr Tufan quite correctly conceded that the Judge's finding that the appellant had to be divorced before he could be in a relationship akin to marriage with another woman is wrong. I find that someone can be living in a relationship akin to marriage even if they remained married. Ultimately, as Ms Heybroek argues, the ultimate test is whether or not the relationship with their previous partner had broken down irretrievably during that period. In this case we had a situation whereby on the findings of the judge himself the Appellant and Mrs Adenuga with whom he is married separated sometime in 1995. He was actually reunited with Ms Ayoola back in 1999 and seems to have lived, on his case, with her, since 1999. His case was that as far as his wife was concerned she was now at some unknown address in Nigeria, but certainly he was not in a relationship with her. Mr Tufan has not been able to point me to any known case in which it has been argued that you have to be divorced before you can be in a relationship akin to marriage.

12. In terms of materiality that links in also with the fourth Ground of Appeal in which it is argued that at paragraph 77 the judge found that paragraph 322 of the Immigration Rules still applied because of the finding of DUT J Parkes that the Appellant had previously submitted false documents in connection with an immigration application. It was argued by Ms Heybroek Counsel in fact that was not part of the reasoning relied upon by the Secretary of State in the refusal notice and in

that regard Mr Tufan accepts that it was not actually part of the decision of the Secretary of State. He seeks to argue that in terms of materiality the judge had accepted that the Appellant had been living in a relationship akin to marriage with Ms Ayoola but then in fact had gone on to consider the suitability and eligibility requirements for leave to remain as a partner. In that regard he referred me to the provisions of the suitability requirements for leave to remain under paragraph 4.2 as to whether the applicant had made false representations or failed to disclose any material facts in the previous application for leave to enter or variation of leave or your previous human rights claim or did so in order to obtain from the Secretary of State or third party documents required to support an application or claim, whether or not the claim was successful.

13. In that regard, the Appellant will then still need to show that he met the requirements of the Immigration Rules and obviously in that regard there may be a consideration as to whether or not the Appellant did meet the requirements of the Rules in that regard, given the previous findings of Upper Tribunal Judge Parkes he had previously submitted false documents. As Mr Tufan submits, whether not the Rules are met is a relevant consideration in a human rights appeal. There still would have to be a consideration as to whether or not there would be any compelling or exceptional circumstances such as to justify leave being granted outside of the Rules. The judge actually has not gone on to consider whether the suitability requirements were met or whether in fact that was challenged within the refusal notice by the Secretary of State. It was not seemingly challenged within the refusal notice as being a reason for refusal.

14. The Judge has clearly used his finding that the appellant and Ms Ayoola were not partners as the appellant was not divorced from his wife, as being his reasoning as to why the Immigration Rules were not met and has also seemingly come to the view that basically the Appellant should be returning back to his home country to make an application for leave to enter once he had become divorced. Clearly again that is on the misapprehension as to the basis of the fact that she does not need to be divorc3ed in order to be a partner and in a durable relationship.

15. In those circumstances I cannot say that the decision of the judge in respect of Article 8 would necessarily have been the same had the judge properly considered whether or not the relationship that he had with his partner was a durable relationship and a relationship akin to marriage such as to mean that they were partners for the purposes of the Immigration Rules and also whether that has affected his findings both in terms of consideration of the Rules and also outside of the Rules. I therefore do find that the judge's error in paragraph 41 regarding the fact that he is not in a relationship akin to marriage with Ms Ayoola as he remains married to Mrs Adenuga is a material error of law.

16. In respect of the second Ground of Appeal regarding the findings of paragraph 276ADE although it is argued in that regard by Ms Heybroek and also within the Grounds of Appeal that the judge has not adequately or at all given reasons as to why the evidence of Mr Olowoyo should be rejected when one looks at the decision of the First-tier Tribunal Judge. In that regard the judge referred to the evidence of

Mr Olowoyo at paragraph 52 of the judgment and said that he had known the Appellant for 24 years, that they had first met in a restaurant and that they see each other once every two weeks on average. He had never been to the Appellant's home. He first met Ms Ayoola about six months previously.

17. In that regard the judge then went on to find in respect of not only Ms Ayoola but the other witnesses as well, that could not say any of these witnesses could be regarded as close friends of the Appellant and Ms Ayoola and that none appeared to be aware the Appellant had been married and lived with Mrs Adenuga for about five years and nor did any of the witnesses appear to have any clear idea how long Ms Ayoola was married to Mr Bramble, her previous partner. The judge at paragraphs 60 and 61 then said in 61, "*if they were in such constant contact with the Appellant as they alleged, I could not comprehend how they could be ignorant to these matters*". He went on at paragraph 62:

> "*In conclusion, I did not find that the Appellant has satisfactorily proved that he has lived continuously in the UK for at least 20 years. I accept that he has provided documentary evidence which proves that he was present in the UK for some of that period, but it is not sufficient to prove continuous residence*."

18. In that regard I find that in fact the judge has given clear, adequate and sufficient reasons for rejecting the evidence of the witnesses regarding the extent to which they, both Ms Ayoola and Mrs Adenuga could say that the Appellant has been continuously present in the UK for a period of twenty years. The judge has adequately dealt with that issue. I therefore do not accept that Ground of Appeal.

19. However, for the reasons that I previously enunciated, I do find that the decision of the First-tier Tribunal Judge does contain a material error of law and that the decision of First-tier Tribunal Judge Walters should be set aside.

Notice of Decision

The decision of First-tier Tribunal Judge Walters does contain a material error of law and is set aside with no preserved findings of fact. The matter I find should be remitted back to the First-tier Tribunal for re-hearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Walters.

No anonymity direction was made by the First-tier Tribunal and no application for any anonymity order has been made before me. I therefore do not make any anonymity direction in this case.

Signed Dated 6th October 2017

RFMcGinty

Deputy Upper Tribunal Judge McGinty