Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32023/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 June 2017	**On 12 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

OLUWASEUN DANIEL ORIJA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. N. Adojutelegan, Natado Solicitors
For the Respondent: Mr. P. Deller, Home Office Presenting Officer

DECISION AND REASONS

1. Following the decision promulgated on 27 April 2017 in which I set aside the decision of the First-tier Tribunal, the appeal came before me to be remade.

2. I heard oral evidence from the Appellant and from his wife Mrs. Rafiat Orija. Both representatives made oral submissions.

3. I have also taken into account the documents in the Appellant's bundle from the First-tier Tribunal (103 pages), the supplemental bundle (176 pages), and excerpts from the Country of Origin Information Report and other background evidence provided in an 11 page bundle by Mr. Adojutelegan at the hearing.

4. It was agreed at the hearing that the matters before me were whether the Appellant met the requirements of paragraph 276ADE(1)(vi) of the immigration rules or, in the alternative, whether the Appellant's appeal fell to be allowed under Article 8 outside the immigration rules.

Findings and Decision

5. I found the Appellant and his wife to be honest and credible witnesses who answered all questions put to them and were not evasive. Their evidence was internally consistent and consistent with the documentary evidence provided. I find that their evidence can be relied on.

Paragraph 276ADE(1)(vi)

6. I have taken into account the previous judgment of Immigration Judge Morgan promulgated on 9 April 2009 (pages 36 to 42 of the Appellant's bundle). I have also taken into account the decision of Upper Tribunal Judge Kopieczek in relation to the judicial review of a decision dated 15 March 2013. This was provided in the supplemental bundle, and was in the Respondent's bundle before the First-tier Tribunal.

7. Judge Morgan made findings as to the Appellant's ties to Nigeria [10] and [11]. He found the Appellant to be credible [10] and the evidence was accepted in its entirety. He found that the Appellant was abandoned by his aunt in the United Kingdom [11]. The Appellant had been living with this aunt in Nigeria having been abandoned by his mother as a child. His father had a mental disability and neither the Appellant nor his brother had ever lived with their father. The Appellant had had no contact with the aunt who had abandoned him in the United Kingdom since 2004. She was the only family he had in Nigeria. He had no contact with his family in Nigeria.

8. This evidence is referred to in the decision of UTJ Kopieczek. He found that it was arguable that the Respondent had acted irrationally in not considering the findings made by the First-tier Tribunal relating to the Appellant's history and arguable lack of ties to Nigeria. He found that these findings were relevant to the question of "no ties" under paragraph 276ADE(vi) of the immigration rules. At the time of this decision in 2013, paragraph 276ADE(vi) referred to the ties that an individual had with his country of origin. UTJ Kopieczek found that the Respondent had erred in not taking into account the findings in the 2009 decision.

9. I have taken into account the case of Devaseelan. The findings of Judge Morgan were not referred to in the decision of the First-tier Tribunal which I set aside. These findings have not been challenged. While I accept that the wording of paragraph 276ADE(vi) has changed since it was considered by UTJ Kopieczek, the findings relating to the Appellant's lack of ties to Nigeria are still of some relevance. In order to meet the requirements of paragraph 276ADE(1)(vi), the Appellant must show that there are insurmountable obstacles to his reintegration into Nigeria, and the strength or otherwise of any ties to Nigeria will have a bearing on that.

10. I find that the Appellant does not have any family members with whom he is in contact in Nigeria. I find that he was abandoned by his mother and has no contact with her. I find that his father suffered from mental health difficulties and the Appellant has never lived with him, nor does he have any contact with him. I find that the Appellant was brought up by his aunt. This is the same aunt who brought him to the United Kingdom and abandoned him here. I find that the Appellant has not had any contact with the aunt who abandoned him.

11. The Appellant was abandoned together with his brother who has leave to remain in the United Kingdom. He has children of his own and is employed. The Appellant was also accompanied by two cousins who remain in the United Kingdom. The Appellant, his brother and cousins were left with a paternal aunt. I find that she is living in the United Kingdom.

12. I find that the Appellant does not have any family in Nigeria who would be able to provide him with support on return to Nigeria to assist him on his reintegration there.

13. I find that the Appellant left Nigeria when he was 14 years old. He is now 27 years old. He has spent thirteen years, almost half his life, living in the United Kingdom. He has not been back to Nigeria since he left, thirteen years ago. I find that the time he spent in Nigeria was when he was a minor. He has spent all of his adult life as well as most of his teenage years in the United Kingdom. I find that he does not have a network of friends and contacts in Nigeria. He has no experience of working in Nigeria.

14. There is no evidence before me that the Appellant has any medical problems. He is 27 years old. He has been educated in the United Kingdom although he has not finished his degree due to financial problems. He is not working at the moment as he is not entitled to do so.

15. I find that the Appellant would be returning to Nigeria on his own. I accept that he is in a genuine and subsisting relationship with his wife, and that she is pregnant, but I am considering the Appellant's position returning alone.

16. I have taken into account the Respondent's Operational Guidance Note and the evidence of the high unemployment rates in Nigeria. I find that there would be difficulties for the Appellant reintegrating into Nigeria given his lack of any meaningful support network, and his lack of employment experience in Nigeria. However I find that he is a healthy and educated young man who speaks English. Whereas I find that there would be obstacles for the Appellant, I find that they would not be "very significant". I find on the balance of probabilities that the Appellant has failed to show that he meets the requirements of paragraph 276ADE(1)(vi).

Article 8 outside the immigration rules

17. I have considered the Appellant's appeal under Article 8 outside the immigration rules, in particular in relation to his family life. The finding that he did not meet the requirements of paragraph EX.1 had not been cross-appealed and there was an acceptance that this finding should stand. However, at the date of the hearing before me the situation has changed in that the Appellant's wife is pregnant.

18. I have considered the Appellant's appeal in accordance with the case of Razgar [2004] UKHL 27. I find that the Appellant is in a genuine and subsisting relationship with his wife. I find that he has a family with her sufficient to engage the operation of Article 8. I find that the decision would interfere with that right.

19. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.

20. In carrying out the proportionality exercise, I have taken into account my findings above in relation to the appeal under the immigration rules.

21. I have also taken into account section 117B of the 2002 Act. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest.

22. The Appellant speaks English (117B(2)). I find that the Appellant's wife is employed full-time as a teacher. There was evidence before the First-tier Tribunal in the form of her letter offering employment. She gave evidence at the hearing that she earned about £29,000 per annum. Payslips are provided in the Appellant's bundle (pages 26 to 28). I find on the balance of probabilities that the Appellant has shown that he would be financially independent (117B(3)).

23. While sections 117B(4) and (5) do not apply to family life I have taken into account that the Appellant's leave to remain was precarious when he entered into his relationship with his wife. However, I find that the Appellant was abandoned here as a minor, and I find that he cannot be blamed for the time that he was without status. Given the circumstances in which he came to be present in the United Kingdom, I find that although the relationship with his wife began when his status was precarious, this does not greatly reduce the weight to be given to his family life.

24. Section 117B(6) is not relevant as the Appellant does not have any children. However, his wife is pregnant and, as she is a British citizen, I find that their child will be a British citizen. It would not be in the interests of that child for his parents to be separated prior to his birth.

25. I find that the Appellant's wife has lived in the United Kingdom for all of her life. I find that all of her family are here, her parents, her siblings and her extended family in the form of aunts and uncles. I find that her friends are here. I find that she has employment here as a teacher. I find that she is pregnant. I find that she is receiving medical care in relation to that pregnancy to which she is entitled by virtue of her status as a British citizen.

26. I have considered whether it would be proportionate to expect her to leave the United Kingdom and to go to Nigeria in order to enjoy family life with the Appellant. In doing so I have considered the fact that she is pregnant. I have found above that the Appellant does not have any family members or friends who could support him on his return, and I find this is even more relevant if he were to be returning with his wife given that she is pregnant. The Appellant's wife stated in her witness statement that she does not know anyone in Nigeria, and I find that there would be no support for them either from any friends or family of the Appellant, or from any friends or family of his wife. I have found that the Appellant would find it difficult to find employment without having had experience of life in Nigeria as an adult and without having a support network of friends and family to assist him. While I have found that these difficulties would not be very significant were he to be returning alone, if he were to be returning with a pregnant wife, these would cause greater problems.

27. I have taken into account the evidence of the provision of medical care in Nigeria. I find on the balance of probabilities that the Appellant's wife would not have access to the same levels of medical care to which she is entitled in the United Kingdom in relation to her pregnancy, certainly not without paying. Given my finding that the Appellant may struggle to find employment immediately on return, and the fact that they will not have any other support, I find on the balance of probabilities that they would not be able to afford such medical treatment. There is therefore the possibility that such medical treatment would be refused.

28. I further find that the circumstances under which the Appellant left Nigeria, and his childhood in Nigeria should be taken into account. He was abandoned by his

mother at a very young age. His father had mental health problems. He does not know where either of them are. He was then brought up by an aunt who abandoned him for the second time, leaving him in a foreign country as a child. The only immediate family member with whom he is in contact is his brother who is living in the United Kingdom. His cousins with whom he came to the United Kingdom are also settled here, as is the aunt with whom he was left. I find that his closest family members are all in the United Kingdom and it is to those he would turn for support on the birth of his child.

29. I have taken into account the case of Agyarko [2017] UKSC 11, in particular paragraph 51. This states that "if an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal". The Appellant has no criminal convictions. He is in a genuine and subsisting relationship with a British citizen. She earns in excess of the amount required to sponsor a spouse application. He speaks English. She is pregnant with his child, who will be a British citizen. The Appellant has nobody in Nigeria who could support him if he returned to make an entry clearance application. In the meantime, he would be leaving his pregnant wife without support, and he would not be present for the birth of their child.

30. I find that the Appellant has established himself in the United Kingdom having been abandoned here as a child. His close family is here. His wife's family are here. She has always lived here. I find that they would struggle in Nigeria given the lack of support. I find that the Appellant's wife would struggle to obtain medical treatment. In the United Kingdom she is entitled to receive such treatment free of charge, being a British citizen.

31. I have also taken into account the fact that, had the Respondent properly considered the Appellant's case in 2013 and paid attention to the previous findings of the Tribunal in 2009 relating to the Appellant's lack of ties to Nigeria, given the immigration rules at the time, it is highly likely that the Respondent would have made a different decision. I find that this is a factor to be taken into account although of course I accept that the current immigration rules are different.

32. I also find that, were I considering paragraph EX.1 as at the date of this hearing, given the change in circumstances in relation to the pregnancy, and taking into account the findings of Judge Morgan, it is more than possible that I would have found that there were insurmountable obstacles to the Appellant and his wife continuing family life in Nigeria.

33. I therefore find, taking into account all the evidence before me, that the Appellant has shown on the balance of probabilities that the decision is a breach of his rights and those of his wife to a family life under Article 8 ECHR.

Notice of Decision

34. The appeal is allowed on human rights grounds, Article 8.

35. No anonymity direction is made.

Signed Date 11 July 2017

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award. I have decided to make no fee award as the circumstances of the Appellant have changed since the application was made.

Signed Date 11 July 2017

Deputy Upper Tribunal Judge Chamberlain