Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/10909/2016**
HU/10911/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 8th August 2018	**On 12th September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MRS UCHENA JULIET ANAKWUE
(2) MISS IMELDA ADAEZE ANAKWUE
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER – SHEFO/218302

Respondent

Representation:

For the Appellants: Miss L Mensah (Counsel)
For the Respondent: Mr A McVeety (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Kelly, promulgated on 13th July 2017, following a hearing at Bradford on 4th July 2017. In the determination, the judge dismissed the appeal of the Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant's Claim

2. The Appellants are a mother and daughter. Both are citizens of Nigeria. The mother was born on 1st August 1973 and the daughter was born on 30th August 1999. They

appealed against the decision of the Respondent dated 18th April 2016, refusing their application to remain in the United Kingdom with their sponsoring husband and daughter respectively, namely, of Mr Kenneth Anakwue, who is a naturalised British citizen. The Sponsor, Mr Kenneth Anakwue, first met the first Appellant in Nigeria in 1995, when he was at that time a Nigerian citizen himself. They wanted to marry. This was opposed by the first Appellant's father. However, the second Appellant was then conceived by the first Appellant. Nevertheless, the first Appellant was made to marry another man and the first Appellant then had two daughters by the names of K and F. They were aged 16 years and 14 years respectively at the time of the decision by Judge Kelly. Eventually, however, in January 2013 the Sponsor was able to propose marriage to the first Appellant again and she accepted. They married in January 2014. This happened after August 2012 and the Sponsor returned from the UK to make arrangements for his daughter, the second Appellant, to come to the UK.

3. The first Appellant entered the UK on 15th October 2012. The second Appellant entered on 27th August 2012. They applied for an extension of leave to remain on 7th July 2015. This was rejected. They now argue that it will be disproportionate and contrary to the best interests of the second Appellant for the Appellants to be removed from the United Kingdom. They give three reasons for this. First, the Sponsor is now a British citizen and works and studies in the UK and his only surviving relative is his brother in Nigeria with whom he no longer maintains contact. Second, both the Appellants are settled and undertake charitable work in the UK. Third, the Appellant's only surviving relative in Nigeria is the first Appellant's brother, and the second Appellant, who has plans of going to university would be prevented from taking up any conditional offers from UK universities on a biomedical science course which he intends.

The Judge's Findings

4. The judge was satisfied that the second Appellant had received offers of a place on a biomedical science course in the UK from four universities. He accepted that the Sponsor was a British citizen. He had not accepted that the first Appellant intended to return back to Nigeria. Both the Appellants had a settled intention to remain in the United Kingdom by 4th November 2012. The Sponsor himself was a party to that decision. All subsequent decisions were made in the full knowledge that their private and family life would not be continued in the United Kingdom unless leave was given to them and the Appellants decided not to return to Nigeria knowing that full well (see paragraph 25).

5. The judge went on to say that he knew little about K and F beyond their ages of being 16 and 14 years. As they were the children of another man in Nigeria, who had since died, they were part of the family unit of the Sponsor. It was reasonable to conclude that they had made friends in this country outside their family circle. The judge concluded in this respect that, "I am thus in no doubt that it is currently in their best interests if each of the above children were to continue to reside together in the same household as the Sponsor (the second Appellant's father) and their mother". However, he did also go on to say that, "given their respective national and cultural ties to Nigeria, as well as the current stages of their education, I am not satisfied that

their best interests ought to require them to remain in the United Kingdom" (paragraph 26).

6. Given these conclusions, it fell to the judge to them simplify the case for which he did (at paragraph 31) and to conclude, in terms of the balance of considerations in the proportionality exercise, that the Appellants could not show that there will be very serious hardship to their relocating to Nigeria given that they are "familiar with its culture and customs" (paragraph 32).

The Grant of Permission

7. Permission to appeal was granted on the basis that it was arguably incumbent upon the judge to consider whether Section EX.1.(b) of Appendix FM were satisfied. The judge had to first be satisfied that the Appellants did satisfy the requirements of the Immigration Rules as a preliminary consideration. The failure to do so was something that arguably affected the outcome of the appeals.

Submissions

8. At the hearing before me on 8th August 2018, the Appellant was represented by Miss Mensah, who relied upon her skeleton argument. She submitted that Judge Kelly failed to consider whether the claim could succeed under EX.1.(b). This states that, where the applicant has a genuine and subsisting relationship with a partner who is a British citizen, "and there are insurmountable obstacles to family life with that partner continuing outside the UK", then it is necessary to have regard to what is set out at EX.2. This provision explains the meaning of "insurmountable obstacles", and this "means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK" such that "very serious hardship" would be occasioned to either the applicant or their partner.

9. Miss Mensah submitted that this was a case where, although the judge did quote (at paragraph 30) EX.1.(b) he failed to focus on the central question of the difficulties that Mr Kenneth Anakwue, the Sponsor, would encounter in Nigeria. He was not willing to relocate to Nigeria. He had at the date of the hearing, completed two years of a three year degree in health and social care at London Metropolitan University. He had funded the degree with a student loan. He was working also to support his studies and his family in the UK. The aim of the studies was to improve his chances of increasing his earnings. The judge did not deal with the question of whether the Appellant will be forced to effectively give up his degree at such a late stage and relocate to Nigeria just in law to continue his family life. This was important in the context of the judge's observation that, "the Sponsor is now a British citizen and cannot therefore be required to accompany his wife to their country of origin …" (paragraph 32).

10. If he was forced into such a situation this would, submitted Miss Mensah, entail "very serious hardship" for him, and subsequently on his family. His wife had not worked for sixteen years. She was a full-time mother. The judge did not deal with the question of why the Sponsor should give up two years of hard work, at great financial expense

that he had incurred, such that he stood to gain better earnings in the future, in order to continue his family life by being forced to go to Nigeria. Indeed, the current position of the Sponsor was that he had, by the date of this hearing, completed all three years of his university studies. He had been able to increase his earning to over £24,000 per annum. His eldest child was now 18 and still dependent upon her sponsoring father.

11. Furthermore, although it is a case that all three children had, at the date of the hearing before Judge Kelly, only been in the UK for four and a half years, the fact was that they have spent their formative years in this country. The youngest was 9½ years when coming to the UK and was 14 at the date of the hearing. The middle one was 11½ years when entering the UK and was aged 16 at the date of the hearing. The eldest was 13½ years when entering the UK and was now nearly 18 years old.

12. For his part, Mr McVeety submitted that the fundamental weakness in the grounds of application was that none of the children were "qualifying children". It was true that the father was a British citizen. But his wife and the children had been in the UK for less than five years. Therefore, EX.1 would not be engaged for the children. There is no need to enquire into "compelling circumstances" or "insurmountable obstacles". Even if these tests were applied, there was no reason, why all of them, having lived in Nigeria, could not return back to that country. There was no breach of Article 8.

Error of Law

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. Whilst Mr McVeety is entirely correct in saying that the children are not "qualifying" and that the grounds of application are misleading in not making this plain so as to wrongly imply that the question of whether or not it is reasonable to expect the children to return (which only applies in relation to a "qualifying" child) needs to be considered, the fact is that Section EX.1.(b) of Appendix FM does have to be applied to the Appellant's wife, the first Appellant. This is because she and the Sponsor have a genuine and subsisting relationship. The Sponsor is a British citizen. What needs to be considered in these circumstances are two questions.

14. First, whether there are "insurmountable obstacles to family life" continuing outside the UK, and in this respect the judge failed to refer to the fact that the Sponsor was undertaking two years of a three year degree in health and social care (which he had now completed).

15. Second, assuming that there were "insurmountable obstacles" the judge had to ask the question whether they would pose a "very serious hardship" for the Sponsor, Mr Kenneth Anakwue. At the point of time when the appeal was heard, it may well have been the case that, with the sponsoring husband of the first Appellant undertaking a three year degree, two years of which had been completed, and which he had financed himself, that he would indeed be faced with "very serious hardship".

16. It may well be the case that his having completed the three years that the same situation does not any longer pertain. This is a question that this Tribunal cannot determine. Suffice it to say, that with an error of law having been found, the matter must be considered by the First-tier Tribunal upon a remittal, which I now do.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Kelly pursuant to Practice Statement 7.2(b) because the nature or extent of any judicial fact-finding, which is necessary in order for the decision and appeal to be remade is such that, it is appropriate to remit the case to the First-tier Tribunal.

This appeal is allowed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 8th September 2018