Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09718/2017

THE IMMIGRATION ACTS

Heard at Birmingham CJC **Decision & Reasons Promulgated**
On 7th June 2019 **On 17th July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

ALHASSAN KWASAU
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Vokes (Counsel)
For the Respondent: Mr D Mills (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge J. Robertson, promulgated on 8th June 2018, following a hearing at Nottingham on 2nd May 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

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2. The Appellant is a male, a citizen of Nigeria, and was born on 12th June 1964. He appealed against the decision of the Respondent dated 21st August 2017, refusing his application for indefinite leave to remain in the UK on the basis of his marriage to [GK], a British citizen, who is present and settled in the UK, as his wife.

The Appellant's Claim

3. The essence of the Appellant's claim is set out in the comprehensive determination of Judge Robertson. She observes how the Appellant had joined his wife in the UK as her dependant, when she arrived with leave to remain on a points based system. The Appellant had arrived together with his children in July 2008. His wife had arrived a few months earlier. Before then, the Appellant ran a law firm in Nigeria. They all lived together in this country. In 2013, however, there was a fire in the family home, and this caused the Appellant to live separately from his family for several months. It was also a time when "there was a breakdown in his relationship with his wife but they moved back to live together after about eight months" (7). The Appellant's problems really began when he made his application for leave to remain separately from that of his wife. His wife was normally responsible for the completion of documents relating to immigration matters. It was during the period of their separation, that the Appellant completed his own application "incorrectly applying for limited leave to remain rather than indefinite leave to remain. His family applied for indefinite leave and are now all British citizens" (paragraph 7).

4. The Appellant states that he cannot return back to Nigeria as there are insurmountable obstacles to his doing so. If he returns this will break the period of his lawful stay in the UK. It will also be disproportionate to his family life interests. His wife has had cancer treatment and needs his support, his children are in education and need financial support. His son plans to go to university this year (paragraph 8). He has also remained a dependant of his wife throughout and "their applications for leave are linked" (paragraph 9). He maintains that "The whole family should have qualified in 2013" if only the Appellant had made the application in the right way (paragraph 9).

5. The judge went on to conclude that:-

> "Whilst I accept that the Appellant's current predicament is as a result of an error made some years ago ignorance of the law is no excuse and it is an accepted principle that there is no such thing as a 'near miss' with regard to the Rules" (paragraph 11).

6. The judge also held that given that the family had lived separately for eight months in 2013 following a house fire when there was a temporary breakdown in the couple's relationship, this was a case where "the family are therefore accustomed to spending long periods apart" (paragraph 13). As far as the children were concerned, the judge's view was that, "they have both shown an ability to adapt to changes in their circumstances" and that although they had relationships with their parents, "I do not find

that this is anything outside the normal relationship between adult children and their parents" given that the children are now 20 and 18 (paragraph 14). With respect to the Appellant's wife having undergone cancer treatment, she was now back at work and the Appellant could provide the support from abroad (paragraph 15). The judge also held that, "I can attach little weight to any private life the Appellant may have established as his status has been precarious throughout his time in the UK" (paragraph 16). It was accepted by the judge that "the Appellant's return may be difficult and may not accord with their plans, [but] I do not find any insurmountable obstacles to his return to Nigeria" (paragraph 17). Finally, "There is a public interest in the maintenance of immigration control" in a case such as this (paragraph 18).

7. The appeal was dismissed.

Grounds of Application

8. The Grounds of Application state that the judge had failed to consider material matters and had materially misdirected herself in law, in erroneously using Section 117B as a blunt instrument given that there was no public interest in requiring the Appellant to return to Nigeria because he would have succeeded in 2013. Also, it was not correct to say that the husband and wife were accustomed to living separately, as this had only happened for one period when there had been a fire in their home.

9. On 15th January 2019, permission to appeal was granted by the Upper Tribunal on the basis that this was a case which merited a departure from the Rules on a strict application of Article 8 proportionality balance. This is because the family are all British citizens following an application made in 2013, in which the Appellant was omitted, because of a temporary breakdown in the couple's relationship, that arose as a result of a fire in the house. In granting permission to appeal, Upper Tribunal Judge Jordan, observed that, "It seems to me that if the application made by his wife in 2013 could or should have included the Appellant, and would have been successful, there is no public interest in removing the Appellant now" (see paragraph 3). In granting permission, it was also observed that, "Either the Appellant's departure will see the end of this relationship or the British family will be required to uproot themselves (some or all) and relocate to Nigeria" (paragraph 3). It was held that the judge did not take on board the full consequences and the realities of her decision.

Submissions

10. At the hearing before me, on 7th June 2019, Mr Vokes, appearing on behalf of the Appellant, submitted that the judge reached a result which was disproportionate, and was recognised as such by Upper Tribunal Judge Jordan, when he granted permission, because it was accepted by the judge (at paragraph 11) that the Appellant should have been granted indefinite leave to remain, together with the rest of his family, if only he had been included in his wife's application, which he drafted in 2013. However, due

to circumstances that arose as a result of the fire at the home, the Appellant was living separately from his wife and made his own application. This should not obscure the fact that the Appellant was living lawfully in this country together with his wife and children for nine years and ten months at the date of the hearing, and failed just two months short of the ten year period for indefinite leave to remain, and the judge failed to take this into account. Furthermore, there was no public interest in these circumstances in requiring the Appellant to return to Nigeria and to be separate from his family, and nor was there any public interest in requiring them, as British citizens, in doing the same. In fact, the conclusion reached by the judge (at paragraph 13) that "The family are therefore accustomed to spending long periods apart" is simply incorrect because there has only been one period when they had been living apart and that was directly as a result of the fire in the home. It was a single period. It could hardly be said to be a "long period" which has repeated itself.

11. For his part, Mr Mills submitted that the fact here was that the couple had separated at the material time. This was in 2013. The fire had led to a family breakdown. The Appellant's wife made her own indefinite leave to remain application and the Appellant made his application on the basis of his dependency on his wife. What we were currently looking at were the consequences of the Appellant having made the wrong application. It is not enough to say that the Appellant had almost qualified back in 2013, if in fact he had not done so.

12. The Appellant's claim that the Secretary of State should exercise discretion in his favour was unwarranted. It was open to the Appellant to make the right application even now. He had not done so. The judge was correct to take Section 117B into account in coming to a balanced decision with respect to both the state interest and the Appellant's own interest. The judge was perfectly alive to the fact that "the Appellant's return may be difficult and may not accord with their plans" (paragraph 17). That did not mean to say that the decision was incorrect. There was no error of law.

13. In reply, Mr Vokes submitted that it was important to look at what the judge had actually found as a question of fact. The judge had found (at paragraph 11) that, "Whilst I accept that the Appellant's current predicament is as a result of an error made some years ago …", which suggested that in applying Article 8, the judge had to take into account the fact that the Appellant had lived in this country for nine years and ten months with his wife and family, and that there had not been any period of an illegal stay during this time. It was not correct to say, as a bland statement, that, "I can attach little weight to any private life the Appellant may have established as his status has been precarious throughout his time in the UK …" (paragraph 16).

14. In fact, submitted Mr Vokes, a great deal of weight can be attached to the Appellant's private life in the UK during this time. If the Appellant now

abandoned his appeal he would be here unlawfully. He would not be able to return on the basis of ten years' lawful residence. He would have no current leave on the basis of which he could invoke the ten year Rule. This was nothing short of a "family splitting" case. It was recognised as such by Upper Tribunal Judge Jordan. The balance of considerations plainly fell in favour of the Appellant in this case. I should make a finding of an error of law and allow the appeal.

Error of Law

15. 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 and remake the decision. My reasons are as follows. First, the judge is incorrect to say (at paragraph 16) that the Appellant's private life should be given little weight. Section 117B of the 2002 Act cannot be applied as a blunt instrument as is well-established in **Kaur [2017] UKUT 14** and in **Rhuppiah [2016] EWCA Civ 803**. This was a case where the Appellant had lived nine years and ten months lawfully in the UK and it is not rational to state that this period of time in the UK can be accorded only little weight. This is particularly the case given that the judge had also recorded (at paragraph 11) that "the Appellant's current predicament is as a result of an error made some years ago".

16. Second, the judge did not give proper weight to the fact (at paragraphs 9 to 11) that the Appellant would have qualified for indefinite leave to remain in 2013, together with the rest of his family, had he made the right application together with his wife, because she failed to reduce the public interest against the Appellant in the assessment of the proportionality considerations. The Appellant and the other witnesses were found by the judge "to be credible witnesses" (paragraph 6). The only reason for the short period of family breakdown between the Appellant and his wife appears to have been on account of a serious fire at their property (see paragraphs 9 to 16). The judge failed to factor this in to a sufficient degree.

17. Third, there was also a failure by the judge to consider the rights of the Appellant's wife and children, especially given that it was accepted by the judge that family life had been established (paragraph 18) and the rest of the family members were now all British citizens. Their circumstances, in terms of the support that the Appellant gave for his wife during her cancer treatment (paragraph 8) and the financial support that the children required (paragraph 8) together with the continuing need for support that he claimed they needed (paragraphs 14 to 15) needed to be properly taken into account.

18. Fourth, ultimately it is incorrect to state (at paragraph 13) that "the family are used to spending long periods apart" and this is irrational, given that the Appellant and his wife had a pre-existing family relationship, which was not precarious, at the time when they were living in Nigeria, together

with their children. In fact, they entered only a few months apart from each other, with the wife coming first and the Appellant and the children coming a few months later. The Appellant was caring for his children and waiting until the end of the academic year before coming to the UK. The period of a few months separation during the time that the Appellant was waiting to come to the UK with the children, as well as the period of eight months when there was a fire in the home, does not rationally demonstrate that the family are used to spending long periods apart.

Remaking the Decision

19. I remake the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the following reasons. First, this is a case where the family has to all intents and purposes been living together for much of their married and family life. The only exceptions are a few months before the Appellant joined his wife in the UK and the eight months' separation, occasioned as a result of the fire at the home. The relationship has been genuine and subsisting throughout that period of time.

20. Second, the Appellant has been with lawful leave to remain in this country for that period of time.

21. Third, it was on account of the Appellant living separately from his wife, that he made the wrong application, whereas they made the right application for indefinite leave to remain, as a result of which they are now all British citizens and settled in the UK.

22. Finally, the balance of considerations in any proportionality exercise, falls in favour of the Appellant in this case. He had made his application on 6th January 2014 and was granted leave to remain as a spouse of a settled person until 1st October 2016. Had he made his application alongside his wife in 2013, which would have included the Appellant as a family member in the wife's application, he would have been successful, and there is therefore no public interest in removing the Appellant now. Ultimately, requiring the Appellant to return to Nigeria now, would amount to "insurmountable obstacles" because it would see the end of his relationship with his family. The alternative, namely, that the British family should uproot themselves and relocate to Nigeria is no less more proportionate. This, accordingly, is a case where the circumstances merited departure from the Rules on a strict application of Article 8 proportionality balance. I allow the appeal.

23. No anonymity direction is made.

24. The appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 12th July 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 12th July 2019