Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15522/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 December 2018	**On 10 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MR CHARLES NDIDI AGO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Adebayo
For the Respondent: Mr E Tufan, HOPO

DECISION AND REASONS

1. The appellant has been granted permission to appeal against the decision of First-tier Tribunal Judge Blundell dismissing his appeal against the decision of the respondent refusing his further application for leave to remain as a spouse in the UK.

2. The appellant is a citizen of Nigeria born on 15 August 1973.

3. I shall set out the chronology of the applications made by the appellant which was given to me in court by Mr Tuffan and agreed by Mr Adebayo.

4. The appellant made an application on 17 May 2012 in Nigeria for entry clearance as a spouse. He was granted entry clearance for 27 months from 19 July 2012 to expire on 19 October 2014.

5. On 18 October 2014, the appellant made an in-time application for indefinite leave to remain on the basis of paragraph 289 of the Immigration Rules. Mr Tuffan said that for the appellant to be granted leave under paragraph 289, paragraph 287 had to be satisfied. Unfortunately, paragraph 287 was not satisfied because the appellant did not possess a knowledge of the UK test and consequently the application was refused on 4 February 2015.

6. In any event the respondent went on to say that where part 8 of these Rules continue to apply, paragraph A277A of the Immigration Rules set out the requirements for considering an application for indefinite leave to remain. As the appellant did not meet the requirements for indefinite leave to remain in the United Kingdom under part 8 of the Immigration Rules, the respondent accepted that the appellant was in a genuine relationship and granted him a period of limited leave to remain for 24 months as the spouse of a person settled in the UK to expire on 4 February 2017.

7. Before expiry of leave, the appellant made an in-time application on 27 January 2017 for leave to remain through his solicitors. His solicitors made two assertions; the first was that the appellant's original passport will be forwarded to the Home Office within 40 days of their letter. The appellant's passport was being retained in order for him to take the UK life test. The second assertion was that the appellant's English Language certificate will be forwarded to the Home Office within 40 days of their letter.

8. According to paragraph 16 of the judge's decision, the next event as that the respondent wrote to the appellant's solicitors on 11 February 2017, stating that the application was invalid because he had not paid the IHS and had not provided his passport with the application. On 17 February 2017, the appellant's solicitors wrote to the respondent, confirming that the HIS had been paid and enclosing proof of the same. Nothing further happened until 24 March 2017, when the respondent wrote to the appellant's solicitors, stating that it was going to take longer than the usual eight weeks to consider the application because they had requested further evidence from the appellant and the appellant had failed to provide it within the given timeframe. On 8 June 2017, having received nothing further from the appellant or his representatives, the respondent wrote to confirm that the application was considered to be invalid because the appellant had not submitted a valid passport.

9. On 16 June 2017, the appellant's solicitors issue a Letter Before Acting indicating an intention to initiate judicial review proceedings. The

respondent replied to the Letter Before Action on 3 July 2017 maintaining her decision that the appellant's application was invalid because of his failure to submit a valid passport within the time frame proposed by the solicitors and despite being given ample time to do so. The appellant did not pursue an application for judicial review preferring instead to submit a further application.

10. On 5 July 2017 the appellant made a fresh application for leave to remain, this time accompanied by a valid passport. The application was refused by the respondent who stated the appellant had to satisfy Appendix FM of the Immigration Rules. It was not accepted that the appellant could meet those requirements.

11. Mr Adebayo submitted that the judge erred in law at paragraph 14. The judge said as follows:

> "14. Before I come to what is said to have been the respondent's error in this appellant's case, I should note that I have not been provided with sufficient information by the appellant to conclude that this would, but for the respondent's error, have been a transitional case. Two key pieces of information are lacking in that regard. Firstly, in order to engage the relevant transitional provisions (in paragraph A280(c)) of the Immigration Rules, I would need to be satisfied that the appellant made a successful application for entry clearance on or before 9 July 2012. Secondly, in order to preserve the operation of that transitional provision beyond the initial period of leave to enter, I would need to be satisfied that the subsequent application was "in time" and that the appellant had been granted leave to remain under part 8, and not under Appendix FM (paragraph A280 B refers). None of this evidence has been provided, and I note that even the appellant's date of entry to the UK has never been precisely defined. The application form and all subsequent documents simply refer to the appellant having entered the UK as a spouse in 2012."

12. Mr. Adebayo submitted that he understood from paragraph 14 that the judge was referring to the first application the appellant made on 18 October 2014 after he had entered the UK. Mr. Adebayo said that the application was made in-time and under the transitional provisions under Part 8 and not under Appendix FM of the Immigration Rules. Relying on his grounds which argued that contrary to the view expressed by the judge that there was no evidence of the date the appellant entered the UK and the dates of his subsequent applications, he submitted that there was clear evidence placed before the judge from which the judge quoted in the determination.

13. I find, as submitted by Mr Tuffan, that the judge correctly stated that the appellant had to show that he applied successfully for entry clearance on or before 9 July 2012. I find it understandable that the judge could not make definitive findings at paragraph 14 on crucial matters because he did not have the precise dates of the entry clearance application and post-

entry application that were made by the appellant. Nevertheless, the chronology indicates that the appellant did successfully apply for entry clearance on 17 May 2012, before 9 July 2012. Therefore, the transitional provisions applied to him.

14. I also accept Mr Tuffan's submission that in order to preserve the operation of the transitional provisions, the appellant did make a subsequent application in time on 18 October 2014 and was granted leave to remain for two years under part 8 and not under Appendix FM.

15. I also accept that the application the appellant made on 27 January 2017 was in-time and this was accepted by the judge at paragraph 15. I find that this application would have come under Part 8 of the transitional provisions if it was a valid application accompanied by a valid passport. I agree with the judge that the application was properly rejected by the respondent as invalid because the application was not accompanied by the appellant's passport. The appellant had retained his passport in order to take the English Language test. I find that the judge was entitled to find that there was no obligation imposed on the respondent, whether by the Rules or any published policy for the respondent to write to the appellant to remind him that his application was on hold whilst she was waiting for his passport and the result of the English Language Test. Indeed, the judge noted that the appellant has never provided an English Language test.

16. Mr Tuffan submitted that there was a gap between the expiry of the appellant's leave to remain on 4 February 2017 and the subsequent valid application he made on 5 July 2017. I accept that because of this gap, the transitional provisions under Part 8 could not be maintained. Subsequently the appellant was required to show that he met the requirements of Appendix FM. Consequently, the judge's conclusions at paragraph 27 disclosed no error of law.

17. I find that the judge's decision does not disclose an error of law. The judge's decision dismissing the appellant's appeal shall stand.

No anonymity direction is made.

Signed Date: 21 December 2018

Deputy Upper Tribunal Judge Eshun