Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07158/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 21st August 2018	**On 26th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FRANK [O]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr A McVeety (Senior HOPO)
For the Respondent: No Legal Representation

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge McGinty, promulgated on 14th September 2017, following the hearing at Manchester Piccadilly on 29th August 2017. In the decision, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me. For convenience I will refer to the parties as they were referred to in the First-tier Tribunal.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, and was born on 20th April 1980. He appeals against the decision of the Respondent, dated 9th June 2017, refusing his application for asylum, and for humanitarian protection, on the basis of his fear of his family and other non-state agents. The refusal letter stated that these were non-Convention reasons as far as the claim for protection was concerned.

The Appellant's Claim

3. The essence of the Appellant's claim is that he will be killed by his family, especially an uncle, with whom he worked on a project in Nigeria in 2010. He also fears he will be killed by the person to whom he owes money. He claims that his uncle and Mr [E] wants to kill him. These claims are rejected by the Respondent. Even so, the Respondent did give consideration to the issue of protection, and concluded that protection would be available to the Appellant because he could relocate within Nigeria and avoid both his uncle and Mr [E] (see paragraph 83 of the refusal letter).

The Judge's Decision

4. The judge focused essentially on the Appellant's family. His wife was a Canadian national. His children also were Canadian nationals. His wife, [SY], had been on discretionary leave to remain up until 30th March 2012, and had been a dependant of the Appellant. His wife had been in the UK as a student. The Appellant had been a dependant on his wife. The student leave had expired. There were children of the family. These were [N], the eldest child, who was born on 24th November 2010, and was aged at the time of the decision by the judge, 6 years. There were [D], who was born on 27th May 2013, and was aged 4 years at the time of the decision. Finally, there was [E], who was born on 1st July 2015, and was aged 2 years at the time of the decision. Judge McGinty also had regard to the fact that there had been a prior decision by Judge Eldridge which had found against the Appellant, and this was his starting point (see paragraphs 31 to 32).

5. The judge went on to record how, although the Appellant himself was of Nigerian citizenship, no application had been made for the children to apply for Nigerian citizenship (paragraph 33). He also observed that none of the children are over 7 years of age and that "I find that none of them have therefore established a significant private life of their own in the UK, despite the fact that I do accept the evidence given by Miss [Y] that the 2 older children are now at school" (paragraph 34). However, he then went on to conclude that, on the basis of evidence produced as exhibit FN017, in respect of the requirements for Miss [Y] to be able to sponsor the Appellant to live in Canada, there was a financial requirement. The judge went on to record that:-

> "As correctly stated by Miss [Y], it is clearly stated on the financial evaluation form which is part of the application form for entry into Canada, that if the amount earned is less than the amount of the minimum necessary income requirements such that you would not meet the

sponsorship eligibility requirements, do not send your application" (paragraph 35).

6. He went on to observe how the basic income requirement for five members of the family would be a minimum of some $50,000 Canadian dollars (paragraph 36). Moreover, neither the Appellant nor Miss [Y] had been allowed to work in the UK for the preceding twelve months and so did not have the income (paragraph 37).

7. The judge ultimately concluded that it was not reasonable for the Appellant to be separated from his children (paragraph 39). There was no guarantee that the Appellant's wife would be able to find childcare in Canada or to be able to earn the amount in excess of the minimum income requirement so as to be able to sponsor the Appellant (paragraph 39). The Appellant could not relocate to Nigeria either because the Foreign Office advice was against travel to several areas of Nigeria where the risks of kidnapping and crime, particularly in the north-east of the country (paragraph 41). Accordingly, even though the children were not qualified children (paragraph 42), and even though they have not been in the UK for seven years and had no private life of their own, the appeal fell to be allowed, bearing in mind the Section 117B considerations. This was because the Home Office Rules had themselves prevented the Appellant from working in the way that he could earn enough money to be able to ensure that a sponsorship application could be made by his wife to enable them all to go to Canada.

Grounds of Application

8. The grounds of appeal state that the judge had erred in light of the appeal with respect to the issue of relocation to Nigeria, as well as relocation to Canada.

9. On 29th March 2018 the Upper Tribunal granted permission to appeal.

Submissions

10. At the hearing before me on 21st August 2018, Mr McVeety, appearing on behalf of the Respondent Secretary of State, submitted that the judge had fundamentally erred with respect to the right of the Appellant's wife, Miss [Y], to return to Canada, as a Canadian citizen, and to then sponsor her husband to join her there. The error occurred because the judge had referred to exhibit FN017 "in respect of the requirements for Miss [Y] to be able to sponsor the Appellant to live in Canada" (paragraph 35).

11. However, if one looks at the Rules with respect to financial evaluation form (IMM 1283) to which the judge clearly had regard, they make quite clear that any financial requirement only applies with respect to someone sponsoring a person other than his spouse or common law partner. They do not apply to Miss [Y] if she was simply planning to sponsor the Appellant to join her as her husband. The guidance is clear that, "if you are sponsoring a person other than: your spouse, common law or conjugal

partner who has no family members, …" then "you must prove that you have an annual income that is at least equal to the minimum necessary income to support the group of persons …".

12. It then goes on to say that the required level of income for five persons would be $52,583 Canadian dollars. This, of course, only applies to an application for a person other than "your spouse, common law or a conjugal partner", which is not the case as far as this Appellant is concerned. Plainly therefore, the judge had actually misread the "financial evaluation". That being so, there was no obstacle to the Appellant returning to the Canada with his wife. He had the option either to join his wife in Canada, or to go to Nigeria, where it was simply not the case that the whole of Nigeria was subject to a risk of kidnap or violence. The advice given by the Foreign and Commonwealth Office in the United Kingdom, that people should not go to Nigeria, was for British citizens. It was not advice to Nigerian citizens, of which the Appellant was one.

13. Mr McVeety submitted that he did not have to take matters any further although it was the case that there were a number of other errors, for example in the way in which the judge had placed the burden of proof on the Respondent Secretary of State to prove why the Appellant could not go to Canada with his wife. Moreover, the judge had stated that the Appellant will have difficulty in getting a job in Canada, as would his wife, but the same applies in this country. The Appellant would have to get a job in the UK as well. He would have to get a job in Canada in the same way.

14. In representing himself, Mr [O] read out a pre-prepared statement. He submitted that he had actually contacted the Canadian Embassy. He had actually been told that he had to show funds in the order of between $52,000 and $65,000 Canadian dollars. He said that he had presented this written communications to the Home Office. He said that the decision made by the judge should be upheld. Moreover, he had now got a right to be with his family. Furthermore, if he was forced to return to Nigeria he would suffer Article 3 violation of his human rights.

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. My reasons are as follows. First, this is a case where the Appellant is a Nigerian national. His wife is a Canadian citizen. The remaining children were at the date of the hearing Canadian citizens. Neither of them had valid leave to remain in the UK. Second, Canada does not have a financial requirement, in the way accepted by the judge, on the evidence presented to him, applying to a spouse of a Canadian citizen. In fact, the financial requirement is a feature of UK law, and it is a stringent requirement, in a way that is not the case with Canadian nationals. That being so, there was no obstacle in the path of the Appellant going either with his wife and children to Canada, (given that

they were Canadian citizens), or to returning back to Nigeria, (given that neither of them had any leave), and given that at the time of the decision the children were not qualified children, so as to retain their right to family life intact.

16. I accept that as of November 2017 '[N]' is now a "qualifying child", but this must be a matter for a future consideration, on any future application. It cannot be said, on the basis of the evidence before the original judge at the time of the hearing, that the position was anything other than what the Respondent now maintains, namely, that the judge was considering an appeal with respect to parties before him, neither of whom were citizens of this country, neither of whom had leave to remain in this country, and in neither case was there a child over 7 years of age. Most importantly, the issue of whether there is a financial bar preventing the Appellant from going with his wife to Canada is not a viable issue that arises. Accordingly, for all these reasons, the decision must be set aside.

17. There has been a delay in sending out this Determination to the parties concerned, because although it was dictated on the day of the Hearing, and typed up shortly thereafter, it appears to have been held up in the system, before promulgation.

Notice of Decision

18. The decision of the First-tier Tribunal involved the making of an error of law and subsequently should be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge McGinty, on the basis of Practice Statement 7.2(b).

19. No anonymity direction is made.

20. This appeal is allowed on behalf of the Secretary of State.

Signed Date

Deputy Upper Tribunal Judge Juss 25th February 2019