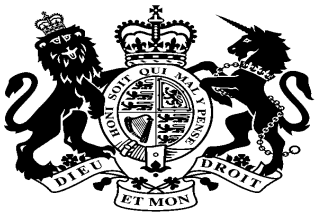

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11464/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 March 2020	**On 14 April 2020**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JUMOKE [O]
[NO ANONYMITY ORDER]

Respondent

Representation:
For the appellant: Mr Nigel Bramble, a Senior Home Office Presenting Officer
For the respondent: Mr Alexis Slatter, Counsel instructed by Addison & Khan Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's human rights appeal. The claimant is a citizen of Nigeria.

Background

2. The claimant and her husband are long-term overstayers. The couple married in Nigeria by traditional customary marriage. The claimant's husband has been in the United Kingdom for more than 20 years and now has discretionary leave to remain. The claimant joined him in 2003. Both the claimant and her partner entered the United Kingdom on visit visas, but did not embark for Nigeria when they expired.

3. The claimant has been unlawfully in the United Kingdom since her visa expired on 19 October 2004 when she was 31 years old. The claimant is 47 now. Her husband supports them both financially and his income is over £18600. Her parents in Nigeria have died. The claimant has a son still living in Nigeria from a previous relationship, but is estranged from him. The claimant has two adult children in the United Kingdom, and a grand-daughter, all of whom are settled here.

4. The claimant's husband is on the 10-year route to settlement, having been granted discretionary leave pursuant to paragraph 276ADE(1)(iii) based on 20 years' residence, in 2016. He has had two 30-month grants of discretionary leave, the first in September 2016 and the second, last year, in March 2019, which will expire in September 2021. If all goes well, he could apply for indefinite leave to remain in 2026.

5. On 27 April 2016, the claimant was encountered by immigration officials, served with forms RED.0001 and RED.0003 and issued with temporary admission.

6. On 3 June 2016, the claimant made an application for leave to remain on private life grounds, but this was refused on 1 November 2016 and certified as clearly unfounded under section 94 of the Nationality, Immigration and Asylum Act 2002 (as amended). The claimant had only an out of country right of appeal which she did not pursue. She did not embark for Nigeria, remaining unlawfully in the United Kingdom.

7. On 5 October 2017, the claimant made a private and family life application, citing her relationship with her husband, her adult children, and her grand-daughter.

8. On 14 March 2019, the Secretary of State gave the husband further discretionary leave, to expire in September 2021.

9. Just over 2 months later, on 21 June 2019, the Secretary of State refused the claimant's private and family life application, noting that the claimant's husband, although he had paragraph 276ADE leave, was not a British citizen, settled, or in the United Kingdom on international protection grounds (refugee or humanitarian protection). The Secretary of State rejected the claimant's assertion that her relationship with her husband was genuine and subsisting, and did not consider that she had family life either with her husband, her adult children here, or her grand-daughter.

10. All of the relationships with her adult children and grandchildren were considered to be private life, not family life, and to have been formed at a time when the claimant

was unlawfully in the United Kingdom, such that under section 117B of the 2002 Act, they could be given little weight.

11. The Secretary of State did not consider that the claimant had demonstrated that exceptional circumstances existed in her case: although the claimant had some health difficulties while she was here, there were health systems in Nigeria which were adequate and the Article 3 ECHR standard of risk was not reached.

12. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

13. On 31 October 2019, the First-tier Judge found as a fact that the claimant and her husband were in a genuine and subsisting relationship; the respondent has not challenged that finding. By that date, the claimant's partner had received his second grant of discretionary leave to remain in the United Kingdom. Their children and grandchildren were lawfully in the United Kingdom, and the Judge found that the entire extended family was settled and integrated. There was uncontested evidence that the claimant's partner's income exceeded the Appendix FM threshold. The Secretary of State accepted that the claimant speaks English and that she would not fail the Suitability test.

14. The First-tier Judge applied the test in *Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 11 and considered both the positives and the negatives on a 'balance sheet' test (see [14]-[15] in the Tribunal's decision). The core of the First-tier Tribunal's decision is at [16]-[17]:

> "16. In the Tribunal's view, once the [Secretary of State] had decided to grant the [claimant's] husband discretionary leave to remain, there was no utility in not granting similar discretionary leave to remain to the [claimant]. Both were closely related long term overstayers whom the [Secretary of State] had not removed, doubtless a pragmatic decision, but one which cannot be seen as encouraging respect for the law, and one which has undoubtedly imposed burdens on public services.
>
> 17. In all the circumstances, the [Secretary of State's] decision to treat the [claimant] differently from her partner cannot be seen as proportionate and in pursuit of a legitimate objective under Article 8.2 ECHR. The appeal is therefore allowed."

15. The First-tier Judge allowed the appeal. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

16. The Secretary of State challenged the reasoning in the First-tier Judge's decision on the basis that he had neither mentioned nor had regard to section 117B of the 2002 Act, that the claimant's husband was granted leave to remain on a different basis, because he had been able to show that he was in the United Kingdom for longer than 20 years in 2016, that there was no reason, despite the grant of leave to him, why he

should not be expected to return to Nigeria 'with some finances and support from family there' to take up employment and live with this claimant in their country of origin.

17. The grounds of appeal asserted that there was an unresolved issue in the First-tier Tribunal about the existence and/or presence of the claimant's adult children and her grandchildren in the United Kingdom. That issue was not pursued at the Upper Tribunal hearing, Mr Bramble accepting that the issue, although present in the refusal letter, had not been argued or relied upon before the First-tier Judge.

18. Permission to appeal was granted by Designated First-tier Judge McClure, who after setting out the grounds of appeal, said this by way of grant:

> "2. Whilst it has to be acknowledged that the [claimant's] partner had been given leave in the United Kingdom such leave was only discretionary leave and the partner was not settled in the United Kingdom. In such circumstances section 117B had to be taken into account not only with regard to finances and English language but also that the relationship in the United Kingdom had been established when both the [claimant] and the sponsor were here without leave. It is arguable that the Judge has failed properly to consider section 117B.
>
> 3. In the circumstances, the ground can be argued."

19. The grant of permission appears to be limited to section 117B.

Rule 24 Reply

20. There was no Rule 24 Reply on behalf of the claimant.

21. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

22. Mr Bramble relied on the refusal letter and the grounds of appeal and asked me to allow the Secretary of State's appeal and substitute a decision dismissing the claimant's challenge to her decision.

23. For the claimant, Mr Slatter drew my attention to the judgment of the Court of Appeal in *GM (Sri Lanka) v The Secretary of State for the Home Department (Rev 1)* [2019] EWCA Civ 1630 (04 October 2019), in particular at [45]-[53], and to *Dube (ss.117A-117D)* [2015] UKUT 90 (IAC) which deals with how part VA of the 2002 Act should be applied by the First-tier Tribunal and Upper Tribunal. Mr Slatter observed that as the claimant's husband was not a qualified person, section 117B was inapplicable here and it could not therefore be an error of law for the Judge to have failed to apply it. This appeal had succeeded on Article 8 ECHR grounds outside the Rules.

Analysis

24. The point on which permission to appeal was granted was that the Judge had failed to deal with Section 117B(4)(b) of the 2002 Act. That argument is misconceived:

section 117B(4)(b) applies only to require that little weight be given to family life developed between the claimant and a qualified person. The claimant's husband is not a qualified person as defined in section 117D. The statutory requirement to give 'little weight' to their relationship is not engaged and the First-tier Judge made no error of law in failing to consider section 117B, impliedly or expressly.

25. There is no explanation given in the refusal letter or the Secretary of State's submissions in the First-tier Tribunal, other than the difference in their length of stay (over 20 years for him, 16 for her) as to why the Secretary of State considers that it is proportionate to separate this couple or to require the husband to forgo the possibility of becoming settled in the United Kingdom.

26. I have considered the guidance given by the Court of Appeal in *GM (Sri Lanka)* in the judgment of Lord Justice Greene, with whom Lady Justice Simler agreed:

> "52. In our judgment the Judge did err. It was made clear by the Supreme Court in *Ali* (supra) that even if it is practicable and feasible for a person to return that is not the end of the story - proportionality must also be considered which necessitates a careful analysis of the fair balance that exists between the State's interest in immigration control and the individual's interests. As Mr Jafferji pointed out in this case the State had accorded the husband and the children DLR and they were (at the time of the FTT hearing) on a pathway to settled status and this being so, the State had no discernible, sensible, objection to the husband and children being in the United Kingdom. This was relevant to any assessment of the proportionality of compelling the father and children to move to Sri Lanka if family life was to be preserved.
>
> 53. In this case the Judge did not say that she was considering the "reasonableness" of the husband leaving and instead focused upon whether he had the ability / capability to move to Sri Lanka: see FTT paragraph [46]. … There will of course be some nexus between the two concepts, but they are not the same: a person might be able to return to a foreign country, yet it might still be unreasonable or disproportionate to compel return. *The point is made for the Appellant that if her husband and children were to follow her then they would lose their leave to remain and with it the chance (which of course did materialise) of settled status in the UK. There is no analysis of whether in such circumstances this was proportionate or reasonable for the husband or for the children."*
>
> [*Emphasis added*]

27. In this appeal, the husband risks losing the chance of settled status to which his paragraph 276ADE(1)(iii) would lead. Since he does not yet have settled status, it would be some years before the husband could support an entry clearance application. If the claimant were removed to Nigeria, her husband would have to choose between going with her and breaking his long connections in the United Kingdom, or allowing her to return alone, knowing that he could not sponsor an application for entry clearance until 2026 at the earliest.

28. In my judgment, the First-tier Judge did not err in assessing that after such a long period of joint cohabitation, it was unreasonable and disproportionate to expect the

appellant to return alone or to expect the husband to forgo the possibility of settlement in the United Kingdom, which has been his home since at least 1996.

29. The First-tier Judge's decision was open to him on the evidence and arguments before her. There is no want of reasoning, nor any material error of law therein. I uphold his decision.

DECISION

30. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law.

I do not set aside the decision but order that it shall stand.

Signed *Judith AJC Gleeson* Date: 18 March 2020

Upper Tribunal Judge Gleeson