Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/37668/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 July 2015	**On 14 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MACDONALD CHIBUEZE OSSAI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr F Habtemariam, Legal Representative from Anglia Immigration Law LLP
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. For ease of reference, we shall refer to the parties as they were before the First-tier Tribunal.

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Clapham (the judge), promulgated on 5 February 2015, in which he allowed the

Appellant's appeal. That appeal was against decisions of the Respondent, dated 5 September 2014, to refuse to vary his leave to remain and to remove him from the United Kingdom under section 47 of the Immigration, Asylum and Nationality Act 2006.

3. Permission to appeal was granted by First-tier Tribunal Judge Levin on 13 April 2015.

Background

4. The Appellant is a national of Nigeria, born on 1 January 1988. There has never been any dispute that he arrived in the United Kingdom on 26 January 2005 with entry clearance as a student and that he has remained here lawfully ever since. His last grant of leave expired on 3 August 2014. On 31 May 2014 the Appellant married Ms Liana Wake, a British citizen. An application to vary his leave on the basis of his marriage was made on 31 July 2014.

5. The Respondent refused the application under the five-year Partner Route of Appendix FM to the Immigration Rules because specified evidence relating to the financial requirements had not been submitted. In respect of the ten-year Partner Route, the Respondent asserted that the Appellant's wife could accompany him back to Nigeria, and so EX.1 was not satisfied. Paragraph 267ADE(vi) of the Rules was considered, but there were said to be no significant obstacles to a return to Nigeria. There were no exceptional circumstances in this case.

6. The Appellant appealed, but for reasons of his own elected to have the matter dealt with on the papers alone.

The decision of the judge

7. The judge found that the Appellant's case failed under the Rules. This was because specified evidence on the financial requirements had not been submitted with the application. Additional evidence had been submitted with the appeal, but it was stated that this was inadmissible (paragraph 6). It was found that in fact the combined income of the Appellant and his wife exceeded the relevant threshold of £18,600 gross per annum (paragraphs 6-7).

8. The judge went on and considered the case outside of the Rules. In paragraph 7 he took account of the following matters: the couple were expecting a baby soon after his decision was being made; the length of time spent by the Appellant in the United

Kingdom; his wife's lifelong residence here; and the satisfaction of the relevant income threshold. Having done this, the judge proceeded to allow the appeal on Article 8 grounds.

The grounds of appeal

9. In essence the Respondent's grounds assert that the judge failed to take account of mandatory factors in section 117B of the Nationality, Immigration and Asylum Act 2002, and failed to take other relevant matters into account such as whether the family life could be enjoyed in Nigeria.

The hearing before us

10. Although it is of course the Respondent's appeal, we initially asked Mr Habtemariam whether or not he accepted that the judge had erred in his approach to Article 8 outside of the Rules. In particular, we raised the issue of whether the possibility of the Appellant making an entry clearance application from Nigeria should have been expressly dealt with by the judge. After some reflection, he accepted that there were errors in the decision. However, he submitted that these were not material to the outcome, given the factors considered in paragraph 7 of the decision. There was no suggestion from Mr Habtemariam that the judge was wrong to have dismissed the appeal under the Rules.

11. Mr Nath submitted that the relevant factors of the public interest in section 117B(1) of the 2002 Act, the possibility of the wife returning to Nigeria, and whether an entry clearance application should be made were all overlooked by the judge.

Decision on error of law

12. We find that the judge has materially erred in law in his approach to and consideration of the Article 8 claim.

13. First and foremost, the judge failed to make any findings in respect of, or give any consideration to the issue of whether, given that he did not meet the Rules, the Appellant should have returned to Nigeria and make an entry clearance application from there. This was an obviously relevant matter to have dealt with in a case concerning Article 8 outside of the Rules. The fact that it is not one of the mandatory factors set out in section 117B of the 2002 Act is beside the point: those factors do not represent an exhaustive list.

14. Second, the relevant matter of whether the Appellant's wife could have returned to Nigeria is not dealt with at all by the judge. Again, this is a factor that should, in all but a few cases, be considered by the Tribunal, particularly when it is expressly raised by the Respondent.

15. Both of these failures are material to the outcome of the appeal. It simply cannot be said that the appeal was bound to succeed under Article 8 on any view of the facts.

16. We therefore set aside the decision of the judge.

The re-make decision

17. We considered it entirely appropriate to go on and re-make the decision in light of the evidence before us. There was no dispute from either representative as to this course of action.

18. The essential factual background to this appeal has never been in dispute. With this in mind, we raised the issue that the Appellant appeared to have acquired in excess of ten years lawful residence in the United Kingdom since arriving here in January 2005. Thus, Paragraph 276B(i) of the Rules would be applicable to his case.

19. Mr Nath confirmed that there was no suggestion of any gaps in the Appellant's leave over the years.

20. On the evidence before us, and in light of the Respondent's position, we find as a fact that the Appellant arrived in the United Kingdom on 26 January 2005 and has remained here ever since with leave as a student. His last application to the Respondent was made in-time and so his leave has been statutorily extended since 3 August 2014.

21. There is no suggestion that the Appellant's residence in this country has been anything other than continuous, and we find that it has in fact been so.

22. It follows that the Appellant acquired ten years continuous lawfully residence in the United Kingdom as at 26 January 2015, and that his residence thereafter has remained lawful. In turn, Paragraph 276B(i) of the Rules has been satisfied.

23. The Respondent has not at any stage considered the application of Paragraph 276B(i) to the Appellant's circumstances. On this basis, we conclude that the Respondent's decision is not otherwise in accordance with the law. Mr Nath accepted this to be the case.

24. Having found that Paragraph 276B(i) is satisfied, there remains the exercise of discretion under Paragraph 276B(ii). As this has not yet been considered by the Respondent, we are unable to undertake the operation ourselves.

25. In reaching a decision on the 'public interest proviso', the Respondent will no doubt take into account the unchallenged evidence of a genuine and subsisting marriage to a British citizen, the presence now of a British citizen child (born in late February this year), and the absence (as far as we can detect) of any misconduct by the Appellant whilst in this country.

26. The Appellant would be well-advised to submit any further relevant evidence to the Respondent as quickly as possible, including any information relating to sub-paragraph (iv) of Paragraph 276B.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

We set aside the decision of the First-tier Tribunal.

We re-make the decision by allowing the appeal on the basis that the Respondent's decision was not otherwise in accordance with the law, and that the Appellant's application therefore remains outstanding before the Respondent awaiting a lawful decision.

Signed Date: 13 July 2015

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make no fee award. The basis upon which the appeal has been allowed is different from that put forward in the initial application. The First-tier Judge was not assisted by the fact that the appeal was to be decided on the papers alone. The matter has had to come to an oral hearing before us in order for the Appellant to succeed.

Signed Date: 13 July 2015

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal