Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11483/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th December 2018	**On 15th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR GBENGA SODIQ FAGBIRE
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Ms C Record, Counsel

DECISION AND REASONS

1. For convenience purposes, I shall employ the appellations "Appellant" and "Respondent" as at first instance. The Appellant is a citizen of Nigeria whose appeal was allowed by Judge Khawar in a decision promulgated on 19th September 2018.

2. The judge found (paragraph 32) that the Appellant's application was properly refused under Appendix FM of the Immigration Rules on the basis that he did not meet the suitability requirements thereof (S-LTR.1.6). The reason for that finding

(which is not challenged) is that the Appellant used deception in the taking of an English language test and therefore engaged in a fraud.

3. Having found against the Appellant on that issue, the judge considered Article 8 ECHR outwith the Rules, referring to well-known case law. He found that the Appellant was involved in a genuine and subsisting relationship with his spouse and in addition they had two young children to whom both the Appellant and the Sponsor were the primary carers (paragraph 37). He found in relation to the details of their family life together that both the Appellant and Sponsor were credible witnesses (paragraph 38). He noted that the children were British citizens and that the Sponsor would be earning within a week of the appeal hearing a sum of £21,000 per annum. Because of the fraudulent act in using a proxy test taker in relation to the English language certificate there was a strong argument in favour of resolving the proportionality issue in favour of the Respondent (paragraph 48). However, on the totality of the circumstances in the case the judge said that this was a finely balanced one and there were a number of mitigating features, all as set out by the judge. In particular, they now had two young British children. If the Appellant was to make an application for entry clearance it would be bound to succeed and therefore any removal decision would be somewhat Kafkaesque. He therefore went on to allow the appeal under Article 8 ECHR.

4. The Secretary of State lodged grounds of application, saying that the continuing disrespect for the Immigration Rules by the Appellant was sufficient to demonstrate a very poor immigration history. Furthermore, it was noted that the children had not yet entered the UK education system and had not had an independent life outside the confines of their family unit. Further grounds were put forward and it was said that the judge erred in his conclusion that the case was on all fours with **Chikwamba** and it was said that the Appellant's wife and children would not be prevented from accompanying the Appellant to Pakistan if they so choose and as such their situation was very different from the Sponsor's case in **Chikwamba**.

5. Permission to appeal was granted by Judge Hollingworth in a decision dated 20th October 2018.

6. Thus, the matter came before me on the above date.

7. Before me, Mr Walker for the Home Office relied on the grounds of application. This was a reasons challenge. The judge had not given sufficient reasons as to why the appeal should be granted under Article 8 ECHR and the decision should be set aside and the matter should be remitted to the First-tier Tribunal for a fresh hearing.

8. For the Appellant, Ms Record said that the judge had been seized of all the evidence. He had considered all relevant matters. It was a finely balanced case and while the use of the word Kafkaesque may not have been appropriate nothing turned on that. I was urged to conclude that there was no error in law.

9. I reserved my decision.

Conclusions

10. In allowing the appeal the judge was more than aware that this was a finely balanced case, given the Appellant had failed under Appendix FM of the Immigration Rules. However, as he pointed out, there was no issue that the Appellant was involved in a genuine and subsisting relationship with the Sponsor (paragraph 37). As the judge put it, they had two young children in relation to whom both the Appellant and Sponsor were the primary carers. They were found to be credible witnesses. The judge noted that this was a finely balanced case (paragraph 49). He was satisfied that there were a number of mitigating features which pointed to the proportionality exercise resulting in favour of the Appellant. He referred to these factors in paragraphs 50 to 57 inclusive. In particular, he noted that the Appellant had subsequently undertaken an English language test which he passed to the requisite standard. The Sponsor had suffered the loss of their first baby and he was satisfied on the basis of her oral evidence that she has been suffering mental health problems ever since and the Appellant had supported the Sponsor during that period. The Sponsor was aged 28 years of age. If the Appellant was removed there would be a considerable impact on both the lives of the Sponsor and the children. There would be a considerable impact on the family. While he may have been using an infelicitous expression to describe the situation as "Kafkaesque" there was nothing material in that point and the judge was merely saying that if obliged to do so, the Appellant would succeed in his application for entry clearance under the Immigration Rules.

11. The judge's reasoning is clear and coherent. He accepted that this was a difficult case and he gave reasons (very clear ones) why the proportionality and balancing exercise should go in favour of the Appellant. In my view, there is no error in law as the conclusions of the judge were certainly open to him on the evidence presented to him.

12. It follows that the judge's decision must stand.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

No anonymity order is necessary.

Signed *JG Macdonald* Date 3rd January 2019

Deputy Upper Tribunal Judge J G Macdonald