Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14844/2019 (V)**

THE IMMIGRATION ACTS

Heard at Field House (by remote means)	**Decision & Reasons Promulgated**
On 9th March 2021	**On 25th March 2021**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

ADEJOKE IGE
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Mupara of Counsel, instructed on a direct access basis
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Skype. A face to face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. The file contained the documents primarily in paper format, with one document

submitted electronically after the hearing in accordance with directions given for the same.

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Gillespie promulgated on 20 January 2020, in which the Appellant's appeal against the decision to refuse her human rights claim dated 19 August 2019 was dismissed.

3. The Appellant is a national of Nigeria, born on 19 February 1968, who claims to have arrived in the United Kingdom in 1995 and who has remained here unlawfully ever since. The Applicant made applications for leave to remain on 15 July 2010 and 31 October 2011 on human rights and long residence grounds; both of which were refused. The Appellant's appeal against the second refusal dated 21 October 2016 was dismissed in a decision of First-tier Tribunal Judge Paul promulgated on 3 April 2018. The Appellant's most recent application for leave to remain was made on 3 May 2019 on the basis of family life with her partner in the United Kingdom who had recently been granted limited leave to remain and on private life grounds. It is the refusal of that application which is the subject of this appeal.

4. The Respondent refused the application the basis that the Appellant could not meet the requirements of the Immigration Rules for a grant of leave to remain and there were no exceptional circumstances to otherwise warrant a grant leave to remain. The Appellant could not meet the requirements of Appendix FM because her partner was not a British citizen or settled in the United Kingdom. The Appellant could not meet the requirements of paragraph 276ADE as the Appellant had not established that she had been in the United Kingdom for at least twenty years (there being no evidence of her being in the United Kingdom prior to 2004) and there would not be very significant obstacles to her reintegration in Nigeria, a country where she had spent the majority of her life and where she speaks a local language of Yoruba.

5. Judge Gillespie dismissed the appeal in a decision promulgated on 20 January 2020 on all grounds. The Appellant sought an adjournment of the hearing in writing before the listed date, on the basis that a witness was going to be outside of the United Kingdom and unable to attend. The application was refused on the papers and when renewed at the oral hearing, refused again.

6. On the substance of the appeal, the First-tier Tribunal considered the earlier decision of Judge Paul promulgated on 3 April 2018 as a starting point in accordance with the principles in *Devaseelan* and noted in particular that the Appellant's account differed between her two appeals. Overall, the Appellant was not found to be credible and although it was likely that she had been in the United Kingdom for a substantial period, she had failed to establish that it had been over twenty years. The refusal would not be a disproportionate interference with the Appellant's right to respect for private and family life.

The appeal

7. The Appellant appeals on three grounds as follows. First, that the First-tier Tribunal materially erred in law in failing to grant an adjournment in circumstances where there was evidence of a witness being abroad and that witness evidence was crucial and would have been decisive of the appeal. As a matter of fairness, an adjournment should have been granted. Further, the reasons given at the hearing for refusing the adjournment differed to those given in the decision. Secondly, that the First-tier Tribunal materially erred in law in failing to consider the Appellant's private life outside of the Immigration Rules and failed to conduct a proportionality balancing exercise. Thirdly, that the First-tier Tribunal failed to give proper weight to the evidence before it; specifically that weight was not given to the positive credibility findings made in relation to the Appellant's husband in his appeal contrary to the weight given to the previous adverse credibility findings in relation to the Appellant; the plausibility of the Appellant and her husband living separately; and the evidence of the Appellant's children and means of contact with them.

8. There were earlier directions in this case with a provisional view that it may be one in which the error of law issues could be determined without a hearing (albeit subsequently listed for a remote video hearing), pursuant to which both parties made written submissions.

9. At the oral hearing, Mr Mupara relied on his written submissions/skeleton argument in support of the grounds of appeal. He submitted that in circumstances where the Appellant sought to establish that the case against her was wrong with evidence from Mr Ebo, the central question was what fairness demanded; regardless of the timing of the request for an adjournment or the reasonableness of Mr Ebo being out of the country at the time of the hearing.

10. Mr Ebo is a businessman originally from Nigeria who was unable to attend the appeal in 2018 as he was out of the country; albeit no application for an adjournment was made on that occasion for him to attend. In relation to the present appeal, an application for an adjournment was made, accompanied by Mr Ebo's travel itinerary and tickets; which was refused on the papers.

11. Mr Mupara submitted that evidence as to the Appellant's presence in the United Kingdom between 1995 and 2004 could only be given by Mr Ebo and as a matter of fairness, there should have been an adjournment to allow this evidence to be heard. Mr Mupara accepted the points made in the refusal of the application for an adjournment on the papers, in particular that it was unreasonable for the Appellant not to warn Mr Ebo about the listing date, or check his dates of travel with him and unreasonable not to put Counsel in funds until the end of December just before the hearing. However, he submitted that these matters were not relevant to the test of fairness. Whilst accepting that a party's conduct

may be relevant to the assessment of fairness, Mr Mupara submitted that in this case, regardless of the Appellant's own unreasonable conduct, the refusal of the adjournment amounted to unfairness.

12. Further, as a matter of procedure, Judge Gillespie stated at the hearing that he refused the adjournment on the basis that he had been brought in from Ireland to hear the appeal and had spent a considerable amount of time preparing for it. However, the decision states that the reasons for refusal were that there was no itinerary available for Mr Ebo's travel; albeit Mr Mupara states that he specifically brought this document to the Tribunal's attention at the hearing. There was no written statement from Mr Mupara as to the travel itinerary or reasons given for refusing the adjournment at the hearing; although he did refer to a witness statement from the Appellant on the latter point.

13. The second ground of appeal is that there was no consideration of the Appellant's private life outside of the Immigration Rules, the decision under challenge moving from finding that the Appellant could not satisfy paragraph 276ADE(1)(vi), straight to the factors in section 117B of the Nationality, Immigration and Asylum Act 2002 but without any attempt to assess the proportionality of the Appellant's removal. A reference to the factors in section 117B is not a substitute for a proportionality assessment. This is a clear error of law in circumstances where the only available ground of appeal was on human rights grounds and not, as previously, whether the decision was in accordance with the Immigration Rules.

14. The error in relation to Article 8 of the European Convention on Human Rights was material as there were a number of factors in the Appellant's favour showing that her removal would be disproportionate. These include that she has been living in the United Kingdom for 16 years; that her husband has leave to remain in the United Kingdom on the basis that he has lived here for more than twenty years; that an application for Entry Clearance would not succeed under Appendix FM; the Applicant speaks English and would be able to find employment without being a burden on the taxpayer. The evidence of the Appellant's private life also included her involvement in the church.

15. Mr Mupara accepted that the earlier decision dismissing the appeal on Article 8 grounds was the starting point, but matters had moved on by then with the evidence of Mr Ebo and the passage of time. It was also relevant that in the earlier appeal, no witnesses were called and Mr Ebo was out of the country; the Appellant was not advised to arrange a witness statement from him nor to apply for an adjournment. It was reasonable for the Appellant to have followed advice, although the Appellant has not made a formal complaint against her previous representatives and did not refer to any of this in her written statement (although she did also give oral evidence there was little detail in relation to the conduct of her earlier appeal).

16. The third ground of appeal is as to the First-tier Tribunal's assessment of and weight to be attached to specific parts of the evidence before it. First, that the First-tier Tribunal failed to attach weight to the statements of the Appellant's children given that they were adults aged 25 and 28 at the date of their statements, which confirmed that they grew up without their mother. The weight to be attached to the evidence should not have been reduced because they had no practical knowledge of when the Appellant left given their very young age at the claimed time.

17. Secondly, the First-tier Tribunal accepted the previous adverse credibility findings against the Appellant but failed to give any reasons for not accepting the finding in his appeal that the Appellant's husband was a credible witness and as such it should not have been held against him that his use of an alias and obtaining a mortgage in a false identity when assessing his credibility.

18. Thirdly, the First-tier Tribunal failed to explain why the Appellant's husband's evidence that they could not live together prior to 2004 was implausible. Mr Mupara accepted that this alone would not constitute a material error of law but was a factor to be considered cumulatively with the other grounds.

19. Fourthly, the First-tier Tribunal failed to give clear or cogent findings that the lack of physical evidence of contact between the Appellant and her children was implausible, in circumstances where her evidence was that she did not keep calling cards between 1995 and 2004 and that was before the days of social media.

20. On behalf of the Respondent, Mr Melvin relied on the written submissions and resisted the appeal on all grounds. In relation to the adjournment, it was submitted that the First-tier Tribunal reached perfectly permissible findings in its refusal which included the historical failure of Mr Ebo to attend the hearing in 2018 and in failing to provide any written explanation for his absence in 2020; even if his travel itinerary was available. Mr Melvin added that it should not be the case that the First-tier Tribunal is effectively held to ransom by a possible witness attendance by the late application for adjournment. In any event, the application for an adjournment was adequately dealt with in paragraphs 4 to 6 of the decision and Mr Ebo's evidence was very limited, combined with the fact that he is a family members means that without move, it would be difficult for a Tribunal to attach any significant weight to it.

21. In relation to the second ground of appeal, in circumstances where the Appellant was found to have lived egregiously under the radar in the United Kingdom; where her relationship and stay were entirely precarious and established during a period of unlawful residence; it is unarguable that the claim could possibly have succeeded under Article 8. Mr Melvin noted in oral submissions Mr Mupara strayed into giving evidence as to the Appellant's family life when the ground of appeal was expressly in relation to private life.

22. In relation to the final ground of appeal, the First-tier Tribunal gave copious good reasons for rejecting the core of the Appellant's claim, appropriately using the previous Tribunal decision as the starting point. The weight to be attached to the evidence was a matter for the First-tier Tribunal and there were numerous reasons for the adverse credibility findings made. The matters raised in the third ground of appeal were not relevant to the outcome.

23. Finally, Mr Melvin submitted that although the findings in relation to Article 8 were brief in the decision, the factors in section 117B of the Nationality, Immigration and Asylum Act 2002 were set out and the findings were proportionate given the dearth of evidence from the Appellant. Overall, there was no basis upon which the First-tier Tribunal could have found that the Appellant's removal was a disproportionate interference with her right to respect for private and family life.

Findings and reasons

24. The first ground of appeal is as to whether the refusal of the application for adjournment amounted to procedural unfairness and therefore an error of law. The issue is not whether the First-tier Tribunal was unreasonable in refusing the adjournment request, but whether there was any deprivation of the right to a fair hearing for the Appellant. This is set out in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC), as follows: *"if a Tribunal refuses to accede to an adjournment request, such decision could, in principle be erroneous in law in several respects; these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the First-tier Tribunal acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? ...*"

25. The appeal hearing before the First-tier Tribunal was listed on 25 September 2019 for hearing on 9 January 2019 with notification being sent on 25 September 2019 date to both the Appellant and her legal representative on record with the Tribunal. On 29 December 2019, an application was made to adjourn the hearing because a crucial witness who provided the Appellant with food and accommodation between 1995 and 2004 was going to be out of the United Kingdom on the date of hearing. A copy of the travel itinerary was included. The application was refused by the First-tier Tribunal on 31 December 2019 on the basis that the hearing date had been notified some 8 weeks before the witness had booked flights, there was no written statement from him (and no Appellant's bundle at all) and the application for adjournment was made some 5 weeks after the witness booked his flight. It was considered that more evidence and explanation was required to justify an adjournment.

26. The application for an adjournment was renewed at the oral hearing on the basis that Mr Ebo was a crucial witness for the period 1995-2004 and a written statement was available from him. The application was opposed.

27. In the decision, having referred to the earlier proceedings in 2018, the adjournment application was refused for the following reasons:

> *"5. An application was made to adjourn the appeal proceedings because Mr Ebo was once again in Nigeria. In a letter to the Tribunal dated 29 December 2019, Mr Mupara said that Mr Ebo was a crucial witness and that he was going abroad on 1 January 2020, returning 9 February 2020. No evidence was provided of his travel itinerary. He is apparently an accountant and a businessman. Mr Mupara said the appellant had instructed him on a Direct Access basis, there were issues over funding and that was the reason why the adjournment application was made so close to the hearing. I refused the application in light of the fact that this was such a material issue before Judge Paul; that the hearing date was notified to the appellant on 25 September 2019 and yet no letter of explanation was provided by this man himself to explain why he was once again unable to attend the hearing through being abroad.*
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> *6. I was not satisfied that fairness required an adjournment given the absence of evidence that he was in fact in Nigeria and all the circumstances. Mr Ebo is said to be a relative of the appellant's husband and I am quite sure they both knew the importance of this witness attending, if indeed he is able to speak credibly to what is said in his statement."*

28. The grounds of appeal and oral submissions state that, first, the travel itinerary was available (which is an error, this was on file and was attached to the written application), and second, the Judge gave different reasons at the hearing. Although there is a witness statement from the Appellant on the latter, there is no written statement accompanied by a statement of truth nor any notes from the hearing submitted by Mr Mupara, who instead sought to give evidence as to what happened during his oral submissions to me. That is inappropriate. In circumstances where such allegations are made, particularly relating to matters of fairness, such a statement could and should have been provided by Mr Mupara dealing with these matters. Less weight can be attached to a statement of the Appellant on this point, particularly where adverse credibility findings have been made against her previously. In any event, as Mr Mupara submitted, the question is one of fairness rather than adequacy or reasons for the refusal of adjournment so the point, even taken at its highest, does not advance the Appellant's appeal in any material way.

29. Aside from the error as to the itinerary, the other reasons for refusal of the adjournment were entirely appropriate. The question is what fairness required, which includes fairness to both parties. In circumstances where the Appellant claims that Mr Ebo is a crucial witness and the only person

able to give evidence on her presence from 1995-2004, there was no explanation at all from her as to the very late application for adjournment and failing to make preparations for Mr Ebo to attend the hearing and no evidence directly from him as to his inability to attend. Further, the assertion that Mr Ebo's evidence was key, crucial and in Mr Mupara's submission, decisive of the appeal needs to be examined more closely.

30. First, Mr Ebo did not attend the previous hearing before Judge Paul, nor did he give any evidence or explain his absence and no application for an adjournment was made on that occasion for him to attend. On behalf of the Appellant this was said to be on the basis of legal advice but no complaint has been made about this and the Appellant has said little or nothing about this herself. Applying the principles set out in paragraph 40(a) in *Devaseelan* the evidence not brought to the attention of the earlier Tribunal, although clearly relevant to the issues before it as to the Appellant's length of claimed residence, should be treated with the greatest circumspection and the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Tribunal – in this case that although the Appellant had resided in the United Kingdom for a considerable period, she had not established that this was from 1995 as claimed or over twenty years.

31. Secondly, the written statement from Mr Ebo is sparse, going no further than an assertion not supported by any detail or documentary evidence of the Appellant being provided with accommodation by him between 1995 and 2004. Mr Ebo does not identify the address, any more specific dates or any details as to the accommodation itself – in contrast to setting out at least the location of where the Appellant's husband was accommodated in 1995. At its highest, the evidence is extremely limited.

32. Thirdly, the evidence from Mr Ebo was not the sole evidence available or relied upon as to the Appellant's claimed presence in the United Kingdom since 1995. There was witness evidence on this from the Appellant herself, her husband, her two children and Rev Fawole; three of whom gave oral evidence before the First-tier Tribunal. Little weight was however attached to all of this evidence for the clear and cogent reasons given in the decision and none was supported by any documentary evidence. In particular it is of note that the Appellant did not address the issue at all in her own written statement, instead simply adopting her husband's statement and his contained a similar lack of any detail to Mr Ebo's statement. In her oral evidence, the Appellant only referred to limited additional details about the accommodation.

33. It was of course open to the Appellant to have submitted evidence from other persons as to her presence in the United Kingdom since 2005, for example from any of Mr Ebo's family members whom she said in oral evidence she lived with and who had not travelled to Nigeria with him at the date of the hearing; or anyone else. It is not the case, contrary to Mr Mupara's assertion, that Mr Ebo was the only person who could give evidence on this issue. Further, although it is not uncommon for those

unlawfully in the United Kingdom to have some difficulty in obtaining documentary evidence of their presence here, the Appellant has not given any explanation for her inability to submit any at all, from any source, for the period 1995 to 2004.

34. Overall, in circumstances where the evidence of Mr Ebo was extremely limited and to be treated with circumspection; where other witnesses gave evidence on the same issue of the Appellant's presence in the United Kingdom and where the Appellant had more than adequate time to prepare for her appeal (including as to the witnesses to be called, not limited to Mr Ebo); it was not procedurally unfair for the First-tier Tribunal to refuse the application for an adjournment. There was no error of law on the first ground of appeal.

35. As to the second ground of appeal, the First-tier Tribunal refer, entirely properly, to the decision of Judge Paul as the starting point in accordance with the principles in *Devaseelan* and in paragraph 33 states: *"Like Judge Paul I have considered the refusal of the appellant's application in terms of the guidance given by the courts, with reference to the Razgar schema and also the requirements of section 117A-D of the Nationality, Immigration and Asylum Act 2002."* Those factors are set out, with the findings that the Appellant's immigration status was unquestionably precarious (as was her husband's status) with her living under the radar having previously been found to be egregious. Further, there was nothing to prevent the Appellant and/or her husband from living with their adult children in Nigeria who could assist their reintegration; or it was open to the Appellant's husband to remain in the United Kingdom for the duration of his leave to remain.

36. These findings are undeniably brief, but in the context of this appeal, the earlier findings of Judge Paul and the lack of evidence before the First-tier Tribunal, they are more than adequate. The Appellant has remained unlawfully in the United Kingdom for a significant period of time, such that little weight should be given to her private life and the maintenance of immigration control is in the public interest. On the Appellant's side of the scales for the balancing exercise, there was very little evidence of anything beyond an extended period of time unlawfully in the United Kingdom, living with her husband. There was no evidence from the Appellant at all claiming any substantive private life developed in the United Kingdom (although some degree of private life can be inferred from her length of time here), for example, no evidence of any employment, education or any involvement in the wider community beyond attending church. Further, there was no evidence at all from the Appellant as to any obstacles she may face returning to Nigeria, let alone very significant obstacles to reintegration and no evidence at all from her or her husband as to why any family life between them could not be continued in Nigeria either. There was therefore no evidence before the First-tier Tribunal of any substance to weigh in the Appellant's favour in the balancing exercise beyond the matters already considered in the decision and in section 117B of the Nationality, Immigration and Asylum Act 2002. On these facts, this

was an appeal which was bound to fail under Article 8 of the European Convention on Human Rights. There is therefore no error of law on the second ground of appeal for these reasons.

37. The matters in the third ground of appeal amount to no more than disagreements with findings made by the First-tier Tribunal which were entirely open to it to make on the evidence before it. As acknowledged by Mr Mupara, none of these matters alone are sufficient to establish a material error of law and even taken cumulatively there is no error of law. First, it was entirely reasonable and appropriate to attach little weight to the evidence of the Appellant's children as to the date the Appellant left Nigeria given that they could have no personal knowledge or recollection of the date due to their age in 1995 (one was a matter of months old and the other under the age of 2) and had no other reference point or evidence of contact with her in the key period in dispute between 1995 and 2004. The fact that they are now adults is irrelevant.

38. Secondly, in paragraph 25 of the decision, reference is made to the Appellant's husband securing a mortgage in an alias, found not to encourage the Judge to find that he is an anyway a reliable witness. There is no error in this comment, the use of an alias to secure a mortgage can rationally be considered when assessing reliability of a person's evidence and in this case, there were no positive credibility findings in relation to him from his own appeal that could or should have been balanced against this. The Appellant's husband's appeal was allowed by the First-tier Tribunal Judge Loke essentially on the basis that the Respondent had accepted that he arrived in the United Kingdom in 1995 and not left since, supported by at least some documentary evidence of his presence in the United Kingdom dating back to at least 1998. The finding that the Appellant did not fall foul of the suitability requirements in the Immigration Rules does not amount to a positive credibility finding.

39. Thirdly and fourthly, there is no identifiable error of law the findings that it was implausible that neither the Appellant or her children were unable to produce any evidence at all of contact with them throughout their childhood; nor that it was implausible for the Appellant and her husband to live separately for nine years and only live together when he changed from staying with the church or in some form or house share to own his own property (with no transition period of renting his own accommodation between). In any event, these matters are at best peripheral to the core of the decision.

40. For these reasons there is no error of law in the decision of the First-tier Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed G Jackson Date 17th March 2021

Upper Tribunal Judge Jackson