IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004195
On appeal from: HU/60763/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 26th of January 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLAMOJIBA FLORENCE OLOWOKOYA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Edward Terrell, a Senior Home Office Presenting Officer
For the Respondent: Mr John Walsh of Counsel, instructed by Universe Solicitors Limited

Heard at Field House on 13 November 2023

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 7 September 2023 to refuse her leave to remain on the basis of private and family life with her British citizen partner. The claimant is a citizen of Nigeria.

2. **Mode of hearing.** The hearing today took place face to face.

3. For the reasons set out in this decision, we have concluded that:

   (1) There is a material error of law in the decision of the First-tier Tribunal, which is set aside; and that
   (2) Following consideration of written submissions from both parties, we dismiss the claimant's substantive appeal.

Background

4. The claimant entered the UK on 9 November 2020 with entry clearance as a student, which was extended to expire on 4 February 2022. The unchallenged evidence of the claimant in her witness statement is that her relationship with the sponsor began when they met at a party in December 2020 and moved in together almost immediately. References in Mr Walsh's skeleton argument to meeting in 2000 are erroneous.

5. The sponsor asserts, and has produced some payslips in support, that he earns £23605 a year from his work as a cleaner with Premium Support Services Limited. He was 43 at the date of hearing, of Nigerian origin, and had lived in the UK for 22 years. It was his account that he no longer had strong attachments in Nigeria.

6. The claimant was previously married, in Nigeria, but was widowed some years ago. Following a dispute with her late husband's family, they had taken her three children away from the claimant and prevented her from seeing them. Her late husband's family were not satisfied with the circumstances of his death, and the children were now estranged from her.

7. The sponsor has a daughter, born in November 2017, from a previous relationship, who lives with her mother. She is now 6 years old and will be 7 next November. The sponsor plays a part in her upbringing, which is confirmed by the evidence of both parties and by a letter from the child's school, which confirmed that he takes his daughter to school and collects her, and also attends open evenings. The sponsor's witness statement says that he does most of the school runs, and also attends GP appointments and school meetings. The sponsor's daughter spends every weekend with them both, and the claimant enjoys cooking for her, introducing her to African cuisine.

8. The claimant never commenced her intended studies in the UK. Initially, they were delayed by the pandemic generally, then she was due to enrol in January 2021. She did not do so because she caught Covid-19 herself and was very unwell. The claimant then could not find the necessary additional tuition fees to enrol before her student visa expired in February 2022. She did not embark for Nigeria when her visa expired, as she should have done.

9. On 17 February 2022, the claimant married the sponsor by proxy in Nigeria. Their parents and relatives represented them at the ceremony. The sponsor's occupation is given as 'cleaner' and the claimant's as 'unemployed'.

10. On 29 November 2022, the claimant applied for leave to remain on human rights grounds. On 7 September 2023, the Secretary of State refused her application.

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

First-tier Tribunal decision

12. The First-tier Judge did not have the assistance of a)resenting Officer for the Secretary of State at the hearing. She heard evidence from the claimant and sponsor at the hearing, which was not tested in cross-examination. The evidence was summarised at [5]:

> "5. The appellant gave evidence in accordance with her signed witness statement dated 30 August 2023. She confirmed that it would be difficult to return to Nigeria as she would be separated from her husband. Her husband, Emmanuel Olusola Adeniyi, also gave evidence in accordance with his statement, and confirmed that he could not go to Nigeria as he would be separated from his daughter. He is a British citizen."

13. In reaching her conclusions, the First-tier Judge noted that when the application was made, and indeed, when the parties married, the claimant no longer had extant leave to be in the UK. She could not succeed within the Immigration Rules HC 395 (as amended).

14. The First-tier Judge allowed the appeal under Article 8 ECHR outside the Rules, in the following terms:

> "7. The burden of proof is on the appellant, and the civil standard of the balance of probabilities applies. The appellant first arrived in the UK on 9 November 2020, with entry clearance as a student, and obtained leave to remain as a student, her final leave expiring on 4 February 2022. She made this application on 24 November 2022, and therefore could not succeed under the Immigration Rules as she did not have leave to be in the UK when she made the application. The issue therefore is under Article 8 ECHR. It was submitted on the appellant's behalf that she cannot return to Nigeria to make her application, as she would miss her spouse and her step-child, and it would not be proportionate for her to return to Nigeria, nor had the Secretary of State given full consideration to GEN.3.2 and 3.3, in respect of the unjustifiably harsh consequences for herself, her partner or a relevant child, taking into account the best interest of the child as a primary consideration. Regard must also be had to the duty of the Secretary of State regarding the welfare of children under Section 55 of the Borders, Citizenship and Immigration Act 2009.
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> 8. The appellant married her spouse, Emmanuel Olusola Adeniyi, on 12 February 2022. He has a daughter by a previous relationship, Adedoyin Adeniyi, born on 18 November 2017, and it is clear that while his daughter may live with her mother, he plays a regular part in her upbringing, as is also confirmed by the letter from the school dated 12 June 2023.

> 9. In my view this is a case where it would be disproportionate for the appellant to return to Nigeria and make an application from there, as she would then be separated from her spouse and her step-daughter."

15. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

16. Permission to appeal to the Upper Tribunal was granted as follows:

> "2. The grounds assert that the Judge erred by failing to provide reasons or any adequate reasons for findings on material matters, namely that he has failed to provide any reasons to support the finding that separation from her spouse and step daughter (who does not reside with the appellant or her spouse), in itself, would be disproportionate. Furthermore the Judge failed to have any regard to the public interest factors outlined at section 117B of the Nationality, Immigration and Asylum Act 2002.
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> 3. The grounds raise an arguable error of law."

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

Upper Tribunal hearing

18. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. We had access to all of the documents before the First-tier Tribunal.

19. Mr Terrell relied on the grounds of appeal and noted the extreme brevity of the First-tier Judge's reasoning. Mr Walsh explained that at the First-tier Tribunal, the claimant had handed in three wage slips regarding her employment in the UK (for which she does not have leave).

20. Having considered the evidence and submissions, we concluded that there was no alternative but to set aside the decision of the First-tier Judge for inadequacy of reasons. It is axiomatic that a determination must disclose clearly the reasons for a tribunal's decision : see *MK (duty to give reasons) Pakistan* [2013] UKUT 641 (IAC). None can be found within this judge's decision.

21. The decision was set aside at the hearing. We then gave directions for both parties to submit written arguments and any other evidence on which they sought to rely.

22. Once those were received, the Upper Tribunal would either decide the appeal on the evidence and submissions before us, or list it for a further oral hearing.

Remaking the decision

23. For the claimant, Mr Walsh made written submissions. He attached evidence of the sponsor's income (£23605 per annum) as a cleaner. He

set out section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) and asserted that the sponsor met the financial threshold for admission of a spouse, that he could not be expected to go to Nigeria with the claimant and seek re-entry from there, and that the established family life interests outweighed the public interest in removing the claimant. Unless there were any matters on which he could assist the Upper Tribunal, Mr Walsh was content for the appeal decision to be remade on the papers.

24. For the Secretary of State, Mr Terrell argued that removal would not be disproportionate. The family life relied upon was precarious and applying *R (Agyarko and Ikuga) v Secretary of State for the Home Department* [2017] UKSC 11 at [47] and [57], a very strong or compelling claim was required to outweigh the public interest in the maintenance of immigration controls.

25. Mr Terrell did not consider that a further oral hearing was required to remake the decision in this appeal, unless there was any matter on which the Upper Tribunal itself required further assistance.

Analysis and conclusions

26. As the factual matrix is undisputed we do not consider it necessary to recall the parties for an oral hearing: we consider that it is appropriate to remake the decision on the evidence and submissions before us.

27. Mr Walsh sought to rely on *Chikwamba,* but this case has nothing like the level of certainty which that analysis requires. The sponsor's income exceeds £18600 which remains, for the time being, the relevant income level for the admission of a spouse. However, the claimant has knowingly breached immigration rules and for a significant period: she never studied at all on the course for which entry clearance was given, and she did not return to Nigeria to make her application to join the sponsor as his fiancée or wife, instead choosing to remain here and make an application on human rights grounds while in the UK without leave. It cannot be regarded as *Chikwamba* certain that entry clearance would be granted to her.

28. We remind ourselves that, applying section 117B(1) of the Nationality, Immigration and Asylum Act 2002 (as amended), the maintenance of effective immigration controls is in the public interest. The claimant meets the requirements of subsections 117B (2) and (3) because she speaks English and through her husband, is said to be financially independent. These are, however, neutral factors and do not positively weigh in favour of a grant of leave to remain to the claimant: see *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58 at [57].

29. This claimant has neither worked nor studied since coming to the UK on 9 November 2020. She was unable to enrol for her course in January 2021, for health reasons, but then continued to stay in the UK without seeking to regularise her position until her student visa ran out on 4 February 2022, a

period of more than a year. She did not embark when her visa expired, but instead entered into a customary proxy marriage in her home country of Nigeria. We can give little weight to the family life which that marriage created: see section 117B(4)(b) of the 2002 Act.

30. The sponsor's child has both parents in the UK, is living with her mother and is taken to and from school by the sponsor father. There is no evidence before us from the child's natural mother, and no evidence to suggest that the private life relationship between the claimant and her step-daughter is parental. Indeed, we do not know what the mother's position is regarding her daughter's relationship with the claimant.

31. On the claimant's account, her relationship both with the sponsor and his young daughter was established when she was in the UK precariously and would have been private, not family life, as they had not yet taken the decision to marry: see section 117B(5). At its highest, the evidence is that there is a good relationship between the claimant and her 6-year-old step-daughter and she cooks African food for her. There is no evidence of any other private life relied upon.

32. Applying section 117B(4) and (5) of the 2002 Act, little weight can be given to the claimant's private life developed in the UK. The claimant's relationship as a step-parent with the sponsor's daughter is not a parental relationship as contemplated by section 117B(6) and that exception does not avail the claimant.

33. Nor is there before us any evidence from which we could conclude that it would not be in the child's section 55 best interests for the claimant to be returned to Nigeria and the child to remain here with her own mother without the claimant.

34. We do not consider that the evidence before us reaches the demanding threshold for 'exceptional circumstances' such that leave to remain should be given outside the Rules. We remind ourselves of the guidance given by the Supreme Court in *Agyarko and Ikuga* on exceptional circumstances: see [54]-[60] in the judgment of Lord Reed JSC, who gave the judgment of the court. At [57], Lord Reed said this:

> "57. That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The

> critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control."

35. At [60], Lord Reed noted that 'exceptional' had been defined by the Secretary of State as meaning 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate'.

36. We find no such circumstances here. The evidence is too sparse for that. It is a matter for the claimant and sponsor whether he chooses to remain in the UK near his daughter, or to travel to Nigeria to continue married life with the claimant there. The evidence before us does not come close to finding that the claimant's removal would have unjustifiably harsh consequences for her step-daughter or her sponsor husband.

37. Accordingly, we remake the decision in this appeal by dismissing the claimant's appeal.

Notice of Decision

38. For the foregoing reasons, our decision is as follows:

    The making of the previous decision involved the making of an error on a point of law.

    We set aside the previous decision. We remake the decision by dismissing the claimant's appeal.

Judith Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 25 January 2024