



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/00281/2014

THE IMMIGRATION ACTS

Heard at Field House

On 1 May 2014

Determination

Promulgated

On 12 May 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ATB

(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr G Jack a Senior Home Office Presenting Officer
For the Respondent: Mr M Ume-Ezeoke of counsel instructed by the
Legal Resource Partnership

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department. I will refer to her as the Secretary of State. The respondent is a citizen of Nigeria who was born on 7 April 1977. I will refer to him as the claimant. The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge N J Bennett ("the FTTJ") who allowed, on Article 8 human rights grounds, the

claimant's appeal against the Secretary of State's decision of 19 December 2013 to give directions for his removal from the UK following the refusal of asylum.

2. The claimant arrived in the UK on 11 January 2002 with entry clearance as a student. His leave was extended twice and expired on 30 September 2004. He made a further application for leave to remain which was refused on 13 November 2007. He was arrested in late July 2008 after he was stopped by the police. He claimed asylum on 10 July 2008 and had a screening interview on 24 February 2011. His substantive interview took place on 17 June 2011. There is a detailed refusal letter dated 19 December 2013.
3. The claimant claimed to fear persecution in Nigeria because he was a Christian. He said that his father was a Muslim but his mother was a Christian and he had become a Christian when he was about seven years old. However, at the hearing before the FTTJ he abandoned his claim for asylum.
4. The claimant said that he was the father of a child from a previous relationship who was born on 26 May 2009. He was no longer in a relationship with the child's mother and had not seen the child since January 2011. The relationship came to an end in late 2010. On 31 July 2013 the claimant married another woman who had recently become a British citizen. She has a daughter by a previous relationship who was born on 30 July 2007. The daughter is a British citizen.
5. The claimant appealed and the FTTJ heard his appeal on 13 February 2014. Both parties were represented and the FTTJ heard evidence from the claimant and his wife. Submissions were made by both representatives. The FTTJ found that the claimant's evidence could not be accepted unreservedly. He "has a tendency to say whatever he thinks will best suit his case, even if it is at the expense of the truth". His wife was found to be a credible witness. The FTTJ accepted that they were in a genuine and subsisting relationship and intended to live together permanently as spouses. She was pregnant and expecting his child.
6. The FTTJ gave detailed consideration to the question of whether the claimant could succeed on Article 8 human rights grounds under the Immigration Rules, reaching the conclusion that there were no insurmountable obstacles to family life with the claimant's wife continuing outside the UK whilst the claimant applied for entry clearance as a spouse from outside the country. The claimant could not succeed on Article 8 human rights grounds under the Immigration Rules. The FTTJ went on to consider the Article 8 human rights grounds outside the Immigration Rules. He found that there had been substantial delay in determining the claimant's application for asylum. This had been made in 2008. The claimant was not interviewed until 2011 and the decision was not made until

December 2013. The Secretary of State had provided no explanation for the delay and there was no indication that the claimant had been responsible for any part of it. The delay reduced the extent to which it could be said that the claimant's removal was necessary for the enforcement of immigration control. On the other hand, Article 8 was not a means of punishing the Secretary of State for the delay.

7. After consideration of the relevant case law the FTTJ said in paragraph 76 and in relation to the proportionality of removing the claimant who would then have to make an entry clearance application for leave to enter the UK as a spouse; "In my judgement, it would be disproportionate to do so in view of the delay without giving the appellant a proper chance of making an application for leave to remain as a spouse from within the United Kingdom that will not fail under Section E-LTRP2 of Appendix FM because of his lack of immigration status. The length of the grant is entirely a matter for the Respondent. I would only wish to make it clear that nothing in my decision should be construed as meaning that I consider that he should be granted the full period of leave usually granted under Article 8: in my view a considerably shorter period would be appropriate, but this is a matter for the Respondent."
8. The appeal was allowed on Article 8 human rights grounds to this extent. The Secretary of State has been granted permission to appeal arguing that the FTTJ erred in law by incorrectly applying the consequences of delay by the Secretary of State, failing to take into account his own conclusions that the delay had not prejudiced the claimant and that he had brought an asylum claim which was without merit. Article 8 was not a general dispensing power enabling an appeal to be allowed which failed under the Immigration Rules. The FTTJ failed to take into account the lack of any compassionate circumstances not recognised by the Immigration Rules.
9. Mr Jack relied on the grounds of appeal and summarised the position in the light of the findings made by the FTTJ. I note that none of the findings of fact are disputed. The FTTJ had concluded that for the claimant to return to Nigeria in order to make an entry clearance application would not cause hardship. He had properly dismissed the appeal on Article 8 human rights grounds under the Immigration Rules. Delay by the Secretary of State had not prejudiced the claimant and in any event the asylum claim, which had no merit, had been withdrawn at the last minute. The claimant had not made an application to remain as a spouse whilst in this country. There was a strong public interest in removing him. The FTTJ appeared to have reached conclusions which were inexorably leading towards dismissing the appeal yet, in his final decision, he reached the opposite conclusion, allowed the appeal, albeit to a limited extent. This was a material error of law. I was asked to set aside the decision and to remake it without the need to hear any further evidence. No further evidence had been submitted and none was required.

10. Mr Ume-Ezeoke accepted that the claimant had not made a marriage application. However he pointed out that his solicitors had kept the Secretary of State informed of the position, submitting information as to changes in personal circumstances as they arose. He submitted that the FTTJ had correctly assessed all the relevant Article 8 factors, including delay. The delay by the Secretary of State had been extreme; more than 5 years without any explanation. Having considered all the evidence and the overall position in the round it was open to him to come to the conclusion that it would be right to give the claimant the opportunity to make a marriage application from within this country. I was invited to find that there was no error of law and to uphold the determination.
11. Mr Ume-Ezeoke accepted that if I was against him and found that there was an error of law such that the decision should be set aside then I could remake the decision without hearing any further evidence.
12. In reply to my question, Mr Jack accepted that if the claimant now made an in country application for leave to remain as a spouse it would be bound to fail under E-LTRP2 because of his lack of status. Whilst the FTTJ did not look at delay in isolation in the body of his reasoning this was the only factor he set out in reaching his final conclusion in paragraph 76.
13. I reserved my determination.
14. The grounds of appeal make little criticism and in my judgement no valid criticism of most of the FTTJ's assessment of the facts, reasoning and conclusions but are directed to whether, in the light of these, his final conclusion to allow the appeal on Article 8 human rights grounds was open to him. I find no merit in the submission that in reaching his final conclusion in paragraph 76 the FTTJ's reference to; "in my judgement, it would be disproportionate to do so in view of the delay..." indicates that the only or main reason for the conclusion was the delay on the part of the Secretary of State. I consider that what is said in paragraph 76 relies on and is derived from all of the FTTJ's reasoning starting at paragraph 54.
15. The Secretary of State agrees with the FTTJ's conclusion that the claimant could not succeed on Article 8 human rights grounds under the Immigration Rules. I can find no fault with the reasoning or conclusion set out in paragraphs 68 and 69 that the element of delay was such as to make it necessary for the FTTJ to consider the Article 8 grounds outside the Immigration Rules.
16. I find that the conclusion which the FTTJ reached in paragraph 76 was, whilst unusual, open to him and appropriate to the particular circumstances of this case. Clearly, it was not intended that it would result in the more usual consequence of allowing an appeal on

Article 8 human rights grounds which would give an individual a finite period of leave to remain which would be likely to lead to indefinite leave. The course of action advocated by the FTTJ which, in my judgement, the Secretary of State would be entitled to follow would result in the grant of a limited period of leave sufficient to enable the claimant to make an in country application for leave to remain as a spouse. Such an application would not be bound to fail because he lacked immigration status. If the application failed for other reasons on its merits then the claimant would have a right of appeal which, if that failed, would lead to the Secretary of State being able to remove him from the UK. Looked at on his own the claimant's circumstances had little merit. However, I find that the FTTJ properly assessed all the circumstances including those of his wife, the child she was expecting, his stepdaughter and delay without giving disproportionate weight to the delay in reaching a conclusion which was open to him. The FTTJ did not take into account delay as a factor which should benefit the claimant by way of punishing the Secretary of State. It was during the period of delay that the claimant started and built up what the FTTJ concluded was a genuine and subsisting relationship with his wife.

17. The anonymity direction made by the FTTJ must continue in force.
18. I find that there is no error of law and I uphold the decision of the FTTJ.

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Signed
Upper Tribunal Judge Moulden

Date 2 May 2014