Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07812/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 January 2019	**On 20 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MR WASIU AKOREDE ORENIWA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Tampuri, Legal Representative
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Nigerian national born on 17 June 1979. He has been granted permission to appeal the decision of First-tier Tribunal Judge Hussain promulgated on 30 July 2018, dismissing the appellant's appeal against refusal by the respondent on 3 July 2017 to grant him further leave to remain as the spouse of a British citizen.

2. The respondent refused the appellant's application on both suitability and eligibility grounds. The respondent alleged that as a result of major inconsistencies between statements given by the appellant to the police

and the Home Office, it was found that he had either given information that was false to one or both of the organisations in respect of the suitability ground.

3. Insofar as the eligibility requirements were concerned, the respondent was not satisfied that the relationship between the appellant and his partner was genuine. In coming to this view the respondent took into account that an Immigration Judge had previously accepted that the appellant's marriage was genuine and subsisting as did the Home Office. However, when questioned by the police, the appellant claimed to be married to [LM] but then attended an interview with his claimed partner [CM] on 17 August 2016 at which various inconsistencies emerged.

4. The appellant's claim was considered under the 10-year partner route but was refused on suitability grounds for the same reasons as previously given. The respondent was of the view that this application would not succeed under paragraph EX.1 because his relationship was not genuine and subsisting.

5. The respondent also considered whether the appellant met the requirements for 10-year private life route within the terms of paragraph 276ADE. The respondent did not consider that there would be very significant obstacles to the appellant's integration into the country which they would have to go if required to leave the UK. It was not accepted that there would be such obstacles because although he may experience a degree of temporary hardship, these difficulties could be overcome bearing in mind his knowledge of the language and familiarity of the Nigerian culture and custom.

6. Finally, the respondent gave consideration to whether the appellant's circumstances were exceptional to merit the grant of leave outside the Immigration Rules. However, in view of the Secretary of State's finding that the appellant's relationship was not genuine and subsisting, she concluded that there were no exceptional circumstances.

7. At the hearing before the judge, it was agreed by the parties that the issues were suitability and genuineness and subsistence of the appellant's marriage. The judge said if he found in the appellant's favour in regard to these two issues, then the appeal fell to be allowed.

8. The judge heard oral evidence from the appellant who adopted his written statement as his evidence-in-chief. He explained that his wife, [CM] was not present at the hearing. They had had misunderstandings. Since February she has been upset over the things happening with the Home Office. He was referred to the police report in which he said that he was married to someone else and had two children. The appellant said at the hearing that he was in a relationship with [LM]. He did not tell the police that he was married to [LM]. In 2014 [LM] told him that she had two children, one or both of whom could be his. They had an argument about

that. The argument led him to the police station. He has never seen the children's birth certificates. When asked why she would say that he may be the father, he said he did not know why she would say that. He was never married to her. Her children do not bear his name. He does not know their father's name either. He was asked why at interview his wife said that he had been married before, to which the appellant said that he had told her about [LM]. He did not hide anything from her. The reason he said she had two children was because [LM] said they were his. He did not tell the interviewer that he had two children because he was not sure.

9. Since the Home Office decision, he has tried to do DNA tests. Then he said that the test had in fact been done, sometime last year, and in fact showed that they were his children. He had not provided copies of these to the Tribunal because he did them his "own way". He was not sure that they are allowed to be admitted. He said [LM] was not aware that DNA tests had been done. He took the children's samples by himself.

10. He was asked which partner he was presently living with, to which he said it was [CM]. They married in 2012. She was not present because they have an issue. When in interview she said that he was married, she may have taken it out of context. He has never been married before. He denied the suggestion that he married her to stay in this country. He said he was not aware that he has any children. In Nigeria he has a senior brother. His mother is alive, but his father is dead.

11. The judge then made the findings which are set out at paragraphs 17 to 24. The judge again repeated at paragraph 18 that the appellant's application under the Immigration Rules was refused on suitability and eligibility grounds.

12. The suitability grounds were that the appellant had provided false representations either to the police or the Home Office or both. The judge said that in his view it was not sufficient for the Secretary of State, who carries the burden of proving that the appellant falls for exclusion on suitability grounds, to assert false representations without particularising what these were. He said the Secretary of State should have made clear what representations the appellant made that were false and proven that the representations were false. The judge found that the Secretary of State had failed to do so and accordingly he found that the appellant's application did not fall for refusal on suitability grounds.

13. Insofar as the eligibility grounds were concerned, the judge noted that the Secretary of State asserted that she was not satisfied that the appellant was in a genuine and subsisting marriage. In taking that position, the Secretary of State acknowledged that the appellant has previously satisfied an Immigration Judge that his marriage was genuine and subsisting as well as the Home Office. However, the Secretary of State asserted that new evidence had emerged which involved the appellant giving a statement to the police as well as he and his claimed wife being

interviewed by the Home Office, where various inconsistencies had emerged.

14. The Secretary of State asserted that in his interview with the police the appellant claimed to be married to a woman called [LM]. The appellant denied that he had said that, claiming instead that his assertion was taken out of context. The judge said he had looked at the statement prepared by DC Sarah Hoyle where she recorded the appellant's comments which clearly showed that the appellant did say that [LM] was "his wife". With regards to the inconsistencies at interview, the judge said they had to be seen in the context of the refusal letter. He said the appellant did not provide a response to the contents of the refusal letter other than to say that there were discrepancies but claimed that they were trivial in nature and not sufficient to lead to the conclusion that his marriage was not genuine and subsisting. The judge did not accept that position.

15. The judge stated that insofar as the eligibility requirements are concerned, the burden of proof is on the appellant. He found that the appellant has not adequately explained why there should be inconsistencies between him and his claimed wife unless of course there was no substance to their marriage. Her absence from the hearing did not assist the appellant. In his witness statement he claimed that his relationship with her had now broken down which had nothing to do with the Home Office decision contrary to what he had said in oral evidence. The appellant said that he had been out of work since the application was refused and his wife has started "cheating". The judge found that the plain fact of the matter is that the appellant's marriage has now broken down if ever it existed. Since the appellant's appeal was on human rights grounds, the judge said it could only succeed if at the date of the hearing, he was able to show that he had a family life. Self-evidently he cannot. As a result, the judge found that the decision not to grant the appellant leave does not interfere with his family life.

16. The judge said that as far as the appellant's private life claim is concerned, he agreed with the Secretary of State that it has not been shown why there would be very significant obstacles to his integration into Nigeria, a country in which he grew up and the culture and language he is familiar with.

17. The judge said that the appellant's claim outside the Immigration Rules can only succeed if his circumstances can be shown to be exceptional. Insofar as his family claim outside the Immigration Rules are concerned, that cannot succeed in view of his finding that the appellant is not in a subsisting relationship. His private life cannot succeed because there is nothing exceptional in his circumstance to justify the grant of leave outside of the Immigration Rules. In making this decision, the judge had regard to the public interest considerations in Section 117B of the Nationality, Immigration and Asylum Act 2002

18. The application for permission to appeal was refused by First-tier Tribunal Judge Davidge in a decision dated 17 September 2018. Judge Davidge said as follows:

> *"2. First-tier Tribunal Judge Hussain (Ft TJ) heard an appeal on human rights grounds against a refusal of an application for leave to remain on dual grounds of 10 years lawful residents and on the basis of marriage. The respondent had refused both grounds of application on the basis of suitability arguing that the appellant had lied because he had been inconsistent about his marital status as between statements he had made to the police and the Home Office. The FTT J found that the respondent had not done enough to meet the burden of showing that the appellant was not suitable. The FTT J went on to conclude that the appellant did not have a genuinely subsisting relationship of marriage, so that neither the marriage rules nor an article 8 claim based on family life in the context of the marriage could succeed. The grounds complaint that the fact that the couple are not divorced makes the FTTJ's conclusion unsustainable is without merit as it is a subsistence of the relationship rather than the fact of a continuing marriage which is relevant.*
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> *3. The grounds point out that the judge failed to separately decide the appeal against refusal of 10 years lawful residence, having concluded that the decision was wrong in so far as it related to suitability the FTTJ needed to separately assess the rules-based position in respect of long residence rather than the issue of very significant obstacles to his integration to Nigeria. I have read the decision and the grounds. It is arguable that in failing to reach a conclusion about the 10 years lawful residence requirements the FTTJ had an insufficient factual matrix upon which to make his article 8 ECHR assessment, given that it must start from an assessment of the public interest considerations as represented by application of the immigration rules including those of long residence, to the application made by the appellant.*
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> *4. The grounds reveal an arguable error of law."*

19. The appellant appealed Judge Davidge's decision. Permission was granted by Deputy Upper Tribunal Judge Alis as it appeared that in the light of what Judge Davidge said at paragraph 3 of her decision, she intended to grant permission and erroneously refused permission.

20. At the hearing before me, I drew Mr Tampuri's attention to grounds dated 17 August 2018 lodged by the appellant against the judge's decision. The grounds said as follows:

> *"1. At paragraph 16 of the determination, IJ Hussain asserts that the Secretary of State has failed to discharge the burden in*

relation to false representations to the police or the Home Office, however, he goes on to dismiss the appeal on the basis of eligibility requirement when in fact, the main issue in relation to the eligibility requirement relates to the same allegation of false representation to the police. In doing so the IJ contradicted himself.

2. *Similarly, the fact that the appellant's relationship with his wife had broken down due to disagreement doesn't mean that their marriage was no longer subsisting. They are not divorced.*

21. I informed Mr Tampuri that there was no mention in these grounds that the judge had failed to consider an appeal against refusal of ten years' lawful residence. Mr Tampuri said that he submitted supplementary grounds which referred to it. He could not find the supplementary grounds and there was not a copy on the court file. I have not seen these grounds. It appears to me that Judge Davidge must have seen the supplementary grounds in the light of what she said at paragraph 3 of her decision.

22. Mr Tampuri however accepted that the appellant had not made an application to the Secretary of State for leave to remain under paragraph 276B on the basis that he has been lawfully resident continuously in the United Kingdom for ten years. It is apparent from the judge's decision that this issue was not raised before him. Mr. Tamuri said the issue appeared in the appellant's grounds. I have seen the grounds that were lodged against the respondent's refusal decision dated 3 July 2017. The grounds were dated 12 July 2017. The grounds did not contain any reference to an application for the appellant to be considered under the ten years' lawful continuous residence rule. I find that Judge Davidge was misled into believing that the appellant had raised this issue and that it was not considered by the judge. I note that at paragraphs 8 and 18 the judge identified the issues that the parties agreed were the issues before him. The issues were suitability, eligibility and genuineness and subsistence of the appellant's marriage. I find that these issues were properly dealt with by the judge.

23. Mr Tampuri submitted that the judge erred in law in not making findings in respect of the appellant's private life with his children. Mr Tampuri conceded that the judge had no evidence that the two children were the appellant's children. There was no DNA evidence before the judge. Although he has now submitted the result of the DNA evidence which claims that the two boys his children, that evidence was not before the judge. Furthermore, I find that this evidence alone would not have been sufficient to get the appellant through. He would have to show what relationship he has with the two boys who, it appears, are being cared for by their mother. In the absence of DNA evidence and the appellant's relationship with the two boys, it cannot be argued that the judge's failure to make a finding in respect of the appellant's private life with his children disclosed as error of law.

24. Mr Tampuri conceded after I took him through the various findings made by the judge, that the judge's decision disclosed no error of law.

25. I find that the judge's decision dismissing the appellant's appeal shall stand.

No anonymity direction is made.

Signed Date: 17 February 2019

Deputy Upper Tribunal Judge Eshun