Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12691/2019

THE IMMIGRATION ACTS

Heard at Field House Remotely	**Decision & Reasons Promulgated**
On 5 January 2021	**On 3 February 2021**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

F O A
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Adewole, Solicitor, Blackfields Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Appellant. Breach of this order can be punished as a contempt of court. I make this order because the Appellant has established that she is the victim of trafficking.

2. The appeal came before me for re-hearing. It is an appeal against the decision of the First-tier Tribunal on 12 November 2019 dismissing the Appellant's appeal against the decision of the respondent on 15 July 2019 refusing her application of 20 May 2019 for leave to remain on human rights grounds.

3. Upper Tribunal Judge Finch's reasons for finding an error of law have already been served on the parties but for the purposes of any appeal they should be regarded as annexed to this Determination and Reasons even though they have already been served. The short point is that Judge Finch was not satisfied that the First-tier Tribunal Judge had given the balancing exercise that was required to determine the human rights appeal and set aside its decision. Judge Finch gave directions including a direction that the First-tier Tribunal Judge's findings at paragraphs 15, 16, 17 and 31 of the First-tier Tribunal's decision are preserved. I set those out below.

4. The First-tier Tribunal decided:

> 15. The respondent states that no family life has been established because the Appellant does not have a genuine and subsisting relationship with her British partner. In making a determination on this issue, I had in mind the following aspects:-
>
> (i) The Appellant and her British partner had a traditional marriage ceremony on 1 February 2019.
>
> (ii) The Appellant then contacted the Marriage Registry at Peterborough and was invited to go in for a marriage interview. Thereafter, they were both invited to attend for a further interview with the Home Office at Solihull, following which, they were given permission to marry.
>
> (iii) The Appellant got married to her British partner in a civil ceremony at Peterborough Registry Office on 1 July 2019 and had a church ceremony on 5 August 2019. Photographic evidence was produced to support this.
>
> (iv) The Appellant gave evidence that they began living together on 1 July 2019, the date they got married. She gave a detailed account of how she met her partner and how she met his parents and family.
>
> (v) The Appellant's partner, Dr Akinbami Akinwale gave evidence. He likewise confirmed how he met the Appellant, explained how much he loved and cared for her and that he wanted her with him every day.
>
> (vi) Ms Kehinde Ajayi gave a statement dated 24 September 2019, in which she confirmed that the Appellant introduced her to Dr Akinwale in December 2017 and that the Appellant began living with him from 1 February 2019. She says that she did not object as she could see that they both loved each other. Based on all that I heard, whilst there was a discrepancy between the Appellant and Mrs Ajayi as to the date that the Appellant and her partner began living together, I am more than persuaded that the relationship between the Appellant and her partner is one that is genuine and subsisting. This was based on the fact that they took their marriage vows seriously and followed their own traditions initially, married according to English law and then married according to their religion. I accept that the Appellant has been living with her British partner either from February 2019 or at the very latest, July 2019. It was evident that both parties care very much for each other, are both in a relationship with each other and are making future plans together, such as having a family. The evidence of the British partner was compelling.
>
> 16. It thus follows that the immigration decision has the effect of preventing the Appellant living in the United Kingdom with her partner against their wishes. The failure to respect her wishes does not have the potential to engage Article 8 but the very fact that her partner is a British citizen, works and lives in the United Kingdom means that the decision to refuse leave may have consequences of such gravity as potentially to engage the operation of Article 8, thereby disposing of the second **Razgar** question.

> 17. In considering the proportionality of the decision, I have in mind that the Appellant and her partner were given permission by the respondent to get married, which may have led to an expectation in their minds, that they would be allowed to remain together in the United Kingdom.
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> 31. As I balance both sides of the argument, I bear in mind that the Appellant speaks English, she is now financially supported by her partner and has been in the United Kingdom for sixteen years, which is a lengthy period of time. She could also rightly argue that with permission having been given her to get married, there was an expectation by her that she would be allowed to remain."

5. I say immediately that this case was not argued before me on the basis of there being a "legitimate expectation" in the public law sense. The point being made by the First-tier Tribunal Judge and accepted by Judge Finch was that the Appellant's decision to remain in the United Kingdom after applying for permission to marry has to be considered against the possibility that being given permission to marry could have been construed as permission to remain.

6. I have before me the papers that were before the First-tier Tribunal and indeed skeleton arguments and similar submissions made in the course of proceedings that are relevant to determining whether there was an issue of law. I have not spent much time with these. More importantly because they are relevant to these proceedings, I have a skeleton argument for the Appellant dated 10 November 2020. The earliest document I was asked to consider is entitled "Appellant's Written Submissions and is signed by Mr Shahadoth Karim of Counsel dated 16th May 2020. Although primarily concerned with whether or not there was an error of law these are still of some relevance because they emphasise the importance of following the decisions in **Agyarko and Iguga, R (on the application of) v SSHD [2017] UKSC 11** and **Chikwamba v SSHD [2008] UKHL 40** and particularly **Agyarko** at paragraph 51 in where it was said:

> "If, on the other hand, an applicant – even if residing in the United Kingdom unlawfully – was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in **Chikwamba v SSHD [2008] UKHL 40**."

7. The written submissions also refer to the "very significant obstacles to reintegration" test at paragraph 276ADE(1)(vi) of HC 395 maintaining that the Appellant came to the United Kingdom as a child and spent all of her adult life in the United Kingdom and has strong and private family life ties in the United Kingdom so that she cannot return. This is particularly so because it is the Appellant's case that she was maltreated and this claim is supported by her own witness statement and that of her aunt. It is also said that the Tribunal ought to have shown more regard for the sponsor's ties and family and private life in the United Kingdom.

8. In short it was contended that there is no public interest in removal and the appeal should be allowed.

9. There is a Reply also by Mr Karim dated 9 June 2020. This is prompted by the reliance on the decision of this Tribunal in **Younas (Section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC)**. The Reply recognises the weight of **Younas** but emphasises there still has to be an individual decision in each case. Before me it was certainly not the contention of the Secretary of State, nor could it have been, that the decision of the

Tribunal in **Younas** somehow overrides the decision of the House of Lords and Supreme Court.

10. It was contended that there were no good reasons to justify temporary separation. The Appellant has not been shown to have committed a criminal offence and there is no suggestion of deception or fraud on her part. It was contended that **Agyarko** recognised that there might be no public interest in removal where a person has been in the UK unlawfully and according to the Reply:

> "Therefore, the fact that the person has been here unlawfully, cannot be a factor to be weighed heavily against the appellant. This would make [51] of **Agyarko** devoid of any real meaning."

11. The appellant's skeleton argument for the hearing before me, as indicated above, was dated 10 November 2020. It is not signed but runs to 33 paragraphs. Curiously it seems to be concerned whether or not an error of law should be found when that had already been established but it does assert that the Article 8 exercise was materially flawed.

12. The Secretary of State's skeleton argument is signed by Ms Isherwood and is dated 21 December 2020. This makes certain points. One is that the Appellant never complained about trafficking to the Secretary of State directly; the claim to have been the victim of trafficking is something that emerged in the appeal to the First-tier Tribunal. Ms Isherwood's point is that the Appellant did not present as someone afraid of returning to her country of nationality lest she be re-trafficked.

13. The Secretary of State maintained that **Agyarko** was explained properly in **Younas** which pointed out how in **Chikwamba** Lord Brown had recognised that it might sometimes be appropriate for a person to return to a country and seek entry clearance from there even if it was only going to be a short stay.

14. The grounds emphasised that the Appellant could not succeed under EX.1 of Appendix FM. The Appellant had not status in the United Kingdom and she could not satisfy the Rules.

15. It is of particular concern to the Secretary of State that the Appellant did nothing to regularise her position after her application was refused until 2011 until the application leading to the appeal before me.

16. According to the Respondent, there were no insurmountable obstacles in the way of the Appellant returning to Nigeria.

17. Before I highlight the evidence, I remind myself that any findings necessary for a "private and family life "claim have to be proved by the Appellant on the balance of probabilities and I confirm that I have not made any findings without first considering the evidence as a whole even if in place I indicate findings before finishing my review of the evidence.

18. The Appellant gave evidence. She adopted her witness statement dated 24 September 2019 and a supplementary statement dated 18 May 2020.

19. In her witness statement 24 September 2019 the Appellant explained how she had entered the United Kingdom in 2003 with her mother's approval because of her uncle's promise to advance her education. The Appellant soon formed the view that the real reason he had brought her to the United Kingdom was to babysit and do family chores. In January 2005,

that is two years after she arrived, she enrolled in a secondary school and studied for her GCSE's and then went to a college where she studied for a BTEC in IT. Contrary to her uncle's expectations she did well in her BTEC examinations but her uncle made it clear that he would not shoulder any further responsibility and he did not need a babysitter because his children are now mature.

20. The Appellant applied for a place at the University of Northampton and accepted the place even though she was unsure how she would fund it.

21. I note that she was nearly 22 years old when she started university. She had help from friends and church members and raised fees for her first year, but life was very expensive and she had to drop out. She then engaged in charitable activities and did much work for the church and came to meet the man she later married. She talked about her relationship with her husband but that is not relevant because of findings that have been made and preserved.

22. The Appellant explained how there was a proxy marriage in Nigeria in accordance with custom and that her father organised the registration of the proxy marriage.

23. The Appellant said very little, if anything, in her statement about any difficulties she might have in returning to Nigeria and of establishing herself there although she did make the point that she had been in the United Kingdom for over sixteen years when she made the statement, which is more than half her life, and that her husband's family were all settled in the United Kingdom and she had strong relationships with people in the United Kingdom who had become her friends.

24. The supplementary statement expressed her "joy" at an opportunity to appeal and then said at paragraph 4:

> "However, since the COVID-19 pandemic and everywhere is locked down, it has become increasingly difficult to even contemplate returning to Nigeria to go and apply for entry clearance."

25. In answer to supplementary questions she expressed the pleasure she had in her husband's family in the United Kingdom and said how she wanted to start a family with her husband in the United Kingdom.

26. She was asked specifically if she had any fears about returning to Nigeria and replied that she knew no-one there and had no idea for how long she would have to stay there without her husband and she had become used to spending her time with her husband. This has to be considered with evidence about their present arrangements which involve her husband spending more than a small amount of time away from the United Kingdom.

27. In cross-examination she confirmed without hesitation that she had a mother in Nigeria but said that she was not close. She accepted that she had sent her aunt to talk to her mother and I consider the aunt's statement below.

28. She was asked if she had some relationship with her mother and accepted readily that she did and that her parents and stepfather had been involved in her wedding planning but that was for cultural reasons. She said that she last spoke to her mother by telephone over the Christmas holiday period 2020. It was a brief conversation but she had contacted her mother to ask after her health. They had previously spoken on the occasion of her

wedding anniversary. She had never been back to Nigeria since she left as a child. She had no contact with her grandmother. Her only contact was with her mother.

29. She said that her husband and his parents mainly arranged the marriage and her father stood in for her. She explained this was part of the proxy marriage arrangements. She said that she had no dealings at all with her natural father. She dealt with her stepfather.

30. She was asked why she did not leave the United Kingdom after her application was refused in 2012. She said she had been there as a child and abandoned and did not know what to do. She admits that she broke the law.

31. Ms Isherwood produced the refusal letter dated 5 March 2012. This was addressed, apparently, to the appellant's solicitors because it referred to them stating that their client had developed a strong bond with her uncle, aunt and cousins in the United Kingdom. It seemed to be the case then that there was family life with her relatives in the United Kingdom. She offered no explanation for this but had indicated that she had little to do with that application.

32. The appellant's husband gave evidence.

33. He adopted a witness statement that he had signed on 24 September 2019. He is a British citizen although also had retained his Nigerian nationality. He had lived most of his life in the United Kingdom. He had obtained a PhD in December 2013 from the University of Glamorgan also known as the University of South Wales. He had a job as a data analysis with BGL Group in Peterborough but then worked for a firm in London and presently worked with Credit Suisse. He had started that employment in October 2017 and that required him to work in Switzerland for much of his time. He also had a consultancy business that gave him a self-employed income. He explained how he met and eventually fell in love with his wife.

34. He said how he had decided to try and regularise the Appellant's immigration status at about the same time that he had started to work in Zurich. He returned to the United Kingdom every weekend to see his wife. He wanted to get their domestic circumstances on an even keel and the traditional arrangements of the marriage all sorted before regularising the position.

35. He said that he had spent his teenage years in Nigeria but had not lived there for over eighteen years and claimed to have only spent eight days in Nigeria. He had no ties with Nigeria at all as his family were all in the United Kingdom. He had clients in the United Kingdom who depended on him being there to support his private business.

36. He did not say how much he earned but confirmed it was more than the £18,600 required by the immigration rules.

37. He thought it would be difficult to integrate into Nigeria. They had no experience of living there and were much better in the United Kingdom with their extended families.

38. He was cross-examined.

39. In answer to further questions he said that since the COVID crisis he no longer returned to the United Kingdom every weekend. More typically it was every two weeks. He was asked if he had ever been to Nigeria and he replied, "Almost twenty years ago and only back twice the last time ten years ago I went for a weekend and a wedding."

40. He was cross-examined.

41. He was asked why he had a Nigerian passport if he never used it. He gave no satisfactory answer.

42. He was then asked about his wedding in Nigeria. He said that his relatives went to Nigeria for the wedding and stayed in a hotel.

43. He said he had minimal contact with his wife's family but did wish his mother-in-law "Happy Christmas" when his wife was talking to her by telephone.

44. He confirmed that he had attended his wedding ceremony in Nigeria. It was pointed out that this was inconsistent with his claim not to have been to Nigeria for ten years. He offered no explanation for getting that wrong.

45. That was the end of the evidence.

46. I looked at the "aunt's" witness statement. She is Mrs Kehinde Ajayi and the statement is dated 24 September 2019. Mrs Ajayi did not attend before me because of family commitments.

47. Her evidence has rather lost its significance because it has been taken over by events. In extreme outline it said that she took the Appellant into her family partly to help her and partly because she proved a very valuable and useful babysitter. She was pleased when the Appellant and her husband found each other. She explained how in 2015 she travelled "home" and met the Appellant's mother and clearly found that a pleasant meeting although she was sorry for the way the Appellant had been treated by her uncle. She said that since the engagement the Appellant had been staying at her now husband's house.

48. She offered the opinion that it would be harsh for the appellant to return to Nigeria. The Appellant and her husband both left Nigeria when they were young and have lost touch with the place and have built a life for themselves in the United Kingdom.

49. The documentary evidence includes documents relating to their accommodation and their marriage and the appellant's husband's employment. It also shows that he has declared income as a self-employed consultant. These things are not in dispute and I see no need to consider the evidence in more detail.

50. There are startling absences in the evidence which do not assist the Appellant. Perhaps of primary importance is the absence of any evidence about the waiting time that the Appellant could expect to face in the event of her going to Nigeria and making an application to return. There is nothing here to suggest that it would be particularly difficult for her to make an application (I have in mind that in some parts of the world people with very modest resources have to travel very long distances indeed to attend an interview and that can be very burdensome) or that the application system is delayed by reason of being overwhelmed.

51. There is no evidence before me that the appellant would not be safe in Nigeria. Certainly, asylum claims from citizens of Nigeria occasionally succeed and Nigeria is not listed under section 94(4) of the Nationality, Immigration and Asylum Act 2002 as a place where claims from women are identified as "clearly unfounded" but generally I have no reason to fear that an educated woman such as the Appellant who has access to financial support

and, probably, some social support cannot go about her ordinary lawful business there with due expedition and confidence.

52. The Appellant's relationship with her mother is clearly subsisting. I accept that the Appellant probably is a victim of "trafficking" in the sense that she entered the United Kingdom expecting to advance her education and found herself doing a lot of domestic chores. However, this is not the case of a person who is attracted to the United Kingdom by false promises and find herself working for example in the sex industry. She has been deeply disappointed but that is all. This is not the kind of case where there are reasons to fear that a person who has been tricked into being trafficked would be a victim again in the event of return. Neither is it the kind of case where there are people in the country of nationality that might be harbouring a grudge or anxious to settle a score. These concerns just do not exist here. The Appellant has earned a BTEC and has read one year at university. She has a financially secure husband and a loving marriage.

53. Further, although the Appellant's relationship with her mother may well be strained but it is pleasant rather than antagonistic. I base this finding on the fact there are telephone conversations between them and the readiness with which she volunteered the information that there was a call at Christmas. It seems to me likely that her mother would be more than willing to meet her and give her some support if not to accommodate her. There is nothing to support a finding that the mother would be making life difficult for her in the event of return to Nigeria but even if her mother ignored her, there is no evidence to support a finding that she would endeavour to harm the Appellant.

54. I do not suggest that the appellant's husband is fabulously wealthy, but he is in regular work. There is nothing to suggest that he would be unwilling or unable to pay for the appellant to be accommodated decently and respectively and safely whilst an application was made.

55. There is nothing to direct me away from my finding that the appellant would be able to return safely to Nigeria and make an application for entry clearance to enter the country with permission as a wife and for that application to succeed and be granted in the usual way.

56. This is not a case where there are children of the family who need their mother. It is not the case where there are particularly compelling reasons for a husband and wife to be together. In fact, this is a case where the husband and wife have organised their affairs that they spend quite a bit of their time apart. I am not for a moment suggesting that this indicates that there is a lack of sharing in their married lives. I accept completely the evidence that they prefer to spend time together and look forward to the times that they can spend together but this is just not the kind of case that one sees occasionally where one party to a marriage really cannot function without the presence of the other.

57. I do not accept that the appellant's husband was entirely truthful in his evidence to me. He was clearly shown to have been at least casual in his evidence about returning to Nigeria because he did tell me he had not been there for ten years and he did tell me he had been back for his wedding and those answers are completely incompatible. He clearly was not concerned to be absolutely accurate and full in his answers to questions. However, he certainly gave no evidence that his wife would be in any kind of danger in

Nigeria because she was married to him but his evidence, like the Appellant's in this respect, I find more significant for its omissions than its content.

58. Really the reason the appellant has not gone back is she does not want to return and her husband does not want her to. There is no reason why they cannot.

59. This is where I must consider the submissions on the law. Clearly the appellant and her husband have established a genuine marriage and this means that requiring her to leave the United Kingdom where her husband is resident some of the time and is a national, will interfere with their private and family lives and the interference will be with relationships that are special and have to be promoted and are very much at the "family life" end of the private and family life continuing. There is no argument about this. The interesting point is whether it should be decided that the interference is proportionate. It is now established beyond all doubt in Part 5A of the Nationality, Immigration and Asylum Act 2002 that the maintenance of effective immigration controls is in the public interest. This must mean that is in the public interest to enforce the Rules and to expect people to abide by them. It is the nature of a Rule to create a boundary or line and there will always be occasions when people close to the line but not on the side of it they wish to be, will be able to give an aura of being hard done by and it is also right that on occasions interference is disproportionate and this has been well recognised by this Tribunal and more importantly by the Supreme Court and the Court of Appeal. However, the difficulty for the appellant in this case is that she remained in the United Kingdom when she ought not to have done. She could have returned to Nigeria or at the very least regularised her position if she had a proper reason to remain. She did not do that and whilst remaining in the United Kingdom without permission became attracted to a man with whom she has formed a genuine marriage. The requirements of the Immigration Rules which are approved by parliament and are the result of policy worked out over many years of experience is that people who wish to marry should have permission to be in the United Kingdom and if they do not should go to their country of nationality or at least outside the United Kingdom and make an application under the Rules. It is established that sometimes (and indeed on other occasions too) where the Rules are going to be satisfied it is disproportionate to require someone to leave in the expectation that they would soon return. However, it is not the role of the Tribunal or the Human Rights Act to circumvent the will of parliament or to say that people who comply with the Rules should not have to leave the United Kingdom in order to make their application. It is not suggested that the Immigration Rules are in themselves fundamentally compatible with human rights and if that were suggested it would not be determined here. So the appeal can only be allowed if there is something out of the ordinary that shows the ordinary consequences of the operation of the Rules would produce a disproportionate result. The decision in **Younas** reminds me to pay particular regard to Part 5A. There are no aggravating factors here. Clearly it is not a deportation case. The appellant speaks good English and is able to integrate into British society. A relationship was established when she was in the United Kingdom unlawfully and that means little weight can be attached to it there is no child involved. I reject completely any contention that the appellant satisfies the requirements of the Immigration Rules under Article 8 terms. She has not shown very significant obstacles to reintegration into Nigeria. As indicated she has no enemies there. Her

mother is there. She is not short of money. There really is no argument at all about it. She just does not want to go.

60. Clearly any refusal to permit the Appellant to remain in the United Kingdom would frustrate her wish to live with her husband in his country of nationality. It would interfere with her, and his, private and family lives. It would also be lawful in the sense that there is a basis in law for the decision and it would be for the proper purpose of enforcing immigration control. The more challenging question is if the decision is "proportionate" with regard to the rules, to Part 5A of the Nationality, Immigration and Asylum Act 2002 and generally.

61. The evidence clearly show that the Appellant is a thoroughly competent user of the English language, that she would be maintained by her husband and, although not necessary for the purpose of considering the rules, that she would probably be able to earn at least a living wage when she was permitted to work. Her long stay in the United Kingdom, her time at university and her connections with a Church are amongst the more important reasons for finding that she is "integrated".

62. I have no hesitation in finding that the Appellant does not satisfy the relevant rules. For the reasons given to explain my conclusion that the Appellant could establish herself in Nigeria in order to make an application for return to the United Kingdom as a wife I am quite unpersuaded that the Appellant would face "insurmountable obstacles" in the way of continuing their family life outside the United Kingdom. They have the means and wherewithal, but not the inclination to live in Nigeria.

63. Neither can the appeal be allowed with reference to Part 5A. I am obliged by section 117B(5) to give "little weight" to a relationship with a qualifying partner that is a established a time when the person is in the United Kingdom unlawfully. The Appellant knew in March 2012 that her application for leave had failed. She was then 21 years old. She was responsible for her affairs and was not overshadowed by her trafficker. I give some weight to the thin veneer of approval given by the decision to permit her marriage and that fact that, by then at least, she was not hiding from the authorities but she should not have been in the United Kingdom much after March 2012.

64. Even so, I remind myself that Article 8 means that it might not be the case that requiring the Appellant to leave is proportionate. That done, I find that there is nothing here that elevates this into a case where there are particular concerns. Especially there are no children and no reason to think that the appellant would be involved in protracted delays or at any kind of risk in Nigeria. The fact that there is a well-known pandemic which I describe as the COVID crisis has not been developed in a way that gives any evidential basis for saying that it creates any reasons that would make removal disproportionate. I just do not know what travel restrictions there are about going to Nigeria or to conditions that would create restrictions on arrival or the chances of anyone being infected there. I have just not been told and I am not prepared to guess.

65. The starting position must be that the Rules apply and a person who does not comply with the Rules cannot expect to be allowed to remain on human rights grounds just because an out of country application for leave can be expected to succeed. None of the concerns that have been found in reported decisions that have been brought to my attention make separation unacceptable exist here.

66. I appreciate that from the perspective of the Appellant and her husband that this decision is a nuisance and a disappointment. I emphasise that the primary cause of the problem is her decision to remain in the United Kingdom without permission. People are not entitled to their own private Immigration Rules and there is a route open to the Appellant to succeed in what she wants to achieve. It is to go to her country of nationality and make an application and then she can expect to succeed. That will involve a period of separation (there is no evidence of an excessive period of separation) in a country where she could live safely while the application is made. I am satisfied that the decision is entirely proportionate.

Notice of Decision

I dismiss this appeal.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 21 January 2021