IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003840
First-tier Tribunal No:
HU/00118/2022

THE IMMIGRATION ACTS

Heard at Field House
On the 11 January 2023

Decision & Reasons Promulgated
On the 30 January 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLUWAFUNKE ABIKE AJAYI

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr E Oremuyiwa of Wilsons Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Ms Ajayi's appeal against the respondent's decision to refuse her human rights claim.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Ms Ajayi as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Nigeria, born on 30 June 1982. She was granted leave to enter the UK as a Tier 4 (General) Dependant Partner from 23 January 2020 to 20 May 2021 and arrived in the UK on 16 February 2020. On 8 May 2021 she applied for leave to remain as the unmarried partner of Adekanmi Morufu Awotidebe, but her application was refused on 20 December 2021.

4. The respondent refused the appellant's application on the basis that she did not meet the eligibility relationship requirement. The respondent did not accept that the appellant met the definition of "partner" in paragraph GEN.1.2 of Appendix FM of the immigration rules. She had stated that she started her relationship with her partner in August 2020 and that they started living together in March 2021. At the time of her application she had therefore been in a relationship for nine months and had been living with her partner for two months. The respondent did not accept that the appellant's relationship with the sponsor was genuine and subsisting. It was considered that paragraph EX.1 of Appendix FM did not apply. The respondent noted that the sponsor had children in the UK with his previous partner but considered that the appellant did not meet the requirements of paragraph EX.1.(a) of Appendix FM in relation to the children as she did not have a parental relationship with them since they resided with their biological parent in the UK and could continue to reside in the UK if the appellant had to leave. The respondent considered further that the appellant did not meet the requirements of paragraph 276ADE(1) of the immigration rules on the basis of her private life in the UK and that there were no very significant obstacles to her integration in Nigeria for the purposes of paragraph 276ADE(1)(vi). It was considered that there were no exceptional circumstances which would result in unjustifiably harsh consequences for the appellant in breach of Article 8 of the ECHR.

5. The appellant's appeal against that decision was heard by First-tier Tribunal Judge Suffield-Thompson on 12 May 2022. There was no attendance by or on behalf of the appellant at the hearing, which was a remote hearing, and the judge proceeded with the appeal in her absence. The judge accepted, on the basis of the evidence before her, that the appellant was in a relationship with the sponsor, a British citizen, that her sponsor had two children from a previous relationship and that the appellant was a care worker for the NHS. The judge noted that the appellant could still not meet the requirements of the immigration rules on family life grounds as she had been living with the sponsor for only one year and two months by the date of the hearing, but she accepted that they were in a genuine and subsisting relationship and intended to carry on living together in the UK. The judge found that the appellant could not meet the requirements of paragraph 276ADE(1) of the immigration rules. As for Article 8 outside the rules, the judge accepted that the appellant had established a family and private life in the UK and that her removal would interfere with that family and private life. She noted the evidence that the sponsor's two boys, aged 7 and 14 years, had regular contact with their father and would stay overnight with him and the appellant and she accepted that the

appellant had formed a close relationship with the boys. The judge considered that it would not be in the boys' best interests for the appellant to be removed from their lives. She considered that the sponsor would not be in a position to go to Nigeria with the appellant as he had his work and children in the UK. The judge considered that the only issue against the appellant was that of immigration control but found that that was outweighed by other factors and that it would be unreasonable to expect her to leave the UK and apply to re-enter. She considered that that would result in more than mere hardship and she accordingly allowed the appeal on Article 8 human rights grounds.

6. The respondent sought permission to appeal to the Upper Tribunal on the grounds that the judge had made a material misdirection of law on a material matter by finding that the appellant's removal would have a detrimental impact on the lives of the children in the absence of evidence of their relationship and given that they lived with their mother and only stayed with the appellant and sponsor at weekends. Further, the respondent asserted that the judge had failed to give adequate reasons for concluding that a short stay in Nigeria for the appellant to apply for entry clearance would negatively impact upon the children.

7. Permission was granted in the First-tier Tribunal on 12 August 2022.

Hearing and submissions

8. The matter then came before me, by which time the Tribunal had been informed, two days previously, that the appellant had instructed Wilsons Solicitors. A skeleton argument was produced for the hearing from Mr Oremuyiwa of Wilsons Solicitors, who also informed me that the appellant had made a Rule 15(2A) application to the Tribunal in September 2022 seeking permission to adduce evidence of her changed circumstances arising after the First-tier Tribunal Judge's decision, namely the birth of her British child. There was, however, no record of the Upper Tribunal having received that application.

9. Mr Oremuyiwa informed me that the appellant had not attended her hearing before the First-tier Tribunal because she was heavily pregnant at the time and was in hospital, but he had no explanation as to why she had failed to inform the First-tier Tribunal of that at the time. It was Mr Oremuyiwa's submission that Judge Suffield-Thompson's decision should be upheld as she had properly applied the provisions of Article 8 and had undertaken a relevant proportionality assessment. It was also argued in his skeleton argument that the judge's decision should be upheld as a result of the birth of a British child or, alternatively, if the decision was set aside, that it should be re-made by allowing the appellant's appeal.

10. Mr Tufan submitted that it was not clear why the judge had concluded as she did when relying upon the relationship between the appellant and her partner's two children, given the absence of evidence to confirm the relationship. Further, the judge had failed to give proper reasons as to why the appellant could not return to Nigeria and apply for entry clearance to join her partner in the UK, and he relied upon the principles in Younas (section 117B(6)

(b); Chikwamba; Zambrano) [2020] UKUT 129 in that regard. Mr Tufan submitted that the judge's decision had to be set aside and the decision re-made, with consent being given for the birth of the appellant's child to be considered as a new matter.

11. Mr Oremuyiwa, in response, raised the point that the appellant had not been living illegally in the UK but had leave to remain here.

Discussion

12. As I advised the parties at the hearing, it was my view that Judge Suffield-Thompson had made material errors of law in her decision such that it had to be set aside. The fact that the appellant had given birth to a British child was irrelevant to the error of law issue as that was a matter arising after the hearing and did not form part of her circumstances considered by the judge. The circumstances before the judge were that the appellant claimed to be in a genuine and subsisting relationship with her British partner and his two children from his previous marriage but could not meet the requirements of the immigration rules under Appendix FM as a partner because she had been living with her partner for less than two years.

13. Judge Suffield-Thompson allowed the appeal outside the Immigration Rules on the basis that it would be disproportionate for the appellant to be removed from the UK. That conclusion was based on the finding that the appellant was in a genuine and subsisting relationship with her partner and his two children from his previous marriage, that it would not be in the best interests of the children if she was removed, and that there would be more than mere hardship if she was removed. However, the appellant did not attend the hearing nor provide any reason for her absence, and the evidence she had submitted in support of her appeal was very limited. There was no evidence of her role in her partner's children's lives or on the extent and nature of her relationship with the children, and indeed the evidence was that the children lived with their mother and stayed with the appellant and their father occasionally. Neither was there any evidence of her relationship with her partner other than the limited evidence produced with her application which included little more than statements from her partner and two family friends, none of which could be tested through cross-examination. In such circumstances there was clearly an absence of reasoning, or sufficient reasoning, by the judge for reaching the conclusions that she did in regard to the appellant's relationship with her partner and his children and it is difficult to understand why she reached those conclusions. In addition, as Mr Tufan properly submitted, the judge failed to provide any proper reasons for her findings consistent with the decision in Younas, when concluding that it would be unreasonable to expect the appellant to leave the UK and apply for entry clearance to return to join her partner here.

14. For all of these reasons I find that Judge Suffield-Thompson's decision contains material errors of law and that the decision has to be set aside.

15. In light of the absence of any properly reasoned findings by the judge, and given the change in the appellant's circumstances, the appropriate course is

for the case to be remitted to the First-tier Tribunal to be heard *de novo* before a different judge with no findings preserved. Whether or not the birth of the appellant's child constitutes a 'new matter', Mr Tufan confirmed that consent was given to reliance upon that matter and the evidence relating to it in any event.

DECISION

16. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Secretary of State's appeal is allowed and the decision is set aside.

17. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge Suffield-Thompson.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 11 January 2023