Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07995/2015

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke on Trent	**Decision & Reasons Promulgated**
On 24th May 2016	**On 26th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MISS CHUKWUYEM USIFO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No legal representation
For the Respondent: Mr Andy McVeety (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Nicol, promulgated 24th July 2015, following a hearing at Manchester on 10th June 2015. In the determination, the judge dismissed the appeal of Chukwuyem Usifo, whereupon

the Appellant applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Nigeria, who was born on 23rd October 1986. She appeals against the decision of the Respondent Secretary of State, dated 9th February 2015, refusing her application for leave to remain in the UK on the basis of her marriage to Mr Owunari Preston Wekema, under Article 8 of the ECHR.

The Judge's Findings

3. The judge had regard to the essential facts, namely, that the Appellant entered the UK on 22nd August 2002 as a visitor, but then on 14th August 2004 applied for indefinite leave to remain as a child of a person present and settled in the UK. This was refused and the Appellant was issued with a removal notice, and her appeal was subsequently dismissed on 24th February 2009.

4. In December 2009 she applied for human rights under Articles 3 and 8 and this appeal was refused on 6th April 2010. She then applied for Article 8 rights and this was refused on 3rd July 2013. On 2nd August 2014, she applied for leave to remain as the spouse of Mr Wekema and this was refused on 8th September 2014. The Appellant had now remained in the UK for twelve years and has family here. Her claim is that she considers the UK as her home and does consider that she has sufficient links in Nigeria.

5. She is now married. She has a private life here. She has good character and is not a burden on the State. She also states that it would be difficult for her husband to relocate to Nigeria as he was born in the UK and has family here (see paragraphs 9 to 10). The judge also went on to say that she herself had a sister and a half brother in the UK (see paragraph 11).

6. The judge went on to give consideration to paragraph 276ADE of Appendix FM and held that the Appellant could not succeed under this preparation and the judge was not satisfied that there were significant obstacles that would prevent the Appellant's integration into Nigeria, despite the fact that her husband had only been back for a short holiday to Nigeria (see paragraph 18).

7. The judge recognised that the Appellant and her husband do have family and private life in this country (see paragraph 20). However, they could continue with their family and private life in Nigeria (paragraph 20).

8. Finally, the judge had regard to the existence of *"exceptional circumstances"* and concluded that, *"I do not find there are exceptional circumstances warranting the consideration of this matter outside the Rules"* (paragraph 21). That being so, the matter was disposed of purely on the basis of the Immigration Rules and the jurisprudence with respect to family and private life was considered on the basis of **Razgar** (see

paragraph 22) and the judge concluded that the decision by the Respondent Secretary of State was a proportionate one.

9. The appeal was dismissed.

Grounds of Application

10. The grounds of application state that the judge failed to have regard to the *"best interests of the child"* and the *"compassionate circumstances"* as well as to the fact that the judge did not consider Section 117B of Part 5 to the Immigration Act 2014.

11. On 9th January 2016, permission to appeal was granted on the basis that the Appellant did not have the benefit of legal representation before Judge Nicol. The judge did not give adequate reasons for the findings on material matters. It was necessary to have specific regard to Section 117A to D of the NIAA 2002 and in particular to the case of **Dube [2015] UKUT 00090**. Finally, although the judge was not required to consider the *"best interests"* of a child as yet unborn, nevertheless, that the Appellant's seven month pregnancy was something that should have been taken into consideration with respect to the reasonableness of her return to her country of origin.

Submissions

12. At the hearing before me on 24th May 2016, the Appellant was unrepresented once again, and simply stated that she met the requirements of Appendix FM, and the judge should have considered the fact that she was pregnant, especially as she was not a burden upon the State, was self-sufficient in being able to show the £18,600 financial threshold requirement, as well as being able to meet the English language test requirements.

13. For his part, Mr McVeety submitted that where the Appellant's appeal failed ultimately was on the question of whether freestanding Article 8 jurisprudence applied. The judge took the view that, *"I do not find there are exceptional circumstances warranting the consideration of the matter outside of the Rules"* (paragraph 21). As a consequence, only paragraph 276ADE was considered of 27. The way in which the judge had applied the Rules was not something that could be criticised. At the time the Appellant could not meet the requirements of the Immigration Rules. Now she can. If that is the case then she has 28 days from the date of this decision to make a fresh application, and this is what she should do.

14. In reply, the Appellant stated that she should not be required to make a fresh application. She said that she could not have returned back to Nigeria even then, in a highly pregnant state of seven months, as she was receiving medical care at the time. Moreover, the judge has not had regard to Part 5A of the Immigration Act 2014, and in particular the fact that Section 117 does not militate against her but actually assist her. There was no public interest requiring her to go back to Nigeria.

No Error of Law

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCE 2007) such that I should set aside the decision. My reasons are as follows. This is a case where the judge has held that, "*I do not find that there are exceptional circumstances warranting the consideration of this matter outside the Rules*" (paragraph 21). This begs the question as to why not. The Appellant could not comply with the Immigration Rules. Yet, she had been in this country for twelve years, was married to Mr Kumara, who had been born and brought up in this country, and who could not relocate to Nigeria, on the basis of the evidence that he gave, and had only been there for a short holiday, and she was heavily pregnant. She also had her entire family in this country, with the exception of her father who was in Mauritania (see paragraph 11). She had a private and family life in this country. The failure in these circumstances to consider the second stage and take into consideration freestanding Article 8 jurisprudence was an error of law. Moreover, it is not clear why Section 117 was not given a full and proper consideration, even in the context of the Immigration Rules which were considered, because this would have affected the way in which the "***Razgar*** *principles*" were then evaluated by the judge (at paragraph 22). For all these reasons, there is an error of law.

Remaking the Decision

16. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal to the extent that it is remitted back to a Judge of the First-tier Tribunal other than Judge Nicol under Practice Statement 7.2(b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal. I direct that the matter be heard by a judge other than Judge Nicol.

Notice of Decision

17. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is submitted back to a judge of the First-tier Tribunal other than Judge Nicol to be heard at the first available opportunity.

18. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 23rd July 2016