



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

Appeal Number: IA/26922/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28 April 2015**

**Decision & Reasons Promulgated  
On 14 May 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR JONATHAN ENI  
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

**Representation:**

For the Appellant: Ms A Fajiwala, Specialist Appeals Team  
For the Respondent/Claimant: Mr D Olawanle, Dell and Co Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge R A Cox sitting at Sheldon Court, Birmingham on 29 December 2014) allowing the claimant's appeal against the decision to refuse to grant him leave to remain, and to remove him as an illegal entrant to Nigeria under Section 10 of the Immigration and Asylum Act 1999 on the ground that there were insurmountable obstacles to him carrying on family life with his wife in Nigeria. The First-tier

Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

2. The claimant is a national of Nigeria, whose date of birth is 6 April 1965. He claims to have entered the UK on 20 June 2001. The Home Office has no record of him having entered legally, and he is considered to have entered by use of documentary deception. Judge Cox found this to be established on the balance of probabilities, and there is no cross appeal against this finding.
3. The claimant remained in the United Kingdom illegally and undetected until he sought to regularise his status in 2012. In August 2012 he made an application for leave to remain on the basis of his relationship with his partner, Patricia Ufuah, a dual Nigerian and British national whose date of birth is 15 October 1967. They subsequently got married in Oxford on 29 November 2012. The marriage certificate states that Miss Ufuah's previous marriage had been dissolved.
4. Ms Ufuah, who had worked as a nurse in Nigeria, had entered the United Kingdom in July 2006 as a work permit holder enabling her to work as a nurse in the UK. After completing five years residence as a work permit holder, she was granted ILR. One year after being granted ILR, she applied to be naturalised as a British citizen, and the application was granted.
5. The application for leave to remain was refused with no right of appeal on 20 November 2013. The claimant applied for judicial review, and the judicial review proceedings were compromised on the basis that the Home Office would reconsider his application, and give him a right of appeal if it was refused. On 19 March 2014 the claimant was served with an IS15A notice informing him of his liability to removal. A Statement of Additional Grounds settled by his legal representatives, Dell and Co, on 13 May 2014 argued that he had built a family life in the UK with his wife who was a British citizen. She was a registered nurse, earning £20,007 per annum. They were also making efforts to have a child through fertility treatment. The claimant had no home or resources back home in Nigeria, and his wife sustained him through her work as a nurse here. The representatives submitted that these represented insurmountable obstacles, and the Home Office was asked to treat the case with the compassion it deserved.
6. On 17 June 2014 the Secretary of State gave her reasons for refusing to grant the claimant leave to remain.
7. It was acknowledged that he was eligible for consideration under EX.1(b), which applies where the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.
8. No evidence had been provided to show that Mrs Ufuah could not return to Nigeria. She was born in Nigeria and had lived 39 years of her life there before coming to the UK. So she had resided in Nigeria for most of her life, and would be familiar with the culture, customs and the language of Nigeria. The fact that she had regular employment and family in the UK were clearly not insurmountable obstacles to her

relocating to Nigeria. She would be able to pursue her nursing career in Nigeria as she had done previously. The appellant and his partner appeared to be healthy, and there were no age-related issues preventing them from relocating to Nigeria. Fertility treatment was available for couples in Nigeria. So there were not insurmountable obstacles to family life continuing overseas.

### **The Hearing before, and the Decision of, the First-tier Tribunal**

9. As previously stated, the claimant's appeal came before Judge Cox on 29 December 2014. The judge received oral evidence from the claimant and his wife. At paragraph [11] of his subsequent decision, he listed the obstacles which the claimant and his wife had put forward:

- The [claimant] has no remaining family in Nigeria. His only surviving relative, his brother, lives in the USA.
- The [claimant] has no home to go to in Nigeria.
- A very low likelihood of his obtaining a job in Nigeria.
- A similar low likelihood of his wife doing so, even as a nurse (she came to the UK for that very reason), and the very fact that she would have to give up her nursing career in the UK, her home and her way of life here.
- Therefore, a real risk of destitution.
- The wife's only relative in Nigeria is her 82 year old mother, who lives in a small, one bedroom flat in a village and who is financially dependent on her daughter, Mrs Eni.
- Whilst fertility treatment may be available in Nigeria at a cost, in view of the above it would not be affordable in any event the move to Nigeria would mean the termination of the current cycle of treatment at its mid-point with deleterious consequences.
- After nearly fourteen years in the UK and with no relatives in Nigeria, the claimant has lost connection with the Nigerian community and way of life in that country.

10. The judge went on at paragraph [12] to say that no point was taken against the credibility of the claimant and his wife and the factual basis of the above propositions. He said he would take no such point himself. He found the claimant and his wife to be credible witnesses. The judge continued in paragraph [13]:

It seems to me that, taken cumulatively, the factors set out by way of bullet points above represent 'very significant difficulties' for this couple if they were required to try to shift their family life together to Nigeria. Furthermore, whilst those difficulties might, I suppose, be overcome in the fullness of time, I do consider they would entail very serious hardship for both of them. There is also another significant factor which should not be forgotten. The wife is a British citizen and therefore also a citizen of the European Union.

11. The judge went on to refer to **Sanade and Others [2012] UKUT 0048 (IAC)**, in which it was held that as a matter of EU law where a child or indeed the remaining spouse is a British citizen, and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so.

12. The judge said he gave weight to this consideration in finding that there were insurmountable obstacles to the claimant's genuine family life with his wife being continued in Nigeria. He went on to allow the appeal under the Immigration Rules.

### **The Application for Permission to Appeal**

13. A member of the Specialist Appeals Team settled an application for permission to appeal to the Upper Tribunal on behalf of the Secretary of State. He argued that the judge had materially misdirected himself in law on paragraph EX.1. His analysis of what constituted very significant obstacles was flawed. The matters raised represented the ordinary hardships that a couple would face in relocating. The judge noted that the claimant considered himself to have lost connection with the Nigerian community, and the way of life of that country, but did not recall that he had spent his formative years and the majority of his life in Nigeria and that he had established a relationship with a partner who had ties to Nigeria. There was no evidence to support the assertion that he or his wife would be unable to seek gainful employment. His wife was a nurse and there was a functioning healthcare system in Nigeria. It was reasonable to suppose that his wife could seek and obtain comparable employment upon return. There was also no evidence to suggest that the claimant would be unable to seek employment, or that he in particular would be precluded from the job market. The judge's finding, based on the claimant's oral evidence, was wholly speculative on this point. The judge recorded the claimant's concerns regarding fertility treatment. The disparity in available provision, or the costs of such provision, did not establish very significant obstacles to family life continuing in Nigeria. The difference in provision should be considered as a factor, but not as a determinative one.

### **The Grant of Permission to Appeal**

14. On 27 February 2015 First-tier Tribunal Judge E B Grant granted permission to appeal. As submitted in the grounds, it was arguable that the judge had misdirected himself in law as to what constituted "very serious obstacles" to the claimant and his wife continuing family life together in Nigeria.

### **The Rule 24 Response**

15. On 11 March 2015 Dell and Co Solicitors submitted a Rule 24 response. They contended the grounds of appeal amounted to no more than a disagreement with the decision of the judge which he was entitled to reach.
16. But if the judge did make an error of law (which was not admitted), the judge also erred in law by not considering Article 8 ECHR.

### **The Hearing in the Upper Tribunal**

17. Mr Olawanle mounted a stout defence of the judge's decision, but having listened carefully to the arguments on both sides, I was persuaded that an error of law was made out, and gave my reasons for so finding in short form. My extended reasons for finding an error of law are set out below.
18. I then invited submissions from the parties as to how the decision should be re-made. Both Ms Fajiwala and Mr Olawanle were content that I should re-make the decision

on the evidence that was before the First-tier Tribunal. Ms Fajiwala declined to ask any questions of the claimant and his wife, and Mr Olawanle declined to adduce further evidence from either of them. Ms Fajiwala's stance on the alleged difficulties which the couple would face on return to Nigeria was that they were not shown to be well-founded, by reference to objective evidence.

### **Reasons for Finding an Error of Law**

19. EX.2 contains a definition of "insurmountable obstacles." The definition was inserted from 28 July 2014. The definition is that insurmountable obstacles means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner. This definition is explored in the Immigration Directorate Instruction on family migration issued in April 2015. Although this particular version of the guidance postdates the decision under appeal, the guidance is to the same or similar effect to the published guidance which was in operation at the date of decision.
20. The guidance stresses that the assessment of whether there are insurmountable obstacles is a different and more stringent assessment than whether it would be reasonable to expect the applicant's partner to join them overseas. For example, a British citizen partner who has lived in the UK all their life, has friends and family here, works here and speaks any English may not wish to uproot and relocate half way across the world, and it may be very difficult for them to do so, but a significant degree of hardship or inconvenience does not amount to an insurmountable obstacle. ECHR Article 8 does not oblige the UK to accept the choice of a couple as to which country they would prefer to reside in. The guidance continues:
 

Being separated from extended family members – such as might happen where the partner's parents and or siblings live here – would not usually amount to an insurmountable obstacle, unless there are particular exceptional factors in the case.

Material change in quality of life for the applicant and their partner in the country of return, such as the type of accommodation they would live in, or a reduction in their income, would not usually amount to an insurmountable obstacle.

The factors which might be relevant for consideration of whether an insurmountable obstacle exists include but are not limited to:

  - (a) Ability to lawfully enter and stay in another country.
  - (b) Cultural barriers.
  - (c) The impact of a mental or physical disability.
  - (d) The security situation in the country of return.
21. As submitted by Mr Olawanle, the examples given in the guidance are not exhaustive. It is also necessary to bear in mind that the guidance does not have the same status as the Rule itself. But the guidance illuminates the fact that Judge Cox failed to draw a distinction between identified difficulties which would not entail *very serious hardship* for the claimant or his partner, as against any identified difficulties which arguably would do so. On the face of it, the judge gives equal weight to all the identified difficulties, when objectively they cannot merit equal

weight. For example, the fact that the claimant has no remaining family in Nigeria and no home of his own to go to in Nigeria, is objectively not a significant obstacle for the obvious reason that what is in contemplation is him returning to Nigeria with his Nigerian born wife: therefore he would be bringing his most important family member with him, or she would be joining him in Nigeria soon. As to maintenance and accommodation, funding can be provided by the appellant's wife from her earnings in the UK, until such point as she can obtain a nursing job in Nigeria (which she can apply for from the UK) and/or the claimant can find employment.

22. Mr Olawanle relied on the fact that the judge found that the claimant and his wife were credible witnesses. As I explored with the parties at the hearing, there is a crucial distinction between the claimant and his wife having an *honest* belief that they face a real risk of destitution on return to Nigeria, as against a *well-founded* fear of destitution. Having reviewed the judge's manuscript Record of Proceedings, I can see no concession by the Presenting Officer that the evidence of the claimant or his wife was well-founded. On the contrary, the implication of her line of cross-examination was that their expressed fears were not well-founded. In the circumstances, the judge was not doing his job properly in simply adopting uncritically as true what were essentially unfounded assertions as to the difficulties of either of them securing employment in Nigeria, and thereby facing a real risk of destitution.
23. The judge also wholly ignored a number of considerations which had to be brought to bear in order to determine whether any of the difficulties which the couple faced (and which the judge found would be overcome in the fullness of time) would entail "very serious hardship for both of them" in the interim. For example, the fact that the couple had embarked on a relationship, and had subsequently got married, in the full knowledge that the claimant was present in the United Kingdom unlawfully was highly relevant to the question of whether the wife having to give up her nursing career in the UK, her home and way of life here was a very serious hardship in all the circumstances. Similarly, the fact that the wife had only been in the UK since 2006 herself was also relevant to the question of whether having to return to Nigeria with her Nigerian husband constituted a very serious hardship.
24. A further error made by the judge was to place significant weight on the **Sanade** principle as reinforcing his finding that there were insurmountable obstacles to the claimant's family life with his wife being continued in Nigeria. The **Sanade** principle was wholly irrelevant to the question of insurmountable obstacles. It merely "explained" how the claimant could potentially qualify for leave to remain under the Rules. The claimant could potentially take the benefit of EX.1 only because he was married to a British national. The judge was wrong to approach the resolution of the question whether there were in fact insurmountable obstacles to family life with a British national being carried on in Nigeria on the basis that the spouse's British national status engendered an insurmountable obstacle per se to family life being continued in Nigeria, or lent significant weight to the case that there were insurmountable obstacles within the meaning of EX.2.
25. For the above reasons, the decision of the First-tier Tribunal is vitiated by a material error of law, such that it should be set aside and re-made.

### The Re-Making of the Decision

26. The evidence before the First-tier Tribunal does not establish that there are insurmountable obstacles to the claimant carrying on family life with his Nigerian born wife in Nigeria. Most of the identified difficulties set out in paragraph [11] of the decision of Judge Cox have been discussed in my error of law decision, and in summary they are either not shown to be objectively well-founded or, in the case of the claimant's long absence from Nigeria or absence of relatives there, to translate into a very significant difficulty. The only identified difficulty of any real substance is the interruption in the fertility treatment which the claimant's wife has been receiving in the UK. I do not consider that the interruption of such fertility treatment would entail very serious hardship for the couple as they can resume fertility treatment in Nigeria. The fact that they will have to pay for it in Nigeria (as they are apparently paying for it in the UK) is not an insurmountable obstacle in the literal sense. As the judge found, all the difficulties faced by the couple would be overcome, including accessing fertility treatment. There is no reason to suppose that the claimant's wife would not be able to fund further fertility treatment in Nigeria once she had secured re-employment there as a nurse.
27. Moreover, as at the date of the decision in the First-tier Tribunal, the evidence was that the couple were undergoing a current cycle of treatment which was at its mid-point. Some four months have elapsed since the hearing in the First-tier Tribunal, and no evidence was put forward to me that the current cycle of treatment is ongoing. The last cycle of treatment which is documented was scheduled to run for two months, and it is not suggested anywhere in the evidence that the fertility treatment is continuous, as opposed to being occasional, with substantial breaks in between.
28. My conclusion is that the claimant has not discharged the burden of proving that he qualifies for leave to remain under the Rules on the ground that there are insurmountable obstacles to him carrying on family life with his British national spouse in Nigeria. I turn to consider a claim outside the Rules.
29. I drew the parties' attention to **R (On the Application of Chen) v Secretary of State (Appendix FM - Chikwamba - Temporary Separation - Proportionality) IJR 2015 UKUT 00189 (IAC)**, the decision of Upper Tribunal Judge Gill. She held that Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case law concerning **Chikwamba v SSHD [2008] UKHL 40**.
30. I accept that questions 1 and 2 of the **Razgar** test should be answered in the claimant's favour. It cannot be disputed that questions 3 and 4 of the **Razgar** test

should be answered in favour of the Secretary of State, and so the crucial question is whether the decision under appeal is proportionate, having regard to the fact that there are not insurmountable obstacles to family life being enjoyed in the claimant's country of return.

31. Mr Olawanle on behalf of the claimant does not rely on any other factors as militating against the proportionality of the claimant's return beyond those relied upon in support of the claimant's case on EX.1. He does not contend that it would be disproportionate for the claimant to return to Nigeria on his own, and for his wife to remain here and support an entry clearance application by him to return as her spouse.
32. I find that the claimant and his wife face a reasonable choice. The reasonable choice is between re-settling in Nigeria together, or the claimant going back on his own to Nigeria and making an application for entry clearance. As he has an adverse immigration history, the public interest is served, and indeed promoted, by an immigration offender such as the appellant returning to his home country in order to regularise his status.
33. I have had regard to the public interest considerations set out in Section 117B of the 2002 Act as amended by the Immigration Act 2014. I consider that the factors which are in the claimant's favour, such as his ability to speak English, are outweighed by factors which militate in favour of his removal, in particular his illegal presence here. I consider that the decision appealed against is proportionate to the legitimate aim sought to be achieved, namely the maintenance of firm and effective immigration controls.

### **Decision**

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal is dismissed under the Rules and also under Article 8 ECHR.

No anonymity direction is made.

Signed

Date **28 April 2015**

Deputy Upper Tribunal Judge Monson