



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

Appeal Number: IA/27719/2014

THE IMMIGRATION ACTS

**Heard at Field House
On Thursday 20 August 2015**

**Decision & Reasons Promulgated
On Thursday 3 September 2015**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MISS KASOPE KELECHI OLUKOGBON
(No Anonymity Order Made)**

Respondent

Representation:

For the Appellant: Mr Walker, Senior Home Office Presenting Officer

For the Respondent: Ms Bexson, Counsel

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal.
2. The Appellant is a national of Nigeria. She arrived in the UK in 2005 aged 16 as a visitor and overstayed her leave. On 12 April 2010, she made an application for an EEA residence card which was refused and her appeal was dismissed. On 15 April 2011, she made an application on human rights grounds. That application was refused. A request for reconsideration was rejected on 2 May 2013. On 24 April 2013, she made an application for leave to remain which was refused on 31 May 2013.
3. Following service of a notice of removal on 22 May 2014, the Appellant made a human rights claim on the basis of her relationship with a British citizen partner, Mr Alan Wolffs. That was refused on 24 June 2014. It is this decision which is under challenge in this appeal. The Respondent considered the Appellant's case under the Immigration Rules but rejected it on that account because she could not show that she had co-habited with Mr Wolffs for at least two years prior to the date of the application. She could not meet the requirements of EX.1 of Appendix FM because it had not been shown that there were insurmountable obstacles to family life continuing outside the UK. The Respondent also considered the Appellant's private life but found that she could not meet the Rules in that regard because she had been in the UK for nine years and it had not been shown that the Appellant had no ties to Nigeria.
4. The Respondent went on to consider Article 8 of the European Convention of Human Rights ("ECHR") outside the Rules, applying the test in Razgar. She decided that there were no exceptional circumstances rendering the decision to remove disproportionate.
5. The Appellant appealed the Respondent's decision. In a decision promulgated on 25 February 2015 ("the Decision"), First Tier Tribunal Judge Lal allowed the Appellant's appeal. He did so ostensibly on the basis that removal would be disproportionate on Article 8 grounds but the appeal was allowed both under the Rules and on human rights grounds. Permission to appeal the Decision was granted by First-Tier Tribunal Judge Lever on 6 May 2015 on the basis that it was not open to the Judge to allow the appeal under the Rules. The grant of permission was not however restricted and the Respondent's grounds of appeal challenged not only the allowing of the appeal under the Rules but also the approach to Article 8 ECHR, the failure to have proper regard to section 117B and the Judge's reasoning in relation to insurmountable obstacles. The matter comes before the Upper Tribunal to determine whether the Decision involved the making of an error of law.

Submissions

6. Mr Walker referred to [3] of the Respondent's grounds. He referred to [11] and [12] of the Decision. The Judge relied on the case of Hayat in both the Tribunal and Court of Appeal. Based on those judgments, the Judge went on to find that it was disproportionate to require the Appellant to return to obtain entry clearance. Mr Walker referred to the case of Chen. He submitted that the Judge had not identified any factor which would render return to Nigeria disproportionate. In relation to [2] of the grounds, there was nothing in this case which required the Judge to go beyond the provisions of the Rules in any event. There are no unjustifiably harsh consequences of removal. There are in any event no insurmountable obstacles to relocation to Nigeria - [4] of the grounds.
7. Ms Bexson submitted that the Decision was comprehensive and that the Judge had adopted a belt and braces approach to the Appellant's situation. This did not mean there was a material error of law. The Judge approached the Rules and Article 8 properly. The grounds are no more than a disagreement with the findings. The Judge had regard to the relationship. There is corroborative evidence showing that the relationship is genuine and subsisting. This is a very strong case. The only issue is whether it is reasonable to require the Appellant to return to Nigeria to obtain entry clearance. The Judge gave clear reasons at [13] why that would be disproportionate even if the separation would be a short one. There was no sensible reason for the Appellant to be expected to make that application. She is in the final months of her degree course and shortly to be married.
8. In response to questions from me concerning the Judge's treatment of "insurmountable obstacles" at [10] of the Decision and what were the insurmountable obstacles to the couple relocating permanently, Ms Bexson submitted that there is evidence of close links to the partner's family in the UK. She submitted that because it was clear that the relationship was genuine and subsisting and that, other than the Appellant's status, the couple could meet the Rules, the Judge was only required to consider the case on the basis that they were being forced to get proper entry clearance and that was the only obstacle. The Judge at [13] also considered that the Appellant's studies and forthcoming marriage was an obstacle and he was entitled to do so.
9. I also asked Ms Bexson where the Judge had considered section 117B as he was required to do when assessing proportionality and where the unlawfulness of the Appellant's status was taken into account. Ms Bexson referred to [14] and submitted that the Judge had considered proportionality in the context of returning to get entry clearance. The public interest in removal was reduced by the fact that the couple can meet the Rules other than in relation to the Appellant's status. Ms Bexson conceded that the Decision was brief but she submitted that did

not make it wrong in law and there was no material error even if there were a gap in the reasoning. The outcome would be the same.

10. The parties' representatives agreed that if I found a material error of law, I could go on to re-make the decision on the basis of the documentary evidence before the First-Tier Tribunal and including the oral evidence as recorded in the Decision without the need for any further oral or written submissions.

Error of law decision and reasons

11. I am satisfied that the Decision contains a material error of law. It is not clear whether the Judge at [3] intended to indicate that the appeal was confined to the issue of whether the Appellant could succeed only in relation to Article 8 outside the Rules or whether this was shorthand for Article 8 under and outside the Rules. However, it is clear from the Judge's reliance on the Court of Appeal's judgment Hayat, that it would only be if an application could not succeed under the Rules that the issue of whether it was disproportionate to require entry clearance to be obtained could be relevant.
12. Further, there is no indication that the Judge has properly considered the issue of insurmountable obstacles at [10]. The Judge appears to have thought that the issue of whether the Appellant should be required to return to Nigeria to obtain entry clearance was one which was pertinent to whether there were insurmountable obstacles. Whilst I do not completely discount the possibility that there might be cases where insurmountable obstacles may be only a temporary obstacle which is nonetheless insurmountable - perhaps where a person to be removed is suffering from a serious medical condition which will be overcome by a forthcoming operation or a late stage pregnancy - that is not this case. What the Judge was required to consider was whether there were insurmountable obstacles to the couple relocating to Nigeria. That is simply not considered.
13. The factors set out at [13] were considered in the context of proportionality and then only in the context of whether there was any sensible reason to require the Appellant to return to obtain entry clearance. There is no consideration of whether there were insurmountable obstacles to permanent relocation or whether it would be disproportionate to expect the couple to relocate to Nigeria.
14. I have considered whether it could be said that the errors were not material to the overall outcome. I am satisfied that the errors are material because the appeal could not on that basis have been allowed under the Rules. I have also considered whether there is any error of law in the Article 8 assessment such that I should set aside only the allowing of the appeal under the Rules and leave intact the allowing of the appeal under Article 8 ECHR. However, I consider that there is an additional material error of law in the allowing of the appeal under

Article 8 ECHR as the Judge when considering the proportionality of removal – whether on a temporary or permanent basis – has made no mention of the Appellant’s unlawful status in the UK. It is not apparent that the Judge, in considering proportionality had any regard to the public interest in the maintenance of immigration control.

15. I am therefore satisfied that the First-Tier Tribunal Decision did involve the making of material errors of law in allowing the appeal under the Rules and on human rights grounds and I set aside the Decision.

Decision and reasons

16. I now turn to re-make the decision. I proceed on the basis that the Appellant pursues a case that she can succeed under the Rules as well as outside them.

17. I have read all the evidence submitted by the Appellant in support of her case. I have also seen and read the decision of the First-Tier Tribunal in 2011 dismissing her appeal (and that of her sisters) at the time of their EEA application.

18. I have absolutely no doubt that the relationship between the Appellant and Mr Wolffs is a genuine one. Their statements are detailed and make clear the very genuine affection which they have for each other. They are to get married on 28 August. Mr Wolffs’ family and the couple’s friends attest to the genuine nature of the relationship and also to the regard they have for the Appellant. I accept also that there is evidence in the bundle which strongly suggests that Mr Wolffs earns a sufficient income to meet the Rules (although this has not been confirmed by the Secretary of State and it is not clear whether the evidence submitted would meet the evidential requirements of the Rules). However, in light of the Appellant’s unlawful immigration status, she cannot meet the Rules for leave to remain as a partner unless she can meet the requirements of EX.1.(b). She can only meet that Rule if there are insurmountable obstacles to family life with Mr Wolffs continuing outside the UK. The phrase “insurmountable obstacles” is neatly summarised by the Court of Appeal in Agyarko and others v Secretary of State for the Home Department [2015] EWCA Civ 440 in the following terms:-

“21. The phrase “insurmountable obstacles” as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.

22. This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase “insurmountable obstacles” has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under Article 8 exists for family members to be granted leave to remain

or leave to enter a Contracting State: see e.g. Rodrigues da Silva and Hoogkamer v Netherlands ([2007](#)) [44 EHRR 34](#), para. [39] ("... whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them ..."). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so).

23. For clarity, two points should be made about the "insurmountable obstacles" criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way: see, e.g., the way in which the Grand Chamber approached that criterion in Jeunesse v Netherlands at para. [117]; also the observation by this court in MF (Nigeria) v Secretary of State for the Home Department ([2013](#)) [EWCA Civ 1192](#); ([2014](#)) [1 WLR 544](#), at [49] (although it should be noted that the passage in the judgment of the Upper Tribunal in Izuazu v Secretary of State for the Home Department ([2013](#)) [UKUT 45 \(IAC\)](#); [2013] Imm AR 453 there referred to, at paras. [53]-[59], was making a rather different point, namely that explained in para. [24] below regarding the significance of the criterion in the context of an Article 8 assessment).
 24. Secondly, the "insurmountable obstacles" criterion is used in the Rules to define one of the preconditions set out in section EX.1(b) which need to be satisfied before an applicant can claim to be entitled to be granted leave to remain under the Rules. In that context, it is not simply a factor to be taken into account. However, in the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken into account, not an absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8: see paras. [29]-[30] below."
19. The insurmountable obstacles relied on in this case can be summarised as follows. The Appellant has an asthmatic condition (although there is no medical evidence to that effect). She says that this would deteriorate in Nigeria. She is also studying at Cardiff University for a degree although Ms Bexson confirmed that her studies will soon be complete. She and Mr Wolffs are to be married on 28 August 2015. She has family in the UK in the form of two sisters (who have no right to remain) and an aunt with whom she lived when she came to the UK. Mr Wolffs is a British citizen. He is in full time employment in the UK. All his family are in the UK as are all his friends. He has never been to Nigeria. He has a medical condition which requires intermittent treatment in the form of operations to remove benign tumours although again there is no medical evidence supporting the extent of the condition or the frequency and nature of the treatment required to deal with it. I note also Mr Wolffs statement that if the Appellant were to be

removed to Nigeria he would go with her even though it would mean giving up his life here (letter of 28 May 2014). Although I do not underestimate the difficulties which Mr Wolffs would face in relocating to Nigeria and I recognise also that the Appellant has been in the UK for nine years and has built a life for herself here, I find it quite impossible to say that the factors relied on amount to insurmountable obstacles. For that reason, the Appellant's appeal under the Rules fails.

20. I then turn to consider whether removal would be disproportionate under Article 8 ECHR. Article 8 protects the right to private and family life. However, it is not an absolute right. The State is lawfully entitled to interfere with an appellant's private and family life as long as it is pursuing a legitimate aim and the interference is necessary and proportionate in all the circumstances of the case. As explained in the case law emanating from Strasbourg, "Article 8 does not entail a general obligation for a state to respect immigrants' choice of their country of residence and to authorise family reunion in its territory" (see citation at [39] of Nagre).
21. The issue in this case is one of proportionality of removal in light of the Appellant's unlawful status in the UK. I do not need to set out the first four questions in Razgar. It is clear from the foregoing that I accept that the Appellant has a family life in the UK with Mr Wolffs. There is no evidence as to the family life between the Appellant and her sisters and aunt. I accept however that her relationships with her family in the UK form part of her private life in any event. I also accept that the Appellant has a private life based on her friendships, academic achievements and community involvement. It is clear that removal will interfere with her Article 8 ECHR rights and indeed with Mr Wolffs' Article 8 rights. I have set out the closeness of the relationship between the Appellant and Mr Wolffs and between them and, in particular, Mr Wolffs' family and their friends and removal would obviously interfere with those relationships. I also have regard to the disruption which would be caused by the Appellant's removal to her continued studies and employment in the area which she has chosen and to Mr Wolffs' employment in a job which he clearly enjoys (if he chooses to go with her). I have regard to the Appellant's and Mr Wolffs' medical conditions. However, as I have noted above, there is no medical evidence in support of the nature and extent of those conditions and whether they can be treated in Nigeria.
22. Against those factors, I am required to have regard to the public interest, in particular the factors set out in section 117B and more generally. The maintenance of effective immigration controls is in the public interest. The Appellant speaks English and, although she is accessing education in the UK, I assume she is doing so without financial assistance from the State. However, those factors are neutral (see AM (s117B) Malawi [2015] UKUT 0260 (IAC)). I am required to give little weight to the Appellant's family and private life formed, as it was, when she was in the UK unlawfully.

23. I have considered Ms Bexson's submission that it would be disproportionate to remove the Appellant because she would be able to meet all the requirements of the Rules except in relation to status and, relying on Chikwamba, there was no sensible reason to require her to return to Nigeria on this basis. Removal on a temporary basis for this purpose would therefore be disproportionate. Mr Walker's reliance on the case of Chen is reinforced by the Court of Appeal's judgment in Agyarko where the Court addressed a similar submission in the following terms [31]:--

"In Chikwamba, the House of Lords found that there would be a violation of Article 8 if the applicant for leave to remain in that case were removed from the United Kingdom and forced to make an out-of-country application for leave to enter which would clearly be successful, in circumstances where the interference with her family life with her husband associated with the removal could not be said to serve any good purpose. It is possible to envisage a Chikwamba type case arising in which Article 8 might require that leave to remain be granted outside the Rules, even though it could not be said that there were insurmountable obstacles to the applicant and their spouse or partner continuing their family life overseas. But in a case involving precarious family life, it would be necessary to establish that there were exceptional circumstances to warrant such a conclusion."

24. I recognise that the finding that there are no insurmountable obstacles to the Appellant and her partner continuing their family life in Nigeria for the purposes of the Rules is not determinative of the issue of proportionality. However, it is an indication that removal of the Appellant would not be disproportionate if there are no other circumstances which point in the Appellant's favour in the balance. In this case, the factors on which the Appellant relies in her favour under Article 8 ECHR are mainly those on which she relies in relation to her application under the Rules.

25. I have considered the additional factors here which might be said to alter the balance when considering the Appellant's case outside the Rules. In particular, I have regard to the background to the Appellant's unlawful presence in the UK. She was effectively sent by her parents to live in the UK with her aunt when she was only sixteen years old. She completed her A levels in the UK. She has been studying at Cardiff University for a degree in Biomedical Sciences and has shown a particular interest in the respiratory field. She has been leading a research project looking at a particularly devastating lung disease and the result of her research is to be published this year. The Appellant says that the way in which she has developed her private life and now her family life in the UK make her situation different from others. She has been in limbo through no fault of her own since being sent to the UK when she was still a minor.

26. Against that, though, I note that the Appellant and her sisters previously sought to remain on the basis of an EU right of residence as extended

family members of their aunt which culminated in an appeal in 2011 which was dismissed. It appears that the application for a residence permit was made at that stage because the Appellant was keen to continue her studies in the UK. As the Judge noted in the decision in that appeal, if the Appellant wanted to study she had the option of returning to Nigeria to obtain the necessary leave to return as a foreign student. She was by that date, twenty-two years old and able to make decisions for herself as to her future. Nonetheless, she remained in the UK and continued to build a life for herself in the full knowledge that she had no right to remain and that at some point in the future she might be removed. The fact that she is in the position in which she now finds herself is in large part due to her own failure to regularise her status in the proper way in the past.

27. I have taken into account all the factors in the Appellant's favour (as set out above). However, when balanced against the public interest in removal due to the Appellant's unlawful status throughout the majority of her time in the UK and the fact that she has formed her private and family life whilst here unlawfully, I conclude that removal of the Appellant would not amount to a disproportionate interference with her Article 8 ECHR rights.

DECISION

The First-tier Tribunal decision did involve the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeal by allowing the Secretary of State's appeal and therefore dismissing the Appellant's appeal under the Rules and on human rights grounds.

Signed



Date 1 September 2015

Upper Tribunal Judge Smith