



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26612/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham
On 27th April 2017

Decision & Reasons Promulgated
On 10th May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS PATRICIA NKIRE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr B Singh of Counsel, instructed by Kenneth Jones Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against the decision of Judge Boardman of the First-tier Tribunal (the FtT) promulgated on 14th July 2016.

2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to her as the Claimant.
3. The Claimant is a female Nigerian citizen born 20th May 1950 who applied for leave to remain in the UK, based upon her family and private life.
4. The application was refused on 11th June 2014. The Secretary of State considered EX.1(b) as the Claimant's husband has indefinite leave to remain in the UK. The Secretary of State did not accept that there were insurmountable obstacles to family life between the Claimant and her husband continuing outside the UK.
5. The Claimant's private life was considered with reference to paragraph 276ADE of the Immigration Rules, the Secretary of State contending that the provisions of this paragraph could not be satisfied. It was not accepted that the Claimant had lived continuously in the UK for at least twenty years, nor was it accepted that she had no ties to Nigeria.
6. The Secretary of State did not consider that there were any exceptional circumstances disclosed by the application which would warrant a grant of leave to remain pursuant to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules.
7. The Claimant appealed to the FtT pursuant to section 82 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). The FtT heard the appeal on 27th June 2016 and found, after hearing evidence from the Claimant and her husband, that there were insurmountable obstacles to family life continuing outside the UK.
8. The FtT considered the version of paragraph 276ADE in force at the date of refusal, and also the version in force at the date of hearing, and found that the Claimant had no ties to Nigeria which was the requirement in paragraph 276ADE(vi) at the date of refusal, and there would be very significant obstacles to her integration into Nigeria, which was the requirement in paragraph 276ADE(vi) at the date of hearing. The appeal was therefore allowed with reference to EX.1(b) of Appendix FM in relation to family life, and paragraph 276ADE(vi) in relation to private life.
9. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FtT had materially erred in law by failing to give adequate reasons for findings on material matters, failed to take into account material evidence, and committed a material misdirection in law.
10. It was contended that when considering insurmountable obstacles, the FtT had not recognised the high threshold, as explained in Agyarko [2015] EWCA Civ 440. The FtT had misdirected itself in law by reversing the burden of proof. The FtT noted that the evidence indicated that the Claimant had a brother in the USA who had supported her financially for many years, a son who was a consultant psychiatrist, and a daughter, but found that there was no evidence that these relatives were willing or able to support the Claimant and her husband financially. The Secretary

of State contended that the burden of proof was on the Claimant to show that they could not.

11. The FtT noted that the Claimant's husband owns a property in the UK jointly with his daughter but there was no evidence the daughter would be willing to consent to a sale of the property. Again the Secretary of State contended that the burden of proof was not on the Secretary of State to show that the property could not be sold, but was on the Claimant if it was contended that the proceeds of sale would not be available to provide funds for herself and her husband to live in Nigeria.
12. It was contended that the FtT had failed to take into account when finding that the Claimant's husband would find it difficult to obtain employment in Nigeria, that the husband was working in the UK, had graduated from a UK university, had obtained long-term employment at managerial level with a European multinational corporation, and would therefore have work experience and skills. The FtT had not taken into account the probability that the Claimant's husband would have accrued a pension over his career, which would be available to assist them in resettling in Nigeria.
13. It was contended that the FtT's evaluation of the insurmountable obstacles test was unsafe, and the same erroneous reasoning applied to the consideration of paragraph 276ADE.
14. Permission to appeal was granted by Judge Saffer of the FtT.

Error of Law

15. At a hearing before me on 14th February 2017 submissions were made by both parties regarding error of law. Full details are given in my decision dated 16th February 2017, promulgated on 22nd February 2017. I set out below paragraphs 20-27 which contain my conclusions and reasons for setting aside the FtT decision;
 20. I announced at the hearing that the FtT had materially erred in law and the decision was set aside. My reasons for reaching this conclusion are set out below.
 21. The FtT misapplied the guidance in Agyarko and I set out below paragraph 21 of that decision;

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. The FtT found that the Claimant and her husband will not have accommodation in Nigeria, no employment, and no family or friends to support them.
 23. The FtT correctly set out the burden of proof in paragraph 5 of the decision but did not apply it. It is my view that the burden of proof has been reversed. There was no evidence from the Claimant's brother, son or daughter, to indicate that

they would be unwilling or unable to provide financial support. The burden on this issue is on the Claimant, not on the Secretary of State to prove that the relatives can offer financial support.

24. The burden of proof was also reversed in relation to the property owned by the Claimant's husband in the UK. The FtT found there was no evidence to indicate whether the daughter would be willing to agree to sell the property or whether a court order would be required. In my view the FtT misapplies the burden of proof here, failing to recognise that the burden lies with the Claimant, not the Secretary of State.
 25. The FtT records that there is no evidence to indicate the value of the property, and the amount outstanding under a mortgage. Again, the burden of proof has been reversed. The burden is on the Claimant to prove that there are very significant difficulties to family life continuing in Nigeria which could not be overcome or which would entail very serious hardship. The Claimant does not discharge that burden simply by providing no evidence.
 26. I find that failing to recognise the high threshold involved in the insurmountable obstacles test, reversing the burden of proof, and failing to consider material evidence, as contended in the grounds seeking permission to appeal, means the decision of the FtT on this issue is unsafe.
 27. The FtT considered paragraph 276ADE briefly, at paragraph 38, finding that the Claimant succeeds for the reasons given when considering the insurmountable obstacles test. Those reasons are flawed by error of law, and therefore the FtT finding in relation to paragraph 276ADE is unsafe and must also be set aside. There are no preserved findings".
16. Having set aside the decision of the FtT, I granted an adjournment request made by Mr Singh so that further evidence could be prepared on behalf of the Claimant. Mr Singh suggested there should be a remittal to the FtT. I rejected this suggestion, having taken into account paragraph 7.3 of the Senior President's Practice Statements. I observed that there had already been two substantive hearings before the FtT, as there had been a previous appeal hearing prior to the hearing by Judge Boardman, which had also been set aside by the Upper Tribunal. The hearing was therefore adjourned for a further hearing to take place before the Upper Tribunal, so that there could be further consideration of whether or not there were insurmountable obstacles to family life continuing outside the UK, a consideration of paragraph 276ADE(vi), and Article 8 outside the Immigration Rules.

Re-Making the Decision - Upper Tribunal Hearing 27th April 2017

Preliminary Issues

17. I ascertained that the Tribunal had received all documentation upon which the parties intended to rely, and that both parties had served each other with any documentary evidence upon which reliance was to be placed. The Tribunal had received the Home Office bundle with Annexes A-R, the Claimant's bundle comprising 72 pages, and a letter from the Claimant's solicitor dated 19th April 2017

enclosing a copy of the land register showing the Claimant's husband and daughter as joint owners of a property in Barking.

18. Mr Singh submitted a further letter from the Claimant's solicitors dated 5th April 2017 which was not on the Tribunal file, together with a further statement made by the Claimant and her husband dated 20th March 2017, medical records in relation to the Claimant's husband, a letter from the Claimant's daughter dated 24th February 2017 together with a mortgage calculator, and a letter from the Claimant's son dated 24th February 2017.
19. Mr Singh advised that the Claimant and her husband would be giving oral evidence. There was no need for an interpreter.
20. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

The Oral Evidence

21. The Claimant gave oral evidence adopting the contents of her witness statements dated 27th June 2016 and 20th March 2017.
22. The Claimant's husband Micah Nkire gave oral evidence adopting his witness statements dated 23rd June 2016 and 20th March 2017.
23. The Claimant and her husband were questioned by both representatives and I have recorded all questions and answers in my Record of Proceedings. It is not necessary to reiterate them here. If relevant I will refer to the oral evidence when I set out my conclusions and reasons.
24. In very brief summary both the Claimant and her husband stated that they could not live in Nigeria. They have no accommodation there, no family or friends, and would have no employment. Their adult children would not be able to provide them with financial support. The Claimant stated that her husband had retired, but his evidence was that he is still in full employment although his 65th birthday was the day before the hearing. He earned £22,000 per year as a mental health support worker.

The Secretary of State's Submissions

25. Mr Mills submitted that the insurmountable obstacles test is a high hurdle and the Claimant had not proved that insurmountable obstacles existed which would prevent her from continuing family life with her husband in Nigeria.
26. Mr Mills described the letters from the Claimant's adult children as unhelpful. They did not provide any evidence of income. It was clear from the evidence that the Claimant's son is a consultant psychiatrist currently living in Canada. It is unclear whether he has any family, as the Claimant and her husband had given conflicting evidence on this. The Claimant's daughter lives in Switzerland. She is a telecommunications engineer.

27. No evidence was given by the Claimant as to the cost of living in Nigeria, and no evidence given of the value of the property owned in the UK, and no evidence given as to the amount of mortgage outstanding. Mr Mills submitted that the Claimant and her family appeared to want to hide assets.
28. Mr Mills pointed out that the Claimant's husband had confirmed that he is still working, although the Claimant had stated that he had stopped work. There was no evidence to show that he could not work in Nigeria. He would be entitled to a British state pension on his 65th birthday which was the day before the Tribunal hearing.
29. With reference to the health of the Claimant's husband, there was no evidence to indicate that any medical treatment required would not be available in Nigeria. It was accepted that he suffers from diabetes.
30. Mr Mills submitted that the Claimant's appeal should be dismissed, as it had not been proved that there were insurmountable obstacles to family life continuing outside the UK, nor had it been proved that the Claimant had no ties to Nigeria.
31. With reference to Article 8 outside the Immigration Rules, Mr Mills submitted that there were no exceptional circumstances which had not been considered within the Immigration Rules. Pursuant to section 117B, of the 2002 Act little weight should be given to any private life established by the Claimant because she has been in this country unlawfully.

The Claimant's Submissions

32. Mr Singh had not prepared a written skeleton argument. In his oral submissions he contended that the evidence indicated that insurmountable obstacles existed to family life continuing in Nigeria. I was asked to find both the Claimant and her husband credible. Mr Singh described them as open and honest, and they were not trying to hide evidence. Mr Singh submitted that it was entirely plausible that they did not know the income of their adult children. I was asked to accept the evidence that the Claimant and her husband had no accommodation, friends or family in Nigeria.
33. I was asked to accept that the adult children had made it clear that they could not financially support their parents if they lived in Nigeria. Mr Singh contended that it was unlikely that the Claimant's husband would be able to find employment in Nigeria. It was also unclear whether he would receive a UK state pension if he lived permanently in Nigeria.
34. I was asked to note that the Claimant and her husband are elderly, and the husband does have medical issues. If the Claimant's appeal was not allowed pursuant to Appendix FM in relation to family life, or paragraph 276ADE(vi) in relation to private life, I was asked to allow the appeal pursuant to Article 8 outside the Immigration Rules. Mr Singh submitted that it would be appropriate to allow the appeal outside the rules, taking into account the total length of time that the

Claimant had spent in the UK, and she had resided here with leave for some of that time.

35. I was asked to find that it would be disproportionate for the Claimant to leave the UK, with her husband remaining here, and for her to make an entry clearance application from Nigeria. It would be equally disproportionate for them both to have to leave this country. Mr Singh submitted that her husband classed his wife as his primary carer even though he was in full-time employment.
36. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

37. The burden of proof is on the Claimant to show that there are insurmountable obstacles to family life continuing outside the UK, and the standard of proof is a balance of probability.
38. The Claimant also relies upon paragraph 276ADE(vi) and I must consider the version in force at the date of the Respondent's refusal. The Claimant must prove that she has no ties, including social, cultural or family with Nigeria. Again, the standard of proof is a balance of probability. With reference to Article 8 outside the Immigration Rules, the Claimant must prove that she has established a family and/or private life that engages Article 8, it is then for the Respondent to establish any public interest factors weighing against the Claimant. The standard of proof is a balance of probabilities.
39. I make the following findings of fact. The Claimant and Micah Nkire are married. They are both Nigerian citizens. They have a son who is 42 years of age, and a consultant psychiatrist living in Canada. They have a daughter who is 36 years of age, currently working in Switzerland.
40. The Claimant's husband studied in the UK. He was resident in this country between 1974 and 1981. In 1981 after he graduated from university he went to work for Unilever in Nigeria. He remained in Nigeria until 1998 and returned to the UK as a visitor on 16th November 1998. When his visit visa expired he remained without leave and was eventually granted indefinite leave to remain on 29th June 2011.
41. The Claimant was in the UK between August 1976 and 1987 although she made trips to and from Nigeria during that period. In 1987 she returned to Nigeria to live with her husband, leaving the children in the UK. The Claimant remained living in Nigeria until she returned to the UK as a visitor on 8th July 2007. Her leave expired on 4th December 2007, and thereafter she has remained without leave.
42. I am satisfied that the Claimant's husband owns a property in Barking, which he purchased in 2000 together with his daughter. I am satisfied that the Claimant's husband is still in employment with an annual income of £22,000. He has been working as a care or support worker since approximately 1999.

43. I find it appropriate to firstly consider section EX of Appendix FM. EX.1(a) is not relevant because that relates to children under the age of 18. I set out below EX.1(b) and EX.2;
- EX.1 (b) 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.
- EX.2 For the purposes of paragraph EX.1(b) “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.
44. The Supreme Court considered insurmountable obstacles and Article 8 outside the Immigration Rules in Agyarko [2017] UKSC 11. It was found that the requirement of insurmountable obstacles is a stringent test to be met, and the definition contained within EX.2 was approved. Although insurmountable obstacles imposed a stringent test, this must be interpreted in a sensible and practical way, rather than as referring solely to obstacles which make it literally impossible for a family to live together in the applicant’s country of origin.
45. If an applicant failed to meet the requirements of the rules, it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would breach Article 8. The exceptional circumstances would need to result in unjustifiably harsh consequences which would make refusal of the application disproportionate. It was found in Agyarko that the fact that the Claimant’s partner was a British citizen and had employment in the UK, could not, without more, amount to insurmountable obstacles to family life continuing outside the UK.
46. I do not find that the Claimant has proved insurmountable obstacles to family life continuing in Nigeria. I reach this conclusion for the following reasons.
47. Both the Claimant and her husband are Nigerian citizens. I accept that the Claimant’s husband has indefinite leave to remain in the UK and this was granted in 2011, but he is not a British citizen. Both the Claimant and her husband have lived in Nigeria for longer than they have lived in the UK.
48. I do not find that they would be unable to accommodate themselves in Nigeria. They have a property in the UK which could be sold, with the proceeds of sale being used to support them and provide accommodation in Nigeria. Although the Claimant has not disclosed the amount of mortgage, I find that it must be relatively small, as her husband in oral evidence indicated when cross-examined that the mortgage would be totally paid off within one or two years. The Claimant’s husband gave evidence that he had made the majority of the mortgage repayments, and therefore he would be entitled to a minimum of 50% of the proceeds of sale.

49. The Claimant's husband has not proved that he would be unable to receive his UK pension in Nigeria. It is not for the Secretary of State to prove that this would be paid.
50. It has not been proved that the Claimant's husband could not find employment. He has previously worked in Nigeria. He is well qualified. He is currently working in the UK. If it is contended that employment would not be available, the burden of proof is on the Claimant. It has not been discharged.
51. No medical issues have been raised in relation to the Claimant. In relation to her husband, it has not been proved that medical treatment would not be available in Nigeria. Medical records indicate that the Claimant's husband was diagnosed with type 2 diabetes in December 2013 and glaucoma in August 2016. According to his medical records he last had a consultation at Moorfields Eye Hospital on 17th January 2017, and is due to have a further appointment on 18th July 2017. The Claimant's husband is receiving medication in the form of eye drops and tablets, but there is no evidence to show that this medication would not be available in Nigeria. The Claimant has claimed to be her husband's carer, but I find this to be exaggerated. It is evident that the husband is in full-time employment.
52. The Claimant indicated to the FtT, that when she was resident in Nigeria without her husband, her brother in the United States used to provide some financial support. That stopped when she returned to the UK. No satisfactory evidence has been given to indicate that if necessary, financial support could not be provided by the Claimant's brother, or her adult children. Neither of the children has provided any evidence of their income or outgoings. There is therefore no evidence that they could not offer financial support to their parents if it was required.
53. I appreciate that the Claimant and her husband want to live in the UK. That however is not the test that I must consider. There would be some disruption to their lives if they moved to Nigeria. However the evidence does not indicate that they would face very significant difficulties in Nigeria which could not be overcome, or would entail very serious hardship.
54. In considering paragraph 276ADE(vi) I take into account the guidance given in Ogundimu Nigeria [2013] UKUT 00060 (IAC). Consideration of whether a person has no ties to a country must involve a rounded assessment of all the relevant circumstances, and is not to be limited to social, cultural and family circumstances. I do not find the Claimant has proved she has no ties to Nigeria. She has spent longer living in Nigeria than she has in the UK. She is a citizen of that country. There would be no language difficulties. The Claimant is a member of a church which the Respondent pointed out had several branches in Nigeria, and this has not been disputed. The test under paragraph 276ADE(vi) is an exacting one, and the Claimant has failed to prove that she has no ties to Nigeria.

55. In considering Article 8 outside the Immigration Rules I have regard to the considerations set out in section 117B of the 2002 Act. The maintenance of effective immigration controls is in the public interest.
56. I accept that the Claimant can speak English, but this is a neutral factor. The Claimant is not financially independent herself, but is dependent financially upon her husband.
57. I must attach little weight to the private life established by the Claimant because it has been established when she has been here unlawfully.
58. The Claimant entered the United Kingdom as a visitor in 2007. She therefore must have indicated to the Entry Clearance Officer that she intended to return to Nigeria at that time. She did not do so. She has remained here without leave and she joined her husband who at that time was also here unlawfully.
59. I do not find that there are any compelling or exceptional circumstances which have not been considered under the Immigration Rules.
60. It is clear that the Claimant and her husband wish to remain in the UK, but I find the weight that must be attached to the public interest in maintaining effective immigration controls, outweighs the weight to be attached to their wishes. It is not of course the case that the Claimant's husband must leave the UK. He has indefinite leave to remain, and if he wishes to remain in this country then he will do so.
61. An alternative to the couple relocating to Nigeria, would be for the Claimant to leave the UK, and to return to Nigeria to make an entry clearance application as the spouse of a person settled here. She would then need to provide all the evidence required under Appendix FM of the Immigration Rules. It would seem that the Claimant's husband could support her application financially, as he claims to have an income of £22,000 per annum, which is above the minimum annual income requirement of £18,600. The specified evidence would however have to be produced. In considering this issue, I take into account the guidance in R (on the application of Chen) (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC). This confirmed that it is not enough to rely solely upon the case law concerning Chikwamba v SSHD [2008] UKHL 40, but if temporary separation to enable an individual to make an application for entry clearance was claimed to be disproportionate, the Claimant must provide evidence that such temporary separation would interfere disproportionately with protected rights. No satisfactory evidence to prove that has been submitted in this case.
62. I therefore conclude the Claimant has failed to prove that there are insurmountable obstacles to family life continuing in Nigeria, she has failed to prove that she has no ties to Nigeria, and there are no compelling or exceptional circumstances which would justify allowing the appeal pursuant to Article 8 outside the Immigration Rules. The Claimant has not proved that it would be disproportionate, as an alternative to relocating with her husband in Nigeria, for her to return to Nigeria to

make an entry clearance application through the proper channels, and provide the specified evidence.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision. The Claimant's appeal is dismissed.

Anonymity

No anonymity direction was made by the First-tier Tribunal. There has been no request for anonymity made to the Upper Tribunal and I see no need to make an anonymity order.

Signed

Date 2nd May 2017

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

The Claimant's appeal is dismissed. There is no fee award.

Signed

Date 2nd May 2017

Deputy Upper Tribunal Judge M A Hall