



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08363/2016

THE IMMIGRATION ACTS

Heard at Stoke
On 6th December 2017

Decision & Reasons Promulgated
On 3rd January 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

EDEWEDE OJEABULU
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Pratt, instructed on behalf of WTB Solicitors
For the Respondent: Mr Bates, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of the First-tier Tribunal (Judge Shanahan) who, in a determination promulgated on the 9th February 2017 dismissed her appeal against the decision of the Secretary of State to refuse his application for leave to remain in the UK on the basis of her family and private life.
2. The Appellant is a citizen of Nigeria born on 15 June 1981. The factual background of the Appellant is set out in the papers and the determination at paragraphs 3 – 9. She entered the United Kingdom on 16 August 2003 with entry clearance as a student with leave valid until 31 October 2004. She was granted a further two periods of leave as a student expiring on 31 January 2009. The course was at London Metropolitan University and when she had completed it she went on to study for a

degree course at a further University. She studied there for approximately 4 ½ years but as a result of personal reasons did not complete the course. When her Visa expired in 2009 she had not completed her degree but was awarded a certificate of higher education in combined studies. She was then unable to secure employment and her sister advised her to return to Nigeria and bought her ticket. However the Appellant not return because of the situation there time; there was serious political unrest, mass unemployment and her parents had fallen on hard times. She decided to remain in the UK believing that she would apply for another visa only to discover that this was not possible.

3. She went to live with her sister and helped her design a website business. In or about August 2011 she moved to undertake a course in computer networking.
4. In or about July 2012 she met her partner. She had informed him about her immigration status but it was understood between them that this was something that she would have to sort out for herself. In or about July 2013 she was unable to maintain her flat because her family were no longer able to support her and she moved in with her partner. They remained there for a few months and then moved in with other friends. Eventually they moved into their own flat. During the time they have been together they developed their relationship.
5. On 25 November 2015 the applicant applied leave to remain in the United Kingdom on a FLR application form and indicated that the immigration route she wanted consideration under was the 10 year partner route and the 10 year private life route.
6. In a decision letter dated the 15th June 2016 that application was refused. The Appellant's immigration history as set out above was summarised and her application was considered under the partner route. The Secretary of State was not satisfied that the applicant met the eligibility requirements of paragraph R-LTRP1.1. This was because the applicant had not provided a certified copy of her partner's British passport and it was not accepted as her partner was a British citizen as claimed.
7. When considering GEN 1.2 the applicant was not married or engaged, her partner and had not provided sufficient evidence to show that they had been cohabiting with each other in a relationship akin to marriage for at least two years. The applicant had given no details of when she moved in with her partner and had stated that her relationship began in July 2012. The evidence of cohabitation provided was limited; with only three pieces of evidence in the partner's name dated 4 October 2014, April 2015 and May 2015 and only three pieces of evidence in the applicant's name dated from September 2014 and July 2015. The other evidence provided was in photo copied format and therefore could not be accepted as valid evidence as it was not from an official source. Thus the Respondent considered that the applicant could not meet the definition of the term "partner" and could not be the requirements of paragraph E-LTRP1.2.
8. She also could not meet paragraph E-LTRP1.2 as she was in breach of immigration laws- her last period of leave to remain expired on 31 January 2009 and had therefore been an over stayer in breach of immigration laws since that date.

9. The Secretary of State considered whether EX1 applied and as to the requirements of EX1(b), it was acknowledged that she had a genuine and subsisting relationship with her partner but that the Secretary of State had not seen any evidence that there were insurmountable obstacles in accordance with paragraph EX2 of Appendix FM which means that very significant difficulties which would be faced by her and her partner in continuing family life together outside the UK in Nigeria or which could not be overcome or would entail very serious hardship for the applicant and her partner.
10. Thus she failed to fulfil EX1 (b) of Appendix FM of the Immigration Rules and thus did not meet the requirements of R-LTRP1.1. and the application was refused under D-LTRP 1.3.
11. The decision under private life was considered under paragraph 276 ADE (1) taking into account her claim that she entered the United Kingdom on the 16th August 2003 and thus had lived in the UK for 12 years. She therefore could not satisfy paragraph 276 ADE (1) (iii). As she was over the age of 18 years and has not spent at least half of her life living continuously in the UK she could not meet the requirements of paragraph 276 ADE (1) (iv) or (v).
12. As to paragraph 276 ADE (1) (vi) and the requirement for there to be very significant obstacles to her integration into Nigeria, it was not accepted that there would be such significant obstacles because she had spent the majority of her life there, including her formative years. It was noted that she would be able to integrate into the way of life there by utilising the knowledge of the culture and language. In addition, her siblings and father resided in Nigeria as set out in the application form and therefore would have family support upon return and thus it was not accepted that she had lost all cultural, social and family ties to Nigeria.
13. The Secretary of State also considered whether there were any circumstances that would give rise to a grant of leave outside of the rules but it was decided that there were no "exceptional circumstances" in her case and did not therefore fall for a grant of leave outside of the rules.
14. The Appellant appealed that decision on the 22nd March 2016 and it came before the First-tier Tribunal in January 2017. The judge heard the evidence from the applicant and her partner both of whom attended the hearing. The evidence of the parties is briefly recorded at paragraphs 10 – 11 of the determination. They both adopted their witness statements and answered questions cross examination.
15. In a determination promulgated on the 30th January 2017, the Appellant's appeal against that decision was dismissed.
16. The judge's conclusions are set out at paragraphs 15-38. They can be summarised as follows:-
 - (a) it was agreed that the Appellant met the suitability requirements under S-LTR but the issue was whether she could meet the provisions in EX1.

- (b) To meet the requirements the applicant needed to demonstrate that she is a partner as defined in section GEN1.2. However the judge found that the applicant and her partner were not married or civil partners nor were they engaged as such therefore she needed to establish that she could meet subsection (iv) that she and her partner had been living in a relationship akin to marriage for at least two years before the date of the application, that is, 23 November 2015 therefore the applicant needed to provide evidence that she and her partner were living together in such a relationship from at least 23 November 2013.
- (c) The judge found that they were in a genuine relationship but that the burden of proof was on the applicant to demonstrate that they were living together in a relationship akin to marriage the two years before the date of the application. Having reviewed the evidence, he was not satisfied that the Appellant and her partner, was in a relationship, were living together in a relationship akin to marriage the two years before she made her application on 23 November 2015 therefore she could not benefit from section EX1.
- (d) Dealing with private life under paragraph 276 ADE the judge found that there were no very significant obstacles to her integration to Nigeria. The judge took into account the length of residence since 2003 but that she had lived all her life in Nigeria. She was familiar with the culture and language family members there (a father and sisters). In cross-examination she indicated that there were no reasons why she could not return to Nigeria apart from her life with her partner. The judge found that she was educated woman and would be able to find employment in the IT field and that she had family members and there was no evidence she would not be provided with some initial support. The fact that she has a relationship in the UK was not relevant considering her ability to integrate on return.
- (e) The judge then considered the issue outside of the rules but reached the conclusion that there were no compelling circumstances to consider the matter outside the rules but nonetheless went on to do so (see paragraph 27).
- (f) The judge applied the five stage test in Razgar and the public interest considerations under Section 117. The judge was satisfied that the applicant and her partner were in a genuine relationship and had family life and that the other limbs of the test was satisfied leading to the issue of proportionality.
- (g) Applying the Section 117 public interest considerations, the judge found that section 117A was engaged as it required her to take into account of the matters set out in section 117B in considering the public interest. In this regard the Appellant spoke English and have been supported by her family and her partner. The judge found that those to be “neutral factors”

which did not entitle the Appellant leave to remain. He went on to consider S117B(4) in the light of the immigration history noting that she came to the UK as a student which expired in 2009 and remained unlawfully since that date. She had made no attempt to regularise her status until 23 November 2015 almost 7 years after her leave expired. He found her leave throughout to have been precarious and unlawful since January 2009. He therefore satisfied that little weight should be attached to her private life and the relationship formed with her partner. The judge found that the Appellant's partner was aware of her status from early on in their relationship and neither could have had any legitimate expectation that without meeting the rules she would be allowed to remain.

- (h) As to the public interest in maintaining the economic well-being of the country, it had been argued that the Appellant's partner's business was successful and employed 30 people. The judge made reference at paragraph 33 to the letters from various people in support of that it would be counter-productive for the business to close if her partner relocated to Nigeria and it was not proportionate to expect the Appellant to return to Nigeria simply to make the application from abroad. However the judge at paragraph 34 found that it was not suggested seriously that he should relocate to Nigeria but that he and the applicant wished to continue the relationship she would be required to return and it will be necessary for him to remain and to maintain the business to support any entry clearance application made from abroad.
- (i) In this context, the judge considered whether it was proportionate to expect the Appellant to leave the UK to make an application from abroad. The judge considered the case of R (on the application of Chen) v SSHD (Appendix F – Chikwamba-temporary separation – proportionality) IJR [2015] UKUT and cited paragraphs 39.
- (j) The judge concluded at paragraph 37 that he was not satisfied that there would be any significant interference with their family life by temporary removal and was not satisfied that the evidence placed before him indicated that temporary separation would be disproportionate in this case. In particular there were no children and the parties entered into the relationship in the full knowledge that the Appellant status was unlawful and not simply precarious. The applicant herself said that there were no real reason she cannot return and apply from Nigeria; a country where she has a family and her partner has confirmed that he would support her application.

17. The Appellant sought permission to appeal that decision and on 3 August 2017 First-tier Tribunal Judge Pedro refused permission.
18. However on renewal of permission, at Upper Tribunal Judge Coker granted permission on 17 October 2017 in the following terms:

“the Appellant seeks permission to appeal, essentially, on the grounds that the first-tier Tribunal Judge failed to consider oral evidence and erred materially in his factual understanding of the documentary evidence relied upon. It is arguable the judge failed to consider the evidence before him in the round including the oral and documentary evidence and fell into material error of law.”

19. A Rule 24 notice from the Respondent was filed on 3 November 2017. It submitted that the judge found that the couple were not married or engaged or been living together in a relationship akin to married two years prior to the application. The judge gave clear reasons for these findings and also finding no compelling circumstances the consideration outside of the rules. It is submitted that the judge drew sustainable conclusions on the facts presented in the grounds amounted to no more than a disagreement with the findings.
20. Thus the appeal came before the Upper Tribunal. I have given careful consideration to the submissions of each of the advocates. I have to consider whether it has been demonstrated that the First-tier Tribunal erred in law when reaching its overall decision.
21. The first ground of challenge relates to the findings of fact made as to length and duration of the relationship. It is submitted that the judge fell into error by reaching the conclusion that she was not satisfied that the parties had provided the requisite evidence to demonstrate that they had been living together in a relationship akin to marriage for a period of two years preceding the date of the application.
22. The judges’ findings on this issue can be summarised as follows:
 - (a) To meet the requirements the applicant needed to demonstrate that she is a partner as defined in section GEN1.2. However the judge found that the applicant and her partner were not married or civil partners nor were they engaged as such therefore she needed to establish that she could meet subsection (iv) that she and her partner had been living in a relationship akin to marriage for at least two years before the date of the application, that is, 23 November 2015 therefore the applicant needed to provide evidence that she and her partner were living together in such a relationship from at least 23 November 2013.
 - (b) The evidence that had been provided did not establish that she had lived with a partner for two years; it consisted of three pieces of evidence her name and three in her partner’s name with the oldest being September 2014 and this was less than two years. There was also a bank statement covering the period 11th of June 2014- 10th of June 2015 but it did not confirm that the applicant was living at the address on city Road in June 2014 but shows the most current address for the customer. The evidence submitted to the Respondent did not show residence at the address from 23 November 2013 (see paragraph 18-19).
 - (c) The judge considered the evidence in the Appellant’s bundle. There were three mobile phone bills for the Appellant dated October – December

2016, a bank statement for her partner dated 29 December 2015 and a water rates bill dated 6 January 2017. None of these demonstrates living together in a relationship akin to marriage for the two years before the application (paragraph 20).

- (d) The judge consider the letters in support of paragraph 22 – 34 of the bundle which confirmed the relationship and the business interests of the partner and the impact of the local community of Chester but none of them provided evidence of how long the Appellant and her partner had been living together is required.
- (e) The judge found that they were in a genuine relationship but that the burden of proof was on the applicant to demonstrate that they were living together in a relationship akin to marriage the two years before the date of the application. The evidence the applicant was that she moved in with her partner in or about July 2013 but she provided no other evidence to substantiate this. The only evidence apart from the witness statement dated back to September 2014 and did not show the required two years prior to the date of the application. The judge found that in any event, the Appellant and her partner were living in a room in friends' houses initially and there is nothing to show that they had any joint commitments or other matters indicative of a relationship akin to marriage. The judge also found there was no evidence when they moved into their current accommodation such as a tenancy agreement; the only correspondence the letting agencies dated 2 October 2014 and it does not indicate when the tenancy started.
- (f) Having reviewed the evidence, he was not satisfied that the Appellant and her partner, was in a relationship, were living together in a relationship akin to marriage the two years before she made her application on 23 November 2015 therefore she could not benefit from section EX1.

23. Mr Pratt in his submissions made reference to the documents within the bundle and by reference to oral evidence given by each of the respective parties. I have therefore considered the documents in the light of the findings of fact. Whilst the judge had referred to the documents within the bundle at pages 22 – 34, there was no particular assessment of the contents of the documents set out at pages 25 – 26 and 29. The letter at page 25 made reference to the author first meeting the Appellant in 2012/2013 and described the close, affectionate and strong relationship between the parties. It also made reference to them having cohabited for several years and that the parties had attended numerous functions together. At page 29 the letter made reference to the Appellant being his partner for “almost 5 years”. Whilst Mr Bates submits that this does not demonstrate when they first met, it seems to me that that evidence should be considered “in the round “when reaching an overall decision on the facts. In particular, the evidence given by the parties in their written statements that they had met in July 2012 and that they began living together at an address in G Avenue before residing together in the property that they now live. In addition, whilst the judge made reference to the evidence of the Appellant and her partner,

there was no reference to the terms of that oral evidence when reaching a decision on the factual circumstances and in particular the length and duration of the relationship. Mr Pratt submits that the oral evidence given was to the effect that they had been living together in a relationship akin to marriage from July 2013.

24. The overall decision as to the duration and length of the relationship should be made on a consideration of the documentary evidence and the oral evidence of the parties. Whilst the judge was correct in stating that the documentary evidence (in the form of bills etc.) was lacking, there was other evidence which, when considered in the round did potentially demonstrate that they had been in a relationship akin to marriage for a period in excess of two years. In any event, the date of the hearing there was no dispute that they have been living together for over two years.
25. As Mr Bates submitted, there was no dispute that the parties were in a genuine and subsisting relationship. He therefore submits that even if there was an error it was not material. Mr Pratt submits that the error is material because it led to the judge to reach the decision that it was not necessary to consider whether there were "insurmountable obstacles" under EX1 and that this was a necessary fact-finding issue. Mr Bates submits that it is not material because in substance the judge considered at paragraphs 25 – 26 that there were no significant obstacles to her reintegration to Nigeria and therefore did consider the issue of insurmountable obstacles.
26. I am satisfied that the error is a material one. The judge expressly found at paragraph 23 that because they had not been living together in a relationship akin to marriage the two years preceding the application, she could not benefit from EX1.
27. Appendix FM, "Family Members", begins with a general statement which explains that it sets out the requirements to be met by those seeking to enter or remain in the UK on the basis of their family life with a person who is a British citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (para GEN.1.1). It is said to reflect how, under Article 8, the balance will be struck between the right to respect for private and family life and the legitimate aims listed in article 8(2). The Appendix nevertheless contemplates that the Rules will not cover all the circumstances in which a person may have a valid claim to enter or remain in the UK as a result of his or her Article 8 rights. Paragraphs GEN.1.10 and GEN.1.11 both make provision for situations "where an applicant does not meet the requirements of this Appendix as a partner or parent but the decision-maker grants entry clearance or leave to enter or remain outside the Rules on Article 8 grounds".
28. Section R-LTRP sets out the requirements for limited leave to remain as a partner. Certain requirements apply in all cases: for example, that the applicant meets suitability requirements relating to such matters as his or her criminal record. Other requirements depend on the applicant's circumstances. In particular, under paragraph R-LTRP.1.1 (d), the applicant must not be in the UK on temporary

admission or temporary release, or in breach of immigration laws (disregarding an overstay of 28 days or less), unless paragraph EX.1 applies.

29. That paragraph applies if either of two conditions is satisfied. The first applies to persons applying for leave to remain as parents. The second applies to persons, such as the Appellant, who apply for leave to remain as a partner and reads as follows:

EX1"(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."

30. 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."
31. One of the issues that the Tribunal had to decide related to whether the Appellant could return to Nigeria accompanied by her partner and whether there were "insurmountable obstacles" to family life being exercised in Nigeria under EX1(b) or when considering the issue of family life outside of the rules (see the decision in Agyarko [2017] UKSC 11).
32. The Supreme Court considered insurmountable obstacles and Article 8 in the decision of R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11.
33. At paragraph 43 the court considered the European jurisprudence and that the "words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned".
34. However the Court went on to state: "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119".
35. Thus the Court found that the requirement of insurmountable obstacles is a stringent test to be met and this was not incompatible with Article 8.

36. In conclusion the Court held at [45] “By virtue of paragraph EX.1 (b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship”.
37. When looking at the issue of Article 8 outside the Rules at paragraph [48] the Court stated:
“ [48]As has been explained, the Rules are not a summary of the European court's case law, but a statement of the Secretary of State's policy. That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the "insurmountable obstacles" test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances". In the absence of either "insurmountable obstacles" or "exceptional circumstances" as defined, however, it is not apparent why it should be incompatible with article 8 for leave to be refused. The Rules and Instructions are therefore compatible with article 8. That is not, of course, to say that decisions applying the Rules and Instructions in individual cases will necessarily be compatible with article 8: that is a question which, if a decision is challenged, must be determined independently by the court or Tribunal in the light of the particular circumstances of each case”.
38. Whilst Mr Bates submits that the judge did consider whether there were “very significant obstacles” to her reintegration as set out at paragraph 26 of the decision, this was not a consideration of insurmountable obstacles as it only considered the circumstances of the Appellant herself in isolation and not those of her partner; which is what the judge noted in paragraph 26 that her relationship with a partner was not relevant to the ability to integrate.
39. Furthermore the judge appears to state that the Respondent did not seriously suggest that the parties relocate to Nigeria (see paragraph 34). However that was in fact what the decision letter had set out in terms was also a submission made by the presenting officer. Thus it is not clear whether the judge did in fact find that there were insurmountable obstacles on the facts of the case.
40. I am satisfied that the issue of insurmountable obstacles was an issue to be considered when reaching a decision as to whether the decision was unlawful under section 6 of the Human Rights Act 1998 (see section 84 (1) (c) of the 2002 Act (as

amended)). It is further material on the basis of a further submission made by Mr Pratt. He submits that there was an element missing from the assessment which related to insurmountable obstacles. In this context he submits that there was evidence set out in the witness statement of the Appellant's partner (see paragraph 11) which gave rise to a level of support provided which went beyond normal love and affection. It is not known what finding was made in respect of that and there is no reference to the oral evidence given on this particular issue.

41. I have therefore considered whether the errors identified above are material given the judge's overall finding that the Appellant could return to Nigeria and make an application for entry clearance.
42. As the judge correctly observed, 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 U.K. In this context the judge properly had regard to the decision of R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC).
43. However what was missing from the assessment of proportionality was whether the parties circumstances were such that the requirement to leave would be disproportionate. This has been clarified now in the decision of the Supreme Court in Agyarko at paragraph [51]

"51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*."
44. On the facts of this case it is submitted on behalf of the Appellant that the financial circumstances of the Appellants partner are such that the Appellant will be able to satisfy the requirements. However this was not an issue that was considered before the FTT in the way the case proceeded. The evidence of the Appellants' partner's business was alluded to in general but no specific findings were made in this regard.
45. In those circumstances, I am satisfied that this was an issue that was relevant to the public interest and the overall balancing exercise undertaken by the First-Tier Tribunal as set out in the decision of Agyarko. Effective immigration control is considerably weakened if it can be demonstrated that the Appellant and her partner are able to support themselves in the United Kingdom at the requisite level as required under the rules. As set out in the decision of Agyarko at [51] (as cited) notwithstanding her residence in the UK as being unlawful, if otherwise certain to be

granted leave to enter if an application were made, there might be no public interest in her removal. It is a factor of some weight which weighs in favour of the Appellant's removal being disproportionate when carrying out the balancing exercise. That was not an issue that was considered by the FTT when carrying out the balance required.

46. For those reasons I am satisfied that the errors made are material to the overall decision. As to the remaking of the decision I am satisfied that the correct outcome is for the appeal to be remitted to the First-tier Tribunal so that further findings of fact can be made on the issue of insurmountable obstacles and the financial circumstances of the parties to reach an overall decision on the issue of proportionality.

DECISION:

The decision of the First-tier Tribunal is set aside; the decision is remitted to the First-tier Tribunal for a further hearing in accordance with the Practice Direction.

SM Reeds

Signed

Date: 30th December 2017

Upper Tribunal Judge Reeds