Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13185/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 January 2018	**On 26 March 2018**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS OLUBUNMI OYEGUNLE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S. Staunton, Home Office Presenting Officer
For the Respondent: Mr A Adewoye, Prime Solicitors

REASONS FOR FINDING AN ERROR OF LAW

1. The Secretary of State appeals against the determination of the First-tier Tribunal Judge who allowed the appeal of Ms Oyegunle. I shall refer to her as the 'appellant' as she was before the First-tier Tribunal.

2. The appellant is a citizen of Nigeria. She was born on 27 September 1964 and is now 53 years old. She is the unmarried partner of Mr Soile who is a British citizen. I can give a very brief immigration history.

3. The appellant arrived on 8 July 1997. She has been in the United Kingdom now for twenty years but, at the time the decision was made on 2

February 2017, she had been in the United Kingdom for some nineteen years. During that time she had overstayed for the entirety of the period unless, as she claimed, she entered as a visitor at which point she would have had some six months' leave to remain. The judge, however, in paragraph 48 found there was no evidence that she entered the United Kingdom lawfully. It does not make very much difference whether she entered as a visitor in 1997 or whether she entered unlawfully. The fact remains that she has overstayed in the United Kingdom for nineteen years or thereabouts.

4. Various applications were made. There was an application for leave to remain made in 2010 which was refused. A further application based on human rights grounds was refused in October 2010 and thereafter she commenced a relationship with Mr Soile which commenced in June 2012. I am satisfied that this is a genuine and subsisting relationship and that they would very much like it to continue. Unfortunately, she was convicted on 30 April 2015 of an offence of using a false document. This arose from her attempts to remain in the United Kingdom. In paragraph 18 of the determination it describes how, after meeting her partner in 2012, they tried to regularise her status but they were advised that there were no grounds to do so. She attempted therefore to 'regularise' her stay, as it were, by using what is called a false instrument. She continued to use it until she was convicted of doing so in 2015.

5. I can perhaps say a little something about the nature of that offending. The appellant was of course in a cleft stick but it was a cleft stick of her own making. She was in the United Kingdom illegally. She could not of course obtain benefits and, understandably, were she to have attempted to do so, it would have been deception and a serious criminal offence. If she worked, as she did, she would have been working illegally on the black market and she would have paid no tax or national insurance, the illegality and the free use of benefits for which others had to pay being a double burden to society.

6. On the other hand, if she used a false document, as she admitted that she did on and off since 2006 – see paragraph 25 of the determination – she was committing a further criminal offence. It was this criminal offence of which she was convicted. Whilst this was a route which was plainly unlawful, it did have the effect that she paid tax and national insurance which was, at least, of some benefit to the community. At the same time, however, it had the possible effect of paving the way for an eventual claim for settlement. For my part, I am not drawing any distinction between somebody who remains unlawfully and works on the black market and somebody who does as the appellant does and manages to find work on the basis of false documentation. These are the consequences and the inevitable result of surviving in the United Kingdom as an illegal entrant or as an overstayer. There is no material distinction. Both are working illegally; one on the black market, the other on the strength of false documents. The fact that the latter using false documents has rendered the appellant a convicted criminal rather than an unconvicted criminal

adds little to the public interest in removing her. Both are liable to be removed save for a successful human rights claim. Consequently the time that was spent in seeking to marginalise or minimise the criminal wrongdoing was in my judgment largely misplaced because what we have is the result of somebody living unlawfully in the United Kingdom for a substantial period of time.

7. The application had to be advanced on the basis of an Article 8 claim. That required consideration which was provided by the decision-maker as to the relevant paragraphs of the Rules. The decision-maker accepted that the eligibility requirements of the Rules had been met but then, when dealing with the suitability requirements, found that those were not met. For the reasons that I have stated, I am not over-concerned about those requirements because what we are really concerned with is whether there would be insurmountable obstacles for the applicant or her partner continuing their family life together outside the United Kingdom which would not result in very serious hardship for the applicant or her partner.

8. Not dissimilar considerations enter into the Immigration Rules, although they are somewhat differently expressed when it comes to dealing with her private life. The appellant had now been in the United Kingdom for twenty years and, in any event, the short period of imprisonment had in fact severed the continuity of her living continuously in the United Kingdom for that period. That is the effect of paragraph 276ADE(1)(iii). We are however principally concerned with the effect of paragraph 276ADE(vi). This applies to someone who has not lived continuously in the United Kingdom for twenty years but where there are very significant obstacles to the applicant's re-integration into Nigeria. It is important that very significant obstacles is not to be treated literally as that would be too high a hurdle. Instead, we are concerned with a test which is a significant one but as referred to in the Rule 24 response made by the applicant. This refers to serious difficulties in removal and relocation elsewhere. The judge considered this in the context of whether it would result in very serious hardship to them both.

9. The judge considered the material factors. The appellant herself has no job. She has two children aged 25 and 26 who live in Nigeria. She stated that she had irregular contact with them. There is something of a conflict of evidence in relation to the level of contact that she has with her children. In paragraph 43 of the determination the judge refers to this. She has a mother who is in Nigeria. Her partner, Mr Soile is a United Kingdom citizen. He is now aged 55 or was at the time of the decision which suggests that he was born in about 1962. He arrived in the United Kingdom in September 1995 and that is now some 21 years ago. The relationship commenced in 2012 and the parties had been cohabiting for that period. It is a relationship which is a genuine and subsisting relationship. At the time that cohabitation commenced, the parties were aware of the legal situation. Indeed that was the reason recorded in paragraph 18 of the determination why they attempted to regularise her status but were told that there was no basis for doing so. Consequently,

the relationship has always been on the basis that the appellant has no right to remain in the United Kingdom.

10. Mr Soile is a self-employed cab driver. He owns some five properties in the United Kingdom and he lives in one of those. Those properties are mortgaged but information as to the exact nature of the equity was not available. The judge said that she did not know their value and she only had what the appellant said as to their equity which she said was not very great. However, as the judge herself stated, it would have been helpful to have had some valuation. In my judgment it would have been *more* than helpful. It was essential because one of the matters that one had to take into account was the financial standing of this family and the amount of assets that they had which were available. The properties, or at least four of them, are rented out and we do not know what the rental incomes are or, if they were known, they are not something that was recorded by the judge. Accordingly, the judge found that the appellant's partner was a self-employed cab driver who had a portfolio of properties, subject to mortgage. She did not know how much the properties were worth and therefore was not able to make any assessment of the equity.

11. In paragraph 56 of her determination she heard evidence from the sponsor that it would take three or four years for him to sell the properties. She did not accept this, making the point that she considered that to be "rather excessive". In my judgment it was simply wrong. If an individual has to sell a property, he sells it on the market and it does not take four years for that to be realised unless the asking price is substantially overstated. Consequently, the First-tier Tribunal Judge approached the appeal on the basis that she knew there were sources of income from the appellant's partner who was described as a businessman who was operating as a self-employed cab driver and was in receipt of income.

12. In addition, the judge took into account the fact that the sponsor suffers from Type 2 Diabetes. He has a bladder problem which was surgically treated but no medication appears necessary for this and he has a mother and sister who live in Nigeria. He visited Nigeria in 2015 and 2016 and, as I said, the appellant has her mother in Nigeria. Accordingly, it is quite clear that they maintain links with Nigeria as a result of those members of the family quite apart from any others that there may be who are in Nigeria. Nevertheless the judge came to the conclusion that there would be insurmountable obstacles to family life continuing in Nigeria. She did so on the basis of a number of reasons set out in paragraph 55.

13. The first was a reference to their ages. The couple are aged 55 and 53 respectively. It does not seem to me that this is a point which can even conceivably be treated as an insurmountable obstacle. They are not old and they are both capable of working. The sponsor's diabetes and bladder problems do not prevent him doing so in the United Kingdom. It is also said that there was an insurmountable obstacle because of the length of absence from Nigeria. For the reasons that I have said, the parties had in fact maintained contact with Nigeria because of relatives that are living

there. Whilst it is perfectly true that the appellant will not have visited Nigeria for a great many years, that does not itself amount to an insurmountable obstacle. That will be determined by the situation that they will face when, and if they return there. It has not of course prevented the sponsor, Mr Soile from making visits to Nigeria, as one would expect, to see his mother and sister there. The judge however found that it is reasonable to assume that their long period of absence will impact on the strength of their ties and their knowledge of day to day matters. Insofar as inevitably they will have developed a different set of ties and a different understanding of life because they have not been living in Nigeria for that period of twenty years or thereabouts, it is inevitable that their ties will be assessed in a somewhat different way but whether that means that it is an insurmountable obstacle is in my judgment an entirely different matter.

14. The judge appears to have relied upon the fact that the work prospects in Nigeria are very considerably less advantageous than they would be in the United Kingdom. I was referred to, although there may well be other material, a document which shows that the unemployment rate in Nigeria is 13.9% but of course that is another way of saying that some 84% are in employment. Apparently the judge relied on a report of Dr Oyetade who said it would be "*very difficult if not altogether impossible*" for the appellant to find employment in Nigeria. I am bound to say the fact that there is high unemployment does not mean that it is *almost altogether impossible* for the appellant to find employment in Nigeria. She has worked in the United Kingdom, she is able to work and it may well be that there are many people who are young graduates but that does not mean that there are not other jobs. The judge however accepted that her chances of finding employment would be very slim. I do not understand on what basis she could not stand up and be, as it were, in competition with others in a similar position and who have obviously achieved finding employment. It is also said that if she were to set up in business she would need to find the capital to put into assets and find accommodation. It was said that this was not available to her so the prospects of the appellant being able to generate income to support herself and her partner do not look realistic. My reading of paragraph 55 of the determination is that there is no rational basis for making the finding that she had not the ability to generate income.

15. That becomes even clearer by looking at paragraph 56 because we are not looking at a couple who are without resources in the United Kingdom. The judge considered the fact that the appellant's partner had come into the United Kingdom 21 years ago. By that stage he would have been in his 20s. In the time that he has been in the United Kingdom he has occupied himself very successfully and has managed to acquire, and it is a great credit to him, a business, a portfolio of investments and to derive both a capital advantage and also an income advantage both from his self-employed work as a cab driver but also from the rental income. In my judgment the First-tier Tribunal Judge, in appearing to accept that it was sufficient for her to determine that those advantages were not of real

substance was an error. She needed much more in order to determine that the appellant and her partner did not have the assets that would have permitted them to relocate bearing in mind the basic facts that they possessed five properties and had a business.

16. The judge went on to say in paragraph 56 that the absence of meaningful family support, in particular the availability of financial support and the real prospect of job insecurity would amount to very serious hardship. First of all I do not see the basis upon which it was important for the couple aged 55 and 53 to have meaningful family support. There is no suggestion that they rely on meaningful family support whilst in the United Kingdom. If they need merely the support of a mother and other family members in Nigeria, then they have those but one is not looking to meaningful family support as a necessary requirement to avoid there being an insurmountable obstacle to family life continuing in Nigeria. The availability of financial support surely exists in the form of the properties that I have mentioned and the rental incomes that they receive. Since we do not know what the value of those properties are, we do not know what the result would be if (on the one hand) the parties leave the United Kingdom, sell the property in which they live, purchase another in Nigeria but remain in receipt of the income from the properties which are let or (on the other hand) sell those properties which are let and reinvest those sums in property in Nigeria. Since we do not know what the pros and cons of those various options are, it cannot be justifiably said by the judge that the absence of the availability of financial support amounted to an insurmountable obstacle.

17. Finally, the judge also referred to the real prospect of job insecurity but it may be that self-employed cab drivers are insecure in the United Kingdom with the advent of Uber but the simple fact remains that the appellant's partner has always managed to run a business which is sufficient to support himself and, at the age of 55, he would still be able to do so in Nigeria. There is no reason why he should not find work as a self-employed cab driver and the fact that this work may be taken up in a different working environment does not amount to an insurmountable obstacle. Indeed I am bound to ask the question, rhetorically, that if a couple who run a business in the United Kingdom, who have a portfolio of five properties, who receive income from property rentals and who are in a position to work, if *they* are not able to relocate without very serious hardship to them both, it is difficult to see how anybody can relocated if the application of an insurmountable obstacles test renders it impossible for them. Whatever therefore the arguments that might have been put forward to say that they would face very serious hardship, I do not see that they are matters which are identified in the determination.

18. There is also a reference to the cost of medication. The sponsor receives medication for his Type 2 Diabetes and that is of course managed free of charge in the United Kingdom. We know of an example of someone who was spending 16,000 naira on medication. We do not know what the sponsor receives by way of income. We do not know what impact it would

be if he had to purchase medication for his diabetes. In these circumstances, whilst I accept that there will be interference and that the couple will have to readjust their lives, the instances upon which the judge relied as amounting to insurmountable obstacles cannot in my judgment stand as a sustainable finding on the material that was before her.

19. In those circumstances I set aside the determination of the First-tier Tribunal and direct that the matter is re-made. It is now the case that the appellant has been in the United Kingdom for twenty years, albeit twenty years which have been punctuated by a very short period of imprisonment in April 2015. However, I think that is a significant enough factor to require the balance to be reassessed. In particular any reassessment will have to be done on the basis of making sustainable findings in relation to the capital and income position of this couple when it comes to deciding whether there are insurmountable obstacles to their relocating to Nigeria.

DECISION

(i) I allow the appeal of the Secretary of State.

(ii) The First-tier Tribunal Judge made a material error of law and I set aside his determination.

(iii) The re-making of the decision will be made in the First-tier Tribunal and I remit the appeal for this to be done.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
Dated 23 March 2018