



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04605/2019

THE IMMIGRATION ACTS

Heard at Field House (via Skype)
On 7 December 2020

Decision & Reasons Promulgated
On 14 January 2021

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

**ED (NIGERIA)
(ANONYMITY DIRECTION MADE)**

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

Representation:

For the Appellant: Mr Parkin, instructed by Rashid & Rashid Solicitors
For the Respondent: Mr Lindsley, Senior Presenting Officer

DECISION AND REASONS

1. On 4 March 2020, a panel of the Upper Tribunal comprising UTJ Kopieczek and UTJ Norton-Taylor issued a decision in which it found that the First-tier Tribunal had erred in law in dismissing the appellant's appeal on human rights grounds. It was ordered that the decision on the appellant's human rights claim would be remade in the Upper Tribunal. This decision follows a further hearing on 7 December 2020, convened for the purpose of remaking the decision on the appeal.

Background

2. The appellant is a Nigerian national who was born in 1985. She first came to the UK when she was between 5 and 7 years old. She lived with her father and his then partner. After about two years, the appellant returned to Nigeria with her grandmother. She lived with her uncle but she left his house in around 2004 or 2005. She lived independently, working as a hairdresser.
3. Whilst still in Nigeria, the appellant entered into a relationship with a man, "O". She was sexually assaulted by O and another man, "S". She was afraid of them and in due course she made arrangements through an agent to come to the United Kingdom. She was unable to pay for the agent's services, however, and reluctantly agreed to have sex with him in lieu of payment.
4. On entering the UK, the appellant went to live once again with her father, in Borehamwood. Her father had a partner and two sons. She lived with them and did household chores. The appellant had a relationship with a man called Ola but that relationship eventually broke down in around 2012. She left her father's house in 2012 as she was not happy there.
5. The appellant then entered into a relationship with a man, "VM". He is a British citizen of a similar age to the appellant, and a plumber by trade. On 15 August 2016, the appellant and VM were interviewed by Home Office officials, who concluded that the relationship was not genuine. The appellant claimed asylum, stating amongst other things that O and S were involved in a cult and that she was in fear of them and their associates upon return to Nigeria. On 30 September 2016 the appellant and VM married at the Register Office in Maidstone.
6. The appellant was referred to the Competent Authority via the National Referral Mechanism. It was initially accepted that there were reasonable grounds to conclude that the appellant was a victim of trafficking but subsequently, on 15 October 2018, the CA decided on conclusive grounds that she was not.
7. The respondent refused the appellant's application on 9 May 2019. The majority of the refusal letter is concerned with the protection claim. The respondent did not accept that the appellant had been in a relationship with O, or that O and S were involved in a cult. She concluded that the appellant could relocate within Nigeria to avoid any threat from them, which would in any event be addressed by the authorities in Nigeria.

The Appeal to the First-tier Tribunal

8. The appeal to the FtT was heard by Judge Abdar on 16 July 2019. In his reserved decision, he accepted the facts I have summarised at [3] and [4] above. He concluded, however, that the appellant had been the victim of a 'horrendous, opportunistic criminal offence' by the two men in Nigeria and that there was no risk arising from the events of 10 years before. Although he accepted what the appellant had been through in Nigeria, he did not accept that she was a victim of trafficking.

9. The judge then turned to Article 8 ECHR at [40] of his decision. He accepted that the appellant was in a genuine and subsisting relationship with VM and that the concerns expressed following the marriage interview were ill-founded. Whilst the judge noted that the appellant's evidence was on occasion inconsistent with that which was given by VM, he held on balance that the relationship was as claimed and that they had entered into a genuine marriage on 30 September 2016.
10. The judge did not accept that the appellant met the requirements for entry clearance under the Immigration Rules and found that 'this is not a Chikwamba type case': [57]. That conclusion was reached because VM's tax return, which appeared to show an income of more than £18,600, was incomplete. The judge also held that there were no insurmountable obstacles to the appellant's relationship with VM continuing in Nigeria, and did not accept in particular that her seeking IVF treatment from the NHS amounted to any such difficulty: [62]. The remainder of the decision concerned paragraph 276ADE of the Immigration Rules and what must be said to be a fairly cursory examination of Article 8 ECHR outside the Rules.

The Appeal to the Upper Tribunal

11. Permission to appeal was granted by Upper Tribunal Judge Martin, sitting as a judge of the FtT. Whilst she considered the remainder of the findings to be unimpeachable, she considered it arguable that the judge had fallen into error in failing to consider the nature and extent of VM's relationship with his children from a previous relationship and the effect of any such relationship on the assessment of Article 8 ECHR.
12. In its decision, the Upper Tribunal noted that there were other grounds of appeal, in particular relating to the protection claim, but that UTJ Martin had been correct to refuse permission on those grounds. It then recorded, at [18], that Mr Jarvis (who represented the respondent at that hearing) accepted that the judge had fallen into error in failing to take account of the situation of VM's three children, then aged 12, 10 and 7. The panel agreed, noting that VM's relationship with the children was 'plainly relevant' to the assessment of whether there were insurmountable obstacles to family life continuing in Nigeria. The panel went on to reject the submission made by Mr Jarvis that this error was not material, and to order that there should be a further hearing before the Upper Tribunal, at which the focus would be on VM's relationship with his children and the impact of any such relationship on the questions posed by the Immigration Rules, at EX1 of Appendix FM in particular, and by Article 8 ECHR more generally.
13. The Upper Tribunal noted, at [20] of its decision, that the evidence in support of there being a relationship between VM and his children was 'very sparse' but concluded that there was sufficient to have meant that this was an issue which was properly before the FtT.
14. At the start of the resumed hearing, I asked Mr Parkin to confirm the material I should have. In addition to the decisions of the FtT and the UT, he said that I should have two appellant's bundles, the first of 135 pages, the second of 36. There was also a skeleton argument (19 May 2020) and separate witness

statements which had been made by the appellant and the sponsor on 13 June 2019. I confirmed that I had these bundles, as well as the original respondent's bundle before the FtT.

15. Mr Parkin indicated that he intended to call the appellant and the sponsor. They were both in his instructing solicitor's office in Merton. The appellant was in a room with a solicitor named Nilesh Rupwate, who confirmed that no one else was present in the room and that this would remain the case whilst the appellant gave evidence. Mr Rupwate indicated that he would remain whilst the appellant gave her evidence so as to ensure that the Skype link remained in place and to ensure the integrity of the evidence. Mr Lindsay was content with the appellant (and then the sponsor) giving evidence in this way.
16. I then heard oral evidence from the appellant and the sponsor, who adopted the statements they had made before the FtT and the Upper Tribunal. They were asked no further questions by Mr Parkin but they were cross-examined extensively by Mr Lindsay. I do not propose to rehearse their evidence in this decision but will refer to it insofar as it is necessary to do so to explain my findings of fact.

Submissions

17. Mr Lindsay submitted that I should consider first whether there were insurmountable obstacles to family life continuing in Nigeria, such that EX1 of Appendix FM of the Immigration Rules was satisfied. In the event that it was, that conclusion was determinative of the appeal, in accordance with TZ (Pakistan) [2018] EWCA Civ 1109. In the event that it was not, the enquiry should progress to consider Article 8 more broadly, and it was accepted by the respondent that there was a category of case which could succeed on that basis notwithstanding the absence of insurmountable obstacles: R (Chen) v SSHD [2015] UKUT 189 (IAC); [2015] Imm AR 867.
18. The primary focus of the case had moved on since the refusal letter, which was concerned principally with protection. It was accepted by the respondent that various parts of the FtT's findings had been preserved, and properly so. Those findings had been summarised at [3] of Mr Jarvis's skeleton argument and there was no attempt to depart from that acceptance.
19. The appellant's evidence had been unsatisfactory in a number of respects. The most recent statement was dated June 2020. The appellant and the sponsor had been inconsistent on highly relevant matters in their evidence. The extent of their contact with the sponsor's children and the appellant's current IVF treatment were areas on which there had not been consistency. Those inconsistencies were important because there was so little other evidence of the sponsor being in contact with his children. It was to be recalled that the burden was on the appellant to establish her claim and she had not discharged that burden.
20. Even taking the evidence at its highest, however, it did not establish that there were insurmountable obstacles to the appellant and the sponsor living together in Nigeria. It was clear from Lal v SSHD [2019] EWCA Civ 1925; [2020] 1 WLR 858 that the focus had to be on the circumstances which would obtain in Nigeria.

The children live with their mother and it had been accepted by the sponsor that they would be adequately cared for in the event that he left the UK. The threshold in EX2 was to be borne in mind and there was no evidence to show that there would be very serious hardship if the sponsor relocated to Nigeria. He could work in Nigeria, even though he might earn less than in the UK. Visits with the children would still be possible.

21. Mr Parkin having confirmed that there would be no submission that paragraph 276ADE of the Immigration Rules applied, Mr Lindsay moved on to Article 8 ECHR outside the Rules. In relation to Chikwamba v SSHD [2008] 1 WLR 1420, he submitted that it was not certain that entry clearance would be granted because the FtT had concluded that the Financial Requirements of the Rules were not met. In any event, there were proper reasons to expect the appellant to make an entry clearance application. She had entered unlawfully and had remained in the UK without leave for many years. The law had, in any event, moved on since the decision in Chikwamba, as explained in Mr Jarvis's skeleton argument. In the event that the appellant returned to Nigeria to make an application for entry clearance, there would be a time-limited interference with her family life. Section 55 of the Borders, Citizenship and Immigration Act 2009 did not militate against that course as it was not established that her removal would have any adverse impact on the best interests of the children. The appellant clearly has some family support in Nigeria and there was no reason why she could not work.
22. Mr Parkin submitted that there was little between the parties on the law. He agreed with Mr Lindsay that the focus under the Immigration Rules should be on whether there were insurmountable obstacles to family life continuing in Nigeria. The structure of the exception necessarily implied that the existence of a genuine and subsisting parental relationship between the sponsor and his children would give rise to an insurmountable obstacle to the appellant and the sponsor continuing their relationship in Nigeria. Whether or not that was the case, it would necessarily give rise to very serious hardship to separate a father from his children. Mr Lindsay had submitted that there were problems with the credibility of the account given by the appellant and the sponsor but their accounts were broadly in accord. They had both stated that they had last seen the children at the end of November and there was no real basis for thinking that the relationship between the sponsor and his children was not a real and subsisting relationship. The parties agreed that the satisfaction of EX1 was determinative of the appeal.
23. As for Article 8 ECHR outside the Rules, it was at least likely that the appellant would be granted entry clearance in the event that she applied for it. What had been said by Lord Reed in R (Agyarko) v SSHD [2017] UKSC 11; [2017] 1 WLR 823 about Chikwamba had been obiter. It was also relevant to recall that the appellant had been accepted by the FtT to have been through terrible experiences in Nigeria. This was, on any proper view, a strong Article 8 claim in which children were involved. There was no criminality. Younas [2020] UKUT 129 (IAC) showed that s117B factors were to be brought into account and there was no difficulty here with either finance or English Language. In considering whether the appellant should apply for entry clearance, the delays caused by the pandemic were also to be borne in mind. To expect her to do so would be disproportionate.

24. I indicated at 1.20pm that my decision was reserved. Mr Lindsay then sought to reply to Mr Parkin's submissions, however, and I sought to ascertain the basis on which he wished to do so. He submitted that Mr Parkin had gone behind an earlier concession (that the Upper Tribunal should not consider the prospects of success of a putative entry clearance application) and that he should not be permitted to do so. He invited me to hold the appellant to the acceptance in the skeleton argument written by previous counsel, Mr Moriarty.
25. Mr Parkin submitted that he was under a duty to represent the appellant to the best of his ability and to put the submissions he considered appropriate. He had merely endeavoured to respond to the submissions made initially by Mr Lindsay.
26. I did then indicate that my decision was reserved.

Analysis

27. I can state my conclusion in this appeal very shortly. I accept that the sponsor has a genuine and subsisting relationship with his three children, who are currently aged 14, 12 and 9. I consider that he would experience very serious hardship as a result of his separation from those children in the event that he attempted to relocate to Nigeria. I therefore find as a fact that paragraph EX1(b) of Appendix FM of the Immigration Rules applies, and that the appeal falls to be allowed on Article 8 ECHR grounds without more: TZ (Pakistan) refers. My reasons for reaching those conclusions are as follows.
28. Mr Lindsay was entirely correct, with respect, to highlight the various difficulties with the evidence in this case. The first appellant's bundle contains very little evidence which bears on the existence of a relationship between the sponsor and his children. There are a few photographs of the appellant and the sponsor with three little girls. I was not taken to those photographs in evidence. There was no attempt to identify the children in the photographs or to state when and where the photographs, which are unlabelled and undated, were taken.
29. In the statements which were made by the appellant and the sponsor on 13 May 2020, it is said that they both play 'a huge part' in the girl's upbringing. It is suggested that the children spent every weekend with the appellant and the sponsor prior to the lockdown and that they also picked the sponsor's youngest daughter up from school regularly. Since the lockdown, it had not been possible to see the children but they had been making plans to do so. The sponsor stated that he was supporting the children financially and that this support, and his contact with them, would cease in the event that he relocated to Nigeria. There are some further photos at the end of this short bundle.
30. There are also what are said to be messages between the appellant and the mother of the sponsor's children, however, and Mr Lindsay asked no questions and made no submissions about those messages. Those messages (which appear to be via Whatsapp) appear to contain warm exchanges between the two women, referring to the children and to the arrangements between the adults for their collection and return before and after visits. I note that the sponsor's ex-partner is named as '[K]'s mum' in the appellant's mobile phone, that being an

abbreviation of the sponsor's younger daughter's name. I note also that there are various messages between the sponsor's oldest daughter and the appellant, also in warm and familiar tones, referring to a wish that 'isolation' was over so that they could be reunited. Again, Mr Lindsay asked no questions about these messages and made no submissions about them. I attach some weight to these messages and to the photos, despite the limitations which I have highlighted above.

31. The reality, however, is that the documentary evidence of there being any relationship between the sponsor and his children is limited. Evidence which I would have expected to see – such as evidence of the financial support which he is said to provide – is altogether absent. Nor is there anything from the sponsor's ex-wife, confirming the role that he continues to play in the lives of the children. These are concerning omissions in a case of this nature, particularly where the Upper Tribunal has previously noted the sparsity of evidence of the relationship between the sponsor and his children.
32. The problems in this case are not merely limited to the comparative absence of evidence, however. As Mr Lindsay quite properly submitted, there were some difficulties with the oral evidence given by the appellant and the sponsor. Although they agreed that they had last seen the children in mid-November, the reasons they gave for the lack of contact differed. The hearing was on a Monday. The appellant and the sponsor stated that they had been working during the preceding weekend and had been unable to see the children for that reason. In relation to the previous weekend, however, the appellant stated that she had tested positive for Covid-19 and had not been able to see the children, whereas the sponsor was not sure of the reason. He stated that the children might have had a party or some schoolwork to do. He then stated that he had been self-isolating with his wife but that he thought it was 'like two weeks ago'.
33. There were also difficulties with the evidence given by the appellant and the sponsor about fertility treatment. The appellant gave very specific details about a new package of treatment she had recently started receiving from the NHS. She detailed courses of medication which lasted for five days, followed by hormone tests and other assessments. The sponsor, however, was not aware of any of this, stating that she was only receiving treatment for 'depression stuff', as far as he was aware. Mr Lindsay did not suggest that I should revisit the finding made by the FtT about the genuineness of the relationship between the sponsor and the appellant but I bear these difficulties in mind in considering the relationship which is said to exist between the sponsor and his children.
34. I have reflected carefully on whether the appellant has discharged the burden of proving on the balance of probabilities that the sponsor continues to enjoy a genuine and subsisting parental relationship with his children. I have borne in mind the very real difficulties which I have examined above. In the final analysis, however, I have concluded that there is sufficient before me to discharge the burden. I reach that conclusion because I find the oral evidence of the appellant and the sponsor to be broadly consistent with the picture which emerges from the Whatsapp messages and the photographs I have mentioned above. Both spoke with genuine emotion about the importance of their relationship with the children, and that emotion chimed with the manner in

which the messages in the bundle are expressed. I was struck by the sponsor's reaction to the suggestion – put clearly and properly by Mr Lindsay – that he could relocate to Nigeria. He seemed genuinely bemused that it might be suggested that he would leave his children in that way, asking Mr Lindsay how he would be able to provide for them financially and how he and the appellant would manage to see them. The oral evidence which ultimately decided this issue in the appellant's favour came right at the end of the sponsor's oral evidence, however. He was asked by Mr Lindsay how often he sees the children and he gave an answer which, in my judgment, had the clear ring of truth. He stated that he saw them about three times a week and that the amount of contact had increased since they had returned to school. He did not suggest that this was for any particular emotional or family reason but simply that his eldest daughter was dependent upon the train to get to school in Chatham and would often call him to ask for help with transport if, for whatever reason, she was unable to depend on public transport. This was not, in my judgment, a man who was attempting to paint an unreliable picture of his contact with his children; it was a man who was honestly describing the vicissitudes of parenting children during the ongoing pandemic.

35. Drawing these threads together, I come to the clear conclusion on the balance of probabilities that there is an ongoing and important family life between the sponsor and his children, characterised by regular contact and financial support. I also accept that the appellant has formed a relationship with the children during the four years that she has been married to the sponsor.
36. The children are now aged 14, 12 and 9. Although they live with their mother, it is clearly in their best interests to continue having regular contact with their father. No authority need be cited for the principle that it is generally in the best interests of a child to continue to do so. I find that they have a genuine and subsisting parental relationship with their father and that it would be contrary to their best interests for him to relocate to Nigeria with the appellant. It was understandably not suggested by Mr Lindsay that the children could relocate to Nigeria with their father. He suggested, instead, that they would be adequately cared for in the UK and that the sponsor's separation from them would not give rise to very serious hardship. He cited the decision of the Court of Appeal in Lal, submitting that the real focus of EX1 is on the circumstances in the country of origin. I accept that submission as far as it goes; what Lal goes to show is that the situation in the country of the appellant's origin must indeed be examined closely if it is to be said that something about it precludes the sponsor's relocation there. In Lal, the obstacle to relocation was said to be the sponsor's aversion to the heat, which had been the subject of insufficient investigation by the Upper Tribunal.
37. What Lal did not decide, however, was that the effective severance of a parental relationship such as that which is at issue in this case is incapable of giving rise to 'very serious hardship' of the kind contemplated by paragraph EX2 of Appendix FM. If that was the submission made by Mr Lindsay, I reject it. As I observed during his submissions, it runs counter to the respondent's current policy¹, which expressly contemplates (at p53) the possibility that separation from a child from a

¹ Family life (as a partner or parent), private life and exceptional circumstances, version 11.0, 16 October 2020

former relationship might, depending on the circumstances, amount to an insurmountable obstacle. I consider that these circumstances are such as to amount to an insurmountable obstacle. The suffering which would be experienced by the sponsor and his children in the event that he relocated to Nigeria surmount the threshold of 'very serious hardship' just as easily as, for example, a sponsor's inability to obtain crucial medical treatment in another country. The emotional suffering experienced by parent and child in the former circumstance is just as pressing, and causative of just as much hardship as the physical suffering experienced in the latter. It matters not, in my judgment, that the children would continue to be housed and parented by their mother; they would suffer greatly because they missed their father, and vice versa.

38. For all of these reasons, I conclude that there are insurmountable obstacles to the sponsor relocating to Nigeria with the appellant. It was accepted on all sides that this conclusion was determinative of the appeal for the reasons explained by the Senior President of Tribunals at [34] of TZ (Pakistan). I accordingly allow the appeal on human rights grounds.

Notice of Decision

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. I continue this direction, which was made by the Upper Tribunal on an earlier occasion, due to the children involved in the case.

M.J. Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

01 February 2021