



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

Appeal Number: IA/03123/2014

THE IMMIGRATION ACTS

Heard at Field House

On 21 August 2014

**Determination
Promulgated**

On 5 September 2014

Before

DESIGNATED JUDGE MURRAY

Between

**EZINWANYI ULUNMA IKEJI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Rashid, Counsel for David A Grand, London

For the Respondent: Ms A Holmes, Home Officer Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a Citizen of Nigeria born on 22 August 1968. She appealed against the decision of the Respondent dated 16 December 2013 refusing to grant her leave to remain in the United Kingdom in the context of Article 8 of ECHR. Her appeal was heard by Judge of the First Tier Tribunal Wiseman on 6 May 2014. The appeal was dismissed in a Determination promulgated on 30 May 2014.
2. An application for permission to appeal was lodged and permission was granted by Judge of the First Tier Tribunal Brunnen on 19 June 2014. There are five grounds of appeal. The permission states that the Judge may have erred in law in assessing whether there were any insurmountable obstacles to the Appellant carrying on her family life in

Nigeria, as he failed to take material matters into account and failed to apply the principles in Izuazu (2013) UK 00045 and when considering Article 8 he failed to apply the principles in Chikwamba and Hayat (2012) UKUT 00444 IAC. The permission states that these grounds are arguable but permission to argue the remainder of the grounds is not refused.

3. A Rule 24 response was made by the Respondent. The Respondent states that Judge Wiseman directed himself appropriately and there is nothing in this case that amounts to an insurmountable obstacle. She states that there is nothing that would amount to more than a mere hardship or hindrance in the Appellant and her partner returning to Nigeria. The response goes on to state that the New Rules post date Chikwamba and the case of VW (Uganda)(2009) EWCA Civ5 and that as held in Nagre there was never a test of reasonableness. The response states that the Judge, in identifying that the Appellant and her partner can live together in Nigeria, has taken into account all the relevant factors and decided that the removal decision was lawful and that the principle of Chikwamba clarified in Hayat does not apply in this case. The response states that there is no error of law in the determination.

The Hearing

4. Counsel for the Appellant submitted that he will be dealing with all five grounds in the application.
5. The first issue is the case of Alvi (2012) UK SC33. He submitted that the Appellant's history from 2001 until 2009 is common ground. She was legally able to remain in the United Kingdom until 2009 and in 2009 she applied in time for a Visa as a Tier 4 (General) Migrant. This was refused as the application was held to be invalid as the photographs supplied by her were not in the correct format. Counsel submitted that she then made more applications, all of which were out of time and all of which were refused. He submitted that at this time she had no legal representation.
6. Counsel submitted that the format in which the photographs have to be submitted does not form part of the Rules but is purely guidance. He submitted that based on the said case of Alvi as this is not part of the Rules the refusal must have been unlawful. Counsel accepted that this may not have been argued before the Judge as the Appellant was represented by another Barrister at that Hearing. He submitted, however, that he is not conceding that point. He submitted that this is a jurisdictional point and has nothing to do with the evidence.
7. He submitted that the Respondent's decision was unlawful ab initio, as the Appellant was never an overstayer. He submitted that she was never illegally in the United Kingdom so there can be no removal directions set.
8. Counsel submitted that this can now be put right by the Upper Tribunal and I was referred to the case of Kareem. He submitted that this point,

based on Kareem (2014) UKUT 24, can be argued even if it was not raised before the Judge.

9. The next issue is “insurmountable obstacles”. Counsel submitted that the proper approach is Izuazu (2013) UK 00045, paragraphs 53 to 59. I was referred to MF (Nigeria) (2013) EWCA Civ 1192. Counsel submitted that at paragraph 55, the Respondent and the Judge accepted there is a durable relationship between the Appellant and her partner. He submitted that the Judge has not taken into account the fact that the Appellant’s mother, sister and sister’s children are all in the United Kingdom, although he has mentioned this in passing at paragraph 54 of the Determination. At paragraph 56 the Judge refers to the Appellant having created an enormous difficulty for herself by overstaying and making unsuccessful applications. He submitted that the Appellant’s difficulties have been created by the Respondent because of the Alvi situation. He submitted that the Judge states there are no insurmountable obstacles to the Appellant returning to Nigeria but this is not a reasoned conclusion. What has to be tested is the degree of difficulty for the Appellant and her partner going to live in Nigeria. He submitted that the Judge has not made any assessment here and although he has referred to the Appellant’s family life with her partner he has not taken into account her relationship with her other family members in the United Kingdom so the Judge failed to take into account material matters. The Appellant was lawfully in the United Kingdom up until 2009 and this is significant. He submitted that her relationship was established when she was lawfully in the United Kingdom not when her status was precarious.
10. The Judge states at paragraph 56 of the Determination “There is an inevitable tendency on the part of an Appellant in a case such as this, to emphasise a lack of family or close friends or even a good chance of employment in the country of origin, because there has been an adjustment to a way of life in this country which would seem very difficult to give up even temporarily”. He submitted that the Judge appears to have prejudged this Appellant before the Hearing took place. He submitted that her only relative in Nigeria is a roving Pastor. The Appellant’s partner is British and came to the United Kingdom on a prestigious scholarship granted by the Foreign and Commonwealth Office in the United Kingdom. He was encouraged to settle in the United Kingdom and did so. He has been granted ILR and at the date of the Hearing he was a British Citizen. He submitted therefore that two different sections of the Government are at odds with each other. In spite of the Appellant’s partner being encouraged to remain, the Home Office is now trying to take that away from him.
11. Counsel submitted that the Appellant’s partner has no family in Nigeria, they are all in America. He has cut his ties with Nigeria. Neither the sponsor nor the Appellant has assets in Nigeria. He submitted that when all of the circumstances of this claim are taken together, there are insurmountable obstacles to the Appellant returning to Nigeria with her partner.

12. The third ground of appeal relates to the Chikwamba point. I was referred to paragraph 58 of the Determination. In this paragraph it is suggested that the Appellant can go back to Nigeria and make an application for entry clearance as a partner in the usual way. Counsel submitted that Lord Justice Sedley in the case of Chikwamba stated that this would be false logic. I was also referred to the case of VW (Uganda) at paragraph 43. He submitted that what the Judge states in his Determination is the opposite of what the Court of Appeal has decided. I was referred to the case of Hayat and Counsel submitted that there would require to be a sensible reason for the Appellant to have to return to Nigeria and then apply to come back to the United Kingdom.
13. I was referred to paragraph 62 of the Determination which refers to people who overstay. He submitted that this is a generalised comment and appears to have been influenced by a general antipathy towards people who overstay. He submitted that the case of Chikwamba does apply in this case.
14. The fourth ground refers to paragraph 276 ADE of the Rules and the Appellant`s lack of ties in Nigeria.
15. I was referred to the Determination at paragraph 59, Counsel submitted that it is true that the Appellant has not been in the United Kingdom for 20 years. The Judge states that she has not lost her cultural ties to Nigeria. He states that that statement is based on reasons he has previously referred to, but Counsel submitted that there are no such reasons in the Determination.
16. I was referred to the case of Ogundimo (2013) UKUT 00060 which deals with a continued connection to life in Nigeria. Counsel submitted that this Appellant has been in the United Kingdom since 2001 and has made three short visits to Nigeria, one of which was to dispose of her assets there. He submitted that she has no continuing connection with Nigeria. He submitted that the Judge has made a flawed assessment relating to paragraph 276 ADE and has applied the wrong test.
17. Counsel then referred to the fifth ground of application which is the Appellant`s long residence in the United Kingdom. He submitted that for lawful residence only 10 years is required. I was referred to paragraph 276ADE and it was submitted that the Appellant has had lawful residence from 2001 and the 10 years was up in 2011. He submitted that because of the Alvi point the Appellant is still lawfully in the United Kingdom but the Judge did not consider this.
18. Counsel then referred to the material factual errors made by the Respondent in the Refusal letter. In paragraph 3 it is stated that the Appellant was granted entry clearance from 1 September 2001 until 31 December 2004. He submitted that this is wrong. He referred to other

errors, for example, that her partner has been an asylum seeker since 2001. That is not true. Her partner has never been an asylum seeker.

19. I was asked to find on all five grounds, that the Judge has made an error of law.
20. The Presenting Officer made her submissions referring to the Alvi point. She submitted that it is almost certain that this was never raised before the Judge and the Appellant was represented by a Barrister. She submitted that the Judge did not make an error by not picking up on this.
21. I was referred to paragraph 18 of the Determination in which it is stated that the Appellant accepted that she had remained without leave in the United Kingdom for a number of years following the refusal of her application to stay as a student. I was referred to paragraph 22 of the Determination which states that the Appellant has accepted that she acted wrongly and overstayed after the refusal of her application. She submitted that the fact that the Appellant has accepted that she has been unlawfully in the United Kingdom for a number of years takes away from any error of law by the Judge relating to the Alvi point which was not raised before him.
22. With regard to insurmountable obstacles she submitted that the Judge has taken into account everything he required to take into account. He refers to the Appellant's mother, sister and sister's children who are in the United Kingdom, although he does not take them into account in particular, when he makes his decision about insurmountable obstacles. She submitted that the Judge does not require to take into account whether the Appellant has property in Nigeria or not. In paragraph 56 of the determination the Judge refers to the Appellant's partner having good financial resources and being a man of means. The fact that the Judge did not take into account assets and property in Nigeria in his assessment is not an error of law. She submitted that the Judge was aware that the Appellant's partner was a British Citizen. He was granted British Citizenship on 14 March 2014 and the appeal was heard on 6 May 2014. She submitted that it is clear that the Judge read the Appellant's partner's statement in which this is stated. The Presenting Officer submitted that the Judge's decision was based on what the Barrister put to him on the day of the hearing and because of this it was open to the Judge to make these findings. The Appellant admitted before the Judge that she has been in the United Kingdom since 2009 without leave.
23. With regard to the Appellant's ties to Nigeria the Presenting Officer submitted that the Judge was wrong to state that the Appellant has no ties there. Her brother is there and she was brought up there. She was in Nigeria for a long time before she came to the United Kingdom. I was referred to paragraphs 30 and 31 of the Determination. The Appellant states that she had no intention of staying in Nigeria and she admits she has a brother there. In paragraph 31 the Appellant states that she does not want to go back to Nigeria but the Presenting Officer submitted that

this is not a good enough reason. She submitted that I need to take the Appellant's own evidence before the First Tier Judge into account when considering the arguments put forward by Counsel. She further submitted that things have moved on since the case of Chikwamba and the Judge was aware of that. The Judge refers to Nagre and Gulshan (2013) UKUT 00640 and considers the Appellant's family and private life.

24. The Presenting Officer submitted that the Judge has considered everything he had to consider. He took into account all the issues and it was open to the Judge to make the decision he did. She submitted that the points made by Counsel at this Hearing were not raised before the Judge and the application should be dismissed.
25. Counsel for the Appellant submitted that the Appellant's partner's intention was to settle in the United Kingdom. He submitted that the Judge was aware that he was a British Citizen. This is stated clearly in the Appellant's partner's statement which was dated 21 April 2014 but he submitted that the Judge did not take everything into account when he made his decision.
26. He submitted that even if Alvi was not raised before the Judge this argument still stands. The decision made by the Respondent in 2009 was unlawful. He again submitted that this is not an evidential point but a jurisdictional point and requires to be rectified. He submitted that with regard to insurmountable obstacles the Judge did not undertake the assessment which is required. The fact that the Appellant was in the United Kingdom lawfully from 2001 until 2009 should be given considerable weight.
29. He submitted that when making an assessment about life in the United Kingdom versus life in Nigeria the fact that the Appellant has no assets in Nigeria must be taken into account.
30. With regard to ties to Nigeria he submitted that because the Appellant is a Nigerian Citizen does not mean that she has ties there. He submitted that Nagre and Gulshan indicate that you can consider matters outside the Rules and when the judge assessed proportionality he made an error, as these matters were not taken into account.
31. He asked me to consider all five points raised and find an error of law in the Judge's Determination.

Determination

32. With regard to the said case of Alvi, it has been put to me that in 2009 the decision by the Respondent was unlawful. This was not raised before the First Tier Judge. The Appellant told the First Tier Judge that she was here illegally and knew that she was here illegally after her application was refused in 2009. This is a historical issue. There is no error of law in the Determination based on this point.

33. With regard to insurmountable obstacles and the said case of Izuazu the Judge has taken into account the evidence which he had before him. At no time was it argued before him that the Appellant had a continuous lawful presence in the United Kingdom. He was clearly aware that her mother and sister and her sister's family are in the United Kingdom. This is shown at paragraph 54 of the Determination. He does not require to take into account the fact that the Appellant has no property in Nigeria and it is clear that he was aware that the Appellant's partner is a British Citizen of some means. The Judge had a statement before him made by the Appellant's partner. The fact that the Appellant's Barrister did not make an issue of this does not matter. The Judge was aware of it when he made his decision and took this into account.
34. With regard to the Appellant's ties to Nigeria she has a brother there and she was brought up there. She states she did not intend to stay in Nigeria but most of her life was lived there and she is a Nigerian Citizen. At paragraph 31 she states that she does not want to go to stay in Nigeria. The Judge noted this and found that this is not a good enough reason for allowing her appeal. Matters have moved on since the case of Chikwamba and the Immigration Rules have changed. The Judge is clearly aware of the cases of Nagre and Gulshan and has properly looked at the Appellant's family and private life in the United Kingdom.
35. I find that the Judge has considered all the facts and all the evidence before him. Of course the Appellant has ties to her country of origin. She will have friends there. The fact that her only family member there is a brother does not mean she has no ties. All social, cultural and family circumstances should be taken into account.
36. With regard to long residence it is true that the Appellant's time in the United Kingdom was lawful from 2001. She used visit visas to come and go to and from the United Kingdom from 2001 until first September 2004 when she came to the United Kingdom as a student until thirtieth September 2009 but since 25 October 2009 she has been here illegally, as admitted by her. Public interest has to be considered. The terms of the Immigration Rules cannot be satisfied. This is stated by the judge at paragraph 56 of the determination. At paragraph 58 a solution is suggested by the judge. At paragraph 63 he states that there are no exceptional circumstances which might lead to a decision being taken outside the Rules. He clearly finds that based on the circumstances of this case it would be sensible for the Appellant to return to Nigeria and apply to come back to the United Kingdom.
37. With regard to the errors of fact in the Refusal letter, these were before the Judge but he has not based his decision on any of them.
38. I find that the Judge was entitled to come to the conclusion he did, based on what was before him at the Hearing. There is no material error of law in the Determination.

Decision

39. As there is no material error of law in the Judge`s Determination the First Tier Tribunal`s decision must stand.
40. The Appellant`s appeal is dismissed.
41. No Anonymity direction has been made.

Signed

Date

Designated Judge Murray
Judge of the Upper Tribunal