



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA322962015

**THE IMMIGRATION ACTS**

Heard at Birmingham Employment Centre  
On 8<sup>th</sup> June 2017

Decision & Reasons Promulgated  
On 27 June 2017

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MR GBENRO STANLEY OGUNBIYI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr H Sarwar (Counsel)  
For the Respondent: Mr D Mills (Senior HOPO)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Bart-Stewart, promulgated on 16<sup>th</sup> November 2016, following a hearing at Birmingham, Sheldon Court on 3<sup>rd</sup> November 2016. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State subsequently applied

for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a male, a citizen of Nigeria, who was born on 4<sup>th</sup> June 1985. He appealed against the decision of the Respondent Secretary of State dated 21<sup>st</sup> September 2015 refusing leave to remain in the United Kingdom, on the basis that he had not met the eligibility requirements at E-LTRPT.2.2. under the 5-year Rule and Appendix FM R-LTRP.1.1.(d). The Secretary of State did not accept that there were insurmountable obstacles to the Appellant's family life with his partner continuing outside the UK. It was not considered that there were very significant obstacles to his return to his home country. His parents and brothers were in Nigeria and they can help him to reintegrate. There were no exceptional circumstances raised in the application.

### **The Appellant's Claim**

3. The Appellant's claim is that he had made an application for leave to remain in the UK on the basis of his private life when on June 2014 he applied for a variation of leave as a spouse, and this was rejected due to the payment transaction being declined on 5<sup>th</sup> July 2014. His representatives wrote to the Respondent on 11<sup>th</sup> July 2014 questioning the rejection. There was a reply that was received on 20<sup>th</sup> August 2014 stating that the transaction had been declined. A further application was then submitted on 9<sup>th</sup> September 2014 which was beyond the 28 days for being treated as in time. This was refused and there was no right of appeal on the basis of this being out of time. The Appellant appealed and the appeal was heard on 2<sup>nd</sup> February 2015 and remitted back to the Secretary of State as the provisions of **Basnet [2012] UKUT 00113** had not been complied with and he was unable to show that the initial application was invalid. Moreover, the Respondent had not served a full bundle of documents.

### **The Judge's Findings**

4. The judge noted how the application of the Appellant with the payment not having been taken, was returned to the Appellant's solicitors with a letter dated 5<sup>th</sup> July 2016. This letter stated, "your fresh application should be returned to the address given on the application form". The representative responded (see page 161 of the main bundle). They returned the application. They did not state this was a fresh application.
5. The judge observed that,  
"Whilst the Appellant in oral evidence said he completed and signed a fresh application form his partner was clear that she only signed two forms". As Sponsor she would have had to sign the application form. Having regard to her evidence and the wording of the solicitor's letter I consider that the likelihood is that it was the rejected application that was resubmitted with the photocopy of the payment card. It was not a fresh application and moreover the signed authorisation to take the fee

would no longer be available (see Basnet). It is unfortunate that the Respondent then took more than six weeks to reply by which time the 28 days to make an application which would be treated as in time had expired.” (Paragraph 14).

6. The appeal was allowed.

### The Grounds of Application

7. The grounds of application state that the judge failed to apply the appropriate threshold for a consideration of appeal under Article 8. The Court of Appeal judgments in SS (Congo) [2015] EWCA Civ 387 and R (Agyarko) [2015] EWCA Civ 440 were material. Moreover, the judge wrongly assessed that the Appellant would face undue hardship in relocating in Nigeria. The assessment of proportionality in the decision in the light of the Appellant’s employment record and the partner’s earnings was flawed.
8. On 3<sup>rd</sup> April 2017 permission to appeal was granted.
9. On 20<sup>th</sup> April 2017 the Upper Tribunal determined that it was unnecessary to hold an oral hearing because the application could be dealt with on the papers.

### Submissions

10. Appearing for the Respondent Secretary of State, Mr Mills, argued that the judge had failed, in her brief determination, to give consideration to the issue of proportionality, at paragraph 22 of her decision where Sections 117A to D of the NIAA 2002 fell to be applied. This was important in the context of whether the Appellant could satisfy the £18,600 financial threshold test. The issue here was whether the Appellant could, without undue hardship, relocate to Nigeria and, in this respect the assessment of proportionality by the judge in the light of the Appellant’s employment record and his partner’s earnings, was significant because it did seem that the Appellant had ceased his employment on expiry of his student visa, and the partner earned below the minimum threshold level.
11. Second, the judge was plainly wrong in stating that, “it has been established that the test here is not exceptional circumstances or insurmountable obstacles” (at paragraph 20). This observation is ameliorated by the recognition in the same paragraph that, “where the Rules and the learning on Article 8 were in harmony the answer given by the Rules might render further enquiry unnecessary, unless there were exceptional circumstances.” (Paragraph 20).
12. The Supreme Court judgments now see ([2017] UKSC 10 and 11) in the cases of MM (Lebanon) and Agyarko do, submitted Mr Mills, uphold the requirement that there have be “exceptional circumstances” and it must be shown that there are “insurmountable obstacles” to the Appellant finding it possible to enjoy a family life in her home country. Yet, if one looks at paragraph 20 of the judge’s determination, it is plain that the requirement of “exceptional circumstances or insurmountable obstacles” is indicated by the judge to be not the correct test. This was an error.

Furthermore, if one then considers how the assessment is undertaken by the judge (at paragraph 22), it is plain that the Appellant could not have succeeded because the application had expired by more than 28 days when the decision was undertaken on it.

13. For his part, Mr Sarwar submitted that ultimately, no matter which way one phrases it, the test is one of “proportionality” and that this is clear from the Supreme Court judgment in Agyarko.
14. Firstly, if one looks at the treatment of “insurmountable obstacles” undertaken in Agyarko (at paragraph 42) the Supreme Court is clear that in Jeunesse, the Grand Chamber identified, “a number of factors to be taken into account in assessing the proportionality under Article 8 of the removal of non-settled migrants.” (Paragraph 42). It is then stated that:
 

“Relevant factors were said to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there were ‘insurmountable obstacles’ in the way of the family living in the country of origin of the non-national concerned, and whether there were factors of immigration control ....” (Paragraph 42).
15. Second, the Supreme Court went on to explain how,
 

“It appears that the European Court intends the word ‘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”.
16. It is then explained how in the previous case law references have been made to “major impediments” or to “the test of insurmountable obstacles” or whether the family could “realistically” be expected to move. The Supreme Court explained that “it is a stringent test”.
17. Third, the Supreme Court goes on to say that,
 

“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 would be granted outside the Rules on the basis that there are ‘exceptional circumstances.’” (See paragraph 48).
18. Fourth, when consideration is given to “exceptional circumstances” the Supreme Court makes clear that, “the European Court has said that, in cases concerned with precarious family life, it is ‘likely’ only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8.” (Paragraph 58).
19. However, the court then goes on to say that, “the European Court’s use of the phrase ‘exceptional circumstances’ in this context was considered by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192 (paragraph 56).
20. Nevertheless, having considered all of this, the court goes on to say that,

“Ultimately, is has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State’s policy, expressed in the Rules and instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of the Immigration Rules, only where there are ‘insurmountable obstacles’ or ‘exceptional circumstances’ as defined.” (Paragraph 57).

21. Finally, the court goes on to say that,

“The Secretary of State has not imposed a test of exceptionality in the sense that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she had defined the word ‘exceptional’, as already explained, as meaning circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate.” (Paragraph 60).

22. On this basis, submitted Mr Sarwar, the judge was entirely right to have allowed the appeal. The decision was in accordance with established jurisprudence. The judge was clear that, “there is nothing to suggest that the Appellant will not have met the other requirements of Appendix FM and whilst there was a chance of refusal and the Appellant having to leave I do not consider this a likely scenario.” (Paragraph 21).

23. After this the judge then considered whether there was a good and arguable case for the appeal to succeed outside the Immigration Rules and at paragraph 22 allowed the appeal on the basis of proportionality.

24. All in all, therefore, the correct test was applied.

25. In reply, Mr Mills submitted that proportionality was a process and not a test and it was for the judge to demonstrate that Article 8(2) of the HRA had been given due consideration. The judge does not expressly ask herself the question whether the decision is proportionate.

### **No Error of Law**

26. I am satisfied that the making of the decision by the judge does not amount to an error of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision.

27. First, the judge makes it quite clear at paragraph 14 of the determination that the application was not a fresh application but was a existing application which had been resubmitted with the photocopy of the payment card and that, “it is unfortunate that the Respondent then took more than six weeks to reply, by which time the 28 days to make an application, which would be treated as in time, had expired.” (Paragraph 14). That is an entirely material fact which it was proper for the judge to have at the forefront of her mind.

28. Second, the judge does not misdirect herself in relation to the requirement of “exceptional circumstances or insurmountable obstacles” because there is recognition of it being necessary to show that there were “exceptional circumstances” (paragraph 20), and the judge has indeed practically applied that test to the facts of this case. Third, the jurisprudence now clarified in **MM (Lebanon)** and **Agyarko** confirms that the approach of the judge was the correct approach.
29. Finally, the relevant factors in relation to proportionality are set out by the judge in that the wife is a UK national, her family is in the UK, she has never been to Nigeria, she has a very real worry of relocating to Nigeria, she would not be able to support her partner’s entry clearance application on her low income, and that she speaks English and is in employment here. The judge also makes the not insignificant observation that whilst “little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious” this did not, nevertheless, mean that she should attach no weight to it and that “there is an implicit distinction with family life.” (Paragraph 22).
30. This Tribunal can only intervene in a decision below if the decision is plainly irrational or “perverse” and I cannot conclude that this is such a case.

**Notice of Decision**

31. There is no material error of law in the original judge’s decision. The determination shall stand.
32. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

26<sup>th</sup> June 2017