



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00636/2017

THE IMMIGRATION ACTS

Heard at Field House
On 3 October 2018

Decision & Reasons Promulgated
On 23 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE R K CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

v

CHIDIMMA [C]
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:

For the Appellant: Ms Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Mr D Adams, counsel

DECISION AND REASONS

1. The Appellant is a national of Nigeria born on 15 August 1982. Her appeal came before me for an error of law hearing on 12 July 2018. In a decision and reasons promulgated on 1 August 2018, I found material errors of law in the decision of the First tier Tribunal Judge and

adjourned the appeal for a resumed hearing. A copy of that decision and reasons is appended.

Hearing

2. At the hearing before me, Ms Willocks Briscoe accepted that the requisite financial limit was met, but the appeal was confined to an assessment of Article 8 outside the Immigration Rules, with consideration of EX1 informing the Article 8 assessment and that paragraph 276ADE(vi) of the Rules was also in play.
3. Mr Adams submitted that the HMRC printout clearly shows that from 2014 onwards that the financial requirements are met.
4. The Appellant gave evidence and adopted her statement signed previously on 30 January 2018. Mr Adams asked her why she was unable to go to Nigeria and maintain family life there, to which she replied that her husband and family life are here in the UK; that she had given up everything to come here and there was no need for her to live in Nigeria. The Appellant stated that she resigned from her job because she received her visa and that she sold her house and car.
5. In cross examination, the Appellant stated that she was a human resources officer at Unity Bank, dealing with recruitment and placements. It was put to the Appellant that she had said that she could not get the same job if you returned, but why could she not get another job, to which she responded that she was trained on the job in the bank and that the economic circumstances mean it is very difficult to get a job.
6. When asked what she did with the money from selling her car she said that it is in her account and she uses it for the upkeep and financial support of her mother, who lives in Imo state in Nigeria, whereas the Appellant was living in Abidjan.
7. When asked why she could not go back to Nigeria, the Appellant responded that the whole reason she is here is to live together with her husband and start a family. She stated that whilst her husband is now British, he originates from Nigeria. When asked why he could not return to Nigeria with her the Appellant responded that he works in the UK and all his financial dealings are here and if he were to go back he would not be able to sustain that. She said that they had spoken about what he would do if the Appellant had to go back.
8. In response to questions by the Upper Tribunal regarding IVF treatment from Homerton Hospital, the Appellant stated that the hospital contacted the Home Office and said she had no rights to have NHS

treatment. She was meant to commence it in November but was told she cannot, however, if she were able to sort out her status she could go back on the waiting list. She confirmed her date of birth (15.8.82).

9. The Sponsor then gave evidence and confirmed his statement, which was signed and dated 31.1.18. When asked by Mr Adams why he would not be able to go back to Nigeria with your wife, he replied that his wife had resigned from her job and moved out from her accommodation and so they have absolutely nothing to fall back on if they moved back. She even sold her car. He denied that he would be in a position to go with her to start a family there, on the basis that he has been living in the UK for the last 12 years; that his friends and his life are here and that he works and pays his tax. He added that he is a British citizen since 25 January 2018 (passport shown).
10. In cross-examination by Ms Willocks-Briscoe the Sponsor confirmed that he originates from Nigeria. He said that he had returned to Nigeria to complete the burial in March 2016 after his mother had passed away in January 2016. He said that he had not spoken to his wife about what would happen if she had to return to Nigeria but that it would break their family and that he was fully convinced she is not going back. When asked what would stop him from going with your wife to Nigeria he would lose his job and he does not have anything there having left Nigeria in 2007. He said that nobody is going to feed him in Nigeria and he would have to fend for himself and he did not have the wherewithal to do this.
11. When asked why he could not obtain work in Nigeria he said that his job - head care assistant - did not exist in Nigeria. The Sponsor said that he also goes to school here as well. When asked if his wife had to return and needed accommodation whether he would help with finance, he said that he was not sure and that he would need to go through his budget and see and that it would affect him emotionally, psychologically and mentally and his right to family life would be violated.
12. When asked about family members the Sponsor stated that he has no family in the UK, but he has three brothers in Nigeria and that his wife has two brothers in Nigeria and her mother.
13. There was no re-examination.
14. In her submissions, Ms Willocks Briscoe handed up the judgment in *TZ (Pakistan)* [2018] EWCA Civ 1109. Her submission is that there is a large volume of evidence but that it does not meet the requirements of Appendix FM-SE. The application was made on 19.9.16 so evidence is

required for the 6 months prior to that and whilst some of the evidence is pre-decision e.g. evidence of employment in the form of a letter from HMRC and Maison Moti and the bank statements go as far back as June 2015, she has not seen the original documents. Under Appendix FM-SE the Sponsor would have had to provide a letter from the employer with his start date, salary and other details. Whilst she accepted that the new employment in 2017 at North Middlesex Hospital sets out the correct terms, the Maison Moti information is missing. In terms of the specified requirements she invited the Upper Tribunal to find the Appellant cannot succeed on that basis.

15. In light of the judgment in *MM Lebanon* [2017] UKSC 10, Ms Willocks Briscoe submitted that the Upper Tribunal can take into account evidence even though it does not meet the strictures of Appendix FM and that she did accept that the level of income is met, although not the specifics and that this is material to an assessment of Article 8 outside the Rules. However, she submitted that there were no insurmountable obstacles nor would it be unduly harsh to expect them to live in Nigeria and nothing had been said in evidence to suggest this. She sought to rely on *TZ (Pakistan)* and the Supreme Court judgment in *Agyarko* [2017] UKSC 11.
16. In respect of the Appellant's immigration status and whether she was here precariously or lawfully, Ms Willocks Briscoe submitted that one can be both precarious and lawful and that unless one has settled status or unequivocal leave then leave is precarious. The initial visa was issued in error and then a residence card was not provided so she is lawful but precarious. She submitted that there is no evidence to show family life could not continue and her partner, the Sponsor, is of Nigerian descent. The issue of his work in the UK and the fact he has friends here as indicated in *Agyarko* [2017] UKSC 11 are not matters that would make it unduly harsh for them to live in Nigeria.
17. In respect of the fact that the Appellant and Sponsor are seeking fertility treatment, Ms Willocks Briscoe submitted that this was a consideration that the parties would have to make themselves and there was no evidence they would not be able to obtain IVF in Nigeria.
18. Ms Willocks Briscoe submitted that there were no very significant obstacles to return and the Appellant could be supported by her husband or live with her mother.
19. In respect of the judgment in *Chikwamba* [2008] UKHL 40, Ms Willocks Briscoe sought to rely on the judgment in *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)

and the finding that temporary separation for entry clearance was lawful, unless there is evidence to show adverse effects such as to make separation disproportionate when assessing that – eg individuals with young children or circumstances which would render it unreasonable. She submitted that there is no evidence the Appellant could not return for a short period to obtain entry clearance.

20. In respect of the section 117A-D criteria, she submitted that little weight should be attached to the relationship as it is precarious and the Appellant's ability to speak English and be financially independent are neutral factors.
21. In his submissions, Mr Adams asked that the appeal be allowed. He submitted that the evidence is clear and that all the circumstances needed to be considered in the round. The Appellant and Sponsor have given credible evidence and have told the truth about having relatives in Nigeria.
22. Mr Adams sought to rely on the document from HMRC and the originals of the P60's, which clearly suffice and that these should be considered within the Rules. Mr Adams invited the Upper Tribunal to make a finding in light of the judgment in *MM (Lebanon)* [2017] UKSC 10. Mr Adams further submitted that precariousness has not been defined properly. He sought to reply on [21] of error of law decision and submitted that precariousness is where there is no legal basis for being in the UK and that was not the case. Once she was given a family permit all that was needed to be shown was the exercise of treaty rights in the UK. Mr Adams submitted that there was no economic liability for the UK. He further submitted that it would be unduly harsh, due to advice by the Respondent's representative the Appellant left Nigeria and sold all her possessions and gave up her job. Her husband has been in the UK for 12 years, for the better part of his adult life and he has put down roots in the UK.
23. In respect of the judgment in *Chikwamba* [2008] UKHL 40, Mr Adams submitted that if one looked at the requirements that, but for the Entry Clearance Officer's mistake, they would have been able to meet the requirements of Appendix FM. He submitted that in these circumstances it would not be reasonable for her to go back and make the application when the evidence is considered in the round. He submitted that what distinguishes this case is the fact that she is going to IVF and it will cause a break and that factor alone is very important and it would be unduly harsh on the Appellant and her husband and their family life.
24. I reserved my decision, which I now give with my findings.

Findings

25. It is not in dispute that the Appellant entered the United Kingdom on 3 October 2015, pursuant to an EEA family permit valid for 6 months. Thereafter the Appellant applied for a residence card as the family member of the Sponsor, who had been granted permanent residence on 28 November 2015. This application was refused in a decision dated 27 January 2016 because there was no legal basis for the Appellant's husband to sponsor her because he is not an EEA national (having derived his permanent residence from his former marriage to an EEA national). Thereafter, the Appellant made a further application for a residence card and also raised the issue of her family life pursuant to Article 8 of ECHR, however, this application was refused on 7 August 2016 for the same reason as before and no decision was made in respect of the Article 8 claim due to the fact that she had not made a formal application.
26. The Appellant then made a formal application on the basis of her family life with her husband on 19 September 2016, which was refused in a decision dated 22 November 2016 on the basis that she did not meet the eligibility requirements, given that she had become an overstayer after the refusal decision of 7 August 2016 and had not made the extant application within 28 days and EX1 did not apply.
27. I have considered whether EX1(b) applies and I have concluded that, in the absence of any evidence to the contrary, there are no insurmountable obstacles to the Appellant's family life continuing with her partner outside the UK, given that the Sponsor originates from Nigeria. Whilst I entirely accept that he would not wish to return to Nigeria, given that he left in 2007 and is now British, he returned in March 2016 following his mother's death and there is nothing which would amount to an insurmountable obstacles that would prevent him from returning.
28. No analysis of whether or not the Appellant could meet the financial requirements of the Rules was made at the time of the refusal decision. At the hearing before me, both parties agree that the financial threshold is met through the Sponsor's salary, but not the specific requirements set out in Appendix FM SE. This is because the March 2016 bank statement and some deposits are missing but there are wage slips covering September 2015 to August 2016 *viz* the period covering the 6 months prior to the extant application made.
29. Thus I find that the Appellant cannot meet the requirements of Appendix FM of the Immigration Rules. I further find that the

Appellant is unable to meet the requirements of paragraph 276ADE(vi) as there was no evidence that there would be very significant obstacles to her integration in Nigeria. I make this finding in light of the fact that the Appellant was born and brought up in Nigeria and was gainfully employed prior to resigning in order to come to the UK to join her husband and she has only resided in the UK for the last 3 years which is an insufficient time to amount to a significant obstacle to her integration. I also bear in mind that her mother and two brothers continue to reside in Nigeria and there was no evidence that they would not be prepared to offer accommodation or emotional support, albeit I accept that the Appellant is financially supporting her mother from the proceeds of the sale of her car.

30. I proceed to consider whether there are exceptional circumstances justifying consideration of Article 8 outside the Rules. I have concluded that there are such circumstances, as a result of the fact that the Appellant entered the UK lawfully pursuant to an EEA family permit. Whilst the Respondent subsequently and lawfully realised that the Appellant was not entitled to such a permit, for the reasons set out at [26] above, I accept that the Appellant and her Sponsor were not aware of this and relied upon it to the extent that the Appellant resigned from work and sold her car and ended the contract on her rental apartment.
31. I find that family life has been established between the Appellant and the Sponsor, who have now lived together as a married couple for the last three years. Applying the judgment in *Razgar* [2004] UKHL 27 I find that to require the Appellant to return to Nigeria would constitute an interference with her family life with her husband, however, the Respondent's decision is in accordance with the law and is necessary to maintain immigration control. The question is whether it would be proportionate.
32. Relevant to the proportionality assessment are the public interest considerations set out in section 117B of the NIAA 2002. The Appellant speaks English and gave her evidence in English. She is financially supported by her husband and thus there is no recourse to public funds. Whilst the point has not been definitively decided by the jurisprudence, I am prepared to accept that financial dependence upon one's partner can be equated to financial independence. I find that she developed her family life whilst in the UK lawfully, at least *ab initio*, however her leave has always been precarious.
33. I also take account of the fact that, in light of Ms Willocks-Briscoe's concession that the Sponsor's salary meets the financial requirements (albeit not the specific requirements of Appendix FM-SE) at the date of decision, that any application for entry clearance were the Appellant

to return to Nigeria, would be likely to be granted. In these circumstances, the judgment in *Chikwamba* [2008] UKHL 40 is applicable. Ms Willocks-Briscoe sought to argue that the decision in *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) was applicable, however, I find that *Chen* is distinguishable on its facts and given that it was a judicial review.

34. I have also considered the judgment in *TZ (Pakistan)* [2018] EWCA Civ 1109, a copy of which was provided by Ms Willocks-Briscoe. I find that it is distinguishable from this case, in that it is clear from [18](a) that the first question that required an answer was with regard to foreign nationals who commenced relationships in the UK when they were well aware that their immigration status was precarious.
35. This Appellant was admitted lawfully pursuant to an EEA family permit, albeit one to which it materialised she was not entitled. That does not detract from the fact that, having married the Sponsor, she sought to obtain the correct entry clearance to join him as his partner or family member, based on the fact that he has permanent residence in the UK. This is a factor that can properly considered as part of the proportionality assessment following *Charles* [2018] UKUT 00089 (IAC). I find that it is also material to the assessment of whether a temporary separation would be proportionate that the Appellant and her husband are seeking fertility treatment and she is now aged 36 years of age.
36. I note that in *Agyarko* [2017] UKSC 11, the second Appellant, Ms Ikuga, sought to remain in the United Kingdom on the basis *inter alia* that she was seeking fertility treatment and that upholding the decisions of the lower courts, the Supreme Court found that this did not amount to: "*exceptional circumstances*" as defined in the Instructions, that is to say, *unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate.*"
37. However, notably, both Ms Agyarko and Ms Ikuga formed relationships with their British partners at a time when they were present in the UK unlawfully, which is not the position in respect of this Appellant who entered lawfully and has sought at all time to abide by the Immigration Rules, albeit she ultimately became an overstayer by a small margin.
38. Thus, I find on the particular facts of this case, given that the requirements of the Immigration Rules for entry clearance as a partner would be met, that to expect the Appellant to return to Nigeria simply in order to obtain entry clearance to re-join her husband in the

United Kingdom, would be unjustifiably harsh and thus disproportionate.

Decision

39. The appeal is allowed on human rights grounds (Article 8).

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

19 October 2018