Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17017/2016**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly **Determination Promulgated**
On 7 December 2017 **On 13 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

Mr OSENI HASSAN MUSA
(ANONYMITY ORDER NOT MADE)
Respondent

Representation:

For the Appellant: Mr Harrison, Senior Home Office Presenting Officer.
For the Respondent: Mr Semega-Janneh instructed by Binas Solicitors.

DECISION AND REASONS

1 This is an appeal brought by Secretary of State against the decision of Judge of the First-tier Tribunal Andrew Davies dated 7.8.17, allowing the applicant's appeal against the Secretary of State's decision of 11.5.16 refusing the applicant leave to remain in the UK. I will retain the designations of the parties as they were before the First tier.

2 The Appellant is a national of Nigeria. He had been granted a multi-entry visit visa valid from October 2010 to 27 October 2015. He was present in the United Kingdom in 2011, when the Appellant met Grace Isaiah, the

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Sponsor. They have been in a relationship since January 2012. They married in Nigeria on 5.1.13, and the Appellant entered the United Kingdom again on 10.2.13 with his entry clearance as a visitor.

3 The Appellant then applied for further leave to remain on 7.6.13 as spouse of the Sponsor. In a decision dated 13.8.13 ('the 2013 decision') the Appellant was granted leave to remain until 13.2.16, on the 10 year route. I return below to the reasons for that grant of leave to remain.

4 On 16.1.16 the Appellant applied for further leave to remain on the basis of his family life with the Sponsor. This was refused on the grounds that the Appellant did not meet the English language requirement of Appendix FM, and did not meet the requirements of EX.1 on the grounds the Respondent was not satisfied that there were insurmountable obstacles to family life continuing outside the United Kingdom, and there were no very significant obstacles to his integration into life Nigeria under paragraph 276 ADE(1)(vi). Further, the Respondent was of the view that there were no exceptional circumstances warranting granted leave to remain outside the rules.

5 In the subsequent appeal, there was a dispute between the parties as to the reason for the grant of leave to remain in 2013. The Respondent asserted in the decision letter of 11.5.16 that the previous grant of leave to remain had been on the basis that the Sponsor had children in the UK with whom she was in a parental relationship, whereas by contrast, in the most recent, 2016, application, no reference to children had been made. The Respondent relied upon the GCID case record sheets within the Respondent's bundle, showing minutes made on 22.4.16 and 10.5.16 (not, it is to be noted, from 2013) suggesting that there had been a reference to children in the 2013 application.

6 The Appellant and Sponsor continued to deny that any reference had been made in the Appellant's 2013 application to the existence of children, and the Appellant relied upon the text of the grant of leave to remain dated 13.4.13 which provided as follows:

> "We are satisfied the from the information you have provided that you meet the relevant eligibility and suitability requirements and you have a genuine and subsisting relationship with a partner and there are insurmountable obstacles to family life continuing outside the United Kingdom.
>
> Because of your particular circumstances you have been granted leave to remain within the immigration rules under D – LTR P .1 .1 of Appendix FM"

7 In his decision dated 7.8.17, the Judge noted at [12] the above reason for the grant of leave to remain in 2013, and noted the Respondent's assertion within that letter that provided the Appellant continued to meet the relevant criteria as set out in Appendix FM Ex1 or relevant legislation in force at the time he should apply for further leave prior to expiry of is

currently and subject to meeting the requirements will be granted a further period of 30 months.

8 Significantly, the Judge accepted at [20] the evidence of both the Appellant and Sponsor that no mention of children had been made in the application of 2013. There is no challenge to that finding in the Respondent's application for permission to appeal.

9 In considering the Appellant's satisfaction the immigration rules, the Judge held, inter alia, as follows:

> "22 I accept that there will be significant difficulties for Ms Isaiah if she returned to Nigeria. Those difficulties are not related to the language but to the difficulties of adapting to a country, which she left at the age of 12 and without the support of close family. She has no work experience in Nigeria. In EX1 of Appendix FM at (b) the exception applies to an applicant who has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen. The Appellant has such a relationship. I must consider whether there are insurmountable obstacles to family life continuing with such a partner outside of the UK. EX2 defines 'insurmountable obstacles' as the very significant difficulties faced by the applicant or the partner and which could not be overcome or would entail very serious hardship for either.
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> 23 I do not accept that such difficulties will apply in the Appellant's case given that he has lived in Nigeria all his life until relatively recently, has visited on a number of occasions since he came to the UK, has close family, particularly his adult children, and has long experience of running a business in that country. I accept that it would be inconvenient and that there will be some difficulties but in his case they do not amount to anything beyond those difficulties.
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> 24 The position is different with Ms Isaiah. The difficulties are not literally insurmountable and of course I take account of the fact that she would have the support both financial and otherwise of her husband. I do accept however that to leave the UK for a country she has not known, other than for short holidays, in her adult life would represent a significant degree of hardship as the she would have to lose proximity to her close family, her course, the way of life and her British employment history with the advantages it would give her when she returns to the labour market after completing her current course.
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> 25 ...
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> 26 I am satisfied that Ms Isaiah in particular would face very serious hardship in order to continue her family life in Nigeria and taken together with the difficulties the Appellant (insufficient on their own) meet the definition in EX2.

10 Having directed himself at [27] that the appeal could only be allowed on the grounds that the decision was unlawful under s.6 HRA 1998, the Judge considered the application of Razgar [2004] UKHL 27, and held at [31]:

> “31 The fact that the requirements of the immigration rules are met is a weighting factor on the Appellant’s side of the scales and it goes a long way to balancing the scales. I have found that there are insurmountable obstacles. I also take into account the Appellant appears to have been conducting a clear impression that there was, on certain conditions, clear path to settlement. That basis you disposed of his business in Nigeria and set up in the UK.
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> 32 I am satisfied that, taking the balance sheet approach to proportionality assessment, the personal interests of the Appellant and his partner outweigh the public interest in immigration control. I am satisfied that refusal was unlawful under section 6 of the Human Rights Act 1998. I allow the appeal on human rights grounds.”

11 The Respondent Secretary of State applied for permission to appeal against a decision on 14.8.17, arguing that the factors which the Judge had taken into account as suggesting that there were insurmountable obstacles to family life continuing outside the UK, i.e. the Sponsor had not lived in Nigeria, she had only visited on short occasions, would lose the ability to access the employment market and her British way of life, including proximity to her family, were the very factors which were found to have been of limited importance in determining the existence of insurmountable obstacles in the Supreme Court decision of Agyarko [2017] UKSC 00011. The Respondent then set out lengthy extracts from the Judgement (paragraphs 33- 36, and 68), and argued that the factors relied upon by the Judge were wholly inadequate to establish that there were any insurmountable obstacles in the present case. It was also argued that such error was significant, as it was this finding that the Judge relied upon to establish that the Appellant had shifted the balance to his favour and that this had been a significant factor in the Appellant’s favour.

12 Permission to appeal was granted by the first-tier Tribunal Mailer on 4.9.17, finding that the Respondent’s grounds of appeal were arguable.

13 I heard submissions from the parties before me. Mr Harrison relied upon the grounds of appeal, and Mr Samega-Janneh relied upon a skeleton argument provided prior to the hearing.

Discussion

14 Paragraphs 33-36 of the Supreme Court Judgement in Agyarko actually contain the Court’s summary of the Judgement of the Court of Appeal, below, in those proceedings. It is to be noted that in those proceedings, the courts had been considering two applications for judicial review of

decisions of the Respondent in which the applicants had been refused leave to remain, with no right of appeal. The Court of Appeal's comments about the paucity of the evidence in those cases, is also to be seen in the light that the courts were conducting a judicial review, not a merits based appeal.

15 Those passages are as follows:

> "33. The Court of Appeal dismissed the appeals for reasons given in the judgment of Sales LJ, with which Longmore and Gloster LJJ agreed. Sales LJ considered first an argument based on the phrase "insurmountable obstacles", used in paragraph EX.1(b) of Appendix FM. Sales LJ accepted that the phrase was intended to have the same meaning as in the jurisprudence of the European Court of Human Rights, where it originated. **It imposed a stringent test, illustrated byJeunesse v The Netherlands (2015) 60 EHRR 17, para 117, where the court found that there were no insurmountable obstacles to the applicant's family settling in Suriname**, although they would experience a degree of hardship if forced to do so. It was to be interpreted, both in the European case law and in the Rules, in a sensible and practical rather than a purely literal way. On the facts of Ms Agyarko's case, the Secretary of State's conclusion that there were no insurmountable obstacles to relocation, and that paragraph EX.1(b) was therefore not met, was not irrational:
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>> "The **statement made in Mrs Agyarko's letter of application of 26 September 2012 that 'she may be separated from' her husband was very weak, and was not supported by any evidence which might lead to the conclusion that insurmountable obstacles existed to them pursuing their family life together overseas.** There was no witness statement from Mrs Agyarko or Mr Benette to explain what obstacles might exist. **The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here - and hence might find it difficult and might be reluctant to relocate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so."** (para 25)
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> On the facts of Ms Ikuga's case, Sales LJ agreed with the Upper Tribunal Judge's assessment that "the factors relied upon by Mrs Ikuga could not possibly persuade any decision-maker that there were insurmountable obstacles to family life continuing in Nigeria, within the meaning of [paragraph EX.1(b)]" (para 50).

34. The alternative argument in each case was that the refusal to grant leave to remain outside the Rules was in breach of article 8. It was argued that it was disproportionate to remove each of the Appellants in circumstances where her husband or partner would have to follow her overseas if they wished to continue their family life together, especially when he was a British citizen; or, alternatively, because an out-of-country application for leave to enter would inevitably be granted, so that her removal served no good purpose. In relation to the latter argument, reliance was placed on the case of Chikwamba.

35. These arguments were rejected. In the case of Ms Agyarko, Sales LJ stated that, since her family life was established in the knowledge that she had no right to be in the UK and was therefore "precarious" in the sense in which that term had been used in the European and domestic case law, it was only if her case was exceptional for some reason that she would be able to establish a violation of article 8.

36. On the facts of Ms Agyarko's case, Sales LJ considered that there were no exceptional circumstances. The fact that Ms Agyarko's spouse was a British citizen did not make the case exceptional: several of the European cases in which applications were rejected had involved a partner or spouse who was a national of the state from which the applicant was to be removed. So far as Chikwamba was concerned, the House of Lords had found that there would be a violation of article 8 if the applicant for leave to remain in that case were removed from the UK and forced to make an out-of-country application for leave to enter which would clearly be successful, in circumstances where the interference with her family life could not be said to serve any good purpose. In Sales LJ's view, Ms Agyarko's case was very far from a Chikwamba type of case. She had not asked the Secretary of State to consider whether leave to remain should be granted on the basis of Chikwamba. This was not an argument of such obviousness that the Secretary of State had been obliged to consider it regardless of whether it was mentioned. Accordingly, the Secretary of State could not be said to have erred in law in failing to grant leave to remain on that basis. In any event, the materials submitted by Ms Agyarko did not demonstrate that an out-of-country application for leave to enter would succeed. On the contrary, the information provided about her and Mr Benette's financial circumstances, for example, indicated that she had no income and that he earned less than the minimum income requirement specified in Appendix FM.

16 These passages in themselves say nothing about what the ratio of the Supreme Court Judgements in Agyako is. I find that the following passages from the Court's judgment are relevant to ascertain the guidance actually given:

> "41. As the European court has noted, the boundary between cases best analysed in terms of positive obligations, and those best analysed in terms of negative obligations, can be difficult to draw. As this court explained in its judgment in Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60; [2016] 1 WLR 4799, para 32, the mode of analysis is unlikely to be of substantial importance in the present context. Ultimately, whether the case is considered to concern a positive or a negative obligation, **the question for the European court is whether a fair balance has been struck.** As was explained in Hesham Ali at paras 47-49, that question is determined under our domestic law by applying the structured approach to proportionality which has been followed since Huang.
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> ...
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> 44. Domestically, the expression "insurmountable obstacles" appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws, and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner." **That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law.** As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.
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> 45. By virtue of paragraph EX.1(b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the

Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, **leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship.** Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in "exceptional circumstances", in accordance with the Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate". Is that situation compatible with article 8?

...

48. The Secretary of State's view that the public interest in the removal of persons who are in the UK in breach of immigration laws is, in all but exceptional circumstances, sufficiently compelling to outweigh the individual's interest in family life with a partner in the UK, unless there are insurmountable obstacles to family life with that partner continuing outside the UK, is challenged in these proceedings as being too stringent to be compatible with article 8. It is argued that the Secretary of State has treated "insurmountable obstacles" as a test applicable to persons in the UK in breach of immigration laws, whereas the European court treats it as a relevant factor in relation to non-settled migrants. That is true, but it does not mean that the Secretary of State's test is incompatible with article 8. As has been explained, the Rules are not a summary of the European court's case law, but a statement of the Secretary of State's policy. That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. **If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the "insurmountable obstacles" test will be met, and leave will be granted under the Rules. 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 will be granted outside the Rules on the basis that there are "exceptional circumstances".** In the absence of either "insurmountable obstacles" or "exceptional circumstances" as defined, however, it is not apparent why it should be

incompatible with article 8 for leave to be refused. The Rules and Instructions are therefore compatible with article 8. That is not, of course, to say that decisions applying the Rules and Instructions in individual cases will necessarily be compatible with article 8: that is a question which, if a decision is challenged, must be determined independently by the court or tribunal in the light of the particular circumstances of each case.

Precariousness

...

52. It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish - or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if there is a protracted delay in the enforcement of immigration control. This point was made by Lord Bingham and Lord Brown of Eaton-under-Heywood in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2009] AC 1159, paras 15 and 37. It is also illustrated by the judgment of the European court in Jeunesse.

53. Finally, in relation to this matter, the reference in the instruction to "full knowledge that their stay here is unlawful or precarious" is also consistent with the case law of the European court, which refers to the persons concerned being aware that the persistence of family life in the host state would be precarious from the outset (as in Jeunesse, para 108). **One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate.**"

17 The outcome in appeals such as the present are necessarily fact sensitive. I find that the Respondent does not necessarily establish any error of law in the Judge's decision by citing that part of the Supreme Court Judgement in Agyarko, in which the Court was summarising the findings of the Court of Appeal below, which had referenced the case of Jeunesse. In that case, the European Court of Human Rights had held that there were no insurmountable obstacles to that family settling in Suriname. However, it is to be noted that notwithstanding that finding, the European Court held in that case nonetheless that that family's long tolerated presence in Netherlands resulted in there being inadequate reasons of public policy to warrant their removal, and a breach of Article 8 was found. The outcome was fact specific.

18 However, I do find, on balance, that the Judge erred in law in his assessment of the existence of insurmountable obstacles in the present case. I repeat the Judge's finding at [24]:

> "I do accept however that to leave the UK for a country she has not known, other than for short holidays, in her adult life would represent a significant degree of hardship as the she would have to lose proximity to her close family, her course, the way of life and her British employment history with the advantages it would give her when she returns to the labour market after completing her current course."

I find that this passage provides reasons for finding the existence of insurmountable obstacles, which are not sufficiently distinguishable from the factors set out in the Court of Appeal's Judgement in Agyaorko, which were held *not* to represent insurmountable obstacles:

> "The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here - and hence might find it difficult and might be reluctant to relocate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so."

19 The Judge therefore erred in law in his assessment at [31] that the Immigration Rules were met in the case.

20 However, I decline to set aside the Judge's decision, for the following reasons.

21 I find that the Judge's error was not material. The Judge made specific reference at [31] to the Appellant having been given an impression, as a result of the grant of leave to remain in 2013, that he was, on a certain conditions, on a path to settlement in the UK. The Judge had held that the grant of leave to remain had been on the basis of the Respondent's previous acceptance in 2013, that there were insurmountable obstacles to family life continuing outside the UK, and that the Appellant had not mentioned anything about children in the 2013 application. His situation was no different in the 2016 application than it was in the 2013 application, except of course that the Appellant had been permitted to remain living with the Sponsor in the UK for that three year period, and the Appellant had as a consequence of that grant, disposed of his business assets in Nigeria, and set up a business in the UK.

22 I find that the Judge's decision would have been no different, had the error of law not been made.

23 In the alternative, and if I am wrong about the materiality of the Judge's error, and wrong to find that the Judge would inevitably have come to the same decision, and if instead the decision falls to be set aside, the task would then arise for me to remake the decision.

24 In those circumstances, I would remake the decision by allowing the Appellant's appeal.

25 There was nothing different in the Appellant's application for leave to remain in 2016 compared with the one in 2013, save, as mentioned above, that the Appellant had as a consequence of the 2013 decision, divested himself of his business in Nigeria. The Judge held that there was no reference to children in the 2013 application, and observed that the Respondent had held in 2013 that there were insurmountable obstacles to family life continuing outside the UK.

26 There as been no relevant change in law since 2013 which would have justified a different outcome upon a repeat application; the addition of para Ex 2 of Appendix FM in the meantime would not have been sufficient justification for a different outcome – Mr Harrison did not argue this, and see the last three lines of paragraph 44 of Agyarko, above, and para 7.16 of the Explanatory memorandum of the Statement of Changes of Immigration Rules, HC532, inserting para Ex.2:

> "The amendments to the Immigration Rules on family and private life in Appendix FM and paragraphs 276ADE-276DH made by this Statement of Changes do not represent any substantive change to the policies reflected in the Statement of Changes HC 194 which came into force on 9 July 2012, but ensure consistency of language with that used in section 19 of the 2014 Act, which now provides statutory underpinning for those policies."

27 If, as per my finding at para 18-19 above, the Judge was not entitled to find that the immigration rules were met, the appeal then fell to be considered outside the rules. That involved, as per para 48 of Agyarko, a consideration of whether the decision resulted in unjustifiably harsh consequences for the Appellant. The assessment of whether consequences are unjustifiable depends entirely on the context.

28 The context here is that the Appellant has been permitted to reside in the UK by reason of the Respondent's decision in 2013. His ties to the UK have only deepened since that time.

29 Para 46 of Agyarko requires that the Appellant's rights be balanced against the competing public interests. However, I find that the public interest does not require a person to be required to leave the UK after having been permitted to remain here for three years, where there has been no material change in his circumstances, or the law. The decision will have consequences, including being required to leave the United Kingdom; giving up his business in the UK, thereby making is two employees redundant; needing to find accommodation and work, or to set another business in Nigeria; the Sponsor needing find employment. These consequences do not have to be extreme; they have to be unjustifiably harsh. In the particular circumstances of the present case, these consequences are harsh and not justifiable.

30 Insofar as it could be said that the decision of 2013 was made erroneously as a result of a misapprehension of the facts or the law by the Respondent, or was over generous (which is not in fact argued by the Respondent), I find that there was nothing done by the Appellant to bring that about, and the Appellant has been under a 'reasonable misapprehension' as to his ability to maintain a family life in the UK. There is, as per para 53 of Agyarko, room for a less stringent approach to the weight to be attached to the public interest in maintaining immigration control, in such circumstances.

31 To require the Appellant to leave the UK, when he has been previously granted leave to remain in similar circumstances; and where there has been no material changes in the law, would in my view be arbitrary, and thus disproportionate. It is not necessary for me to address the Appellant's submissions regarding legitimate expectation.

Decision

I find that the making of the decision involved the making of an error of law.

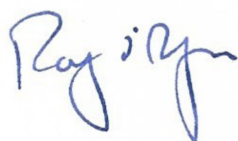
However, the error was not material.

I do not set aside the decision.

The Judges decision is upheld and the Secretary of State's appeal is dismissed.

In the alternative, if I were required to set the decision aside and re make the decision, I would allow the Appellant's appeal.

Signed: Date: 5.4.18



Deputy Upper Tribunal Judge O'Ryan