



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

Appeal Number: HU/11161/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 7 November 2018**

**Decision & Reasons Promulgated  
On 04 January 2019**

**Before**

**THE HONOURABLE MR JUSTICE MARK TURNER  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
UPPER TRIBUNAL JUDGE CRAIG**

**Between**

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

Appellant

**and**

**MR NATHANIEL ADEBUSUYI OGUNBUYIDE  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant (Secretary of State): Mr N Bramble, Senior Home Office  
Presenting Officer

For the Respondent (Mr Ogunbuyide): Mr I Konusanac, solicitor, Igor & Co  
Solicitors

**DECISION AND REASONS**

This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Loke in which following a hearing at Taylor House on 4 July 2018, in a Decision and Reasons promulgated on 25 July 2018, she had allowed Mr Ogunbuyide's appeal against the Secretary of State's decision refusing Mr Ogunbuyide's application for leave to remain on human rights grounds. For ease of reference I shall throughout this decision refer to Mr Ogunbuyide, who

was the original appellant, as “the claimant” and to the Secretary of State, who was the original respondent, as “the Secretary of State”.

The claimant, who was born on 12 May 1963, is a national of Nigeria. He entered this country in July 2008 with entry clearance as a student. He was granted leave to remain until 22 December 2011 and before this leave expired he applied for a further extension but this was refused in January 2012. An appeal against this decision was dismissed and the claimant’s appeal rights were exhausted on 3 July 2012. On that day he made a human rights claim, which was refused on 8 April 2013 with no right of appeal. Notwithstanding that the claimant had no lawful right to remain in this country he refused to leave.

On 5 May 2015 the Secretary of State made a further decision to refuse him leave to remain and an appeal against this decision, which was apparently not certified as clearly unfounded, was dismissed in a decision promulgated by First-tier Tribunal Judge Khan on 18 August 2016. Following this decision, the claimant made yet another application to remain on human rights grounds, which was refused by the Secretary of State on 12 September 2017. This application was founded upon the relationship which the claimant now had with a Ms White. The Secretary of State does not dispute that the claimant and Ms White are in a relationship and that they have been together since 2012. However, the basis of the refusal was that the claimant did not qualify for leave to remain under the Rules because the requirements set out with EX.1. of Appendix FM of the Rules were not satisfied in that there were not insurmountable obstacles (as defined within EX.2) preventing family life from continuing in Nigeria and there were no exceptional circumstances in this case which could warrant a grant of leave to remain outside the Immigration Rules. It was against this decision that the claimant appealed and, as already noted above, this appeal was allowed by First-tier Tribunal Judge Loke.

The Secretary of State now appeals against this decision, leave having been granted from First-tier Tribunal Judge Mark Davies on 13 September 2018.

### **The Decision of First-tier Tribunal Judge Loke**

As she was obliged to, Judge Loke first consider whether or not the requirements set out within EX.1. were satisfied and she did this at paragraph 11, which set out the provisions within EX.1. At paragraph 11 Judge Loke stated, correctly, as follows:

“11. The respondent is satisfied that the appellant satisfies the suitability requirements contained in the Immigration Rules. Thus, in order to qualify for leave to remain under the Immigration Rules, the appellant must satisfy EX.1., which relevantly provides:

EX.1.

- (b) The applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable

obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) 'insurmountable obstacles' means the 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."

Judge Loke then under Findings stated as follows at paragraph 13:

"13. The appellant submits that there would be insurmountable obstacles to family life continuing in Nigeria. The threshold to be met is a high one; *Agyarko* [2017] UKSC 0011."

The judge then set out all the factors relied upon by or on behalf of the claimant but found that within the meaning set out within the Rules there were not very significant difficulties which would prevent the family life continuing within Nigeria; none of the difficulties could not be overcome or entail very serious hardship for either the claimant or Ms White. The judge, however, then went on to consider whether or not the removal of the applicant would be disproportionate, considering Article 8 outside the Rules. At paragraph 23 the judge noted that the claimant could speak extremely good English and was being financially supported by Ms White but also that the claimant's private life was accrued while his immigration position was precarious and that since 2012 his presence in the United Kingdom had been unlawful. It followed that when the claimant had entered into his relationship with Ms White in 2012 "both were fully aware that the appellant did not have lawful status to remain in the United Kingdom".

The judge then however (at paragraph 24) referred to what was said at paragraph 51 of *Agyarko*, to the effect that there might be no public interest in the removal of an applicant where an applicant was otherwise certain to be granted leave to re-enter following removal. Without giving further consideration to the circumstances in which this would be a relevant factor to which weight should be given the judge goes on to say that: "On that basis I find that the public interest in his removal is significantly reduced." In the following three short paragraphs, that is paragraphs 25 to 27, the judge goes on to find that although having already found that EX.1. does not apply, nonetheless (paragraph 26) "the hardship caused is unjustifiable and that removal is disproportionate in the circumstances". I set out the judge's reasoning in full as follows:

"24. With respect to weight, I bear in mind para 51 of *Agyarko* which states that were the appellant otherwise certain to be granted leave to enter the United Kingdom, there might be no public interest in his removal. It is relevant that the appellant meets the suitability requirements, meets the financial requirements, and would plainly meet the English [speaking] requirements of the Rules. On that basis I find that the public interest in his removal is significantly reduced.

25. In the appellant's favour I take into account the fact that the appellant and Ms White have a genuine and subsisting relationship. This is manifested in the care Ms White gave to the appellant after his accident in 2013, and in the care that the appellant currently provides to Ms White. I also take into account the number of testimonials from friends and distant relatives which support the appellant's positive good character, and indicate that the appellant has been engaged in charitable work whilst in the United Kingdom. I find of particular relevance the following:
- a) That the appellant does provide genuine practical help and support to Ms White to assist her when her knee is painful as Ms White described in evidence;
  - b) That Ms White has absolutely no experience of or connection to Nigeria;
  - c) That Ms White's family is in the United Kingdom, and while there is an absence of any evidence from the family as to the extent of any difficulties, I accept Ms White's statement that she would face some difficulty were she to leave them.
26. Given my assessment that the public interest in the appellant's removal is significantly reduced, and bearing in mind the hardship that would be caused to the appellant and in particular to Ms White were the appellant to be removed, I find that the hardship caused is unjustifiable and that removal is disproportionate in the circumstances.
27. I find that removal of the appellant would amount to a disproportionate interference with his right to respect for family and private life, and I allow this appeal."

The basis on which the Secretary of State seeks to challenge this decision is that the judge has not identified what could be said to be of such weight in this case as could possibly justify the grant of leave outside the Rules. At ground 1 the Secretary of State sets out what his policy is, which was upheld by the Court of Appeal in *TZ and PG* [2018] EWCA Civ 1109 as being a legitimate policy and in which the relevant parts of this decision were cited as follows:

"The Secretary of State's policy is that such leave should only be granted where exceptional circumstances apply, i.e. circumstances in which refusal would result in unjustifiably harsh consequences for the person concerned. The legality of this policy and the test that is articulated were accepted in *Agyarko* (see [19] and [48]).

The settled jurisprudence of the ECtHR is that it is likely to be only in an exceptional case that Article 8 will necessitate a grant of leave to remain where a non-settled migrant has commenced family life in the UK at a time when his or her immigration status is precarious (see, for example *Jeunesse v Netherlands* [2016] 60 EHRR 17 at [100] and [114]) ...

Where precariousness exists it affects the weight to be attached to family life in the balancing exercise. That is because Article 8 does not guarantee a right to choose one's country of residence. Both the unlawful overstayer and the temporary migrant have no right to

remain in the UK simply because they enter into a relationship with a British citizen during their unlawful or temporary stay. The principle was accepted in *Agyarko* at [49] to [54] leading to a statement of general principle at [57]:

‘In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

... when as a matter of law all material issues will be before the Tribunal and will necessitate a decision), as explained below where Article 8(1) is engaged and the consideration of Article 8 outside of the Rules must follow, the Tribunal should consider the insurmountable obstacles test within the Rules before considering the exceptional circumstances test outside the Rules.

Where Article 8 is in issue within the Rules there will of necessity have to be a conclusion on the question of whether there are insurmountable obstacles to the relocation of the appellant and his or her family. That involves an evaluation or value judgment based upon findings of fact. When a Tribunal goes on to consider an Article 8 claim outside of the Rules (as it will do where Article 8 is engaged, see *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799 at [80]), it will factor into its evaluation of whether there are exceptional circumstances both the findings of fact that have been made and the evaluation of whether or not there are insurmountable obstacles - that being a relevant factor both as a matter of policy and on the facts of the case to the question of exceptional circumstances.”

The Secretary of State also within the grounds refers to the decision of this Tribunal in *Chen (Appendix FM - Chikwamba - temporary separation - proportionality) (IJR)* [2015] UKUT 00189, and noted that it was in the circumstances for this claimant on evidence put before the Tribunal to show that removal would be a disproportionate breach of Article 8. I note that in *Chen* Upper Tribunal Judge Gill made reference to the decision of the Court of Appeal in *Hayat* [2012] EWCA Civ 1054, in which the court had made it clear that the *Chikwamba* test had to be considered after consideration had been given as to the reasons why removal would be in the public interest. In this case it is clearly because of the weight which must be attached to the need to effect consistent and fair immigration control for all.

We have regard in particular to what was stated in very clear terms and very recently by the Supreme Court in *Agyarko* [2017] UKSC 11, which is referred to within the skeleton argument properly prepared for this hearing on behalf of the claimant. At paragraph 56, the Supreme Court in *Agyarko* cited with approval what had been stated by Lord Dyson MR, as he then was, in *MF (Nigeria)* [2013] EWCA Civ:

“In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual’s Article 8 rights, the scales are heavily weighted in favour of deportation and

something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal."

*MF (Nigeria)* was of course concerned with deportation but it is quite clear from the Supreme Court decision in *Agyarko* that absent compelling reasons the public interest in the removal of a person who has no leave to remain and who cannot succeed under Article 8 within the Rules would have to be sufficiently compelling as to warrant an exception being met justifying a decision allowing that person to remain.

We are in no doubt at all that none of the reasons given by the judge in this case could possibly have sufficient weight as could properly be said to be "compelling". The judge clearly found that family life could continue in Nigeria and that the consequences of requiring that would not be sufficiently severe that any difficulties could not be overcome and nor would they entail very serious hardship either for the claimant or Ms White. It is right that Ms White has recently had a knee replacement operation but that is not of sufficient severity as could possibly amount to such a compelling circumstance. If indeed the applicant would be able to mount a successful application from outside the country there is nothing to prevent him doing so but the public interest reasons that require people such as this claimant to leave the country are very weighty. If people such as this claimant, who has known that he had no right to remain in this country for some considerable time, are allowed to remain absent sufficiently compelling reasons, then effectively everybody in a similar situation would be encouraged to remain in the belief that once they have lived together with their partner for a little more time (despite what is clearly provided within Sections 117B(4) and (5) of the 2002 Act), they would just be allowed to stay. In this case there are no compelling reasons why this claimant should not now be removed and we will accordingly remake the decision, dismissing his appeal. We are able to do this on the basis of the material previously before the First-tier Tribunal because no arguable basis has been advanced upon which our decision could be any different. We accordingly find as follows:

### **Decision**

**We set aside the decision of First-tier Tribunal Judge Loke as containing a material error of law and remake the decision as follows:**

**The claimant's appeal is dismissed, on human rights grounds, Article 8.**

No anonymity direction is made.

Signed:

A handwritten signature in black ink, appearing to read "Ken Craig", is written over a light blue rectangular stamp or background.

Upper Tribunal Judge Craig

Date: 27 December 2018

