



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13063/2017

THE IMMIGRATION ACTS

Heard at Field House
On 5 August 2019
Extempore judgment

Decision & Reasons Promulgated
On 14 August 2019

Before

UPPER TRIBUNAL JUDGE COKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MATTHEW [B]

Respondent

Representation:

For the Appellant: Miss S Jones, Home Office Presenting Officer

For the Respondent: Mr J Dhanji, Counsel, instructed by Rashid & Rashid Solicitors
(Merton High Street)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against a decision by First-tier Tribunal Judge Roopnarine-Davies promulgated on 28 March 2019, who allowed Mr [B]'s appeal against a decision of the Secretary of State refusing his human rights claim.
2. Mr [B], who is a Nigerian citizen, arrived in the UK as a visitor in September 2006. He remained lawfully in the UK until 24 January 2008 but some point after that he

applied for and was issued with an EEA residence card. That card was apparently obtained on the basis of 'non-genuine' reasons. Mr [B] and his current partner have been together since 2009. They met in 2008 and began living together in 2009. At that time his partner had a 16-year-old son who lived with them. He is now an adult although he continues to live with the couple and is working. Mr [B]'s partner is a British citizen, having originally come to the UK as the dependant of a refugee.

3. The application that was made by Mr [B] was for leave to remain as a partner of British Citizen. It was accepted both by the Secretary of State and by the judge that they are in a genuine and subsisting relationship and that their attempts to marry in the UK have been unsuccessful, to a certain extent because of Mr [B]'s lack of status. They had been together by the time of the appeal for nearly nine years. It was accepted that the financial requirements of the Rules were met. His partner works as a senior care assistant at a care home and has done so since 2003. She earns over £26,000 a year, which is well over the minimum threshold of £18,600. She has health problems and has been under the care of St George's University Hospital since 2002. The medical evidence that was before the First-tier Tribunal Judge was that, provided she continued on her current treatment, she would continue to do well, that she has an undetectable viral load and a good immunological response. She has had no HIV-related illnesses since 2002 and she is seen on a six-monthly basis for review.
4. There was no evidence in the material that was placed before the First-tier Tribunal Judge about the lack of availability of drugs for her treatment or for that there was a lack of a review process in Nigeria. The only evidence that appears to have been before the First-tier Tribunal Judge in connection with the availability of health treatment is that the gender power imbalances mean that women often face barriers in dictating their own sexual partner selection, contraception, number and spacing of children, which puts them at greater risk of HIV, and that there is gender inequality within Nigerian society, culture and law. There is nothing specific directed at the particular health issues faced by Mr [B]'s partner or that, if she were to go to Nigeria with Mr [B], she would face particular identifiable difficulties. The references to which I was directed as having been before the First-tier Tribunal were not such as to enable a finding that she would face discriminatory treatment in her health care.
5. Mr [B]'s evidence and that of his partner to the First-tier Tribunal differed. His evidence was that he did all the household chores and accompanied her everywhere. Her evidence was not to that effect. She continues to hold down a full-time responsible job. The evidence in connection with his claimed support was rejected by the First-tier Tribunal Judge. Mr [B], whilst he was in Nigeria, worked as a security officer for GlaxoSmithKline in Lagos for twelve years. Although it was submitted to the First-tier Tribunal Judge that because of his age, 62, he would have difficulty finding further employment or fresh employment in Nigeria, that appears to be a submission only and it does not appear that there was any evidence produced to the First-tier Tribunal which would support the assertion that being 62 years old having worked previously as a security officer for twelve years, having worked in the UK, that he would not be able to obtain some form of employment in Nigeria.

Furthermore, it was not submitted that his partner, a skilled senior care worker, would not be able to find employment of some sort in Nigeria.

6. In terms of accommodation, Mr [B] has two adult daughters in Nigeria with whom he is in occasional contact and he has sisters in the UK with whom he is in contact. He has three brothers in Nigeria with whom he is not in contact. Although it is stated that accommodation would be difficult to find in Nigeria it is unclear on what basis the judge made that finding, given the existence of daughters with whom he is in occasional contact, given the lack of reliable or credible evidence that he would be unable to find work or that his partner would be unable to find work. It is difficult to understand on what basis she reached a conclusion that accommodation would be difficult to find in Nigeria, at least in the short term whilst the couple were settling into Nigeria.
7. The First-tier Tribunal Judge in paragraphs 16 and 17 of her decision refers to the circumstances of Mr [B] cumulatively constituting insurmountable obstacles to family life continuing in Nigeria. Those circumstances that she identifies as insurmountable obstacles are his age, finding a job, accommodation, that his partner is British, that she is law-abiding and contributes to the economic wellbeing of the UK, she has never lived in Nigeria, her health condition and the care he gives to her, the documented discrimination in healthcare for women in Nigeria, her length of residence in the UK, her only child lives here where the centre of her life is and that little care and support would be available to the couple in Nigeria. The fact that she is law-abiding and contributes to the economic wellbeing of the UK and that she is a British citizen are not matters that relate to whether there are insurmountable obstacles to the couple's family life continuing in Nigeria. Issues that would constitute or would contribute to whether there was a sustainable finding that there were insurmountable obstacles to the couple's family life continuing would include age, finding a job, accommodation and potentially some of the difficulties that she might have in relocating to a country where she has never lived and any health and care requirements that she needs.
8. I have already dealt with the fact that her health needs are met in the UK by six-monthly reviews and available drugs and that there was no sustainable evidence that that was not available to her in Nigeria. The reference to documented discrimination in healthcare is a generalised couple of sentences that bears no relation to the fact that she would be going back with identified health needs, a lack of evidence that those health needs could not be met, and she would be going back with a partner who is a Nigerian citizen who has lived there for an extremely lengthy part of his life and where he has relatives in Nigeria.
9. Insofar as finding a job and accommodation in Nigeria for him are concerned, I have already dealt with the lack of evidence to support that finding. That therefore leaves very, very few circumstances that would cumulatively constitute insurmountable obstacles. I am therefore satisfied that the decision by the First-tier Tribunal Judge is not simply a generous decision on the part of the First-tier Tribunal Judge but is

perverse. It is virtually impossible to understand how a First-tier Tribunal Judge, based on the evidence that was before the First-tier Tribunal, could reach the decision that those matters amount to insurmountable obstacles.

10. The First-tier Tribunal Judge then went on to look at the wider application of Article 8 and I do likewise, on the basis that Mr [B] does not meet the requirements of the Immigration Rules. At this point, it is a question of whether or not the decision is proportionate. Mr [B] has been unlawfully in the UK since 2008, possibly 2009. The fact that the Presenting Officer did not take issue with that is not a concession that she was waiving his unlawful presence and it is difficult to understand the First-tier Tribunal Judge's comment where the judge says, "although I have found that he has been less than honest in obtaining a residence card no issue was taken with this". It is difficult to know on what basis the First-tier Tribunal Judge can ignore the fact that someone who is seeking leave to remain on human rights grounds has spent about the last seven or eight years in the UK unlawfully.
11. Mr Dhanji refers to Mr [B]'s family here in the UK and to his partner's close family in the UK. All are adults. The fact that she is settled in terms of finances, employment and accommodation does not mean that it is disproportionate for her to relocate to another country with her partner. There was, it seems, no evidence before the Tribunal that the partner or indeed Mr [B] could not return to the UK as visitors and there was no evidence, it seems, that the various family members with whom she has ties could not travel to Nigeria for visits or holidays or why that would not be sufficient to maintain the type of contact that they currently have. There was, it seems, no evidence of any particular dependency of any of those relatives on either Mr [B] or his partner or by either of them on those relatives.
12. In paragraph 20 of the decision the judge makes a finding that a temporary separation from the partner in order to make an entry clearance application would be a disproportionate interference in their family life. It is difficult to understand on what basis the judge has reached that conclusion. There is speculation as to what might happen if he did not obtain entry clearance and the example is given because his wife is unable to work; but, so far as is recorded in the First-tier Tribunal decision, there is no indication that his wife would not be able to work and therefore it is speculation to say that that would be likely to result in a permanent and unreasonable break in their family life.
13. There is also a conclusion that any delay in obtaining entry clearance is likely to be detrimental to family life. There does not appear to have been any evidence before the First-tier Tribunal as to how long it takes for entry clearance applications to be dealt with or why it would be that delay would be detrimental to family life. The care that Mr [B] claimed that he gave to his partner was disputed or not accepted by the First-tier Tribunal Judge and there is no indication that she needed help from him in connection with her health needs.

14. I am satisfied that the decision by the First-tier Tribunal Judge that there were compelling or exceptional circumstances such that refusal would result in unjustifiably harsh consequences because of serious difficulties in continuing family life is a perverse decision.
15. The First-tier Tribunal Judge erred in law such that the decision is set aside to be remade.

Remaking the decision.

16. Although Mr Dhanji submitted the appeal should be remitted to the First-tier Tribunal for rehearing, I decline to do this. There has been no request by Mr [B] for leave to file further evidence. The evidence before the Tribunal is clear and has been referred to by me in the preceding paragraphs. In the light of the reasons given by me to set aside the decision of the First-tier Tribunal and the lack of evidence to support a finding that there are insurmountable obstacles to relocation to Nigeria or that it would be disproportionate to return to Nigeria, I remake the decision by dismissing the appeal.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by Mr [B] against the decision of the SSHD refusing his human rights claim by dismissing it.

Jane Coker

Signed
Upper Tribunal Judge Coker

Date 6th August 2019