Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02319/2020 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre Working Remotely by Skype for Business On 18 February 2021	**Decision & Reasons Promulgated On 04 March 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OKANLAWON SOPITAN

Respondent

Representation:
For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr S Galliver-Andrew instructed by Migrant Legal Project (Cardiff)

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

2. The appellant is a citizen of Nigeria who was born on 22 July 1967. His immigration history was a matter in dispute. He claims to have entered the UK in 1986. That was subsequently disputed by the respondent on the basis that the stamp within his passport was a forgery. The appellant

remained in the UK until June 2006 when he returned to Nigeria. He came back to the UK in August 2006. He returned with leave as a visitor valid until 1 January 2007.

3. On 27 January 2009, the appellant submitted an application for indefinite leave to remain based upon fourteen years' residence. That application was refused with no right of appeal.

4. On 9 March 2012, the appellant submitted an application for leave to remain as the unmarried partner of a person settled in the UK. That application was also refused with no right of appeal.

5. On 18 October 2014, the appellant was served with notice of intention to remove (IS151A).

6. On 24 August 2015, the appellant made a human rights claim relying on Art 8. That claim was refused and certified. The appellant only had an out of country right of appeal which he did not exercise.

7. On 10 May 2016, the appellant made an asylum application. That application was refused with no right of appeal.

8. On 1 June 2016, the appellant made an application as a potential victim of trafficking but that was also refused.

9. On 5 April 2017, the appellant submitted an application for leave to remain based upon his private and family life under Art 8.

10. Then, on 28 August 2018 he submitted an application for indefinite leave to remain which was refused.

11. On 24 January 2020, the Secretary of State refused his human rights claim made on 5 April 2017. The basis of that application, in addition to relying upon his private life in the UK, relied upon his relationship with his 'partner' in the UK under the relevant Rules in Appendix FM of the Immigration Rules (HC 395 as amended). In refusing the appellant's application, the Secretary of State concluded that the applicant could not meet the requirements of the ten-year route as a partner (R-LTRP.1.1(a), (b) and (d) of Appendix FM). In particular, the Secretary of State concluded that the appellant's claim fell to be refused as he did not meet the suitability requirement in para S-LTR.4.3. on the basis that he had made a false representation by using a passport which contained a false or fraudulent stamp in it. The Secretary of State also concluded that the appellant could not succeed under Art 8 either under the Rules (namely para 276ADE(1)(vi)) or outside the Rules.

The Appeal to the First-tier Tribunal

12. The appellant appealed to the First-tier Tribunal. In a determination sent on 2 October 2020, Judge Page allowed the appellant's appeal. First, the judge found that the suitability ground in para S-LTR.4.3. of Appendix FM

did not apply. He found that it was not established that the appellant had knowingly used deception in the light of the fact that the Home Office, at the hearing, had not sought to obtain and provide any verification evidence to prove that the appellant's passport had a forged or counterfeit stamp in it. Indeed, the point was not pursued by the HOPO before judge Page.

13. Having made that finding, Judge Page went on to consider the appellant's claim under the Rules and Art 8 of the ECHR. First, he set out para EX.1 of Appendix FM. The appellant relied upon EX.1(b), namely that he had a genuine and subsisting relationship with a partner in the UK who was a British citizen and that there were "insurmountable obstacles to family life with that partner continuing outside the UK".

14. At para 22 of his determination, Judge Page made the following findings:

> "The Foreign and Commonwealth Office advice is that British citizens are advised not to travel to Nigeria. The appellant's wife would have to provide a negative test certificate 96 hours before being allowed to board a flight to Nigeria and pre-book another test seven days after arrival. There are dangerous levels of COVID-19 in the provinces in Nigeria documented on the Foreign and Commonwealth Office website. It would plainly be an obstacle to the appellant's partner if she had to take the risk if she went there with the appellant while he sought entry clearance as her partner. She is in work as a nurse and is entitled to remain in the United Kingdom as a British citizen and if the appellant was removed to Nigeria it would put an end to their cohabitation akin to married life. There would plainly be an interference with their protected right to family life under Article 8 and having established that interference the burden is upon the respondent to justify the interference on the balance of probabilities as a legitimate and necessary interference proportionate to the legitimate aim of immigration control. She is in employment and is able to support him financially in the United Kingdom. Consequently, I cannot see any great public interest in requiring him to return to Nigeria to obtain the necessary entry clearance to return as her partner. For these reasons I find that the appellant does meet the requirements of EX.1 and EX.2 above of Appendix FM. As this Immigration Rule is met this must be of great weight in the balancing exercise that I must perform under Article 8".

15. Then at para 23, the judge went on to find that para 276ADE(1)(vi) was not met if the appellant returned alone as:

> "There would not be very significant difficulties because he could do it, albeit with hardship. As I have found that the appellant meets the requirements of EX.1 and EX.2 because of his relationship with his British citizen partner he cannot reasonably be expected to go to Nigeria in the current circumstances. Findings under paragraph 276ADE(1)(vi) are otiose in any event".

16. Then at para 24 the judge reached the following conclusion on the appeal:

> "For the above reasons I allow the appeal under the Immigration Rules under Article 8".

The Appeal to the Upper Tribunal

17. The Secretary of State sought permission to appeal to the Upper Tribunal. She did so on a number of grounds. First, the judge had conflated two separate issues, namely whether there were "insurmountable obstacles" to family life continuing in Nigeria under para EX.1 and whether it would be disproportionate to expect the appellant to return to Nigeria, in particular to make an entry clearance application. Secondly, as regards that latter issue, to the extent that the judge sought to apply Chikwamba v SSHD [2008] UKHL 40 in concluding that the appellant could not be expected to go to Nigeria to seek entry clearance, the judge had made no finding as to whether or not an entry clearance application was bound to succeed. Further, following the UT's decision in Younas (section 117B(6)(b); *Chikwamba*; *Zambrano*) Pakistan [2020] UKUT 129 (IAC), the judge had failed to take into account s.117B of the Nationality, Immigration and Asylum Act 2002 (as amended) and the public interest issues in determining that there was a breach of Art 8. Thirdly, in respect of the issue under para EX.1, the judge failed adequately to reason why there would be "very serious hardship" in returning to Nigeria given the COVID-19 pandemic prevalent throughout the world and that the situation in Nigeria was no more dangerous than in other parts of the world including parts of the UK itself. Finally, the judge failed to identify the "exceptional circumstances" justifying a finding that Art 8 was breached given that the relationship between the appellant and his partner was formed in full knowledge that he had no right to be in the UK.

18. On 23 October 2020, the First-tier Tribunal (Judge Parkes) granted the Secretary of State permission to appeal on all grounds.

19. In response, the appellant filed a rule 24 response dated 20 November 2020 seeking to uphold Judge Page's decision.

20. The appeal was listed at the Cardiff Civil Justice Centre on 18 February 2021 with the UT working remotely. Mr McVeety, who represented the Secretary of State, and Mr Galliver-Andrew, who represented the appellant, joined the hearing remotely by Skype for Business.

Discussion

21. It was accepted before me that the judge's finding that the suitability ground in para S.LTR.4.3. of Appendix FM was not applicable to the appellant, stood unchallenged.

22. The 10-year route for leave to remain as a 'partner' is set out in Section R-LTRP.1.1(a), (b) and (d). It was accepted before me that the appellant's claim under the 10-year route turned upon the application of para EX.1. It is accepted that the appellant meets all the suitability requirements in Section S-LTR (Section R-LTRP.1.1.(d)(i)). Further he meets the eligibility

requirements in paras E-LTRP.1.1. to 1.12 (R-LTRP.1.1.(d)(ii)). But, in order to satisfy the requirements in R-LTRP.1.1.(d)(ii) and (iii), he also had to establish that para EX.1 applied. That was also the position before Judge Page.

23. So far as relevant para EX.1 provides as follows:

> "(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".

24. Paragraph EX.2 defines what "insurmountable obstacles" mean as follows:

> "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".

25. If the appellant satisfies the requirements of para EX.1, and therefore mets the requirements for leave to remain as a 'partner', there would be no public interest in removing him and in those circumstances his removal would breach Art 8 of the ECHR (see TZ (Pakistan) v SSHD [2018] EWCA Civ 1109 at [34] per Sir Ernest Ryder, Senior President of Tribunals).

26. If, however, the appellant could not meet the requirements of the Rules then his claim outside the Rules would require an assessment of the proportionality of his removal balancing the impact upon him (and his partner) of removal against the public interest in effective immigration control. In such circumstances, the public interest would only be outweighed if there were unjustifiably harsh consequences to the appellant and/or his partner (see R (Agyarko and Another) v SSHD [2017] UKSC 11 at [48] and [50] per Lord Reed).

27. In a case where an individual claims that there is no public interest in their removal because after leaving the UK they would be granted entry clearance, requires an assessment of whether an entry clearance application would be successful and, even if it would, that the balancing exercise under Art 8.2 be undertaken having regard to the relevant considerations set out in Part 5A of the Nationality, Immigration and Asylum Act 2002 (see Younas at [83]–[90], explaining the House of Lords' decision in Chikwamba).

28. In this appeal, Mr McVeety submitted that the judge conflated the issue of "insurmountable obstacles" under para EX.1 with the issue of whether the appellant should be required to return to Nigeria simply to obtain entry clearance. Indeed, in that latter regard, Mr McVeety submitted the judge failed also to find whether the appellant would, in fact, meet the entry clearance requirements as a partner.

29. Mr Galliver-Andrew submitted that the judge had not conflated the two issues. He had made a clear finding that para EX.1 was met on the basis that there were "insurmountable obstacles" to the appellant and his partner continuing their family life in Nigeria. He had come to a reasoned decision based upon the length of their relationship, that his partner was a nurse who worked in the NHS and the COVID-19 circumstances, including that his partner had previously contracted COVID-19 and her evidence was that her "body is never the same" (see para 16 of the determination). Mr Galliver-Andrew accepted that the decision might not be the most cohesive but the judge had made quite clear the basis on which he had made his findings and the appellant had succeeded in establishing para EX.1 applied and that therefore his removal would breach Art 8 of the ECHR. Mr Galliver-Andrew accepted that there were some problems around the judge's consideration of the Chikwamba issue as he had not made any findings as to whether or not the appellant would meet the requirements for entry clearance. Although Mr Galliver-Andrew contended that the appellant would in fact meet the requirements as a partner, he accepted that the judge had made no finding in that regard.

30. The judge appear to reach his ultimate decision to allow the appellant's appeal on the basis that the appellant met the requirements of the Rules as a 'partner', in particular the requirements of para EX.1. The judge specifically said that the appellant met the requirements of para EX.1 in para 22 of his determination and, it would appear, his decision to allow the appellant's appeal "under the Immigration Rules under Article 8" set out in para 24 was, in effect, an application of the position in TZ (Pakistan) at [34], namely that there is no public interest in removing the appellant who meets the requirements of the Rules.

31. That said, however, the judge's reasoning in para 22 is not entirely clear. He conflates the issue under para EX.1, which is whether there would be "insurmountable obstacles" to the appellant and his partner continuing their family life in Nigeria, with the issue that, applying Chikwamba, whether there any public interest in the appellant's removal to Nigeria in order to seek entry clearance. That issue was, however, irrelevant if the appellant succeeded because he met the requirements of the Rules. It was only relevant to a claim that his removal would breach Art 8 outside the Rules.

32. Further, to the extent that the judge's reasoning was directed to the Chikwamba issue, he clearly fell into error in two respects. First, he made no finding as to whether or not the appellant would meet the entry requirements as a partner. It may well be that he would, as Mr Galliver-Andrew submitted, but the judge made no findings in that regard at all. Secondly, even if the appellant would meet the requirements for entry clearance as a partner, the judge did not engage with the balancing exercise required even in that circumstance applying the considerations set out in s.117B which, as the UT pointed out in Younas, must be undertaken even if the Chikwamba principle is relied upon.

33. Taken together with the lack of clarity in the judge's reasoning – moving between para EX.1 and proportionality – these errors are, in my judgment, fatal to his ultimate disposal of the appeal by allowing it under Art 8.

34. But, in any event, even if the judge's reasoning can be seen as exclusively directed towards the issues under para EX.1, I am not satisfied that the judge's reasoning is sustainable.

35. Whilst the judge set out the requirements of EX.1 and the meaning of "insurmountable obstacles" in para EX.2, it is not clear whether in para 22 of his determination, in finding that the requirements of EX.1 and EX.2 were met, he properly applied that definition and gave adequate reasons for concluding that the requirements were met.

36. In Lal v SSHD [2019] EWCA Civ 1925, the Court of Appeal identified the proper approach to determining whether under para EX.1 (by reference to the definition in para EX.2) an individual has established "insurmountable obstacles" to their family life continuing abroad. At [36], the Court said this:

> "In applying this test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty. If it meets this threshold requirement, the next question is whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK, if not, the decision-maker needs finally to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both)".

37. As the Court of Appeal in Lal noted (at [37]), Lord Reed said (at [43]) in Agyarko that the test had 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".

38. In para 22 of his determination, Judge Page concluded that the impact of the COVID-19 pandemic in Nigeria was "an obstacle" to the appellant's partner going with the appellant to Nigeria. The judge said that in the context of his going to Nigeria to obtain entry clearance. The judge also noted that the appellant's partner worked as a nurse in the NHS and, no doubt, by that reference captured the appellant's case, and his partner's evidence, concerning her role in the NHS and that she had been ill with COVID-19. The judge did not, however, address whether that obstacle amounted to a "very significant difficulty" – the first issue identified in Lal when applying para EX.2.

39. Further, and if it did, the judge did not make any finding as to whether that difficulty made it "impossible" for the applicant and his partner to continue their family life in Nigeria and, if it did not, whether any steps could reasonably be taken which would avoid or mitigate the difficulty and

whether nevertheless returning to Nigeria would entail "very serious hardship" to the appellant and/or his partner – the second and third issues identified in Lal when applying para EX.2.

40. That was the approach – described as the "logical approach" to applying EX.2 – by the Court of Appeal in Lal. Whilst it is not necessary to apply a rigidly structured approach to the issues under para EX.2, in determining whether there are "insurmountable obstacles", the essential elements of para EX.2 have to be addressed and, with adequate reasons, findings made in favour of an individual before it would be proper to conclude that para EX.2 is satisfied.

41. I accept Mr McVeety's submissions that the judge's reasoning in para 22 cannot sustain his conclusion that the appellant succeeded under Art 8. In this appeal, I am persuaded that the judge's findings do not reflect sufficiently the elements of para EX.2 and, as a result, his reasons are not adequate to conclude that the appellant met the requirements of the Rules. The judge was, it would appear, deflected from the essential elements of para EX.2 by focusing, at various points in para 22 of his determination, upon the issue about whether the appellant (and his partner if necessary) should be required to return to Nigeria to obtain entry clearance. That, of course, was a separate issue (arising under Art 8 outside the Rules) from whether there were "insurmountable obstacles" for their family life continuing in Nigeria so that the requirements of para EX.1 were met.

42. In summary, therefore, the judge failed properly to consider the elements of para EX.1. read with para EX.2 and wrongly conflated the issues under para EX.1 and those relevant to the Chikwamba issue and whether there was any public interest in removing the appellant if he could succeed in obtaining entry clearance as a partner on return to Nigeria.

43. For these reasons, the judge's decision to allow the appellant's appeal under Art 8 involved the making of a material error of law and that decision cannot stand. It is set aside.

44. At the end of the hearing, I invited the views of the representatives as to the proper disposal of the appeal if I concluded that the First-tier Tribunal's decision could not stand as a matter of law. Both representatives accepted that the decision would need to be re-made and, Mr Galliver-Andrew indicated, both the appellant and his partner might well wish to give evidence. Both representatives accepted that the judge's conclusion (at para 21) in relation to the suitability requirement was not challenged and should stand. In addition, Mr McVeety accepted that the only remaining live issue under the 10-year route for leave as a 'partner' was para EX.1. The genuineness of the relationship and the remaining eligibility requirements in E-LTRP.1.1.–1.12. were not in dispute.

Decision

45. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 involved the making of an error of law. That decision cannot stand and is set aside.

46. In the light of the extent and nature of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit the appeal to the First-tier Tribunal to re-make the decision in respect of Art 8. The findings referred to above at para 45 are preserved, including in relation to the suitability requirement. The appeal should be heard by a judge other than Judge Page.

Signed

Andrew Grubb

Judge of the Upper Tribunal
22 February 2021