



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/12847/2019
HU/12850/2019

THE IMMIGRATION ACTS

Heard Remotely at Field House
On 18 March 2021

Decision & Reasons Promulgated
On 04 May 2021

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

OLATUNJI AREMU AKINTOYE
(anonymity direction not made)

First Appellant

CAROLINE TEMITOPE AKINTOYE
(anonymity direction not made)

Second Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr P Georget, Counsel instructed by Portway Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought with permission from the First-tier Tribunal against a decision of the First-tier Tribunal dismissing the appellants' appeal against a decision of the respondent on 17 July 2019 refusing them leave to remain in the United Kingdom on human rights grounds.

2. The first appellant is a dual national of Nigeria and the United States of America and was born in September 1950. The second appellant is a Nigerian national born in May 1957. They are married to each other.
3. For the purposes of introduction only, in summary outline, it is the appellants' case that the First-tier Tribunal's decision was skewed by unjustified findings of fact. Before I consider this I look at the actual decision complained of to see why the Secretary of State refused the applications. As indicated above, it is dated 17 July 2019. It starts at page 81 in the hearing bundle.
4. The appellants made an application on 19 September 2018.
5. In the case of the first appellant it was noted he had last entered the United Kingdom on 20 July 2018 with entry clearance as a visitor valid for six months.
6. He said he had a family life in the United Kingdom with his wife and also with his adult children.
7. The respondent said that he was "not eligible" to apply as a partner or parent because the partner was not a qualifying partner as she was not British or settled in the United Kingdom and he had no dependent children under the age of 18. The Secretary of State was only concerned with the "private life route".
8. Paragraph 276ADE(1) of HC 395 was identified as the most relevant rule but the Secretary of State decided that the first appellant was not suitable because the Secretary of State had been notified by an NHS Trust that he had failed to pay overseas visitor charges which had been incurred on his behalf. It was explained that £35,579 was owed to the Barking, Havering and Redbridge University Hospitals NHS Trust.
9. The refusal letter then considered particularly the requirements of paragraph 276ADE(1)(vi), which required an applicant to show "very significant obstacles" to integration into the country to which they would be returned, and it was not accepted such obstacles existed in this case.
10. The respondent noted that the first appellant had lived in Nigeria or the USA for most of his life and understood the culture and could make himself at home in either of those countries.
11. It was the first appellant's claim that his medical conditions and reliance on his adult children would prevent him from re-adapting to life outside the United Kingdom but the respondent said that there were functioning healthcare systems in both countries of which he was a national and that he had lived outside the United Kingdom without assistance and support for most of his life and, although it was recognised that "your circumstances have changed", it was not accepted there would be "very significant difficulties reintegrating". A feature of the reasoning was that the first appellant's wife would be returning to Nigeria with him and they could continue their life together.
12. In the case of the second appellant it was noted that she too had entered the United Kingdom on 20 July 2018 with entry clearance valid for six months. She was not eligible to apply as a partner or parent for the same reasons as her husband and her case was examined on private life grounds.
13. Her application was not refused on grounds of suitability.

14. Plainly, she had not lived in the United Kingdom for at least twenty years. The Secretary of State considered the possibility of her satisfying the requirements of 276ADE(1)(vi) and looked for “very significant obstacles” to reintegration into Nigeria. Again it was found that she had lived outside the United Kingdom for most of her life and was familiar with life in Nigeria. She too claimed she had medical conditions and reliance on her adult children prevented her from re-adapting to life outside the United Kingdom but the respondent said that Nigeria had a functioning healthcare system and she should access it in Nigeria.
15. The respondent looked for exceptional circumstances.
16. These are considered under the heading “Exceptional Circumstances” in the letter dated 17 July 2019 starting at page 84 of the hearing bundle. I find the third paragraph under that heading confusing and I set it out below. It says:

“You have told us that you suffered a stroke during a previous visit to the UK in 2016 which left you hospitalised for 3 months. You returned to Nigeria in 2017 following the loss of your mother and re-entered the UK on 20 July 2018. You submit that since you re-entered the UK, your health has deteriorated and you are no longer able to return to Nigeria where health care facilities are poor and you would have no one to take care of you. You have provided medical evidence from your GP, Dr Jason John, dated 05 July 2019 which states that following the stroke in 2016 you have been left with right sided weakness, mobility issues and are now bedbound and reliant on others for all aspects of care. Dr John notes that your daughter is currently taking care of you. You have told us that whilst your partner has previously provided informal care for you, she is suffering with health problems of her own, namely kidney problems and high blood pressure, and is no longer capable or caring for you by herself.”
17. It is, I find, plain from the appellants’ solicitors’ letter of 19 September 2018 that it is the first appellant who suffered a stroke and his wife, the second appellant, cannot care for him because she has kidney problems and high blood pressure.
18. The Secretary of State found the health conditions nowhere near sufficiently severe to make removal unlawful on Article 3 grounds. The Secretary of State also found that specialist kidney treatment was available in Nigeria. The Secretary of State did not quibble with the claim that they were supported by their children in the United Kingdom but said that could continue in Nigeria.
19. For reasons that are not entirely clear the Secretary of State looked at Section 117B of the Nationality, Immigration and Asylum Act 2002 and reminded herself that little weight should be given to a private life established when a person is in the United Kingdom unlawfully or established at a time when a person’s immigration status is precarious, which the appellants’ circumstances clearly were.
20. The appellants appealed the decision and the “grounds of appeal” to the First-tier Tribunal set out the appellants’ case in detail. Perhaps the nub of the case is set out at ground 3 where it is asserted:

“The Respondent has also failed to adequately consider that this case discloses exceptional circumstances such as to mean that refusal would result in unjustifiably harsh consequences for the Appellants, such that refusal of the application would not be proportionate under Article 8 of the ECHR.”

21. The grounds complain that the respondent found the appellants unsuitable because of an unpaid NHS bill without acknowledging that the appellants' family in the United Kingdom had "already set up a plan for the payment of this amount and are paying the above amount in monthly instalments since November 2018."

22. Paragraph 6 sets out what the exceptional circumstances might be thought to be. The appellants said:

"The Respondent has failed to consider all the evidence and the real facts of the case. The first appellant namely Olatunji Aremu Akintoye's health condition has recently deteriorated and as a result he was left disabled after a stroke, which resulted in paralysis of his right side, for which he has lost his mobility. Since the first Appellant has suffered a stroke he has become fully dependent on his family for care. The second Appellant namely Caroline Temitope Akintoye is currently in dialysing 3.5 hours thrice a week via her right internal jugular line which is delivering good blood flows and dialysis, she also is currently suffering from kidney problems and high blood pressure and as a result both Appellants are fully reliant on their children for long-term care. The respondent did not fully consider both the Appellants' medical documents and witness statements which provided an account of their underlying medical condition. The Respondent submits that a significant degree of hardship or inconvenience does not amount to insurmountable obstacles."

23. There was then reference to the relationship between the appellants and their grandchildren in the United Kingdom and the lack of people available to care for them in Nigeria.

24. Mr Georget had prepared a skeleton argument for the First-tier Tribunal dated 27 November 2019. This explains that the appellant has three adult children and grandchildren in the United Kingdom and that they currently live with their daughter Bukola and her family in Barking. Paragraphs 3 and 4 set out the alleged history. I do not think it controversial and it explains what this is all about:

"3. In November 2016, the appellants entered the UK with leave to visit their family, as they had previously done on numerous occasions. On that occasion, however, the 1st appellant, who had been known to have diabetes and high blood pressure, tragically suffered a very serious stroke. That left him partially paralysed and resulted in him being hospitalised for over three months. He received extensive medical and physiotherapy treatment in an effort to manage the effects of the stroke and recover some of the affected parts of his body. In March 2017, the first appellant's elderly mother sadly passed away and the appellants rushed to return to Nigeria from their visit. The 2nd appellant cared for her husband as he continued to recover.

4. On 20.7.18, the appellants arrived in the UK for another visit to see their family, again with leave, and unfortunately again there was a wretched turn of events. The first appellant suffered a very bad fall and this time had to be hospitalised for another two and a half months. His condition deteriorated. To make matters still worse, the second appellant was then diagnosed with advanced kidney disease and rushed into intensive and regular course of life-saving dialysis treatment."

25. Against this background I consider the decision of the First-tier Tribunal.

26. At paragraph 3 the judge raises the possibility of the first appellant having entered into a bigamous marriage at around the time he became a citizen of the United States of America. It is not clear what, if anything, the judge did with this finding. However, it was

not part of the Secretary of State's case and was never raised with the appellants. It is unattractive because it implies an adverse finding on the first appellant's credibility that was not apparently of any concern to the respondent and was never raised with the first appellant. That said, it is not clear what the judge did with the finding if that is what it was.

27. The judge then considered the appellants' movements. He noted that the first appellant suffered a stroke when he was in the United Kingdom and then returned to Nigeria with his wife and that the second appellant (the judge was unsure if the first appellant arrived at the same time) returned to the United Kingdom on 13 June 2018. The judge considered the application and noted the claim that the appellants' family were supporting them and there would not be adequate healthcare in Nigeria.
28. The judge considered the respondent's decision which I have outlined above.
29. The judge made findings of fact. It is "not disputed by the respondent" that the first appellant had been weakened on the right side of his body after a stroke in 2016. The judge did not accept the first appellant's claim to have suffered a "severe fall" leading to his admission in hospital on arrival in the United Kingdom. According to the judge a medical discharge summary from the NHS Barking, Havering and Redbridge University Hospitals shows the first appellant was admitted having a history of headaches in the morning and having fallen from his bed on 20 July 2018 and that he "was discharged the same day". The first appellant arrived in the United Kingdom on 20 July 2018 and according to the judge the evidence "confirms he must have been taken to hospital as soon as he arrived in the country" and if he did fall from his bed he must have fallen before he travelled. According to the judge the evidence does not show that the first appellant had been hospitalised for two and a half months and the judge did not accept that he had had a severe fall.
30. The judge noted the respondent did not dispute that the second appellant was suffering from end stage kidney disease. The judge found it was unclear when the second appellant was first diagnosed with kidney disease. She was not cross-examined on the point.
31. At paragraph 28 the judge said:

"In answer to my questions, [the second appellant] said that she had felt ill before she came to the UK, but '*not too much*'. In her oral evidence, [her daughter] said that before coming to the UK her mother had felt tired and was taking vitamins for this. She said that her mother became very ill whilst in the UK and was taken to hospital, and it had been a shock to them when she was diagnosed as suffering from kidney disease. Based on the evidence, I find that [the second appellant] was displaying signs of illness before she came to the UK. But because of the absence of evidence of when she first sought treatment from the NHS, I am unable to make a finding on when she was first diagnosed as suffering from end stage kidney disease."
32. The judge then considered evidence and found that the appellants could be looked after in a care home in Nigeria or arrange for care at their home. The judge accepted the first appellant lived with his daughter and the second appellant split her time between their daughter and their son. The judge accepted they both required help with their everyday lives as a result of their medical problems and their children provided support including quite personal care for the first appellant.

33. The judge then looked at the possibility of care in Nigeria. The judge was critical of the scant detail in the witness statements but concluded that the first appellant, who had been a church pastor in Nigeria, could look to the congregation for emotional support. This was based in part on considering the evidence of the appellants' son John, who reported what he understood had been happening in Nigeria. The judge did not accept that in their twelve months away they had lost contact with friends and family in Nigeria.
34. The judge noted that it was not denied that the first appellant owed money to the NHS following his treatment for a stroke in 2016. The judge found that the appellants' daughter was currently making payments towards the bill but the sums were nominal and unless things changed the bill was not going to be repaid for a very long time. The judge concluded that the appellants' presence in the United Kingdom would add to bills on the health service that would not be paid.
35. The judge found that any interference with private and family life would be proportionate. Paragraph 52 is significant. The judge said:
- “The question, therefore, is whether the interference is proportionate. I have had regard to s.117B of the 2002 Act, including subsection (1): that the maintenance of effective immigration control is in the public interest. I take into account that the appellants do not meet the requirements of the Rules, which is a weighty but not determinative consideration. Mr Georget does however submit that the appellants arrived in the UK as visitors and not as 'health tourists' and had never been overstayers. He said that while they have sought to remain in the UK, it was a result of unforeseen circumstances, i.e. the deterioration of their health, and that it should not be held against them. It does, however, seem peculiar that given her frail [the first appellant] condition apparently was before his stroke in 2016, that he would go through the arduous journey of returning to the UK for a holiday only a year after he had left. Furthermore, the evidence was that [the second appellant] felt ill before coming to the UK (although she claims that she was not so ill, and her kidney disease was undiagnosed at the time), and while the NHS letters do not say when she first sought treatment from the NHS it would appear that investigations into her condition began on 11 September 2018 (AB/25) and therefore only a few weeks after she arrived in the UK. In the normal course of events, I would likely be unconvinced by the claims that the appellants did not come to the UK for medical treatment and that their plan was to return to Nigeria before their visit visas expired. However, I accept Mr Georget's submission that these questions were not put to them by Miss Patel in cross-examination and I therefore proceed on the basis that the appellants did not come to the UK as 'health tourists' or to bypass the requirements for leave to enter as dependent relatives under the Rules. Nevertheless, when they arrived in the UK, the appellants would have had no expectation they would be able to remain in the UK with their children or benefit from medical treatment on the NHS indefinitely.”
36. The judge found that their ill health would frustrate integration into British society. They had only been in the United Kingdom for a short period of time. The judge was required by statute to attach “little weight” to any private life established while their status was precarious. The judge found that their decline of health was not unforeseeable because they had been poorly before they arrived. The judge found they had no expectation of being allowed to remain. The judge found that any difficulties in maintaining family life were a consequence of choosing to live in different countries and not something that was particularly weighty in a balancing exercise.

37. The judge rejected any contention that the decision interfered with the appellants' rights or the United Kingdom's obligations under Article 3 of the European Convention on Human Rights. They are simply not that seriously ill.
38. It is rather difficult to work out quite what happened leading to the first appellant's admission to hospital. As the First-tier Tribunal indicated, it seems clear that the appellants arrived in the United Kingdom on 20 July 2018. The appellant's account in this interview is entirely straightforward. He said: "On my arrival, I had a severe fall for which I was admitted to hospital". His wife's evidence is not exactly similar but wholly consistent. She said: "On arrival, my husband had a fall which resulted in a further deterioration of his physical health."
39. The bundle before the First-tier Tribunal at page 244 included a "medical discharge summary" but it was incomplete. Only the odd-numbered pages were provided. This shows the appellant was admitted to hospital on 20 July 2018 but does not show when he was discharged. The discharge date is left open. The explanation for admission states:

"A 67 year old male, attended with history of headache in the morning. This was followed by a fall from bed. Patient had no recollection of events. He also reported weakness in his right arm."
40. I find this extremely ambiguous. On one reading the fall from bed followed his admission from hospital. The respondent's bundle included a letter from King Edwards Medical Group and Dr Jason John dated 17 August 2018. This said of the first appellant that he:

"unfortunately was admitted again recently with a worsening of his symptoms and he is currently still an in-patient at the local Queen's Hospital. He has deteriorated in that he is now dependent on all aspects of daily living particularly washing and caring as well as feeding."
41. The appellants' bundle for the hearing at the First-tier Tribunal at page 15 included a financial statement from the NHS Trust and the last item on there is marked: "4450 - overseas visitor in-patient Queen's Hospital - non-elective 20/07/2018 - 03/10/2018 HRG AA 35A stroke cases ...". This was in the context of a bill of £20,816.50 not being paid. Whilst I accept that I have the advantage of assistance from Counsel because the point was drawn to everyone's attention, I can only conclude that the judge's decision that the appellant was discharged from hospital on the day he arrived is attributable to his misreading the papers.
42. The grounds also criticise the judge's findings in relation to the failure to pay the health charge incurred on the appellant's last visit to the United Kingdom when he had a stroke. The main point taken by Mr Georget is that the judge did not seem to appreciate that although the bill had not been paid the family were paying a nominal sum and were actively engaged in renegotiating a more realistic sum which had not been presented very long before the proceedings, so the suggestion that there was no possibility of it being paid was not examined properly.
43. Mr Melvin's position, which was presented with more subtlety than I summarise it here, was that none of these errors mattered because the case could not succeed because the evidence was not of sufficiently severe illness to prevent removal and in any event the finding that it was not in the public interest to remain incurring bills that would not be paid was a legitimate finding open to the judge on the evidence. I follow that submission

and it has given me cause to reflect but there are so many inappropriate adverse findings about the first appellant may have infected the infected the balancing exercise that I am not satisfied that the decision is sound.

44. Further, there are two appellants here and the decision in the first appellant's case assumed there would be continuing support from his wife, if only emotional support and companionship in what appears to have been a long marriage. The appellant's wife does suffer from kidney failure. Again there is an appearance of prejudice because although the Secretary of State did not regard either appellant as a health tourist the judge still found it necessary to express a degree of scepticism on that point. He said at paragraph 52:

"In the normal course of events, I would likely be unconvinced by the claims that the appellants did not come to the UK for medical treatment and that their plan was to return to Nigeria before their visit visas expired."

45. I do not understand any need to make comments such as this. Broadly, parties can agree facts and whilst the Tribunal may not be bound by them as a matter of law, it is hard to think that such agreements can be ignored safely without notice. Further, comments of the kind I have indicated, and there are others in the Decision and Reasons, again leave the concern that the balancing exercise has been skewed by adverse findings that are not justified.

46. I am not sure that the parties really appreciate how seriously ill the second appellant appears to be. There is a summary of the dialysis process in the letter of Dr A James, a consultant nephrologist with the Barts Health NHS Trust. Dr James describes the dialysis process in the following terms:

"This involves blood being removed from her body, which is purified and re-infused into her body, continuously over a period of four hours, during each session of treatment. This is a life-sustaining treatment and without Dialysis, she is unlikely to survive longer than a few days or weeks. She is fit to travel, albeit limited by arthritis in her knees, she will need wheelchair assistance to travel. If you need any further information, please do not hesitate to contact me, with the permission of [the second appellant]."

47. It may be the dialysis treatment is practicably available in Nigeria, by which I mean not only that it is available but that the second appellant will be able to access it and my concerns about her return are unfounded but I have not been able to discern any clear findings in that point and the modest change in jurisprudence following the decision of the Supreme Court in **AM (Zimbabwe) v SSHD [2010] UKSC 17** might be very pertinent in any redetermination. I do appreciate that this decision was not available to the First-tier Tribunal Judge, who certainly cannot be criticised for not applying it because it had not been decided.

48. I agree with the contention in the grounds that the finding that appropriate emotional support would be available in Nigeria is based on nothing better than conjecture. The evidence was that there was no-one who would provide that kind of care and the judge's finding that support from family, friends and/or congregants (the first appellant it seems was a church pastor for a time) is based on speculation and fails to appreciate the very marked decline in health which the second appellant has experienced after coming to the United Kingdom.

49. I am very aware of the difficulties these appellants will face in showing they have a human right to remain in the United Kingdom based on a decline in their health that followed very soon after entering as visitors. However, I agree with Mr Georget that their case is not absolutely helpless and the decision that has been made is shot through with findings that are unjustified or unnecessary and which clearly may have skewed the balancing exercise.
50. I set aside the decision of the First-tier Tribunal.
51. I have decided the appeals should be determined again in the First-tier Tribunal. This case has not been done properly and the appellants are entitled to preserve maximum appeal rights.
52. The appellants had made an application to adduce further evidence. This was to correct problems arising from the judge taking points that had not been raised. This evidence was not necessary to answer the points but appeared to make things clearer. I was able to resolve the issues without reference to that evidence and did not determine the application. If the appellant wishes to rely on further evidence the application must be renewed, appropriately supported with documentation and explanation in accordance with the Rules in the First-tier Tribunal. It may well be that the health of the appellants is something that requires further evidence and further consideration.
53. I am also concerned that the respondent does not seem to have addressed the problems the second appellant might face but rather seems to have muddled her difficulties with those of the first appellant. I have gone through the papers, anxious that I might be doing the Home Office injustice by simply misreading the file. If I am guilty of that then I apologise profusely but as far as I can see the refusal letter referred to the first appellant's difficulties twice rather than the first appellant's difficulties and then the second, so if that is right the Secretary of State might want to consider remaking her decision.

Notice of Decision

The appeals are allowed. They will be reheard in the First-tier Tribunal.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 23 April 2021