



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: UI-2021-001804
HU/03609/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 9 September 2022**

**Decision & Reasons
Promulgated
On 6 November 2022**

Before

**UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

**DR. PROMISELYNDA IJEOMA OBIOHA
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Ms A. Ahmed, Senior Presenting Officer

For the Respondent: In person

DECISION AND REASONS

1. The Respondent, to whom we will refer as the Claimant, is a national of Nigeria born on 3 June 1984. On 20 January 2020, she made a human rights application for leave to remain in the United Kingdom, based on her private life. This application was refused in a decision dated 18 February 2020 and the Claimant appealed against this decision. Her appeal came before First tier Tribunal Judge Malone for a remote hearing on 15 October 2021. The SSHD was not

represented at that hearing and the Claimant appeared as a litigant in person. The Judge noted at [4] that the appeal proceeded by way of the Claimant giving evidence in the form of answers to questions put to her by him and at [5] that the documents before him were a notice of refusal; a notice of appeal and grounds of appeal. In a decision and reasons promulgated on 26 October 2021, the Judge allowed her appeal.

2. The SSHD sought permission to appeal against this decision, in time, on the basis that the Judge had materially erred in law: (i) in making contradictory findings as to whether or not there would be very significant obstacles to the Claimant and her infant child returning to Nigeria and in failing to provide any reasoned basis for so finding and (ii) in giving weight to immaterial matters and in effectively undertaking a freestanding article 8 assessment.
3. Permission to appeal to the Upper Tribunal was granted by First tier Tribunal Judge Grimes on 1 December 2021 on the basis that it was arguable that the Judge erred in his application of the test set out in paragraph 276ADE(1)(vi) of the Immigration Rules and in failing to attach weight to the claimant's failure to meet the requirements of the Rules in the proportionality assessment pursuant to article 8. It was also arguable that the Judge failed to give adequate reasons for finding that the public interest is outweighed by the claimant's right to private life, in light of the apparent lack of documentary evidence and the lack of clarity as to the outstanding elements of the claimant's teacher training course.

Hearing

4. At the hearing before us, the Claimant again appeared in person. It became apparent that her child was unwell and had been taken to A&E by a friend. We offered to adjourn the appeal for 7 days so that the Claimant could re-join her child without delay, but she was adamant that she wished to proceed with the hearing and so we agreed to proceed, at her request.
5. We heard first from Ms Ahmed, who submitted that there was a tension between paragraphs 26 and 27 of the Judge's decision and reasons: at [26] the Judge finds he cannot be satisfied on removal to Nigeria the Claimant would encounter very significant obstacles to integration and at [27] the Judge found he was satisfied on return to Nigeria to her home area that the Claimant would encounter difficulties falling not that short of very significant obstacles to integration.
6. Ms Ahmed queried whether the Judge considered protection issues albeit these had not been raised as part of the human rights appeal. She submitted that if the Judge was concerned about these matters and potential difficulties in re-integrating into her home area, the

Judge should have gone on to consider relocation elsewhere in Nigeria.

7. Ms Ahmed then drew attention to [33] onwards and the Judge's article 8 *Razgar* consideration. She submitted that the finding at [42] that: "*The Appellant has done no wrong in this country*" was a curious finding given that the test was not whether or not she has done wrong and that in being overly sympathetic this had clouded the legal test: see [43] and [44]. Ms Ahmed submitted that in finding at [42] that "*babies do not always appear at the most convenient of times*" this was immaterial. Ms Ahmed further submitted, with respect to [44] that the Judge had not addressed why refusal of the application would have such unjustifiably harsh consequences that it outweighed the public interest.
8. We gave Dr Obioha the opportunity to make submissions, having provided her with an opportunity to re-familiarise herself with relevant documentation *viz* the Judge's decision and reasons, the SSHD's application for permission to appeal and the grant of permission to appeal by First tier Tribunal Judge Grimes. Dr Obioha confirmed that she had represented herself at the hearing before the First tier Tribunal because when the refusal letter came she realised what was contained in her application was different from what she had provided by way of instructions to her former representative, in that it focused on her being a single parent with depression, which also contradicted the letter of representations. Dr Obioha asserted that all the documents had been submitted. She said that the Judge asked her so many questions based on the application and she responded to all of them and requested to speak at the end of questioning, which he allowed her.
9. Dr Obioha said that she had stated clearly to the Judge what she was appealing for. She was given the opportunity to apply for an extension for work experience and she was given a year to do this. However, the visa was granted in February and her child had been born in March. She said that she tried to leave her in order to obtain work experience but she was too young. Dr Obioha said that she wrote to London Metropolitan University who informed her that an extension could only be given once and she would need to write to the Home Office. Consequently, Dr Obioha said that she drafted a letter which was submitted with the grounds of appeal to the First tier Tribunal and that she explained all this to the Judge.
10. Dr Obioha said that during the lockdown she worked as a Teaching Assistant and had submitted her PGCE certificate and document confirming that she is qualified because she did the course. She had, by the time of the appeal hearing, undertaken and passed the ECT transition vocational training. Dr Obioha further informed us that she had just started work at Capital City college on Monday 5 September 2022 in order to undertake the work

experience component of her teaching qualification and that she was teaching Biology A level.

11. We reserved our decision which we now give with our reasons.

Decision and reasons

12. We have concluded that there are material errors of law in the decision and reasons of the First tier Tribunal Judge.

13. The SSHD asserts, firstly, in her grounds of appeal that the Judge materially misdirected himself both in making contradictory findings as to whether or not the Claimant would experience very significant obstacles in integrating in Nigeria; in failing to have regard to the correct test, or any caselaw or country background evidence as part of this assessment; failed to make any assessment as to whether or not the Claimant would rely on family support on return and in concluding at [34] that the decision interferes with the Claimant's private life in the United Kingdom, absent any reasons for that conclusion.

14. We find that there is merit in this challenge. At [26] the Judge held:

"I cannot be satisfied that, on removal to Nigeria, she would encounter very significant obstacles to integration there."

And at [27] that:

"I am satisfied that, on removal to Nigeria, on return to her home area, she would encounter difficulties falling not all that short of very significant obstacles in integrating". She comes from the South Eastern part of Nigeria. She regards herself as Biafran. She is Ibo. I take judicial notice of the fact that the area from which the Appellant comes is one where there is a large degree of lawlessness. Rape is common and the rate of extra-judicial killings is high."

At [32] the Judge stated clearly:

"I have found that the Appellant is unable to demonstrate she falls within paragraph 276ADE(1)(vi) of the Immigration Rules."

Whilst we find that these findings are not, in fact, inconsistent, there is no role for a "near miss" when assessing whether or not the very significant obstacles test is met. Whilst the test is well-established and thus it is not strictly necessary for the Judge to have made reference to the relevant caselaw eg. *Kamara* [2016] EWCA Civ 813, the absence of a self-direction based on the jurisprudence does give rise to a risk that the test has not been correctly applied.

15. At [32] the Judge continued:

“However, I acknowledge that it would currently be difficult for her to return there with Olaedo”.

We accept the SSHD’s submission as set out in the grounds of appeal and further particularised by Ms Ahmed, that the Judge has not provided reasons as to why this would be the case. Presumably the Judge is referring back to the finding at [27] as to the circumstances potentially pertaining in the Claimant’s home area of Nigeria. However, there was no evidential basis in terms of background country evidence before him to support this finding nor any consideration of whether the Claimant and her daughter could return to another area of Nigeria e.g. Lagos and if not, why not.

16. In addition, as submitted by the SSHD, there is no consideration of the availability of family or other support in Nigeria. At [31] the Judge held:

“I have little doubt that it is in Oladedo’s (sic) best interests that she continue to reside in the United Kingdom for the time being. I accept it would be hard for the Appellant to return to Nigeria with a young child without a male protector, given the current circumstances in South Eastern Africa and the fact that the pandemic is still very much evident.”

Whilst the Judge had a statutory duty to consider Olaedo’s best interests pursuant to section 55 BCIA 2009, there is no evidential basis to support the Judge’s finding that the Claimant would have no male protector on return to Nigeria; what the currently circumstances are in South Eastern Africa, which is too vague to be of any real meaning; nor of the impact of the pandemic at the date of decision (October 2021). We find that the Judge’s findings in this respect are unsustainable.

17. At [33] the Judge turned to consideration of Article 8 outside the Immigration Rules. The SSHD asserts that the Judge thereafter embarked on a freestanding Article 8 consideration. We agree, albeit the Judge did, at [35]-[39] consider the statutory public interest considerations at section 117A-D of the NIAA 2002. He found at [38] that the Claimant had always been in the United Kingdom lawfully, but with precarious status and reminded himself of the judgment of Lord Wilson in Rhuppiah [2018] UKSC 58 and at [39] that the Claimant speaks very good English and is financially independent in that she is financially supported by her church. However, as is clear from AM (S 117B) Malawi [2015] UKUT 0260 (IAC) which was endorsed by Lord Wilson at [38]-[40] of his judgment in *Rhuppiah* at best these factors are neutral. Given that the Claimant’s daughter is Nigerian (DOB 22.3.19) and under the age of 7 years, section 117B(6) is not in play. Consequently there is no basis in the

statutory public interest considerations without more for the Judge to find that the public interest is outweighed by the Claimant's right to enjoy private life in the UK.

18. At [43]-[45] the Judge held as follows:

"43. The Appellant only seeks a period of leave to enable her to complete her teacher qualification here. Without the practical side being fulfilled, her qualification is worthless.

44. After extremely careful consideration, I have come to the conclusion that to refuse the Appellant's application for what is, in real terms, a request for a small immigration indulgence, would have consequences which would not only be harsh, but would be unjustifiably so. I find that on the particular facts of this case, the public interest in refusing the Appellant's application is outweighed by the Appellant's qualified protected right to enjoy private life in this country.

45. I find the Respondent's decision is disproportionate. It unlawfully infringes the Appellant's qualified protected right to enjoy private life in the United Kingdom ..."

19. In light of the absence of clear and sustainable reasons, we accept the SSHD's submission that the Judge erred in failing to adequately explain why refusal of the application would have such unjustifiably harsh consequences that it outweighed the public interest in the maintenance of immigration control. We are concerned by the judge's reference to the claimant being afforded a 'small immigration indulgence'. Article 8 ECHR does not exist to provide those who are thought to be deserving of sympathy or indulgence with a right to remain in the United Kingdom and in concluding otherwise we consider that the judge was treating this qualified right as a general dispensing power, contrary to *Patel & Ors v SSHD* [2013] UKSC 72.

20. We further find that, whilst the Judge was entitled, having heard evidence from Dr Obioha, to find her honest and credible, her oral evidence, absent any documentary evidence in support did not found a sufficient evidential basis upon which the Judge could find that her private life outweighed the public interest in maintaining immigration control.

21. We further recognise the correctness of the point made by Judge Grimes in granting permission to appeal which is that nowhere in the decision and reasons did the First tier Tribunal Judge recognise that the Claimant was unable to meet the requirements of the Immigration Rules. Consequently, the SSHD is entitled, and the Tribunal is required to weigh in the balance against the claim the fact that it could not have succeeded under the Rules *cf. Rhuppiah*

(op cit) at [4] and the judgment of Lord Reed in *R (Agyarko) v Secretary of State for the Home Department* [\[2017\] UKSC 11](#), [2017] 1 WLR 823, at [46] and [47].

22. It follows that we find the First tier Tribunal Judge made material errors of law in his decision and reasons and that his decision needs to be set aside. We have decided to re-make the decision without a further hearing and to dismiss the appeal. This is because we find that it is not possible for the Claimant to succeed in her appeal on human rights grounds.
23. We, like the First tier Tribunal Judge, have no reason to question the credibility of the Claimant and we accord her due respect for her qualifications and endeavours to qualify as a teacher, alongside caring for her daughter as a single mother. This is not, however, sufficient to find that the SSHD's decision to refuse her application for leave to remain on the basis of her private life would result in unjustifiably harsh consequences for her, either in relation to her private life in the UK or her circumstances upon return to Nigeria, about which little is known other than her own evidence. We take account of her daughter's best interests in making this assessment, noting, however, that her daughter, who was born on 22 March 2019 is thus only 3 and half years of age and therefore, her best interests are clearly to be with her mother and to continue to be cared for by her.
24. We take account of the statutory public interest considerations. We find that the Claimant has had periods of leave as a student in the United Kingdom, alongside periods of time in Nigeria from 14 December 2012 to the expiry of the most recent grant of leave on 29 January 2020. The Claimant made an in-time application for leave to remain based on her private life on 20 January 2020 and thus has the benefit of section 3C leave. Thus we find that her residence in the United Kingdom has been lawful, albeit precarious. We find that she speaks English to a high standard, given she has attained a PhD and we had the benefit of her oral evidence and we accept, in the absence of any countervailing evidence, that she has been financially supported by her Church and through employment. However, section 117B(6) of the NIAA 2002 is inapplicable given that her daughter is only 3 years of age currently.
25. We take account of the fact that the Claimant is unable to succeed under the private life provisions of the Immigration Rules and that we are required to weigh this in the balance when considering whether removal of the Claimant and her daughter would result in unjustifiably harsh consequences for them. The conclusion by the First tier Tribunal Judge that it would appear to have been largely based on the fact that the Claimant had not yet completed the practical component of her teaching qualification. However, the Claimant informed us that she has recently started

working as an A level Biology teacher at Capital City College. Now that the Claimant has successfully embarked on the teaching hours element of her PGCE qualification, we find that she should be eligible for sponsorship as a skilled worker by the College, given that, as a science teacher, she may well qualify for consideration as a shortage occupation, as she asserted in her application form.

26. Whilst we have no hesitation in finding that it would be harsh for the Claimant and her daughter to return to Nigeria, there is no evidence before us to show that it would be unjustifiably harsh. The Claimant spent the first 29 years of her life in Nigeria; she is familiar with life and culture there and the First tier Tribunal Judge found that there are no very significant obstacles to her integration there. There is a paucity of evidence as to the presence of family members and a potential support network, but it is the case that the Claimant has returned to Nigeria several times over the course of the last 9 years, in order to make further Tier 4 visa applications. We find there is no bar on her ability to travel to and reside in Nigeria. Whilst she may not wish to return there and to have to relocate with her young daughter, which is understandable, this does not render the decision of the SSHD disproportionate or unjustifiably harsh for the Claimant or her daughter.

Notice of Decision

27. For the reasons set out above, we find that the First tier Tribunal Judge made errors of law in his decision and reasons. We set aside his decision and substitute a decision dismissing the Claimant's appeal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

26 September 2022