



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2021-001940**  
**First-tier Tribunal Nos:**  
**HU/50569/2020**  
**IA/01349/2020**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 25 May 2023**

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**MARTIN OKEBULU NNACHI**  
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Nazir, Legal Representative from Copeland  
Immigration Services

For the Respondent: Ms A Nolan, Senior Presenting Officer

**Heard at Field House on 3 May 2023**

**DECISION AND REASONS**

**Introduction**

1. The Appellant appeals against the decision of First-tier Tribunal Judge O'Garro ("the Judge"), promulgated on 13 July 2021 following a hearing which took place on 1 July 2021. By that decision, the Judge dismissed the Appellant's appeal against the Respondent's refusal of his human rights claim.
2. The Appellant is a citizen of Nigeria, born in September 1979. He came to the United Kingdom in November 2004 as a visitor and then overstayed. It was not until 4 May 2020 that he made an application to

regularise his status. That application was predicated on his claimed private life under Article 8 ECHR. In the application form he stated that he could not meet any of the relevant Immigration Rules (“the Rules”) and was therefore applying outside of their remit. He mentioned nothing about any family life in this country.

3. The application was refused on the basis that there were no very significant obstacles to the Appellant’s reintegration into Nigerian society. Once his appeal was lodged with the First-tier Tribunal, the Appellant raised the issue of a claimed relationship with a British citizen partner Ms Giramiya (“the Sponsor”). He disclosed that the couple had in fact married in December 2020. When the Respondent put in her review prior to the hearing before the Judge, she asserted that the relationship was a “new matter” but that consent would be given for the First-tier Tribunal to consider the issue as part of the appeal. The Respondent was not satisfied that the claimed relationship was in fact genuine and subsisting. It was noted that the Appellant’s unlawful status in this country meant that he was unable to satisfy the immigration status requirement under Appendix FM. In addition, the Respondent was not satisfied that the relevant financial requirements were met.

### **The Judge’s decision**

4. Having set out the matters to which I have already referred, the Judge considered a variety of evidential sources and ultimately concluded that the Appellant’s relationship with the Sponsor was genuine and subsisting and that they had in fact married in December 2020: [27] – [33]. However, the Judge then took the view that because the marriage post-dated the Appellant’s application in May 2020, he could not bring himself within Appendix FM at all and therefore she did not consider the provisions contained therein. Instead, the Judge went on to consider paragraph 276ADE of the Rules. She directed herself to the appropriate authorities relating to the very significant obstacles assessment and took a range of factors into account, ultimately concluding that the Appellant could not meet the provisions of that particular Rule.
5. Following that conclusion, the Judge went on to examine the Appellant’s case under Article 8 in its wider scope. She took account of a number of factors already considered, the mandatory considerations under section 117B NIAA 2002, as amended, and also issues relating to the Sponsor: [35] – [51]. In respect of the Sponsor, the Judge took account of the fact that they had begun and then carried on their relationship at a time when the Appellant was in this country unlawfully, that the Sponsor was a British citizen with close family members living in the United Kingdom, and that she did not want to leave her employment and the life she knew in this country. In balancing up the relevant considerations, the Judge concluded at [53] and [54] as follows:

“53. I have found that the appellant does not meet the requirements of the Immigration rules for a grant of leave to remain. The appellant has

provided no evidence that satisfies me that his circumstances are exceptional or that his removal will cause unjustifiable harshness for the appellant and his partner.

54. The appellant and his partner can relocate to Nigeria and continue their family life there. Alternatively, I find the appellant could leave the United Kingdom and with the assistance of his partner who can continue to support him financially, apply for entry clearance.”
6. At [55] the Judge went on to consider the well-known Chikwamba principle, but concluded that it did not apply in that case in part because the Appellant had adduced no evidence to show that a temporary separation would disproportionately interfere with protected family life. At [56] the Judge confirmed that she had looked at the evidence in the round and was concluding that removal would not be disproportionate. The appeal was accordingly dismissed.

### **The grounds of appeal**

7. The grounds of appeal were not drafted with particular clarity, but essentially make the following points. First, it is said that the Judge failed to take account of all relevant evidence when assessing Article 8. Second, it is said that the Judge failed to take all relevant matters into account when assessing whether a temporary separation would be proportionate or not. Third, that the Judge failed to consider all relevant factors when deciding whether there were exceptional circumstances in the case.

### **The grant of permission**

8. Permission was granted by the First-tier Tribunal. In the first instance it was thought arguable that the Judge had failed to consider all relevant evidence or provide adequate reasons on “key issues”. The judge considering the application also raised a new ground of his own volition, although unfortunately he did not have regard or at least did not set out the principles/guidance relevant to this approach as established in the case law: see for example AZ (error of law: jurisdiction; PTA practice) [2018] UKUT 00254 (IAC).
9. The new issue was this. Once the Judge had found that the Appellant was married to the Sponsor and that their relationship was genuine and subsisting, it was arguable that she should then have gone on to consider whether EX.1 of Appendix FM to the Rules applied in the case. This in turn would have entailed the Judge considering the “insurmountable obstacles” test under that exception (in combination with EX.2).

### **The hearing**

10. At the hearing before me I indicated that I would hear argument on the grounds of appeal as drafted, together with the new matter raised in the grant of permission. Ms Nolan did not object to that course of action.
11. Mr Nazir submitted that the Judge had not taken proper account of what was contained in the witness statements of the Appellant and the Sponsor. In respect of the possibility of the Appellant going to Nigeria to apply for entry clearance, Mr Nazir submitted that there could be delays in that course of action.
12. Ms Nolan submitted that the Judge had in fact been aware of all relevant matters and had taken these into account. Having said that, she accepted that there was some merit in the new ground raised in the grant of permission. She submitted that GEN.1.9.(a)(iii) of Appendix FM did not preclude the Appellant from being able to rely on Appendix FM at all, with reference to R-LTRP.1.1 of the Appendix. She further accepted that GEN.1.2 did not contain a “date of application” requirement, unlike the position of cohabiting unmarried partners. It followed that the fact the Appellant’s marriage post-dated his application did not preclude him being able to rely on Appendix FM, contrary to the Judge’s stated view at [25] and [34] of her decision. In short terms the Judge had apparently erred by failing to consider Appendix FM.
13. Ms Nolan, submitted that whilst the Judge should have considered EX.1, together with EX.2, all of the factors she had in fact addressed were relevant to the insurmountable obstacles test and whilst the Judge had not expressly used that term in her decision, any error was immaterial because the outcome would have been the same if those same considerations had indeed been factored into the appropriate test.
14. Alternatively, Ms Nolan suggested that if there was a material error I could and should go on to re-make the decision in this case based on the evidence as it stood together with the Judge’s findings.
15. In reply, Mr Nazir submitted that there was not very much difference between the insurmountable obstacles test and the unjustifiable harshness test. He too accepted that if I were to find a material error of law I should go and re-make the decision on the evidence and Judge’s findings. He made no application for a resumed hearing or to adduce new evidence.
16. At the end of the hearing I reserved my decision.

## **Conclusions**

17. I remind myself of the need for appropriate judicial restraint before interfering with a decision of the First-tier Tribunal.

18. In the present case, I am satisfied, albeit by a narrow margin, that the Judge did make a material error of law and that her decision should be set aside.
19. I agree with Ms Nolan's analysis of GEN.1.9 and GEN.1.2. In respect of the latter provision, the fact that the Appellant married the Sponsor after his application did not preclude him from relying on the provisions of Appendix FM. The Judge was wrong to have concluded otherwise.
20. Following from that, the fact that the Appellant was an overstayer meant that he could not have satisfied the immigration status requirement (I note also that the Judge did not address the financial requirements issue because she was of the view that Appendix FM did not apply at all. This omission does not play a material part in my decision, however). Thus, the Judge should have, but did not, considered EX.1 and EX.2.
21. The question then arises as to whether, in light of what the Judge did find, her failure to have addressed the insurmountable obstacles test could have made any difference to the outcome of the appeal? In answering that question, I need to address matters raised in the original grounds of appeal and which were also the subject of oral submissions from Mr Nazir.
22. Having regard to the Judge's decision as a whole and reading it sensibly, I am entirely satisfied that the Judge had all relevant evidence in mind and that she addressed relevant considerations and supported her findings with legally adequate reasons. It is clear from the face of her decision that she was aware of the nature of the documentary evidence, which of course included the witness statements for the Appellant and Sponsor: [8], [17], [28] - [33] and [56]. The Judge took full account of the oral evidence provided by both the Appellant and the Sponsor. She was clearly aware of the way in which the Appellant's case was being put: there is a reference to the contention that there would be insurmountable obstacles to the couple living in Nigeria at [15], to the issue of very significant obstacles at [35] - [37], and matters relevant to the Appellant's wife at [50] and [51]. I am satisfied that the Judge took all relevant matters into account and left none out of account.
23. In respect of the Judge's reasoning, there is no requirement to provide reasons for reasons and any suggestion that the ultimate conclusions reached by her were not immediately followed by reasons fails to appreciate the fairly obvious fact that she was simply drawing together and relying on everything she had said previously in her decision, including legally adequate reasons. For example, the conclusion at [54] that the Appellant and the Sponsor could relocate to Nigeria together, must be seen in context of the assessment of both of their circumstances in the preceding fifteen paragraphs or so. Specifically, the Judge took account of the Sponsor's British nationality,

the fact that she had close members in this country, that she did not want to leave her employment, and that at present her life is based very firmly in this country. There was no evidence before the Judge to indicate that the Sponsor would be unable to get a visa to live in Nigeria with the Appellant, her witness statement did not raise security concerns, and as far as I can see there was no significant evidence to indicate that any such concerns, even if expressed, would have been well-founded.

24. In respect of the Appellant's evidence, no assertions as to any particular fears were raised by him in his witness statement and again I am satisfied there was no reliable evidence to support any assertions which may have been put forward in oral evidence.

25. Bringing the above together, the Judge has not erred in relation to a consideration of the evidence and her findings thereon. This leads me to the next step in the analysis, namely whether, in light of the sustainable findings, the Judge's failure to specifically address the insurmountable obstacles test constitutes a material error. Initially, I took the view that there was probably no material difference between the insurmountable obstacles threshold and that relating to unjustifiably harsh consequences. I am not aware of any authority which has considered the particular issue. It is clear from the definition in EX.2 that the phrase "insurmountable obstacles" sets a high threshold:

"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."

26. On reflection, it may be that there is a slight difference and that the unjustifiably harsh consequences test is marginally higher. I say this with reference to [44] - [45] and [4]8 of Agyarko v SSHD [2017] UKSC 11; [2017] 1 WLR 823:

"44. Domestically, the expression "insurmountable obstacles" appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws, and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "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." That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the

expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.

45. By virtue of paragraph EX.1(b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in "exceptional circumstances", in accordance with the Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate". Is that situation compatible with article 8?"

27. It might appear from those passages that the application of the unjustifiably harsh consequences test once insurmountable obstacles are found not to exist implies a different threshold, although that remains not entirely clear to me. In any event, in the circumstances of this case, I am prepared to accept that the Judge's error was material and therefore I set her decision aside. In so doing, I preserve all relevant findings of fact.

### **Re-making the decision**

28. In re-making the decision, I bear in mind the agreement of both parties that I should proceed to take this course of action without directing a resumed hearing and without receiving further evidence. I reiterate that there has been no application to adduce further evidence at any stage.

29. I have considered all of the documentary evidence which was before the Judge and I note her record of the oral evidence received by her. In line with the Judge's finding, I am satisfied that the Appellant and Sponsor are married and remain in a genuine and subsisting relationship. On the basis of undisputed evidence and/or the Judge's additional findings, I find that:

- (a) The Appellant has been an overstayer since 2004;
- (b) The couple have both been fully aware of the Appellant's unlawful status throughout their relationship;
- (c) The Appellant speaks English;
- (d) He has no material health problems;

- (e) There is no reliable evidence to suggest that he is not capable of finding work in a variety of fields;
- (f) There are no considerations, taken alone or cumulatively, which go to show that there would be very significant obstacles to the Appellant reintegrating into Nigerian society. He would be able to establish a reasonable private life within a reasonable time and would be considered enough of an insider by Nigerian society as a whole.;
- (g) The Sponsor is British and has close family members living in this country. She is of Ugandan heritage. She full-time employment and I accept she has an annual salary of approximately £35,000, although the evidence specified under Appendix FM-SE has not been produced;
- (h) The Sponsor does not suffer from any material health problems;
- (i) There is no evidence to indicate that the Sponsor would be unable to lawfully enter Nigeria to live with the Appellant and I find that relocation for the couple is a realistic possibility in that regard;
- (j) I am not satisfied that there are any well-founded security risks in respect of the couple's possible relocation to Nigeria;
- (k) It is more likely than not that members of the Sponsor's family would be able and willing to provide at least some meaningful support to the couple in at least the short term.

30. The insurmountable obstacles test requires me to apply a high threshold. On the evidence before me and the core finding set out in the preceding paragraph, I conclude that that threshold has not been met. It is clear that the Sponsor wishes to remain in the United Kingdom and one can readily sympathise with that position. She has a good job and close family members in this country. She has not, as far as I am aware lived in or visited Nigeria. Relocation to Nigeria would entail genuine difficulties for her and I do not underestimate these in any way. In respect of the Appellant, he too would face difficulties in re-establishing himself in Nigeria, but these would not be at the level experienced by the Sponsor for obvious reasons set out at some length by the Judge.

31. Bringing together the circumstances of the Appellant and the Sponsor, it is clear that there would be genuine obstacles in their path. Life would not be particularly easy, especially in the short-term when they were seeking to establish themselves in that country. Against that, there are no particular features of the case which, either taken in isolation or cumulatively, raise their combined circumstances to the high threshold with which I am concerned. It follows that EX.1 cannot be satisfied and the Appellant cannot bring himself within the Rules.



32. I turn to the possibility of the Appellant returning to Nigeria alone in order to apply for entry clearance; the so-called Chikwamba point. On the face of it, this might appear to be a more palatable course of action for the couple to consider, at least from the Sponsor's perspective.
33. The case-law on the Chikwamba point has seen recent and significant developments in the form of the Court of Appeal's judgment in Alam v SSHD [2023] EWCA Civ 30; [2023] 4 WLR 17. The judgment of Laing LJ (with whom Jackson and Snowden LJ agreed) makes it abundantly clear that the Chikwamba point is now considerably limited to cases in which an application for leave to remain is refused on the narrow ground that there is a failure to meet the immigration status requirement and nothing else. Even then, it might nonetheless be proportionate to expect an individual to return to the country of origin (or some other country) and apply for entry clearance. In the present case, the Appellant was a significant overstayer, his application was refused on several bases, there has been no formal assessment of the financial requirements with reference to Appendix FM-SE, and there has been no evidence to suggest that a temporary separation would entail a disproportionate impact on either the Appellant or the Sponsor.
34. I appreciate that applying for entry clearance from abroad can result in delays, but that is, with respect, part and parcel of the Article 8 landscape. It is not, in the circumstances of this particular case, an answer to the possibility of following that route.
35. Overall, I am entirely satisfied that it would not be disproportionate for the Appellant to return to Nigeria in order to apply for entry clearance. Preparations for the application could be made prior to departure. Legal advice could be taken. There is nothing to suggest that the Sponsor would not be able to at least visit the Appellant whilst he was in Nigeria waiting for his application to be decided and/or any subsequent appellate proceedings.
36. Finally, I step back and consider whether, taking all matters into account, there are exceptional considerations in this case which would make the Appellant's removal disproportionate, notwithstanding my conclusions thus far. I am entirely satisfied that there are none.
37. For all of these reasons the Appellant's appeal against the Respondent's refusal of his human rights claim fails.

### **Notice of Decision**

**The decision of the First-tier Tribunal involve the making of an error of law.**

**The decision of the First-tier Tribunal is set aside**

**Case No: UI-2021-001940**  
**First-tier Tribunal Nos: HU/50569/2020**  
**IA/01349/2020**

**I re-make the decision by dismissing the Appellant's appeal.**

**H Norton-Taylor**  
**Judge of the Upper Tribunal**  
**Immigration and Asylum Chamber**  
**Dated: 12 May 2023**