



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Appeal No: UI-2024-000484
First-tier Tribunal No:
HU/58064/2021
IA/17655/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 July 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HA
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms A. Nolan, Senior Home Office Presenting Officer

For the Respondent: Mr L. Youseffian, Counsel instructed by Portway, Solicitors

Heard at Field House on 17 June 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity, because of certain sensitive personal matters that arise.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, it is convenient to refer to the parties as they were before the First-tier Tribunal (“FtT”)
2. The appellant is a citizen of Nigeria born in 1968. She arrived in the UK illegally on or about 28 December 2008. On 24 February 2020 she made an application for leave to remain on the basis of family life with her husband, a British citizen. That application was refused in a decision dated 2 December 2021.
3. The appellant appealed to the FtT. Her appeal came before First-tier Tribunal Judge S.J. Clarke (following the remittal of an earlier decision of the FtT by the Upper Tribunal) at a hearing on 6 December 2023 following which her appeal was allowed. Permission to appeal Judge Clarke’s decision was granted by a judge of the FtT in a decision dated 8 February 2024. Thus, the appeal comes before me.

Judge Clarke’s decision

4. The respondent did not send a representative for the hearing before Judge Clarke. Judge Clarke identified the issues in the appeal as being whether there were insurmountable obstacles to family life continuing in Nigeria, and whether the appellant’s removal would result in unjustifiably harsh consequences, or is disproportionate under Article 8 ECHR.
5. Judge Clarke heard evidence from the appellant and her husband. The genuineness of the relationship between the appellant and her husband was not in issue.
6. She noted, and accepted, the medical evidence that the appellant is on the third course of 12 weekly counselling sessions.
7. At [10] she found that the appellant and her husband were credible witnesses because they gave consistent answers. Judge Clarke referred to the appellant’s evidence in relation to her and her husband in terms of their not having family members in Nigeria. She referred to the appellant’s evidence that there was a politician in Nigeria who abused her and that she remains fearful of him. However, Judge Clarke also said that there was no objective evidence to confirm that he is in office or what political influence he may have in Nigeria.
8. She referred to their evidence that it was only when marriage was proposed that the appellant’s husband found out about the appellant’s immigration status, and that it was the appellant who encouraged her to attempt to legalise her stay, which the appellant had repeatedly attempted to do. She accepted the evidence that the appellant’s husband has lived in the UK for over 30 years and that it was more likely than not that he has no ties or assets in Nigeria. She accepted that the appellant’s husband has an adult daughter living in the UK.

9. At [11] she concluded that there were no insurmountable obstacles to the appellant returning to Nigeria with her husband, who is still a national of Nigeria and who, she found, could work as a driver there as he had done in the UK. Alternatively, he could visit the appellant in Nigeria whilst she makes an out of country application.
10. She found that the appellant's husband could not return to live in Nigeria, because of his age and his ties to the UK.
11. She concluded that the appellant making an out of country application to join him in the UK was "the more likely scenario".
12. At [12] Judge Clarke found that the appellant had a strong subjective fear of return but she could go and live in a different area, and that her husband would assist her. She found it implausible that he would not settle her there, even if he returns to the UK to continue working to further her out of country application.
13. As regards Article 8 outside the Immigration Rules ("the Rules"), after referring to s.117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") Judge Clarke referred again to the appellant having tried to regularise her stay, but also that she had remained in the UK without leave. She noted that the appellant speaks English and that her husband has been supporting her. She found that her husband would send her money to ensure that she is properly housed and maintained, or would join her in the short term to be able to do so.
14. After referring to *Alam & Anor v Secretary of State for the Home Department* [2023] EWCA Civ 30, she concluded that the temporary removal of the appellant is sufficient to engage Article 8 "because there is a separation of the couple whilst the Appellant makes her out of country application to join the husband who may settle her into living in Nigeria whilst making her application but who would return to the UK to sponsor it".
15. She further concluded at [15] that the out of country application would more likely than not be granted given that the appellant satisfies the Rules but for her lack of status when making her application (for leave to remain). She found that there remains significant public interest requiring an application to be made from abroad in this case, given that the appellant had no intention of returning to Nigeria when she entered the UK initially.
16. It is necessary to quote the final paragraph [16] of Judge Clarke's decision in full.

"Therefore, the pivotal issue is whether temporary separation would be disproportionate and in this regard I take into account the medical issues of both the Appellant and her husband noting the Appellant's subjective fear and the counselling she is receiving as well as the husband is aged 64 years, his own spinal problems evidenced by

walking and his change of work to become a driver because of a work injury, and his repeated attempts to enable the Appellant to regularise her stay in the UK albeit she did not leave the UK to make an out of country application to join him. In this case, the worsening mental health of the Appellant which I find is caused by the outstanding immigration removal, will no doubt be of great concern to the husband, and despite the available treatment and medication for her multiple health issues both physical and mental, I find that the balance tips in favour of the Appellant because of the impact upon the husband as well as the Appellant should she need to go and make an out of country application. Therefore, I allow the appeal because I find it would result in unjustifiably harsh consequences to the Appellant and her husband and it would be disproportionate for her to make an out of country application to join him in the UK.”

The grounds of appeal and the ‘rule 24’ response

17. The grounds of appeal contend that Judge Clarke’s conclusion that the appellant falls within the ambit of *Alam* is inadequately reasoned.
18. It is argued that, apart from wrongly stating at [15] that the appellant entered the UK as a visitor when in fact she entered illegally, the conclusion that temporary separation would cause unjustifiably harsh consequences, contradicted the earlier finding at [11] that the sponsor would be able to visit her. It is argued that Judge Clarke had failed to give adequate reasons as to why the appellant’s health issues could not be treated in Nigeria, which treatment could be funded by remittances from her husband. It is asserted that Judge Clarke “appears to gloss over the available treatment when acknowledging this exists”.
19. The grounds further argue that “...this also undermines [Judge Clarke’s] finding that the appellant and her husband can relocate to Nigeria and continue family life there, as there are no insurmountable obstacles” to their doing so. The judge would then have had to consider Article 8 outside the Rules and to decide whether it would be disproportionate for them to leave the UK together. It has not been shown why it would be unreasonable for the appellant’s husband to go with her to Nigeria, it is argued. There would be medical treatment for them and the appellant’s husband could work as a driver in Nigeria.
20. As the appellant did not pursue Article 3, the grounds argue that Judge Clarke should have considered in the alternative whether the appellant herself would face very significant obstacles to integration in Nigeria, in line with paragraph 276ADE(1)(iv) of the Rules or PL 5.1.(b) (as the Rules now are). The appellant could not meet that requirement of the Rules, it is argued.
21. The appellant’s rule 24 response points out that the respondent’s own “written review” agreed that the appellant met all the requirements of the Rules save for the immigration status requirement. The review had stated

that the appellant had to demonstrate that it would be disproportionate for the appellant to return to Nigeria to make a fresh application.

22. The grounds, it is argued, misunderstand Judge Clarke's decision in that her finding is that whilst there may not be insurmountable obstacles to the couple's family life continuing in Nigeria, given that her success in an entry clearance application was near certain, her removal was nevertheless disproportionate in all the circumstances.
23. As regards availability of treatment, it is argued that that is not the same as proportionality. The judge had found that the appellant's husband would not leave the UK. There would be a period of separation, it was found. That would expose the couple to physical and mental harm, even if eventually treatable. The judge found that such was not proportionate, and it was open to her to make that finding, it is argued.
24. As regards the public interest, Judge Clarke had also indicated at [14] that the public interest was not so pressing given the appellant's attempts to regularise her stay.
25. The rule 24 response relies on *Secretary of State for the Home Department v. AH (Sudan) & Ors* [2007] UKHL 49 and *Volpi & Anor v Volpi* [2022] EWCA Civ 464 in terms of the need for restraint by an appeal court when examining a decision of another judge.
26. The grounds, it is said, amount only to a disagreement with Judge Clarke's conclusions, even if it is considered that the decision was a generous one.

Submissions

27. I summarise the parties' submissions. Ms Nolan relied on the grounds of appeal. It was submitted that despite finding at [11] that there were no insurmountable obstacles to the appellant returning to Nigeria with her husband, at [12] that the appellant could return to a different area of Nigeria and her husband could help her with an entry clearance application, and at [15] that there was a significant public interest in such applications being made from abroad, her conclusion at [16] on proportionality is inadequately reasoned.
28. Mr Youseffian reiterated the matters advanced in the rule 24 response. Although there had been a finding of no insurmountable obstacles to family life in Nigeria, that does not mean that her removal was automatically proportionate, he submitted.
29. It was pointed out that the respondent did not send a representative to the appeal before the FtT, the evidence of the appellant and her husband was unchallenged and Judge Clarke accepted it. Factors that were taken into account were the past abuse of the appellant, their lack of family ties in Nigeria, and the appellant's severe mental health issues which were worsening. Mr Youseffian referred to letters from the appellant's surgery in

terms of her depression, anxiety and PTSD and the medication that she is taking. Judge Clarke had referred to the appellant's strong subjective fear. Judge Clarke also found that the appellant's husband would not return to Nigeria, and that an out of country application would more than likely be granted.

30. Although the judge had referred to the public interest, the fact that the appellant had tried to regularise her stay reduced the public interest.
31. It was submitted that this was not a classic scenario of needing to make an entry clearance application from abroad. Mr Youseffian submitted that [16] should not be read in isolation. The only reason the appellant could not meet the requirements of the Rules was in terms of the immigration status requirement, he said. Even if Judge Clarke's decision could be considered generous, it was unassailable, he submitted.
32. In reply, Ms Nolan submitted that given that the judge had found that the appellant's husband would go with her to Nigeria to help her settle pending an entry clearance application, it was unclear why she then concluded that temporary separation was disproportionate. *Alam* indicates that a full proportionality assessment was required, it was submitted.

Assessment and Conclusions

33. In so far as the grounds assert any relevance in Judge Clarke having mistakenly said at [15] that the appellant entered the UK as a visitor, I do not consider that anything turns on that matter. It is clear from [2] that she was aware that the appellant entered the UK illegally. What she said at [15] was plainly a simple error, and she did not suggest that there was anything significant in her having entered as a visitor. In her decision she emphasised the appellant's unlawful status and the fact that she did not leave when she should have done.
34. I do not accept the submission on behalf of the appellant that Judge Clarke decided that the public interest was lessened because the appellant tried to regularise her stay. She did not say so, and what she said at [14] does not make good that contention.
35. Having said that, I do not consider that the respondent's challenge to Judge Clarke's decision has merit. Judge Clarke's findings about a lack of insurmountable obstacles to family life in Nigeria, the availability of medical treatment and the support from and visits by the appellant's husband, do not undermine her ultimate conclusion on proportionality at [16]. I do not need to repeat the contents of that paragraph. It consists of a succinct summary of the various factors that led her to conclude that requiring the appellant to leave the UK would be disproportionate in its impact on the appellant and her husband, acknowledging as she did that the separation would be temporary. She was plainly aware of, and took into account, the public interest at [14] and [15].

36. Mr Youseffian acknowledged that Judge Clarke’s decision could be considered a generous one. That may be so. Nevertheless, I am satisfied that she was entitled to conclude that removing the appellant, even for a temporary period, would result in unjustifiably harsh consequences such as to make the decision disproportionate. That was her assessment of the facts, it was an assessment that is free from error of law, amounting to the required full proportionality assessment indicated in *Alam*, when considered in the context of her decision overall.

Decision

37. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal, therefore, stands.

A.M. Kopieczek
Judge of the Upper Tribunal
Immigration and Asylum Chamber
22/07/2024