



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/14727/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14th April 2014

Determination Promulgated
On 30th May 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

CHIKA VICTORIA ESONONU
(NO Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss M Dogra, Ali Sinclair, Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellant

1. The application for permission to appeal was made by the respondent although for the purposes of this determination I will refer to the parties as they were described before the First Tier Tribunal.

2. The appellant is a citizen of Nigeria born on 20th April 1980 and she appeals against the respondent's decision to refuse to vary her leave and extend her leave to remain as a partner of a British citizen. The appellant entered the UK on 2nd February 2011 with entry clearance as a Tier 4 (General) Student Migrant that was valid until 15th October 2012. She studied towards a masters degree in business economics at London Metropolitan University and met her husband David Waijhaka in October 2011. He is a British citizen. She subsequently married on 8th November 2012.
3. The reasons for refusal letter did not dispute the genuine and subsisting nature of the relationship. The reasons for refusal letter refused the appellant's application for limited leave to remain as a partner further to paragraph E-LTRP.4.1 of Appendix FM on the basis that she had failed to provide a valid English language qualification and it also appeared that the application was refused under the financial requirements further to E-LTRP.3.1. It was acknowledged that her partner had lived in the UK all his life and was in employment in the UK but the appellant had failed to show that there would be "*insurmountable obstacles*" to them continuing their relationship in Nigeria. The appellant did not meet the private life requirements contained in paragraph 276ADE. Because she failed to produce evidence to show she met the financial requirements the appellant could not show that she met all of the eligibility requirements E-LTRP.1.2-4.2. This is a requirement of R-LTRP.1.1(c). (Indeed Judge Canavan recorded at [8] that it was conceded that at the date of the application the appellant's husband was not earning the required income to meet the threshold contained in paragraph E-LTRP3.1).
4. Further to paragraph R-LTRP.1.1(d) it is possible for an application to be considered only if the appellant meets the relationship requirements and the immigration status requirements further to E-LTRP.2.1. EX.1(b) applies where a person is in a genuine subsisting relationship with a partner who is settled in the UK and where there are "*insurmountable obstacles*" to family life with that partner.
5. First-tier Tribunal determination Judge Canavan in a determination dated 12th February 2014 found that at paragraph 22

"Whilst the appellant's husband is a British citizen who has been a resident in the UK for a long period of time I find that, apart from those two facts, there are very few other circumstances that would indicate that he would face any real difficulties if he did have to relocate to Nigeria with his wife. Whilst he may not wish to relocate I find that there is insufficient evidence before me to show that there would in fact be any 'insurmountable obstacles' to him doing so for the purposes of EX.1 of Appendix FM."
6. Judge Canavan cited **Sanade & Others (British Children - Zambrano - Dereci) [2012] UKUT 00048** and she also quoted **Mahmood v Secretary of State for the Home Department [2001] INLR 1** which stated that a state does not have a general obligation to respect the choice of residence of a married couple.
7. However, Judge Canavan proceeded to allow the appeal under Article 8 stating that the Tribunal had made clear that judges were still bound by their duties under Section 6 of the Human Rights Act 1998 and that there was still a freestanding human

rights assessment outside the Immigration Rules arising from statutory requirements **MF (Article 8 – new rules) Nigeria [2012] UKUT 00393**.

8. She stated *“although I have found that there are no insurmountable obstacles to the couple continuing their family life together in Nigeria within the meaning of paragraph EX.1 the test is still quite a high one”*.
9. The judge then proceeded to apply the questions posed in **Razgar v Secretary of State for the Home Department [2004] INLR 349**.
10. She took into account the fact that paragraph GEN.1.1 of Appendix FM of the Immigration Rules states that

“The requirements of the Rules reflect how the balance should be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic wellbeing of the UK...”.
11. She proceeded at paragraph 27 of her determination to state that *“some provisions to the new Immigration Rules do not ‘perfectly mirror’ the common law principles developed over the past few years”*.
12. At paragraph 29 the judge found that circumstances had changed since the application and stated if she were deciding the case nearer to the date she perhaps would have found that requiring her to make a further application would be reasonable although she proceeded

“However at the date of the hearing the appellant’s circumstances have changed in that her husband is now in work. The evidence before me shows that he is likely to be earning an annual salary in excess of the £18,600 required in Appendix FM. The appellant is an educated woman who has also been offered work.”
13. In essence the judge found that the couple were now in a position to support themselves without recourse to public funds.
14. At paragraph 30 the judge also found that the appellant had been awarded a masters degree from a UK university which was sufficient to satisfy the English language requirements of Appendix FM. She gave her evidence in English at the hearing without any apparent problem.
15. The judge then proceeded to consider **Chikwamba v SSHD [2008] UKHL** where the House of Lords concluded that it would only be comparatively rarely certainly in family cases involving children that an Article 8 appeal should be dismissed solely on the basis that it would be proportionate for the appellant to apply for entry clearance abroad.
16. The judge therefore found at paragraph 32, that, on the evidence before her at the date of the hearing, the appellant would likely to be able to meet the substantive requirements of the Immigration Rules relating to partners and that she did not have

a poor immigration history such that it would be reasonable to expect her to return to Nigeria “solely in order to make an application for entry clearance”.

Application for Permission to Appeal

17. The Secretary of State made an application for permission to appeal on the basis that **MF Nigeria** confirmed that the Immigration Rules were a complete code from the starting point for the decision maker. Any Article 8 assessment should only be made after consideration under those Rules. It was made clear in **Gulshan [2013] UKUT 00640 (IAC)** that the Article 8 assessment should only be carried out when there were compelling circumstances not recognised by these Rules. In this case the Tribunal did not identify such compelling circumstances and its findings were therefore unsustainable.
18. **Gulshan** also made clear that an appeal should only be allowed where there were exceptional circumstances (**Nagre [2013] EWHC 270 (Admin)**) and endorsed the Secretary of State’s guidance on the meaning of exceptional circumstances namely where refusal would lead to an unjustifiably harsh outcome. The Tribunal had not followed this approach and therefore erred in law.
19. The judge had not provided any adequate reasons as to why the appellant’s circumstances were either compelling or exceptional to make her removal disproportionate. The appellant and her husband began their relationship in the knowledge that she may be required to leave the UK and it was submitted the Tribunal therefore found there were no insurmountable obstacles to the appellant and her partner continuing their family life in Nigeria.
20. Permission to appeal was granted by Tribunal Judge Reed on 3rd March 2014 on the basis that the judge had failed to adequately identify what compelling circumstances were not recognised by the Rules and had also failed to adequately explain why the refusal would lead to an unjustifiably harsh outcome.

The Hearing

21. At the hearing Mr Tarlow relied on the grounds of application for permission to appeal. Further to **Gulshan** and **MF** there needed to be exceptional or exceptionally harsh grounds in order to proceed under the substantive Article 8. There was nothing within this appeal, as reflected in the determination, that reached such a level of difficulty for the appellant that the old style Article 8 would apply. This was simply a case where an application should be made from abroad and the appellant could return and make that application.
22. Miss Dogra stated that paragraph 32 of the determination had been taken out of context. The determination should be read as a whole and in particular paragraphs 23 to 33 set out the reasons in detail why the judge allowed the appeal.

23. First and foremost at the date of the hearing the appellant would have satisfied the Immigration Rules and the judge made detailed findings on this.
24. Further the judge had taken into account the immigration history of the appellant and noted that she was here lawfully. Further to E-LTRP.1.1 she was not in the UK as a visitor and thus at the date of the hearing she could have satisfied R-LTRP1.1(c). The appellant had a good immigration history and thus there were grounds that she could consider beyond the Rules.
25. Also there was no good reason why the appellant should go back and Judge Canavan at paragraph 31 had given a valid explanation of **Chikwamba** and had addressed her mind to this and did not consider that it was proportionate to ask the appellant to make an out of country application.
26. Mr Tarlow submitted that there was nothing which came into the compelling circumstances of paragraph 24 of **Gulshan**.

Conclusions and Findings

27. In particular I note paragraph 24(b) of **Gulshan** which states after applying the requirements of the Rules, only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them **Nagre**.
28. I find that the judge had quite clearly gone into an assessment of whether the appellant could satisfy the Immigration Rules and this is set out at paragraphs 9 to 22 of her determination. She noted at paragraph 10 the exact Immigration Rule R-LTRP1.1 and she noted at paragraph 11 the reasons why the appellant could not succeed under paragraph 1.1(c) because of the financial requirements. The appellant had also failed the English language requirement and thus fell short of meeting all the eligibility requirements for the purposes of R-LTRP1.1. It is clear that the judge was fully aware of **Gulshan** and indeed this is cited at paragraph 19.
29. However I can appreciate that the judge referred to the phrase of insurmountable obstacles as cited in **MF Nigeria** and indicated that there were no insurmountable obstacles.
30. She nevertheless went on to make a consideration outside the Rules.
31. **Gulshan** sets out the term

"Insurmountable obstacles were not obstacles which were impossible to surmount but concerned the practical possibilities of relocation and 'in the absence of such insurmountable obstacles, if removal is to be disproportionate it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh...' Nagre."

32. However as the judge stated by the time that the matter came before her the appellant would have satisfied the requirements in her view of R-LTRP1.1 and it was on this basis that she took the matter forward particularly in view of the appellant's good immigration history and found further to **Chikwamba v Secretary of State for the Home Department [2008] UKHL 40** that

*"Whilst it acknowledged that there may be some cases where the immigration history is so poor that it might be necessary to require them to apply from abroad, the House of Lords concluded that it would **only be comparatively rarely, certainly in family cases** involving children, that an Article 8 appeal should be dismissed solely on the basis that it would be proportionate for the appellant to apply for entry clearance abroad."*

33. Although the judge did not specifically spell out what she considered were "*arguably be good grounds for granting leave to remain outside*" the rules she nevertheless made it clear from an overall reading of the determination, not least through the application of **Chikwamba**, which is still good law.
34. I therefore find that there was in essence a disagreement with the judge's decision which, although it may have been generous, was open to the judge on the findings made by her.
35. I therefore find there is no error of law in this determination and the determination shall stand.

Signed

Date 29th May 2014

Deputy Upper Tribunal Judge Rimington