IAC-HW-MP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38921/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th March 2015	**On 17th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MS ZAINAB OLUWABUNMI ALLI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B. Hawkins of Counsel
For the Respondent: Mr P. Duffy, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria, born on 2nd April 1970. She appeals against the decision of Judge of the First-tier Tribunal Edwards sitting at Richmond-upon-Thames on 25th November 2014, who dismissed her appeal against decisions of the Respondent dated 10th September 2013. They were to remove the Appellant and to refuse her leave to remain following her application made on the grounds that a refusal to grant her

leave would breach this country's obligations under Article 8 (right to respect for private and family life) of the Human Rights Convention.

2. The Appellant entered the United Kingdom on or about 6th October 2003 as a visitor with leave valid until 6th April 2004. She overstayed thereafter. On 12th December 2011 she submitted an application for leave to remain outside the Rules which was refused on 7th November 2012. On 21st November 2012 the Appellant submitted further representations, the refusal of which on 10th September 2013 led to the present proceedings.

3. The Appellant's application was on the basis that she was the unmarried partner of Mr Julius Ajayi Fakolade ("the Sponsor"), a British citizen, since June 2008. They have lived together since September 2009, at first with the Sponsor's son, Stephen and thereafter moving into their own accommodation in February 2013.

Explanation for Refusal

4. The Respondent refused the application after considering whether the Appellant could bring herself within Appendix FM to the Immigration Rules. The Respondent did not accept that the Appellant was in a genuine and subsisting relationship with the Sponsor. The documentation submitted did not indicate that the Appellant and Sponsor were living together. The Appellant had entered the United Kingdom in 2003 at the age of 33 and had therefore spent a significant part of her life in Nigeria including her formative years. There were no age-related issues that would prevent her from returning to Nigeria, a country where she had family, cultural and social connections. She had overstayed her visa and had remained here for a significant period of time before attempting to regularise her stay.

The Hearing at First Instance

5. The Appellant argued that a separation caused by the Appellant returning to Nigeria to apply for entry clearance from there was not a viable option. It would mean the Sponsor having to live alone in his current flat. He was aged 64 years and in full-time employment but due to his health could not live on his own. The Sponsor's son was no longer able to accommodate the Sponsor who had not lived on his own for at least the last 30 years. If the Sponsor were to accompany the Appellant to Nigeria and stay with her until she obtained entry clearance it would mean the end of his employment. He had lived in the United Kingdom for the last 38 years and had been a British citizen for more than twenty years. To force him to permanently relocate to Nigeria would be unduly harsh. There were insurmountable obstacles to family life continuing outside the United Kingdom. There had been delay in the Respondent's decision since the Appellant had made her application for leave to remain.

6. In his determination the Judge noted that the Appellant had two adult children living in Nigeria with whom she was on good terms and that the Appellant had a poor immigration history. Her application for a visit visa to come to the United Kingdom was dishonest because she had never intended to return at the end of the claimed visit. The relationship between the Appellant and Sponsor was genuine and subsisting but there

were no insurmountable obstacles to family life continuing outside the United Kingdom. The reasons the Judge gave at paragraph 25 were:

> "The Appellant has close family in Nigeria with whom she is on good terms. She is in good health. So is [the Sponsor]. He has worked as a teacher in Nigeria, if he so desired. He has a job in UK but is nearing the age when he will receive his state retirement pension. He visits Nigeria frequently. There may be minor inconveniences but they do not amount to insurmountable obstacles."

7. The Judge held that the Appellant could not meet the Rules and dismissed the appeal under the Rules. He then turned to consider whether the Appellant was entitled to succeed under Article 8 outside the Rules. At paragraph 27 he found that there was nothing of an exceptional nature that would merit a grant of leave outside the Rules. At paragraph 28 he said:

> "This is an ordinary case of someone faced by the choice of returning to Nigeria and either awaiting being joined by [the Sponsor] or of successfully making a prompt proper and honest application to join him in the UK."

At paragraph 29 he found the decision to remove the Appellant to be proportionate and in compliance with Article 8.

The Onward Appeal

8. The Appellant appealed against that decision arguing that the Judge had failed to address the submission that temporary separation between the parties was not viable in this case. The Judge had also failed to deal with the length of time the Sponsor had lived in the United Kingdom and that he had family members here. There were no reasons given why the decision to remove the Appellant was proportionate and the Judge had failed to undertake a proper balancing exercise.

9. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Osborne on 28th January 2015. In a lengthy decision she granted permission to appeal. At paragraph 7 of her decision to grant permission she wrote:

> "At paragraph 15 of the decision the Judge records 'they hope to marry once her immigration status is settled and both of them are divorced from their current spouses'. This is not consistent with the information provided by the Appellant's partner in his witness statement where he states 'we hope to get married as soon as her immigration status is regularised and we both obtain our respective divorces'."

10. Judge Osborne concluded that as neither the Appellant or her partner were free to marry in the United Kingdom "had the Judge taken this evidence into account he may have reached a different decision about the possibility of the Appellant having the ability to make a proper and honest application to join [the Sponsor] in the UK". That was arguably an error of law on the basis of an inaccurate statement of the facts. I comment in more detail on this aspect of the grant of permission below, see paragraphs 21 and 22.

11. A second reason given for granting permission at paragraph 8 of the grant was:

> "Although the Judge has made a simple finding that the decision to refuse the application is proportionate to all the circumstances in the case this has not followed a detailed examination of the Appellant's Article 8 rights outside the Rules. If that is what the Judge intended then it was incumbent upon him to make a full assessment of the Appellant's Article 8 rights outside the Rules including the application of Section 117B of the Nationality, Immigration and Asylum Act 2002. The Judge's reasoning in this regard is therefore not clear and accordingly I find that permission to appeal is to be granted".

12. The Respondent replied to the grant of permission by letter dated 6th February 2015 stating that she opposed the Appellant's appeal. The Respondent wrote:

> "The Appellant clearly cannot satisfy the requirements as enunciated by the Judge at paragraph 9 and 23 of the determination. It was further open for the Judge to conclude that there was nothing exceptional in this case and it was open for [the Appellant] to make the necessary application from abroad if she wished (see paragraphs 27 and 28). As to the requirements of Section 117B of the 2002 Act these are at best neutral to the Appellant. There were therefore no material errors of law in the determination".

The Hearing before Me

13. The matter came before me to decide in the first instance whether there was an error of law such that the determination fell to be set aside and the decision re-made. If there was not then the decision would stand. In oral submissions Counsel indicated he relied on the grant of permission which he described as "unusually detailed". The Judge at first instance had accepted that the Appellant and Sponsor were in a genuine relationship but dismissed the appeal on the basis that the Appellant could return to Nigeria and apply for entry clearance from there. The Judge was in error because he had failed to consider critical factors which were material to whether the Appellant could so return. The Judge had indicated that both parties were divorced when in fact they were both still married, merely separated from their spouses. The Judge was not right to describe this as an ordinary case. It showed a casual approach to the facts. It would be extremely difficult where neither the Appellant nor the Sponsor were divorced even if they were in a genuine relationship for the Appellant to apply for entry clearance.

14. The Judge had ignored the factors set out in the skeleton argument (see paragraph 5 above). The Sponsor had mentioned in his statement that on two occasions in September 2012 he had passed out whilst he was at home but fortunately the Appellant was there and had called an ambulance. The Judge had failed to deal with that. The fainting was caused by high blood pressure. If it happened again the Sponsor could be in real danger.

15. Citing a Scottish case and a decision of a Deputy High Court Judge, Counsel argued that in deciding whether there were insurmountable obstacles the test was still one of reasonableness. Counsel conceded that

failure to mention Section 117B was not a material error and he would not make submissions thereon.

16. In response the Presenting Officer argued that the primary finding of the Judge was that there were no insurmountable obstacles to the Appellant returning to Nigeria. Since the Appellant failed under the Rules it was not necessary to go on outside the Rules if everything which could be argued was already covered within the Rules. The question of insurmountable obstacles was concerned with the practice of relocation. The Judge had in mind the authority of **Nagre**. The Appellant was in a precarious situation. There was a very small gap between failing under paragraph EX.1 of the Immigration Rules and the human rights assessment outside the Rules. There was nothing exceptional which would enable the Appellant to succeed. The Sponsor's health problems were high blood pressure and rheumatism, these were not debilitating diseases. The facts of this case did not come close to the facts in the House of Lords decision of **Chikwamba**. In that case the Sponsor could not travel to Zimbabwe as the Sponsor was a recognised refugee and the Appellant would have succeeded under what is now paragraph EX.1 of Appendix FM. This was not a case of the Respondent saying that the Appellant should go back to apply purely for administrative reasons, rather the Judge was saying there were no insurmountable obstacles to the Appellant doing that.

17. In response Counsel argued that if all the Judge had done was look at whether there were insurmountable obstacles that would be an error of law as that was not the appropriate test, see **Izuazu**. The Judge had not grappled with the factual situation as summarised in the skeleton argument. The Sponsor's health problems were serious; at such an age if he was losing consciousness that could not be described as a minor problem. It could be life-threatening. Citing the case of **Iqbal [2014] EWHC 1822** the "**Chikwamba** point" (the need to return to apply for entry clearance) was one of those potential issues relating to proportionality which was not covered by the drafting of the Rules. There could conceivably be cases where there were no insurmountable obstacles to the continuation of family life outside the UK but the requirement to return to the applicant's country of origin to make an application for leave to enter the UK would be a disproportionate interference with their Article 8 rights. It was not reasonable to expect the Sponsor to go out to Nigeria. There was no question mark over the Sponsor's means, therefore this was very much a **Chikwamba** case.

Findings

18. The Judge found that the Appellant and Sponsor were in a genuine and subsisting relationship but that there were no insurmountable obstacles to family life between the Appellant and Sponsor continuing outside the United Kingdom. Whilst there were minor inconveniences they did not amount to insurmountable obstacles. Further the appeal could not be allowed outside the Immigration Rules as there was nothing of an exceptional nature in the facts of the case.

19. The challenge to the Judge's determination in this case is very much a reasons based challenge. The thrust of the Appellant's case being that the Judge has placed insufficient weight on the difficulties the Sponsor would face if he were obliged to travel to Nigeria with the Appellant or indeed if the Appellant were to return to Nigeria to apply for entry clearance from there.

20. Before I deal with this main point, there are a number of peripheral matters that I should deal with. First is the question of the marital status of the Appellant and the Sponsor. The Appellant and Sponsor are it seems still married to other persons but according to the statements they submitted to the Judge they hoped to get married. What in fact happened in this case is that the Judge quoted from the Appellant's statement at paragraph 4. That read:

> "We hope to get married as soon as my immigration status is regularised and we both obtain our respective divorces".

21. Reading the Appellant's statement it is perfectly clear what she intended by that. She meant that she and the Sponsor wish to marry but there are two conditions precedent before they can do so. The first is that her immigration status is settled which means some form of grant of leave. The second condition precedent is that she and the Sponsor obtain divorces from their respective spouses. The confusion in this case such as it is appears to have arisen because the Judge has quoted directly from the Appellant's statement dated 7th December 2011, paragraph 4 but in doing so has inserted a comma after the word "settled". I can only assume that this is a typing error since no comma appears in the original statement.

22. However I would disagree with Judge Osborne who granted permission that this sentence is to be read disjunctively and that the Judge in quoting this section of the Appellant's statement that he believes that both the Appellant and the Sponsor are already divorced. In my view, notwithstanding the insertion of a rogue comma, what the Judge has said is perfectly clear just as what the Appellant in her statement said was perfectly clear. The parties are in a genuine and subsisting relationship which they wish to cement at some future date by marrying. However they cannot marry until they are free to do so. It follows therefore that there was no arguable error of law in paragraph 15 of the determination and the grant of permission was not correct to say that the Judge had made an inaccurate statement of the facts. In point of fact, even if the Judge had wrongly assumed that the parties were divorced, it is difficult to see how this impacted adversely on the Appellant in the determination. If anything such an error was of assistance to the Appellant since it indicated that there were few obstacles indeed to the parties furthering their relationship by marriage underlying the fact that this was a genuine and subsisting marriage, something which the Respondent had not accepted in the refusal letter.

23. However as I indicate this is a peripheral matter, the key issue is whether the Judge has adequately examined the Appellant's Article 8 claim outside

the Immigration Rules. Paragraph EX.1 of Appendix FM is not a freestanding basis for an application. Although the Appellant could show that she was in a genuine and subsisting relationship with a partner who was a British citizen, the Judge found that there were no insurmountable obstacles to family life with the Sponsor continuing outside the United Kingdom. The Appellant attacks the Judge's reasoning by arguing that the Judge has overlooked relevant factors specific to the Sponsor such as his health and his employment. This argument overlooks paragraph 17 of the determination where the Judge stated:

> "[the Sponsor] is now 64 years of age and there is a suggestion that he has health problems. However the evidence before me does not show that it is to be anything other than the 'sad concomitants of age'. I do note that he is employed as a security guard".

24. The Appellant prays in aid two incidents which occurred almost three years ago where he fainted. It is difficult to see how that evidence in any way controverts the Judge's finding at paragraph 17 of the determination. The Sponsor continues to be able to hold down a job which as a security guard might at times be physically quite demanding. The Judge has had in mind the medical evidence but has rejected it. It was not necessary for the Judge to set out each and every piece of the medical evidence put before him. The test is whether the losing party can understand why they have lost. In this case the losing party should reasonably be expected to understand that medical evidence was not sufficient to show that there were insurmountable obstacles to the Sponsor travelling to Nigeria with the Appellant. The Sponsor might lose his job as a security guard but the Judge found that the Sponsor had a history of working as a teacher in Nigeria and could therefore reasonably be expected to obtain alternative employment. Further, although the Sponsor had lived in the United Kingdom for a long period of time the Judge was fully aware that the Sponsor travelled frequently to Nigeria and thus maintained good contacts with his country of origin.

25. As to the **Chikwamba** point, it does not appear that any evidence was presented to the Judge that if the Appellant were to return to Nigeria and apply from there, there would be an unduly long wait. The Sponsor had indicated in his evidence that he could take two weeks off work by way of a holiday to accompany the Appellant to the High Commission. It does not appear that it was presented in argument to the Judge that the turnaround time at the High Commission in Abuja or Lagos would be significantly longer than that. In any event this was not a **Chikwamba** case since the Judge's main finding was that the Sponsor could relocate permanently with the Appellant.

26. Having found that the Appellant could not bring herself within the Rules the question then was whether the Appellant could succeed outside the Rules. It is fair to say that the Judge's treatment of the Appellant's claim outside the Rules at paragraphs 27 to 29 is concise but that of itself does not mean that it is wrong. The test is whether the losing party can understand why they have lost. The Judge had directed himself earlier in the determination in accordance with the authority of **Razgar [2004]**

UKHL 27 and was aware therefore that the test outside the Rules under Article 8 still came down to a proportionality exercise. The Judge had already dealt with the relevant points that I have explained above and I agree with the Presenting Officer's submission that once it was established that the Appellant could not succeed under paragraph EX.1(b) there was very little else that needed to go into the scales on the side of the Appellant in carrying out the proportionality assessment outside the Immigration Rules.

27. Of course the Immigration Rules are not the final word on the matter, in a non-deportation case they are not a complete code and therefore as the Court of Appeal in **MM** have made clear there remains a proportionality exercise to be carried out informed by Strasbourg and UK jurisprudence. However there was no point in the Judge repeating what he had already said in deciding that there were no insurmountable obstacles. All that could be taken as read. What the Judge did do at paragraph 28 was give his reason why this case could not succeed outside the Rules because it was what he described as "an ordinary case". There was nothing of an exceptional nature in the case. This I take to be another way of saying there were no compelling and/or compassionate circumstances such that the appeal should be allowed outside the Rules, particularly bearing in mind the Appellant's bad immigration record.

28. She could not succeed under the private life provisions since little weight could be afforded to her private life in this country, established as it had been whilst her status here was unlawful and indeed no submissions were made to me on that point. At the end of the day the Article 8 assessment was for the Judge to make on the basis of findings of fact. Another Judge might on the same facts have formed a different Article 8 assessment but that is not to say that this Judge in this case made an error of law. He found that any interference with the family life of the Appellant and Sponsor caused by the Respondent's decision to remove the Appellant was proportionate to the legitimate aim pursued. In effect the grounds of appeal and arguments put forward by the Appellant are a mere disagreement with the result but do not demonstrate any error of law. I therefore dismiss the appeal. I make no anonymity order as there is no public policy reason for so doing.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal.

Appeal dismissed.

Signed this 15th day of April 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed this 15th day of April 2015

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Deputy Upper Tribunal Judge Woodcraft