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Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/53820/2013

THE IMMIGRATION ACTS

At Field House
on 7th April 2015

Decision and Reasons Promulgated
on 16th April 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

MR TEMITOPE ARIYO
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Nwaehwu, of Moorehouse Solicitors.

For the Respondent: Mr. Duffy, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. I refer to the parties as they were in the First tier tribunal though it is the respondent who is appealing in the present proceedings.
2. The appellant is a national of Nigeria, born on 2nd May 1989. He came to the United Kingdom as a student on 25 March 2011. He had leave until 28 January 2013.

3. He lives with his wife who is also from Nigeria. She has indefinite leave to remain. The file indicates that her mother is also living here. They have a young child, born in the United Kingdom on 12 April 2013. At hearing I was presented with a certificate confirming that she has been recognised as a British citizen.
4. He made an in time application for further leave to remain so as to pursue other studies. This application was refused on 13 December 2013.
5. He appealed successfully to the First-tier tribunal consisting of First tier Judges Kamara and Shiner. Their Determination concluded that the appellant did not meet the requirements of paragraph 247 ZX(c) or (d) of the rules. This deals with the requirements for leave to remain as a student. However, at the appeal stage Article 8 became an issue. The tribunal considered this under Appendix FM of the immigration rules. The appeal was allowed on the basis of family life and that EX.1 of Appendix FM applied.

The permission to appeal raised a number of grounds. At the hearing the parties were in agreement that there was only one issue, namely, the way EX.1 in Appendix FM was dealt with. EX.1 allows exceptions to certain eligibility requirements for leave to remain as a partner or parent. It applies if:

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. states:

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.

6. The determination at paragraph 21 sets out the appellant's domestic circumstances. The conclusion was that there would be very serious hardship, particularly for his wife, in attempting to relocate. This would include abandoning her own degree studies. There was also the fact they had modest resources and cared for their 18-month-old child.
7. In challenging the decision Mr Duffy submitted that there is no appraisal of the likely life that that would face in Nigeria. Instead, the focus has been upon their life in the United Kingdom. Mr Duffy was unaware of any reported decisions which would assist in considering what was involved in the planning the exception.
8. Mr S. Nwaehwu in response said that the respondent's contention amounted to no more than a disagreement with the judges' findings and was an attempt to re-argue the appeal.

Consideration

9. Considering the determination overall it is clear that the judges have conscientiously applied themselves to the appeal and their determination is well presented and clear.
10. EX1 refers to insurmountable obstacles to family life with that partner continuing outside the UK. EX2 seeks to define "insurmountable obstacles" as very significant difficulties faced by the applicant or their partner 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. The Court of Appeal in MR (Nigeria) [2013] EWCA Civ 1192 considered insurmountable obstacles in the context of para 398 and deportation. The Master of the Rolls stated at paragraph 49:

We would observe that, if "insurmountable" obstacles are literally obstacles which it is *impossible* to surmount, their scope is very limited indeed. We shall confine ourselves to saying that we incline to the view that, for the reasons stated in detail by the UT in *Izuazu* at paras 53 to 59, such a stringent approach would be contrary to Article 8.

11. It is true that the determination would have been strengthened by some reference to the likely situation facing the appellant's in Nigeria. What amounts to significant difficulties must involve an objective assessment. The wording of EX (1) indicates that there must at least be some focus upon the situation in the appellant's home country, in this case, Nigeria. However, Mr Justice Sales in Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) at paragraph 33 stated :

In relation to Section EX.1(b), for example, there may be individual cases in which, for some reason, there are particularly compelling reasons arising from the specific circumstances why leave to remain should be granted under Article 8, even though there may not be insurmountable barriers to family life continuing outside the United Kingdom, in the applicant's country of origin;

12. The focus in paragraph 22 is upon the situation of the appellant and his wife in this country. The point in the paragraph is that the couple have a young child and modest resources and they would have to start afresh. Paragraph 22 refers to their way of life in the United Kingdom and highlights the fact that the appellant's wife is halfway through a degree course.
13. Paragraph 22 of the determination shows an assessment was made of the family circumstances and the impact on them of relocation. Impliedly, a move to Nigeria at this stage would cause of them significant difficulties. In considering whether there is an error of law the issue is not whether I would have reached a different conclusion in the application of EX1. Whilst the assessment could be considered a generous one it was one open to the judges. Whilst specific reference to Nigeria should have been made I do not find it fatal to the assessment. The appellant had spent time with his child so that his wife could study. As I read the determination the judges are implying that if they return to Nigeria, they would have to start afresh; they do not have the cushion of substantial savings and have to care for a young child. If they return to Nigeria his wife's studies would

have to end. Having put paragraph 22 in the context of the entire determination and the facts not in dispute a material error of law has not been demonstrated. Consequently, the decision shall stand.

FJ Farrelly
A Deputy Judge of the Upper Tribunal