Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25298/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decisions & Reason Promulgated**
On 3rd August 2017	**On 19th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR JULIUS IDOWU ADEWALE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Appiah (Counsel)
For the Respondent: Mr P Armstrong (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge L K Gibbs promulgated on 5th December 2016, following a hearing at Hatton Cross on 7th November 2016. In the determination, the judge dismissed the appeal of the

Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Nigeria, a male, and was born on 16th April 1962. He arrived in the UK on 8th March 2005 as a visitor, and after his visit visa expired on 7th July 2005, he became an overstayer. In 2007 he was served with a notice of removal. In February 2015, however, he made an application for leave to remain in the UK on the basis of his private and family life. That application was refused by a decision dated 29th June 2015. The Appellant appeals against that decision.

The Appellant's Claim

3. The Appellant's claim is that he and a Ms Dallas, who was born in the UK and is a UK citizen, are in a genuine and subsisting relationship. Ms Dallas has never been to Nigeria. All her family members live in the UK. She has two adult children who live in the UK and she cares for her grandson three days a week. She has been employed by the Department of Work and Pensions since 1990 and earns £26,975 per annum. She also suffers from Meniere's disease for which she takes medication. The Appellant himself has five children in Nigeria with whom he speaks on the telephone, and his mother is also alive in Nigeria and he has a half-brother and sister who live there.

The Judge's Findings

4. The judge concluded that although it was the case that Ms Dallas was a British citizen who had only ever lived in the UK,

> "... she has been aware of the Appellant's lack of status for several years. I acknowledge that she has children in the UK but they are adults and the evidence before me is that they live independently of their mother. Although I accept that Ms Dallas and the Appellant care for her grandson on a regular basis I am not persuaded that the disruption of this arrangement could be said to be an insurmountable obstacle for the purposes of paragraph EX.2 of Appendix FM of the Immigration Rules" (paragraph 13).

5. The judge then went on to consider the condition of Ms Dallas suffering from Meniere's disease which, "does not affect her on a daily basis (the medical evidence before me refers to her *'sometimes'* being trouble) and I place significant weight on the fact that it does not prevent her from working" (paragraph 14). The judge then had regard to the latest judgment in **Agyarko [2015] EWCA Civ 440** in relation to the test relating to "insurmountable obstacles" (at paragraph 15) and concluded that the Appellant would not face significant obstacles to integration in Nigeria (paragraph 16). Article 8 was considered and the case of **SS (Congo) [2015] EWCA 387** applied (paragraph 17).

6. The appeal was dismissed.

Grounds of Application

7. The grounds of application state that the judge failed to give weight to the fact that the Appellant met all the provisions of Appendix FM, but no finding was made by the judge on this issue, and it may have affected the proportionality assessment, such that the judge did not carry out a reasoned proportionality assessment, taking into account the provisions of Section 117B.

8. On 21st June 2017, permission to appeal was granted by the Tribunal.

9. On 13th July 2017, a Rule 24 response was entered by the Respondent Secretary of State to the effect that the judge at paragraph 13 gave reasons for his finding that there were no insurmountable obstacles to the Appellant and his British citizen partner moving to Nigeria to pursue their Article 8 rights. The findings made by the judge were open to her to make. The Grounds of Appeal were merely a disagreement with the application of the Rules to the facts.

Submissions

10. At the hearing before me on 3rd August 2017, Ms Appiah, appearing on behalf of the Appellant, relied upon the Grounds of Appeal and the ten paragraphs therein, which covered a number of issues. She placed particular emphasis on two main issues. First, there was the question of "insurmountable obstacles". Second, there was the question of whether the judge should have looked at the position outside the Immigration Rules. The Appellant satisfied the provisions of Appendix FM. He was, however, an overstayer. There was no issue relating to the genuineness of the relationship with Ms Dallas and the fact that they had a subsisting relationship. At paragraph 3 of the determination, the judge at the outset makes it clear that "insurmountable obstacles" is an issue before her. However, the assessment, when it occurs, is such that from paragraphs 9 to 14, the judge fails to give particular consideration to whether there are insurmountable obstacles to relocation. The fact was that Ms Dallas had not lived in Nigeria. She had never been there. She was a British citizen. The judge needed to factor in these matters properly. Moreover, she was looking after her grandson (see paragraph 13). In addition to this she was suffering from Meniere's disease (see paragraph 14) and the judge was wrong to say that the fact that she was not prevented from working did not shift the balance of considerations in her favour. This is because if one has regard to the grounds of application (at paragraph 6) it is clear that the prognosis of Dr Ajayi is that, "the attacks are unpredictable, and are incapacitating for hours at a time …". The judge ought to have discussed Dr Ajayi's diagnosis in this respect at paragraphs 13 to 14.

11. For his part, Mr Armstrong submitted that it was not true that the judge did not consider the position outside the Immigration Rules because this is plain to see at paragraph 17. One must also not overlook the fact that this was an Appellant who had come on a visit visa in 2005 and had then chose not to return, despite the fact that he had five children and a mother and a sister in Nigeria. He has stayed in this country for twelve years. He now claims to be in a relationship with Ms Dallas. He is not married to her. She is aware of his "precarious" immigration status, and has

chosen to live with him knowing that this is the case. The judge does not overlook the fact that Ms Dallas earns £26,975 per annum (at paragraph 10). But if this is the case, then why is this Appellant any different from any other person in his position, and why should he not be required as any other person, to return back to his country and make an entry clearance application to join Ms Dallas in this country in the proper manner? There is no reason why he should not be required to do so. He cannot argue, as is sometimes done, that he would not be able to satisfy the financial threshold requirement because Ms Dallas earns more than the required amount.

12. He had after all spent 43 years in Nigeria and had a family there. It is simply not reasonable to suggest that the provisions of the law should not apply to him as much as they do to others and that he should not be required to return and make a proper application, rather than simply have the benefit of staying unlawfully passed his visit visa in 2005. As for the question of Ms Dallas's illness, the judge had properly taken this into account. She refers to it at paragraph 14. Not only is she able to work but there is no evidence at all that she could not be treated in Nigeria, should she wish to return there with the Appellant, if she does not want to support his application to come back to this country. What they cannot do is have it both ways.

13. It is important that the judge ends the determination by reference to **Agyarko** (at paragraph 15) and the recognition there that the phrase "insurmountable obstacles" is one which "imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules" (paragraph 15). The Appellant could not satisfy that standard. The judge did thereafter consider Article 8 outside the Rules (paragraph 17), and applying the law, concluded that the Appellant could not succeed.

14. In reply, Ms Appiah submitted that it was speculative to suggest that the Appellant, having entered on a visit visa in 2005, had no intention thereafter to return back to Nigeria. Moreover, this was the case where Section 117 had not been considered by the judge.

No Error of Law

15. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007). My reasons are as follows.

16. First, it is not the case that the judge has not given proper consideration to "insurmountable obstacles" facing the Appellant. He is in a relationship with Ms Dallas. The two of them, however, are not married. The judge gives consideration to this at paragraphs 9 to 12 of the determination and observes that the Appellant is a fit and healthy man, who is a qualified person and who has previously been employed in Nigeria. It is open to the Appellant to return back to Nigeria in order to make a proper application under the Immigration Rules for entry clearance to join his partner in this country. There is nothing to suggest that such an application would not have as fair a chance as any other in being successfully considered. The financial threshold requirement does not stand in the way of the Appellant (see paragraph 10).

Equally, it is open to Ms Dallas, should she so wish, to accompany the Appellant to Nigeria and be with him there for however long the two of them wish to be the case.

17. These are the findings of the judge and they are properly summarised at paragraph 13 of the determination, where the judge recognises that the care of the children of Ms Dallas does not stand in the way of either of the two possibilities outlined above being pursued because these children are now adults and they live independently of their mother. The judge does not ignore the fact that Ms Dallas and the Appellant care for her grandson on a regular basis, but she was not persuaded that there were "insurmountable obstacles" for the purposes of paragraph EX.2 of Appendix FM.

18. Second, the judge does give proper consideration to the fact that Ms Dallas suffers from Meniere's disease (see paragraph 14). She observes that she has not been prevented from working. I note Ms Appiah's submissions before me that Dr Ajayi in his report as the Appellant's GP dated 8th August 2014 states that the Meniere's disease attacks on the Appellant are unpredictable and are incapacitating for hours at a time. However, the judge deals with this by noting that, "it does not prevent her from working" and that "there is no evidence before me to persuade me that Ms Dallas's medical condition creates an insurmountable obstacle to family life continuing outside of the UK" (paragraph 14).

19. Third, whilst the judge refers to the decision in **Agyarko [2015] EWCA Civ 440**, the Supreme Court has now given judgment in **Agyarko [2017] UKSC 10 and 11** to confirm that there have to be "exceptional circumstances", which is taken to mean "unjustifiably harsh consequences for the individual" (see paragraph 60). Furthermore in referring to "exceptional circumstances" the Supreme Court has made it clear that, "the European Court has said that, in cases concerned with precarious family life, it is 'likely' only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8" (paragraph 58).

20. Fourth, the judge does consider the position outside the Immigration Rules, and expressly makes this clear, and does so in the context of the case law in **SS (Congo) [2015] EWCA 387**. For all these reasons, the decision of the judge is comprehensive, clear, and soundly based in law.

Notice of Decision

21. There is no material error of law in the original judge's decision. The determination shall stand.

22. No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 15th September 2017