Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14257/2016

THE IMMIGRATION ACTS

Heard at Field House
On the 19th November 2018

Decision & Reasons Promulgated
On 29th November 2018

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MISS LOVETH AGUDWA

(No Anonymity Direction made)

Claimant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Claimant: Mr Fripp (Counsel)
For the Respondent: Ms Pal (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Greasley promulgated on the 25th May 2018, in which he allowed the Claimant's Human Rights appeal, having found that pursuant to paragraph EX.1 and EX.2 of the Immigration Rules under Appendix FM that there would be very significant difficulties faced by the Claimant or her

partner in continuing their family life together outside the United Kingdom and which could not be overcome or entail very serious hardship for the Claimant or their partner.

2. The Secretary of State seeks to appeal that decision for the reasons set out within the Grounds of Appeal. This is a matter of record and is therefore not repeated in its entirety here, but in summary it is argued in ground 1 that the Judge failed to take account at the starting point the findings of fact which had been made by the Tribunal previously in respect of the Claimant's asylum claim and that the previous determination made findings against the Claimant which may have included facts about her family in Nigeria and it was incumbent upon the Judge to have this before him. The Judge had made a determination without having the complete factual matrix. However, Ms Pal indicated to the Tribunal orally before me today, that although there had been a previous decision of Immigration Judge Tamara promulgated on the 21st July 2008, that decision had not been in the Secretary of State's bundle before the First-tier Tribunal, and Mr Fripp, although knowing that there had been a previous decision made by the Secretary of State was himself wholly unaware of a previous Tribunal decision by a previous Immigration Judge. I accept having heard from Mr Fripp that he did not know that there was any previous decision by Immigration Judge Tamara and no criticism can be made of him of not having produced that decision that he was unaware of to the Tribunal, particularly, when that decision was made in 2008, some 10 years before the decision being made by First-tier Tribunal Judge Greasley, and before the Claimant had entered into the relationship with Mr Porter, that formed the basis of the decision of First-tier Tribunal Judge Greasley. Ms Pal indicated in any event that she was not pursuing the ground of appeal seeking to argue that the Judge was wrong in failing to consider the previous determination. As that ground is not being pursued by the Secretary of State, I do not need to make a finding in that regard.

3. In respect of the second ground of appeal the Judge erred in finding that there were insurmountable obstacles on the basis that the Claimant's partner would be at risk if he went to Nigeria and that although the Foreign and

Commonwealth Office evidence showed the possibility of kidnapping there was nothing to suggest the Claimant's partner could not have taken steps to reduce such a risk or why such steps would be insurmountable, and that given the threat of terrorist incidents worldwide including the UK the Judge had failed to identify why this was an insurmountable obstacle to family life. It was further argued that there was absolutely no evidential basis for a finding that the Claimant's partner could not obtain work beyond the "wild speculation" of the Claimant and that the Judge had failed to give adequate reasons for finding in the Claimant's favour in that regard.

4. Ms Pal relied upon the original Grounds of Appeal and the new Grounds of Appeal to the Upper Tribunal, both of which I have fully taken account of. In addition, in her oral submissions she argued that the Foreign and Commonwealth Office showed a general possibility of kidnapping and violence, but nothing to show that the Claimant's partner could not go to Nigeria and that the Claimant herself had spent more than half her life there and that he would be returning with her to a country that she knew well. She argued that the threshold EX.1 is a high one, as confirmed by the Supreme Court in the case of Agyarko, as argued within the renewed Grounds of Appeal. She argued that effectively the Judge was saying that no non-Nigerian could go back to Nigeria. She argued that the Foreign and Commonwealth Office evidence was that over 100,000 people visited Nigeria and most visits were trouble free and the Claimant's partner was a Nigerian national. She argued the Judge had failed to adequately assess why there were insurmountable obstacles to a family life in Nigeria and that the Claimant herself was a national of Nigeria who speaks the language which would lessen the risk on her partner.

My Findings on Error of Law and Materiality

5. I accept the submissions made by Mr Fripp that the First-tier Tribunal Judge has properly set out the advice given to travellers by the Foreign and Commonwealth Office and at paragraphs 31 to 37 the Judge took account of the areas to which the Foreign and Commonwealth Office were advising

against travelling, and the areas to which all but essential travel was advised. The Judge properly noted at paragraph 32 that the advice went on to state that travellers should avoid places where crowds gather including places of worship, markets, shopping malls, hotels, bars and restaurants and that attacks could be indiscriminate and could western interests and that there was a high risk of kidnap throughout Nigeria which could be motivated by criminals or by terrorists or for financial gain and that a number of kidnaps included foreigners. The Judge had also taken account of the fact that although recent terrorist kidnaps had occurred mostly in Northern Nigeria they could occur anywhere and that travellers had been advised by the Foreign and Commonwealth Office to avoid large crowds and public demonstrations and that although 117,000 British nationals had visited Nigeria and were most trouble free professional security advisors were often recommended and that visitors had to be vigilant at all times and that there was often a curfew in many parts of Nigeria and that British nationals were increasingly being targeted by scam artists operating in Western Africa including Nigeria.

6. The Judge found that the sponsor, Mr Porter would be easily identified as a westerner in Nigeria, and it was clear, having seen the photographs referred to by Mr Fripp of Mr Porter contained within the bundle, that he would be easily identified as a Caucasian male as someone who is likely to be a foreigner and that was a finding open to the Judge on the evidence. The Judge found that Mr Porter would face potential very serious and significant difficulty as an easily identifiable westerner both in terms of prospective criminality and potential ill treatment.

7. Although it is argued by the Secretary of State that there was nothing to suggest that the Claimant's partner could not have taken steps to reduce such a risk or why such steps would be insurmountable, although as the First-tier Tribunal Judge noted the decision in Agyarko v The Secretary of State for the Home Department had indicated that the insurmountable test was a stringent test, pursuant to EX.2 insurmountable difficulties consisted of very significant difficulties which would be faced by the Claimant or their partner

in continuing their family life together outside the UK which could not be overcome or would entail very serious hardship for the Claimant or their partner. In this case, Mr Porter had as the Judge accepted, had never lived or visited Nigeria at paragraph 31 of the decision and had never worked there as he found at paragraph 37. The Judge found further at paragraph 37 that there would be very significant security concerns arising if he would attempt to do so in terms of living and working in Nigeria. I accept that was a finding open to the Judge on the evidence. This was not a finding that all non-national Nigerians could not go and live and work in Nigeria, it was a specific finding based on the sponsor himself that he would face very significant difficulties. In circumstances where in addition to the kidnapping risk advice that travellers should not go to places of worship, markets, shopping malls, hotels, bars and even restaurants, and for someone who although returning with his wife who is a national of Nigeria, Mr Porter himself from the evidence had never visited Nigeria let alone lived or worked there as the Judge found, the findings of the Judge in relation to EX.1 and EX.2 were open to him on the evidence.

8. Although it is clear that the Judge did in fact err in finding that it was extremely unlikely that Mr Porter would be able to gain employment in Nigeria as a plumber or heating engineer and that it was highly unlikely that his training, expertise and qualifications would be easily transferrable skills, at paragraph 35 of the decision, on the basis that there is no actual evidential basis put before the Judge for such findings, in light of the fact that the Judge had already concluded that Mr Porter would easily be identified as a westerner and that he personally would face very serious and significant difficulties as an easily identifiable westerner both in terms of prospective criminality and potential ill treatment, I find that the Judge had already concluded that there were very significant difficulties for the purposes of EX.2 which could not be overcome or would entail very serious hardship for the Claimant or her partner and that the Judge's error in respect of the employment situation is not material, given his findings in respect of the other risks to Mr Porter personally. The second ground of appeal therefore does not reveal a material error of law.

9. In the third ground of appeal it is argued that the Judge should have gone on to consider the reasonableness of temporary separation for the purposes of entry clearance if the Judge had properly found the Claimant's case could not succeed under the Rules. However, that ground was not pursued by Ms Pal at the appeal hearing, and in any event, the Judge did properly find that the criteria of EX.1 and EX.2 were met.

10. It was not argued within the Grounds of Appeal that the Judge erred in considering the appeal under the Immigration Rules, but even if there was an error in that regard, given the date of the decision on the 23rd May 2016, as the decision on Human Rights grounds would have to be considered through the lens of the Immigration Rules, as the Judge was entitled to find on the evidence presented that the requirements of the Immigration Rules were met, any such error in that regard was not material.

11. However, again, I repeat that that was not argued as a ground of appeal before me nor in the Grounds of Appeal submitted.

12. The decision of First-tier Tribunal Judge Greasley does not reveal a material error of law and is maintained.

Notice of Decision

The decision of First-tier Tribunal Judge Greasley does not reveal a material error of law and is maintained.

No anonymity direction is made in this case, none having been made by the First-tier Tribunal Judge and none having been sought before me.

Signed

RFMcGinty

Deputy Upper Tribunal Judge McGinty Dated 19th November 2018