



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/32180/2015

THE IMMIGRATION ACTS

Heard at Field House
On 13 July 2018

Decision and Reasons Promulgated
On 06 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EBY OKAFOR
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding (Senior Home Office Presenting Officer)

For the Respondent: Ms J Fisher (for M and K Solicitors)

DECISION AND REASONS

1. This is the appeal of the Secretary of State, against the decision of the First-tier tribunal of 26 April 2018 to allow the appeal of Eby Okafor, a citizen of Nigeria born 18 March 1945, itself brought against the decision of the Secretary of State of 23 June 2015 to refuse his claim for leave to remain on human rights grounds.
2. His application of February 2015 was to remain with his British citizen partner Aisha Bello, and was made on the basis that he was elderly and unable to readjust to life in

Nigeria without her support; however, it would be unreasonable to expect her to uproot from her strong ties in the UK.

3. The Secretary of State refused the application on the basis that it was not accepted that there were sufficiently serious health complaints in play. Mr Okafor could find treatment for Type 2 Diabetes and his partner could be treated for asthma, hypertension and osteoarthritis.
4. The immigration history recorded by the Secretary of State states that Mr Okafor had EEA residence card applications refused on 2 February 2009 and May 2010; applications outside the Rules were refused in November 2013 and March 2014.
5. Mr Okafor told the First-tier tribunal that he had arrived in the UK in 2007 and subsequently lived with a cousin, who helped to support him, together with the church and now his Sponsor. He had met the Sponsor at church in 2008 and they had cohabited since July 2011, marrying on 14 May 2014.
6. The Sponsor gave evidence before the First-tier tribunal, explaining that she was aged 59, and had obtained indefinite leave to remain under the legacy programme, and then became a British citizen on 30 July 2012 having suffered problems after her family had disowned her for marrying outside of the Muslim religion. Her first husband had been killed and her twin daughters abducted in the religious crisis there, and she came to the UK. Her son had come here with her, though he was returned to Nigeria in 2005, and they had subsequently lost contact. At one time she had held down two jobs to help support herself and Mr Okafor, but she had stopped work in 2016, and now received benefits by way of enhanced rate Personal Independence Payment (PIP) and Employment and Support Allowance (ESA).
7. She could not return to Nigeria because of the cultural difficulties she had had following her first marriage which meant she would obtain no support from her family; she was dependent on the welfare benefits she now received. She was awaiting a knee replacement operation here. She put forwards evidence of receiving specialist care for her osteoarthritis, a foot injury, sleep apnoea, fibroids and irritable bowel syndrome. She and Mr Okafor feared for their safety given the security situation in Nigeria; she had returned to Nigeria, most recently in 2016, to look for her children, and stayed in hotels: she had needed airport assistance to pass through the port of entry alone.
8. The First-tier tribunal found that Mr Okafor was to be presumed to have entered the country irregularly absent clear evidence to the contrary, and proceeded to analyse the appeal via the exception in Appendix FM to the Rules: it noted that this required, for spouses without children, that insurmountable obstacles be established, defined by the Exception provision within Appendix FM as very significant difficulties to be faced in continuing life together abroad.
9. The First-tier tribunal concluded that the departure of Mrs Bello from her country of nationality where she was dependent would constitute insurmountable obstacles to the couple's relocation, given the difficulties she would face in Nigeria which had been effectively recognised by her having been granted asylum, her dependency on welfare benefits that were predicated on UK residence, and her healthcare regime in the UK

which could only be accessed whilst living abroad at significant cost and practical difficulty.

10. In the alternative, it would be disproportionate to expect Mrs Bello to remain in the UK whilst Mr Okafor sought entry clearance from abroad: to do would mean contemplating their separation for a period of several months when they were mutually dependent and neither was in good health, contrary to the *Chikwamba* principle.
11. The Secretary of State appealed on the basis that a material error of fact had been made: Mrs Bello had not in fact been granted asylum. Permission to appeal was granted on 16 May 2018 on the basis that this may have had a material impact on the assessment of proportionality.
12. Before me, Mr Wilding submitted that it was clear that the misconception as to the acceptance of Mrs Bello's asylum claim had undermined the approach of the First-tier tribunal. Ms Fisher argued that the decision was a sustainable one given all the circumstances of the case and having regard to the relevant authorities.

Findings and reasons

13. I accept that there was an error of law in this appeal. The First-tier Tribunal plainly attached some significance to its misguided belief that the Sponsor had been granted refugee status. However, as should have been apparent from its own summary of the material before it, and has in any event now been confirmed by the Secretary of State, her claim had succeeded under the "legacy" exercise. This factor would inevitably have had some impact on the balancing exercise conducted by the First-tier Tribunal: it acted on the basis that there had been an acceptance by the UK authorities that she possessed a well founded fear of persecution in Nigeria, and thus could not reasonably be expected to relocate there. However in reality she had been granted settlement on other grounds.
14. However, I do not consider that this was a *material* error in all the circumstances. The Exception set out in Appendix FM for partners unable to meet the full requirements of the Rules requires that it be established that "there are insurmountable obstacles to family life with that partner continuing outside the UK." This is further defined thus:

"EX.2. 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."
15. This provision was expressly cited and applied by the First-tier Tribunal. The essence of its thinking is readily apparent. The Appellant is a relatively elderly man, aged 72 at the date of the decision below, and the Sponsor is a middle-aged British citizen who has been settled in the UK for some years and is accepted as having significant health problems. As has often been emphasised in the course of litigation involving the legacy programme, grants of leave were made by reference to generally recognised principles of human rights law, including the right to private and family life. This is made clear,

for example, by Ouseley J in *Jaku* [2014] EWHC 605 (Admin) §33 referring to the overall policy over the period during which the legacy programme ran being to “remove those who entered unlawfully unless it would breach the Refugee Convention, the ECHR ‘or there are compelling reasons, usually of a compassionate nature, for not doing so in an individual case’.”

16. Accordingly the starting point for assessing the propriety of the Sponsor's return to Nigeria was that she has already been granted leave to remain because her Article 8 rights would have otherwise been the subject of disproportionate interference, or due to some other compelling compassionate reason. That is not the same situation that a refugee is recognised as facing, but nevertheless clearly represents an acceptance that there are significant barriers to return there.
17. The Sponsor suffers from a number of documented health conditions that in the context of the evidence as a whole, the First-tier Tribunal considered rendered her return to Nigeria unrealistic, because it would separate her from the healthcare regime that is essential to her well-being. That was an understandable and humane decision. Indeed, the government guidance on Employment and Support Allowance states that recipients will be “usually in this group if your illness or disability severely limits what you can do.” So it is clear that she is a vulnerable individual who has been identified as having a severe limitation on her ability to care for herself. Whatever connections she has in Nigeria have already been assessed by the Secretary of State, in granting her settlement, as insufficient to make it proportionate for her to return there in her own right. One could imagine an assessment of proportionality that attributed greater weight to immigration control and less to the private and family life of the parties, but there is nothing irrational about the application of the law to the facts here.
18. I accordingly conclude that whilst there was an error of law in this case by way of an error as to a significant factual issue, it was not a material error of law, because there is no real likelihood that the decision of the First-tier Tribunal would have been any different had the mistake not been made.

Decision:

The decision of the First-tier Tribunal does not contain a material error of law.

The appeal of the Secretary of State is dismissed.



Signed:
Deputy Upper Tribunal Judge Symes

Date: 20 July 2018