Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10655/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 July 2019	**On 26 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

STEPHEN [U]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms C Jaquiss, Counsel
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

In a decision promulgated on 20 February 2019 I set aside the decision of the First-tier Tribunal and adjourned the appeal to be re-made by me in the Upper Tribunal. A copy of my decision on error of law is attached as an appendix to this decision.

The appellant is a national of Nigeria born on 10 February 1947. On 1 December 2015 he applied for indefinite leave to remain, relying on his long residence in the UK of eleven years and his relationship with his British wife, Ms [MN] ("the sponsor"). The application was refused on 5 April 2016 because the respondent considered that the appellant had only resided lawfully in the UK

for 5 months and that there were no insurmountable obstacles to family life continuing in Nigeria. There were not very significant obstacles to the appellant's reintegration in Nigeria. There were no exceptional circumstances to warrant a grant of leave outside the Immigration Rules.

The appellant appealed against the decision on article 8 grounds.

The appeal was adjourned on 4 April 2019 because the sponsor was under the effects of alcohol and Ms Jaquiss had been unable to take instructions. Ms Everett indicated she wished to cross-examine the sponsor. It was noted that there was a "tension" between the sponsor's extensive medical problems and care needs and her ability to work 48 hours per week as a cleaner.

The appellant and sponsor attended the adjourned hearing on 8 July 2019 and both gave oral evidence in English, which I have recorded in full in my record of the proceedings. The appellant's solicitors filed no fewer than six bundles of documentary evidence without making any effort to present the documents in a coherent fashion and including many pages of evidence which have no bearing on the issues in this appeal, such as documents relating to the appellant's political activities. To compound problems, almost all of page numbering is illegible.

This is a case in which I have had to be selective in my references to the evidence in order to avoid my decision becoming unduly lengthy.

After hearing the oral evidence, I heard closing submissions from both representatives which I have recorded and taken note of.

Ms Jaquiss helpfully provided a skeleton argument. She acknowledged that the only issue for consideration was family life under Article 8. Whilst her skeleton argument focuses on the application of Article 8 outside the rules, it was agreed that the appellant's lack of immigration status did not bar him from relying on the rules because of the provision in paragraph E-ELTRP.2.2[1].

The appellant bears the burden of establishing the factual matters on which he relies to the civil standard of a balance of probabilities.

I approach my evaluation of Article 8 by reference to the five questions to be asked as set out in paragraph 17 of Razgar [2004] UKHL 27. The appellant must show that he currently enjoys protected rights and that there would be a significant interference with his human rights as a result of the decision. It is for the respondent to show that the interference is in accordance with the law and in pursuit of a legitimate aim. I must then assess whether the decision is necessary in a democratic society, including whether it is disproportionate to the legitimate aim identified.

[1] "E-LTRP.2.2. The applicant must not be in the UK –
(a) … or
(b) in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded), unless paragraph EX.1. applies."

Appendix FM of the rules states in relevant part as follows:

> "EX.1. This paragraph applies if
>
> (a) … or
>
> (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. 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."

Section 117B of the 2002 Act reads as follows:

> "(1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) …"

I make the following findings of fact.

The appellant is now 72 years of age. His immigration history is not a matter of dispute. He entered the UK as a visitor on 14 May 2005 and his leave to enter expired 14 October 2005 since when he has remained in the UK unlawfully as an overstayer. He has remained in the United Kingdom for 14 years and has not returned to Nigeria.

The sponsor is a British citizen, having naturalised on 17 February 2011. She was born in Kinshasa in the Democratic Republic of Congo on 31 July 1961. In her witness statement, dated 20 July 2017, she states that she arrived in the United Kingdom in 1991 without entry clearance with her ex-partner and her son, Mana Kati. She goes on to state that the family claimed asylum and that, in May 2002, she was granted indefinite leave to remain.

The appellant and the sponsor gave consistent evidence that they met in 2008 and that they started a relationship in February 2010, when they began to live together. They married on 11 July 2012.

There are no children of the relationship.

The appellant has three children from a previous relationship in Nigeria. He said the youngest was around the age of 14. The sponsor's son, Mana Kati, has children of his own and resides with his partner and children in the United Kingdom. I was told the sponsor had 13 other children, all of whom are deceased. I have no records from her asylum claim. I note the records from gynaecology clinics which have been provided only refer to, at most, five past pregnancies.

In 2015 the appellant was diagnosed with type II diabetes for which he is treated with medication.

The sponsor has also been diagnosed with various medical problems. The latest letter from her family doctor, Dr Anya Kabakova, is dated 15 March 2019. I shall set out most of her letter because it lies at the heart of this aspect of the appellant's case:

> "I can confirm that [the sponsor] is a patient here. She was last seen in the surgery on 27/2/19. She has severe low back and leg pain, and was previously under the musculoskeletal team who diagnosed left S1 nerve root impingement, which is where a nerve becomes trapped on coming out of the spinal canal and is irritated all the way along its length down into the leg. This is also known as sciatica. She also has a diagnosis of osteoarthritis. She has had physiotherapy and is taking amitriptyline and co-codamol, with omeprazole to protect her stomach. She is currently having acupuncture at the surgery for it too.
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> In January this year she was admitted and treated for suspected malaria. She then had an episode of one-off wheezing requiring nebulisers, likely secondary to a viral chest infection.
>
> We have also seen her in the past with neck pain radiating down into her right shoulder and arm, and burns to her arm. There had been concerns about the amount of alcohol she was consuming, though when last asked she had not been drinking since she burnt her arm on 10/5/17.
>
> She has a diagnosis of diffuse idiopathic skeletal osteosis and has had problems with back and foot pain in the past.
>
> She also has a history of fibroids and had a hysterectomy and oophorectomy in September 2012 for very heavy bleeding. …"

The sponsor currently works 48 hours per week as a cleaner. I can find nothing in her employment records or the GP notes to suggest she has regularly needed to take time of work due to ill-health. I was not told that she claims or receives a personal independence payment. I was told she sometimes looks after her grandchildren. I do not accept therefore that the sponsor's various illnesses are serious enough to prevent her living an active life and I reject the claim made by the appellant that he has to provide care for her other than very occasionally when she falls ill.

I accept the sponsor has been referred for an X-ray but the results are not yet known.

There is no independent or medical evidence suggesting the sponsor has any diagnosis of mental health conditions, although there are references in the notes to alcoholism and to the sponsor being distressed, as when her partner was reported to have disappeared in June 2017.

Evidence has been submitted purporting to show that the sponsor would not be able to receive medical treatment in Nigeria. The strongest evidence is the respondent's CPIN Nigeria: Medical and Healthcare issues (28 August 2018), which Ms Jaquiss provided. This document gives an overview of the healthcare system in Nigeria. The public healthcare system is under-resourced and largely confined to urban areas. Many people rely on the private system, which is expensive and beyond the reach of most. In relation to medicines, it has been estimated that the proportion of people with access to essential medicines required for the treatment of chronic diseases, such as malaria and HIV, is 40%. The current drug distribution system has been described as chaotic. Figures from different sources show that between 15% and 75% of drugs circulating in the country are fake.

The appellant has obtained three letters purporting to represent the views of doctors practising in Nigeria. They all state the sponsor could not be treated in Nigeria and recommend she continue to receive treatment in the United Kingdom. I can give these documents very little weight for the following reasons.

The appellant was vague about how he came to obtain these letters. He said his friend, George, got them for him but there is no evidence from this person. The appellant insisted that the only medical evidence provided to the authors of the letters was the letter from Dr Kabakova but that contradicts the appellant's additional witness statement, signed on 27 June 2019, in which he said he provided his wife's "full medical reports and in particular the letter from [her GP]". The fact the appellant knew little about how the letters were obtained was troubling.

The letters refer to other matters not stated in Dr Kabakova's letter. None of the letters, as might reasonably be expected of senior medical practitioners, are couched in cautious terms given the authors have not examined the sponsor or taken her history and have apparently relied on a single letter from a GP as the basis for their opinions.

The letter from Dr Oluwaseyi suggests that the sponsor's main disabling condition is diffuse idiopathic skeletal osteosis, not the nerve root impingement/sciatica, which is the condition for which she is currently being treated. Dr Okoroafor's letter states that treatment is unavailable in Nigeria for any of the sponsor's conditions without stating what the procedure which has to be undertaken is. The letter from Dr Ogundele also refers to the "difficult procedure" for S1 nerve root impingement without saying what the procedure is. I bear in mind Dr Kabakova is treating the sponsor with painkillers and acupuncture. The appellant said she has massages. It has not been suggested by Dr Kabakova that the sponsor requires surgery and I have already noted the sponsor is able to work full-time as a cleaner.

No effort has been made to show whether or not that medications, such as amitriptyline and co-codamol, are available in Nigeria. They are common medications and it is safe to assume that these or equivalent brands are available, albeit they might have to be paid for and there is a danger that the drugs supplied may be fake. The same might be said regarding the medications which the appellant relies on to control his diabetes.

The appellant said that he would not be able to find employment in Nigeria because of his age. That is probably true. However, he is not able to work in the United Kingdom at present and the sponsor is the family breadwinner. The sponsor said she did not think she would be able to get a job in Nigeria. Common sense suggests this would be problematic, although she is able to hold down a full-time job in the United Kingdom despite her back pain and sciatica. She said she is not educated but she would not have to find skilled or professional work to support herself and the appellant. Given the fact the appellant sought to draw a veil over the extent of his family and connections in Nigeria, as discussed below, I infer there may be other sources of support in any event.

It was clarified in evidence that the sponsor became aware that the appellant had no leave to remain in the relatively early stages of their relationship.

The appellant confirmed he has not claimed asylum, although he maintains he fears returning to Nigeria.

The sponsor has made at least three trips to Nigeria. The evidence was unclear about the circumstances. The appellant confirmed his mother resides in Nigeria. He said that, on the sponsor's first visit to Nigeria, she stayed with his friend and he took her to "his people". It was the same on the third visit. The appellant confirmed he has three children in Nigeria but said he does not communicate with them very much. He said they live with his mother but he did not say why they do not live with their own mother. He said his mother lives in a village. The appellant denied that the friend who helped the sponsor on two of her visits would help him if he returned to Nigeria.

The sponsor said she could not remember how many times she had been to Nigeria. She said she stayed in a hotel and visited the appellant's mother. She

said she did not see anyone apart from the appellant's mother and children. She did not see any of his friends. She did not mention a village.

I infer from the vagueness of the evidence that the appellant has sought to minimise his links to Nigeria. I note that the sponsor's hospital discharge letter, dated 25 December 2018, states the sponsor contracted malaria on a recent visit to Lagos because she had not taken malarial prophylaxis. Ms Isherwood referred me to references in the documents to the sponsor visiting Nigeria in January 2015, April 2017 and December 2018. I proceed on the basis the sponsor has some familiarity with Nigeria given she has made three visits there without the appellant accompanying her.

There is plainly family life in this case and removing the appellant would potentially lead to a significant interference with the enjoyment of that family life. The decision is in accordance with the law and in pursuit of the legitimate aim of maintaining immigration controls. The appeal turns on the outcome of the proportionality balancing exercise.

On the public interest side, the maintenance of immigration controls is important. The public expects people with no right to live in the United Kingdom to be removed.

The appellant speaks English and is financially independent. However, these are merely neutral factors in that they do not weigh in favour of the appellant.

Little weight can be given to the appellant's relationship with the sponsor because it was established at a time he was in the United Kingdom unlawfully. Family life has always been 'precarious'.

The correct approach to Article 8 in cases of precarious family life has been the subject of definitive guidance in the judgment of Lord Reed in R (Agyarko) v SSHD [2017] UKSC 11. His Lordship explained that the test of insurmountable obstacles, as used in paragraph EX.1 of Appendix FM of the rules and later defined in paragraph EX.2, was taken from the jurisprudence of the ECtHR:

> "42. In Jeunesse, the Grand Chamber identified, consistently with earlier judgments of the court, a number of factors to be taken into account in assessing the proportionality under article 8 of the removal of non - settled migrants from a contracting state in which they have family members. Relevant factors were said to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there were "insurmountable obstacles" in the way of the family living in the country of origin of the non - national concerned, and whether there were factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (para 107).
>
> 43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non - national concerned. In some cases,

> the court has used other expressions which make that clearer: for example, referring to "un obstacle majeur" (Sen v The Netherlands (2003) 36 EHRR 7, para 40), or to "major impediments" (Tuquabo - Tekle v The Netherlands [2006] 1 FLR 798 , para 48), or to "the test of 'insurmountable obstacles' or 'major impediments'" (IAA v United Kingdom (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could "realistically" be expected to move (Sezen v The Netherlands (2006) 43 EHRR 30, para 47). "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119."

In TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109, the Senior President of Tribunals emphasised the importance of tribunals following the approach described by the Supreme Court. It was lawful for the respondent to set a requirement within the rules that there be insurmountable obstacles to the continuation of family life in the country of proposed return. The respondent's policy that leave should only be granted outside the rules where exceptional circumstances apply was lawful. Where precariousness exists, it affects the weight to be attached to family life in the balancing exercise. That is because Article 8 does not guarantee a right to choose one's country of residence. The weight to be attached to family life will depend on what the outcome of immigration control would otherwise be. Section 117B of the 2002 act is also relevant. The consideration of Article 8 outside the rules is a proportionality evaluation. Some factors, such as the public policy in immigration control, are heavily weighted. When a tribunal considers Article 8 outside the rules, it will factor into its evaluation of whether there are exceptional circumstances both the findings of fact that have been made and the evaluation of whether or not there are insurmountable obstacles.

The proposed country of return is Nigeria. My task is to decide whether the conditions which would be faced there amount to insurmountable obstacles to the continuation of family life, recognising that the test is a stringent one.

The appellant lived in Nigeria, as far as I know, until the age of 58. He has three children in Nigeria and his elderly mother. It is likely that he has friends and extended family members there as well. Given the sponsor's visit was to Lagos, as disclosed in the medical notes, I proceed on the basis the appellant would in fact be returning to Lagos.

The sponsor is not Nigerian but, as noted above, she has travelled there independently on at least three occasions, including as recently as December 2018. She speaks English and has lived with a Nigerian husband since 2010. I

see no reason she could not, with the support of the appellant and his family members, adapt to living there over time.

The appellant is elderly and has diabetes. However, his disease is controlled by medication and he indicated he would work but for the legal restriction on his doing so.

The factors which Ms Jaquiss argued showed the test of insurmountable obstacles was met were (1) the lack of employment prospects, and (2) the unavailability of medical treatment for the sponsor. I have therefore given these matters careful attention.

On the employment point, no background evidence about the job market in Lagos was provided but I accept the general submission that, at their stage of life and with no recent employment history, it might well prove difficult for both the appellant and the sponsor to find employment. I do not know what skills or professional qualifications the appellant has but the point is that he is at retirement age. I do not know whether he has any pension entitlement in Nigeria. The fact the sponsor does not currently have Nigerian nationality might also be an impediment to finding work in her case.

Given the stance of the appellant was to deny having family members in Nigeria other than his elderly mother and children, there was no proper exploration of what financial support might be available from family members in Nigeria. In the circumstances, I infer there would be some and that this would assist the couple to meet their needs.

The medical evidence paints a picture of a woman with disabling conditions which would suggest significant limitations in her ability to mobilise and which would mean she suffers discomfort. However, as noted, she holds down a full-time job as a cleaner. The appellant told me she has been promoted to the position of manager but that is not confirmed in the letter from the employer and I proceed on the assumption her job involves a degree of physical effort. I am unable to accept that her physical health problems significantly limit her ability to mobilise. There must be some limitation but, as matters stand at present, this is relatively minor. She does not require care from another person.

In terms of treatment, I have rejected the three letters purporting to show that she could not access treatment in Nigeria. She does not require the “procedures” mentioned in those letters. She requires medication and perhaps physiotherapy/acupuncture. I am not satisfied she could not obtain the treatment she currently receives, albeit she may have to pay for it.

I accept the sponsor has her son and grandchildren in the UK. However, her son is an adult and lives separately with his own family.

The circumstances of this case do not reach the threshold of ‘insurmountable obstacles’.

Ms Jaquiss argued that, even if the appellant could not succeed on the basis of showing there were insurmountable obstacles to family life being pursued outside the United Kingdom, the decision would be disproportionate. She relied on the principles established in Chikwamba v SSHD [2008] UKHL 40.

In Agyarko, Lord Reed confirmed the principles set out in Chikwamba that the weight to be given to the public interest in removal might be reduced if an individual were certain to be granted leave to enter if he made an application from outside the UK (see paragraph 51). The point has sometimes been put in terms that there would be no sensible purpose in requiring someone to go abroad in such circumstances (see Hayat v SSHD [2012] EWCA Civ 1054). However, where there is a sensible reason and the interruption to family life will only be temporary, then removal can be proportionate.

In R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) it was held that Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights.

Ms Jaquiss relied on the same evidence showing the sponsor is earning well in excess of the minimum income threshold. I see no reason that her employment would not continue for the foreseeable future.

As seen, the test is to consider whether the appellant would be “certain” to be granted leave to enter and, if so, whether there is any sensible purpose in expecting him to return to Nigeria just to make the application, given that would involve interference with family life, albeit of a temporary nature.

I have considered the applicable rules in Appendix FM. The appellant is the ‘partner’ of a British citizen because he is married to the sponsor. I cannot see that any of the suitability grounds would catch him. The appellant’s relationship with the sponsor is clearly genuine and subsisting. The financial requirements are met by the sponsor’s salary. The appellant is exempt from the English language requirement due to his age. Paragraph 320(7B) cannot be applied because of paragraph A320.

Assuming then that the appellant made a paid application and produced his passport and specified evidence, I find he is “certain” to be able to show that the requirements for entry clearance are met.

Rather than the facts of this case showing that there is a sensible reason to require him to return to Nigeria to make the application, the circumstances suggest it would simply be costly, inconvenient and unpleasant for the

appellant and the sponsor to be separated after seven years of marriage. I was not told how long the process of making an application for entry clearance would take in Lagos. However, any lengthy separation would be difficult for this couple. The appellant is an elderly person and he has diabetes. The notion that he should go to Nigeria for an extended period would, I find, be unjustifiably harsh and therefore disproportionate.

The appeal is therefore allowed on Article 8 grounds.

Notice of Decision

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The following decision is substituted:

The appeal is allowed on Article 8 grounds.

No anonymity direction made.

Signed Date 17 July 2019

Deputy Upper Tribunal Judge Froom

TO THE RESPONDENT
FEE AWARD

The appeal has been allowed but I do not find it is appropriate to make a fee award. The appeal was allowed as a result of the evidence adduced at the hearing and the respondent was entitled to refuse the application on the basis of the information provided at the time.

Signed Date 17 July 2019

Deputy Upper Tribunal Judge Froom

APPENDIX: decision on error of law

"DECISION AND REASONS ON ERROR OF LAW

1. *The appellant appeals with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal Devittie, promulgated on 30 August 2018, in which he dismissed the appellant's appeal against a decision of the respondent to refuse his application for indefinite leave to remain.*

The appellant had relied on his long residence in the UK of eleven years and his relationship with his British wife, Ms [MN] ("the sponsor").

The respondent considered that the appellant had only resided lawfully in the UK for 5 months and that there were no insurmountable obstacles to family life continuing in Nigeria. There were no very significant obstacles to the appellant's reintegration in Nigeria. There were no exceptional circumstances to warrant a grant of leave outside the Immigration Rules.

The Judge of the First-tier Tribunal also found there were no insurmountable obstacles to family life continuing in Nigeria. He found the appellant and the sponsor were "relatively free of serious medical conditions" and that both would be able to work. In assessing proportionality, the Judge reduced the weight to be given to relationship because it had been formed at a time the appellant was in the UK unlawfully.

The Appellant's application for permission to appeal was refused by the First-tier Tribunal because the allegation that the Judge had failed to have regard to a letter from the sponsor's GP was not made out. The appellant's bundle did not contain any such letter.

The application was renewed and granted by Deputy Judge of the Upper Tribunal Sutherland Williams. He also saw no evidence that the GP's letter had been filed at the Tribunal in time for the hearing. In any event there was evidence regarding the sponsor's health which the Judge considered. Even if the GP's letter had been before the Judge it would not have made any difference. However, he continued,

> *"I am granting permission to appeal on the basis that it is arguable that the judge at first instance should have considered in more detail the nature of the appellant's sponsor's health (by reference to the evidence in the main bundle), whether it was serious, and then given reasons for any findings in that regard. Thereafter, and importantly, it is arguable that the judge should have considered whether or not that health issue, if made out, could have been treated in either the DRC or Nigeria."*

The respondent has not filed a rule 24 response.

Ms Jaquiss, who had only been instructed at the eleventh hour, made an application to amend the grounds. In particular, she wished to argue that Judge Devittie had overlooked the appellant's protection claim, failed to make findings on the ability of the appellant to meet the financial requirements of the Immigration Rules so as to

consider the Chikwamba point and had failed to apply section 117B in making his proportionality assessment.

I refused Ms Jaquiss's application. The appellant had been legally represented and these matters should have been raised earlier. The appellant had chosen not to pursue his protection claim when his appeal was before the First-tier Tribunal after an adjournment had been granted. It did not appear that the Chikwamba point had been argued and Ms Jaquiss acknowledged that the financial requirements could not have been met as at the date of hearing. As far as section 117B was concerned, the decision shows that Judge Devittie had the public interest factors in mind and, even if he should have had closer regard to matters such as the fact the appellant was financially independent and speaks English, these factors could not have weighed I favour of allowing the appeal. They are neutral factors.

Returning to the challenge made in the written grounds, Ms Kotas accepted that Judge Devittie had made a material error of law in failing to have regard to and make findings on the medical evidence which was before him.

Judge Devittie's decision is short and the reasoning concise. The following paragraphs contain the important passages:

> *"7. The appellant suffers from diabetes but is in good health and there is no suggestion that his medical condition would pose difficulties upon his returning to Nigeria. This is a country in which he has lived for most of his life; he has children in the country and no doubt would have retained strong family and social ties. I do not therefore consider that he would encounter any significant difficulties in his reintegration. The sponsor is from the DRC, but she is fluent in English, which is the official language in Nigeria and with his support she would be able in the fullness of time to integrate into life in Nigeria. They will no doubt be come difficulties including financial matters, but there is no evidence before me to show that either the appellant or the sponsor are not able to engage in employment.*
>
> *8. I do not accept the evidence of the sponsor that she suffers from any serious illness and she has failed to produce any report to substantiate this claim. The evidence shows that she has made frequent visits to the hospital and in these circumstances, if there was any condition which is debilitating, she would have had no difficulty at all in obtaining an expert medical report. This she has not done.*
>
> *9. I therefore come to the conclusion that the evidence demonstrates that there are no insurmountable obstacles to this couple continuing family life outside the United Kingdom. In consideration of the appellant's claim outside immigration rules I find that there are no exceptional circumstances that would justify the grant of leave in light of the fact that I have made a specific finding that they are both relatively free of serious medical conditions and would be able to seek employment in Nigeria upon their return. That is not to say that there would be no difficulties but I am satisfied that these could be overcome.*
>
> *10. In considering the public interest I shall have regard to the fact that this relationship commenced when both parties were fully aware that*

> *the appellant does not have any entitlement to remain in the UK. This is a significant factor that weighs against the appellant in relation to the interests of effective immigration control. This is an appellant who came to United Kingdom and remained in breach of the immigration rules. In all the circumstances I find that the removal of the appellant, even if it means the severance of ties with his spouse, would not be a disproportionate interference with family life."*

Having considered the matter carefully and, in the light of the agreement of both parties that the decision pays insufficiently close regard to the evidence which was before the Judge, I set aside the First-tier Tribunal, which shall have to be re-made. It is clear that, even without the GP's letter, there was medical evidence before the Judge showing that the sponsor has a number of health issues, including significant pain potentially affecting her mobility. This evidence was either not addressed at all or was rejected without giving reasons for doing so. Whilst I agree with Judge Devittie that the failure to produce a medico-legal report was a matter of concern, the appellant was entitled to know why the Judge concluded, notwithstanding this evidence which was available, that there we no insurmountable obstacles to family life continuing in Nigeria.

It may well be the case that the appellant cannot show there would be insurmountable obstacles given the high threshold to be passed. However, the issue for me is whether the Judge's decision is adequately reasoned, which it is not.

There is no need to remit the case to the First-tier Tribunal so I adjourned the appeal for a continuance hearing in the Upper Tribunal reserved to myself. The parties may file up to date evidence.

> ***Notice of Decision***
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> *The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The decision will be remade in the Upper Tribunal.*
>
> *No anonymity direction made."*