Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01779/2021
HU/50497/2021 (UI-2022-000241)

THE IMMIGRATION ACTS

Heard at : Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On : 5 April 2022	**On : 6 June 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

AO
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Mensah, instructed by AJO Solicitors
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes before me following the grant of permission to appeal to the Upper Tribunal.

2. The appellant is a national of Nigeria born on 12 June 1976. He entered the UK on 8 June 2012 as a spouse with leave to remain until 17 August 2014. His relationship with his spouse broke down shortly after his arrival and his leave to

remain was curtailed at the instigation of his wife. The appellant claims that his wife was abusive towards him. They divorced in 2015. He then overstayed and remained in the UK unlawfully. In 2017 he underwent a Muslim marriage with his current partner, a Gambian national with indefinite leave to remain in the UK as a refugee, and on 24 July 2020 he applied for leave to remain as an unmarried partner on the basis of that relationship.

3. The respondent, in a decision dated 7 February 2021 refusing the appellant's application, accepted that he had a genuine and subsisting relationship with his current partner and that he met the eligibility relationship and financial requirements of the immigration rules, but considered that he did not meet the immigration status or English language requirements and that he failed to meet the requirements of paragraph EX.1.(b) of Appendix FM of the immigration rules as there were no insurmountable obstacles to family life continuing outside the UK in Nigeria. The respondent considered further that there were no very significant obstacles to the appellant's integration in Nigeria and that the requirements of paragraph 276ADE(1) of the immigration rules were therefore not met on private life grounds. The respondent also considered that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

4. The appellant appealed that decision and his appeal came before First-tier Tribunal Judge Galloway on 12 January 2022. The appellant was represented before the Tribunal but the respondent was not. It was argued before the judge that there were insurmountable obstacles to family life continuing in Nigeria as the appellant's partner could not live there since she had already fled her own country as a refugee and Nigeria was unsafe for her as she would be at risk from gangs as a foreigner. Further, they had sought fertility treatment in the UK and it would not be available to them in Nigeria.

5. The judge considered that the English language eligibility requirement was met on the basis of evidence before the Tribunal. However, relying upon the findings in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129, she considered that the appellant could not benefit from paragraph EX.1. of Appendix FM of the immigration rules as a result of his immigration status and she concluded that the requirements of Appendix FM could not therefore be met. She found, in any event, that there were no insurmountable obstacles to family life continuing outside the UK and she went on to consider Article 8 outside the immigration rules. She accepted that it was not reasonable for the appellant's partner to return with him to Nigeria since she was a refugee who was working and settled in the UK and she feared for her safety in Nigeria, but she found that the appellant could return to Nigeria alone in order to make an entry clearance application to return to the UK, albeit noting that it could take between 9 and 12 months to process such an application. The judge considered that there were no insurmountable obstacles to the appellant returning alone and that it would not be unduly harsh to expect him to do so, in view of his immigration history and period of overstaying. The judge considered that little weight could be given to his relationship with his partner under section 117B(4) of the NIAA 2002, since it had been formed whilst he was in the UK unlawfully.

She concluded that requiring the appellant to leave the UK and apply for entry clearance under the immigration rules served the public interest of maintaining an effective immigration control. The judge therefore concluded that the appellant's removal in order to make an entry clearance application from Nigeria would not be disproportionate and she accordingly dismissed the appeal.

6. The appellant sought permission to appeal that decision to the Upper Tribunal on the grounds that the judge had erred by failing to explain why there were no insurmountable obstacles to family life continuing outside the UK and that if it was accepted that the appellant's partner could not be expected to relocate to Nigeria then it should have been accepted that paragraph EX.1(b) applied and the appeal should have been allowed on that basis. If EX.1.(b) was satisfied, there was no public interest in removal. It was asserted that the judge had conflated her consideration under GEN.3.2 within the immigration rules with the wider test under Article 8 and had failed to make any clear finding as to why there were no unduly harsh consequences under GEN.3.2.

7. Permission was granted by the First-tier Tribunal on 14 February 2022. The respondent issued a rule 24 response opposing the appellant's appeal.

Hearing and submissions

8. The matter then came before me. The parties were both in agreement that it could be seen from [20] of her decision that Judge Galloway had misunderstood the findings at [71] and [72] of Younas in considering that paragraph EX.1.(b) was not available to the appellant in this case. The findings in Younas were made on the basis that the appellant in that case, having been in the UK as a visitor when he made his application for leave to remain, did not meet the eligibility requirements in paragraph E–LTRP.2.1 and could not benefit from EX.1 as a freestanding provision, whereas the appellant in this case was not restricted from benefitting from EX.1. The judge had therefore not given proper consideration to the question of insurmountable obstacles under paragraph EX.1.(b) and to the impact on the appellant's partner of being required to continue family life in Nigeria. That was a material error of law requiring the decision to be set aside.

9. Clearly that was correct and accordingly I set aside Judge Galloway's decision. Both parties were content for me to re-make the decision in the appeal on the basis of the evidence already before me after hearing submissions.

10. Ms Mensah, in her submisisons, relied on her skeleton argument which was before the First-tier Tribunal and asked me to make no distinction, in considering the risks to the appellant's partner in Nigeria, on the basis that she was black, but asked me to consider the position on the same basis as it would be considered if she was a white British citizen. Ms Mensah relied upon the FCO advice on security for foreigners working in Nigeria, which referred to the high level of risk and the risk of kidnaping, especially in Northern Nigeria. She

submitted that even if the appellant's partner could find work in Nigeria to replicate her work as a palliative care worker in the UK, she would be at risk. Ms Mensah also relied upon the Home Office CPIN report relating to risks to women in Nigeria. She submitted that there would be insurmountable obstacles to the appellant's partner living in Nigeria for those reasons, and also considering that as a refugee from Gambia she had already experienced sexual violence at the hands of men. The appellant would be able to offer only limited assistance to his partner in integrating into life in Nigeria because of his lengthy absence from the country. It was his partner who was the main breadwinner in the UK, but in Nigeria she would have difficulties being able to work. Ms Mensah submitted that the same factors meant that there would be unjustifiably harsh consequences for the purposes of GEN.3.2 of Appendix FM such that the decision to refuse the appellant's application was disproportionate. It would not be proportionate to expect the appellant to go back to Nigeria alone and be separated from his partner, since their separation could be as long as 12 months whilst an application for entry clearance was being processed and, further, the appellant had entered the UK lawfully on the basis of his marriage at that time and had moved the centre of his life to this country. The decision should therefore be re-made by allowing the appellant's appeal.

11. Before Mr Tan made his submissions I put it to him that, given the judge's findings at [33] on the difficulties the appellant's partner would face in moving to Nigeria with him, should not the decision simply be re-made by allowing it under EX.1.(b). Mr Tan submitted that the judge's misunderstanding of the test in EX.1.(b) tainted her findings at [33] and these should not, therefore, be considered as meeting the test in EX.1.(b). Furthermore the judge, at [33], did not apply the relevant test for "insurmountable obstacles" as discussed in the case of Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 11 but was considering a question of reasonableness. Therefore the matter had to be decided afresh.

12. Mr Tan submitted that no argument had been made that there were very significant obstacles to the appellant's integration in Nigeria and there was no suggestion that he would have problems himself. He had a financial platform from which to operate in Nigeria as he had previously sold his properties there and he had family members in the country. He would be able to find employment in Nigeria and it was in that context that the question of "insurmountable obstacles" should be considered. The appellant was from Ibadan in Oyo State which was a different area to the problems referred to in the FCO advice and there was no evidence of there being any risk there. His partner would not be alone and therefore would not face the same issues as lone women. As for the need for the appellant and his partner to have fertility treatment, there was no evidence to show that it was not available in Nigeria and in any event the medical evidence produced confirmed that fertility treatment could not presently be carried out There was no evidence that there were any dependency issues in relation to the appellant's partner's family in the UK. As for the issue of proportionality, the appellant could not meet the requirements of the immigration rules and, since it was important that there be

an even playing field there was no reason why he should be able to circumvent the immigration rules for entry clearance which other people had to meet. There was no evidence that an entry clearance application would take up to 12 months. The GOV.UK website referred to a period of 12 weeks. A temporary period of separation was not disproportionate, particularly given that the appellant had been in the UK unlawfully for a significant period of time.

13. Ms Mensah submitted, in response, that the judge's findings of fact should be preserved and it should be found that there were insurmountable obstacles to family life continuing in Nigeria and/or unjustifiably harsh consequences if the appellant was required to leave the UK.

Discussion and Findings

14. Whilst I posed the question to Mr Tan, as to why the decision could not simply be re-made by allowing the appeal under EX.1.(b) on the basis of the judge's findings at [33] in relation to the difficulties the appellant's partner would face in relocating with him to Nigeria, I am persuaded by Mr Tan that that would not be appropriate nor would it be correct in law. That is for two reasons: firstly, that the judge's misunderstanding of the test in paragraph EX.1 tainted her findings at [33]; and secondly, that the judge was considering the question of reasonableness at [33], which was not the same as "insurmountable obstacles" and which did not involve the same test, as discussed in Agyarko. Having said that, I agree with Ms Mensah that the respondent could not then rely upon Judge Galloway's findings at [26], in relation to the weight to be given to the appellant's adverse immigration history, as preserved findings. Accordingly, the correct course would be to re-make the decision afresh, with no findings preserved, and that is what I do.

15. As set out in the case of Agyarko, the test for "insurmountable obstacles" is a stringent one (para 43) and (at para 43), the expression "insurmountable obstacles" is defined by paragraph EX.2 as meaning "*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*." I have to agree with Mr Tan that the case put for the appellant in that regard is not a strong one and certainly not one that meets that stringent test. The appellant relies upon the Home Office CPIN and the advice of the FCO in regard to risks to women, security risks to foreigners and the risk of kidnapping. However as Mr Tan submitted, those reports provide information on a general security risk but do not suggest that such risks arise in the appellant's home area of Ibadan and the Oyo State. Further, his partner will not be relocating to Nigeria as a lone woman with no support. The appellant spent the majority of his life there and is familiar with the customs, traditions and way of life. It has not been argued further that he would face very significant obstacles to integration in Nigeria and therefore, as Mr Tan submitted, he would be able to provide support to his partner by way of finding employment and providing for her financially and by way of family support from his family members. There is also no real reason why his partner would not be able to find work herself in Nigeria in her own

area of work. Although, as Ms Mensah submitted, the appellant's partner is a refugee who suffered persecution in her own country, that does not mean that she would not be able to live safely in Nigeria without support from the appellant and his extended family members. I make that finding and observation without any reference to his partner being black and would reach the same conclusion if she was white – a point Ms Mensah made on more than one occasion.

16. As for the appellant's reliance upon access to fertility treatment, Mr Tan rightly pointed out that such treatment was not being offered to the appellant and his partner currently, owing to his wife's BMI, as seen in the letters from Manchester University hospital at pages 100 and 101 of the combined bundle. Neither is there evidence to show that such treatment would not be available in Nigeria. There are otherwise no other considerations which are relied upon and supported by evidence, such as dependent family members in the UK, in asserting that there would be insurmountable obstacles to family life continuing in Nigeria. Accordingly, for all of these reasons, whilst relocating to Nigeria will no doubt be disruptive, inconvenient and difficult, I cannot see how the test is met in EX.2. and do not accept that the appellant is able to meet the requirements of the immigration rules in Appendix FM. As already mentioned, there has been no further case put forward under paragraph 276ADE(1) of the immigration rules and in any event there is no evidence to suggest that there would be very significant obstacles to the appellant's integration in Nigeria.

17. Turning to exceptional circumstances under GEN.3.2 of Appendix FM, and the question of the respondent's refusal to grant the appellant leave to remain resulting in unjustifiably harsh consequences for him or his partner, the same considerations apply as set out above. It is also relevant to note that any expectation for the appellant's partner to accompany the appellant back to Nigeria in order to continue their family life need only be a temporary one, whilst awaiting the grant of entry clearance for the appellant to return to the UK under the immigration rules. It is open to the appellant's partner to spend periods of time in Nigeria as well as in the UK, or for her to remain in the UK whilst the appellant awaits the grant of entry clearance, in which case she would be able to continue her job and her life in the UK. It is submitted that a separation of 9 to 12 months whilst awaiting the grant of entry clearance amounts to a disproportionate interference with family life, but as became apparent at the hearing, there is no evidence to show that that would be the relevant period of time. Judge Galloway's reference to 9 to 12 months at [22] of her decision came from the findings in Younas where it was said at [45] that the documentary evidence regarding timescales for entry clearance applications from Pakistan to join a family member in the UK indicated that it took up to 12 weeks from attending the visa application centre appointment to receiving a decision, or 30 days if the priority service was paid for, and at [65] it was considered that the appellant would be out of the UK (in Pakistan, awaiting a grant of entry clearance) for between 4 and 9 months. Accordingly the waiting time is unlikely to be as long as 12 months.

18. In any event, relevant weight has to be given, in assessing proportionality under Article 8, to the strong public interest in maintaining an effective immigration control, considering the appellant's inability to meet the requirements of the immigration rules. In that respect, I accept Mr Tan's submission that consideration has to be given to the fact that the appellant made his application at a time when he was in the UK without any leave, having failed to return to Nigeria when his previous period of leave expired and having remained in the UK unlawfully for a considerable period of time. Further, whilst he is able to speak English and is financially independent, little weight is to be given to the appellant's family and private life under section 117B of the NIAA 2002 as his relationship began when he was living in the UK unlawfully and his private life has latterly been conducted during such a period of time. There is nothing in the evidence before me to suggest that the appellant should not be expected to leave the UK and make a valid entry clearance application to return to the UK and should not be able to circumvent the requirement to made a proper application under the immigration rules. As the case of Younas established, there was nothing in the findings in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 which precluded such a requirement in circumstances such as the appellant's. Accordingly I consider the respondent's decision to refuse the appellant leave to remain in the UK to be entirely proportionate and I do not accept that it gives rise to a breach of Article 8. The appellant's appeal against the decision is accordingly dismissed.

DECISION

19. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside and is re-made by dismissing the appellant's appeal.

Anonymity

The First-tier Tribunal made an anonymity order for the reasons given at [6] of Judge Galloway's decision. I continue that order.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 6 April 2022