Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24685/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 August 2017	**On 19 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

MR IDOWU OLUWATOSIN OGUNBOWALE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss D Revill, Counsel, instructed by Rashid & Rashid Solicitors (Merton High Street)
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of a decision of First-tier Tribunal Judge Eldridge which was promulgated on 17 October 2016 and set aside by me on 12 July 2017. Findings in relation to the genuine and subsisting relationship between the appellant (as he was in the First-tier Tribunal) and his wife Miss Winifred Oshodie have been preserved.

2. In addition to the witness statements before the First-tier Tribunal, I have had a bundle of papers placed before me by the appellant which includes a supplementary statement from the appellant dated 22 June 2017, and one from his wife dated 23 June 2017 running to five brief paragraphs. Both of those statements predate my error of law decision. Although I gave leave for additional evidence to be filed and served, none has been.

3. Handed to me at the hearing was a small clip of papers, the most significant of which being a bank statement from HSBC which indicates, (and it is not disputed), that a figure of £2,100 was paid into Miss Oshodie's account on 27 June 2017 from her employers, Costain Ltd representing her monthly net salary. That figure would be consistent her being in receipt of an annual salary somewhere in the order of £25,000 gross.

4. It is regrettable that Miss Oshodie did not attend to give evidence. I heard from the appellant concerning a work commitment she had in Norwich which prevented her travelling, although the explanation was somewhat convoluted.

5. The factual evidence, however, is not particularly contentious. The appellant is a national of Nigeria, born on 7 April 1981. He entered the United Kingdom in 2009 and overstayed at the expiry of his visa. He formed a relationship with Miss Oshodie in 2013 and they married on 13 November 2014. Judge Eldridge's findings on the genuineness of that subsisting relationship have been preserved and I need not rehearse them.

6. The appellant maintains that it is not open to him to return to Nigeria with his wife because his wife has lived in this country since she was aged 15 and has become accustomed to the British way of life. He has many friends here, whom he regards as his family, having become increasingly more distant from his connections in Nigeria. He asserts he will be unable to re-integrate. He has no close social, cultural or family ties remaining in Nigeria. He has not returned to Nigeria during the seven years he has been in the United Kingdom. He states, at paragraph 10 of his witness statement, "If I am allowed to remain in the UK, I would like take [*sic*] employment in the country and would like to offer a better life for wife [*sic*] in the UK." He says, at paragraph 12, it would cause him "extreme hardship and suffering" if he is returned as he considers the United Kingdom to be his home "physically, psychologically and emotionally".

7. He has never relied on state benefits and has been financially supported by his wife. He says in paragraph 9 of his witness statement, "I regret that I remained in the country illegally but that was not intentionally [*sic*] and will kindly request the Immigration Judge not to penalise me for this mistake".

8. The appellant says his wife is unable to relocate to Nigeria with him. She holds a significant professional position as a civil engineer employed by an established

international company. She says in her witness statement (albeit she was unable to attend the hearing to give live evidence) that she has lived in the United Kingdom for 13-14 years and has lost all ties to Nigeria which she considers to be "an alien country". All her close friends are here. She points out (as recorded above) that her annual salary exceeds the minimum threshold for a sponsoring spouse. She says she will have considerable difficulties in securing a comparable position in Nigeria. There is a suggestion that accommodation in Nigeria may not be easy to find.

9. There was no issue between the parties on the relevant law. The requirements for leave to remain as a partner are set out on paragraph R-LTRP of the Immigration Rules. The applicant must not be in the United Kingdom in breach of immigration laws (disregarding an overstay of 28 days or less), unless paragraph EX.1 applies. The relevant provision in the present case is paragraph EX.1(b) applicable to those who apply for leave to remain as partners:

> "(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." (emphasis added)

10. Paragraph EX.2 adds a definition to the section highlighted as follows:

> "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."

11. These provisions were considered at length by the Supreme Court in **Agyarko & Anor v Secretary of State for the Home Department [2017] UKSC 11**. Of particular significance is paragraph 51 of the judgment of Lord Reed which states as follows:

> "Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside

> the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in **Chikwamba v Secretary of State for the Home Department**."

12. In applying the provisions of the Immigration Rules in the context of **Agyarko,** the question is whether there are insurmountable obstacles to the appellant returning with his spouse to Nigeria. There would undoubtedly be difficulties and inconvenience, but nothing in the territory of very serious hardship. That they enjoy a comfortable life with community ties here in the United Kingdom which would not immediately be replicated in Nigeria does not come close to an insurmountable obstacle. The claim must inevitably fail under paragraphs EX.1(b) and EX.2 of the Immigration Rules.

13. Perhaps recognising the inevitability of that conclusion, Miss Revill, for the appellant, devoted the thrust of her submissions to the application of Article 8 outside the Rules. She submitted that the appellant had established a substantial family life in the United Kingdom, albeit during a period when his presence was unlawful or precarious. He speaks fluent English and would be likely to pass an English language test, and the minimum income threshold is met.

14. Referring to paragraph 51 of **Agyarko**, Miss Revill submitted that this is a case where an application for entry clearance would succeed. Miss Revill used terminology such as "highly likely" and "more than probable", but she accepts that it falls "a little short of certain". She drew to my attention that Judge Eldridge considered it likely that such entry clearance would be granted, but conceded that his view carries limited weight when the decision is being remade *de novo*.

15. Mr Avery, for the Secretary of State, pointed to the language of Lord Reed in paragraph 51 of **Agyarko**, which says "might" be no public interest rather than "will not". He submitted that there must be very strong or compelling reasons for considering Article 8 outside the Rules, and there is none here. He says that the public interest in maintaining immigration control is very strong in the case of a long-term over-stayer such as the appellant, and that little weight should be given to a private life forged when an appellant's immigration status has been precarious. He indicated that the entirety of the relationship between the appellant and Miss Oshodi has taken place while he has been unlawfully in the United Kingdom. He further stated that it is far from certain that the appellant will be granted entry clearance. It is a matter for the relevant office to consider on such material as is placed before him or her.

16. Assessing Article 8 outside the Rules, I have regard to the approach commended by Lord Reed in paragraphs 56 and 57 of **Agyarko:**

> 56. […] The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very

> compelling ... is required to outweigh the public interest", applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in *Hesham Ali*.
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> 57. That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. <u>The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it.</u> In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control. (emphasis added)

17. The appellant is an over-stayer who has forged a private and family life entirely during a period when his presence has been unlawful or (at the very least) precarious. The public interest, articulated in section 117B of the Nationality, Immigration and Asylum Act 2002, militates strongly in favour of his return to Nigeria, notwithstanding the relationship with his wife and his other social and community ties. That is entirely proportionate to his right to a family and private life.

18. Whilst the appellant <u>may</u> be granted entry clearance which would allow him to return at a future date, it cannot be said that such a grant would be certain as contemplated in paragraph 51 of **Agyarko**. Even if the grant of entry clearance is "more than probable" (to borrow from Miss Revill) I cannot see anything in the particular circumstances of the appellant's case to suggest that it is exceptional such as to justify allowing his appeal under Article 8 outside the Rules. The private and family life considerations in this case do not outweigh the public interest in removal.

19. In the circumstances the appellant's appeal must be dismissed.

Notice of Decision

(1) The decision of the Firs-tier Tribunal having been set aside, the appeal is remade as follows.

(2) The appellant's appeal is dismissed under the Immigration Rules and on human rights grounds.

(3) No anonymity direction is made.

Signed *Mark Hill* Date 18 September 2017

Deputy Upper Tribunal Judge Hill QC