The Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32981/2015

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 2nd June 2017	**On 6th July 2017**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

MS. OLUBUNMI OLUMIDE.
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Muhammad of International Immigration Advisory Service (Levenshulme).
For the Respondent: Mr A McVettey, Home Office Presenting Officer.

DECISION AND REASONS

Introduction.

1. Permission to appeal to the Upper Tribunal has been granted to the appellant against the dismissal of her appeal by Judge of the First tier Tribunal Fox.

2. The appellant is a national of Nigeria born in August 1978. She came to the United Kingdom on a visit visa in July 2008 and then overstayed. On 4 August 2011 she applied for leave to remain on the basis of article 8. This was refused with no right of appeal. She then requested reconsideration on 21st December 2011 which was refused on 29 September 2015. That decision conferred a right of appeal.

3. The basis of her claim was that she has a partner, Mr Jason Mills who is a British national. The application was considered under appendix FM. It was accepted she met the suitability requirements. It was accepted that she met R-LTRP 1.1. (d)(ii). The issue was whether paragraph EX 1 (b) applied, namely, that she had a genuine and subsisting relationship with the British partner and there were insurmountable obstacles to family life continuing outside the United Kingdom. The respondent took the view that she and her partner could live in Nigeria. The partner said he had never been to Nigeria but the respondent said she could help him adjust. The couple were undergoing fertility treatment in the United Kingdom but this was also available in Nigeria.

4. Regarding private life she had not been here the necessary 20 years required under paragraph 276 ADE of the immigration rules. The respondent did not accept there were very significant obstacles to her integration back into Nigeria.

5. No exceptional circumstances were identified justifying a freestanding article 8 right to remain.

The First tier Tribunal

6. There was no presenting officer in attendance before First-tier Judge Fox. At paragraphs 5 to 7 the judge set out the principal case law relating to article 8 as incorporated in appendix FM and on a freestanding basis and referred to the decisions on section 117 B of the 2002 Act. At paragraphs 22 to 27 the judge set out his findings.

7. He commenced by stating that her claim in relation to return to Nigeria and her partner's ability to join her, amounted to no more than matters of personal convenience. The judge referred to the appellant entering on a temporary basis and her partner being aware of her precarious status. The judge referred to section 117 B. The judge stated there was no evidence to demonstrate why the appellant could not return to Nigeria and apply for entry clearance from there. The judge pointed out she had no entitlement to the medical services she had received to date in the United Kingdom and that there was provision for fertility treatment in Nigeria.

The Upper Tribunal.

8. Permission to appeal was granted on the basis the judge failed to provide a structured assessment in line with the Razgar sequential approach for an article 8 assessment. The grant of leave referred to an attendant brevity of findings and a lack of reasoning or consideration of the immigration rules.

9. The appeal was opposed by the respondent and the rule 24 response submitted that the judge had directed himself appropriately. It was contended that the decision did address the rules as well as a freestanding article 8 assessment.

10. In the appellant's statement she sets out how she was put in contact with her partner and they telephoned each other. She came to the United Kingdom in 2007 to meet him and then returned to Nigeria. When she came back in 2008 they resume their relationship and have been together since. She says she is receiving fertility treatment at the hospital in Manchester and that she suffered a miscarriage in May 2016.

11. At hearing the appellant's representative relied on the grant of permission to appeal. He submitted there was no detailed consideration of the proportionality of the decision in line with the Razgar approach. He referred to the length of the relationship and submitted it would be harsh to expect the appellant's partner to go to Nigeria. He was in full-time employment here.

12. The present officer referred me to the high threshold indicated in the case law. For instance, in Agyarko & Ors, R (on the application of) v SSHD [2015] EWCA Civ 440 the Court of Appeal referred to a party who had overstayed unlawfully and formed a relationship with a British citizen who then sought leave to remain, as is the case here. The "insurmountable obstacles" test under the Immigration Rules was a stringent test and more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.However,the test was to be interpreted in a sensible and practical rather than purely literal way.

13. The Supreme Court (R –v- Agyarko and Ikuga [2017] UKSC 11) referred to the respondent's instructions to caseworkers who are required to consider the seriousness of the difficulties. Relevant factors where the ability of the parties to enter and stay in the country concerned; cultural and religious barriers and the impact on any disability. At paragraph 42 Supreme Court referred to the Grand Chamber decision of Jeunesse in relation to insurmountable obstacles. Relevant was the extent to which family life would effectively be ruptured; the ties with the contracting State; the obstacles to the family living in the country of origin and the need for immigration control. The Supreme Court referred to the need for a practical

and realistic approach and that the issue was not whether it was literally impossible for a family to live together.

14. The presenting officer submitted that the fact that a partner had employment or family here or that a move would be inconvenient was generally not be sufficient. Whilst the decision of Immigration Judge Fox was brief he contended that it was difficult to see how the appellant could have otherwise succeeded, particularly having regard to the provisions of section 117 B.

15. The decision at paragraph 18 records a submission from the appellant's representatives that the insurmountable obstacles suggested consisted of her partner's employment and his status as a British citizen and the fact he had never travelled to Nigeria. The presenting officer submitted it was open to the appellant to return to Nigeria and her partner could support an application for entry clearance if the necessary requirements were met. Against this, the appellant's representative said there was no guaranteed such an application would succeed.

16. While still dealing with the error of law issue I asked the parties if they were agreeable to me asking the appellant's partners some questions. No objection was raised. He confirmed he had never been married before and had no children. He said he enjoyed good health. He said he earned in excess of the £18,600 set out in the rules. He confirmed that his wife had been receiving fertility treatment provided by the National Health Service rather than privately.

Consideration

17. The decision of First-tier Judge Fox is very brief. That is no fault and brevity is to be aspired to provide the decision adequately deal with the points arising. In this instance the decision would have benefited from greater structure.

18. The grounds of appeal complain that the judge appeared to assume there were compelling circumstances justifying freestanding article 8 assessment. Having done so, the judge did not follow the sequential steps in Razgar. I have difficulty seeing how an appellant can complain about a judge going on to consider a freestanding assessment if an appeal does not succeed under the rules.

19. It would have been preferable for the judge to set out separately the immigration rules and then state why article 8 on a freestanding basis was being considered. However, in this instance this amounts to a matter of form. It is my conclusion it would have made no material difference to the outcome. The factual matrix is clear and the judge obviously grasped this.

20. Essentially, the appellant came to the United Kingdom in 2008 intending to resume her relationship with her partner by deliberately overstaying. He was aware of her precarious position. Whilst here she has sought to conceive and has availed of the National Health Service. She did not pay for what undoubtedly expensive treatment. I acknowledge that she did try to regularise her situation in 2011 but this was unsuccessful.

21. The immigration rules are meant to be article 8 compliant. There were similarities between the issue of significant obstacles under paragraph 276 ADE (vi) and the question of insurmountable obstacles to family life in EX (1(b) of appendix FM. At paragraph 5 the judge refers to article 8 being codified in the rules. The judge set out the relevant arguments in relation to insurmountable obstacles at paragraph 18 and the question of integration at paragraph 19. He also sets out the basis for a freestanding assessment at paragraph 20. In the findings the judge does roll all the matters together and it is here that a separate structure would have been preferable. Ultimately however it is clear what factors were taken into consideration. In particular, the judge was influenced by the abuse of immigration control by the appellant and the connivance in this by her partner. The judge referred to the section 117 B factors: principally, the parties' awareness of their situation. Whilst the judge did not formally go through the sequential approach of Razgar the existence of family life was accepted and he progressed to the final determinative issue of proportionality.

22. In conclusion, whilst the decision would have benefited from a more structured approach the essential points were set out .On the facts the conclusion was one open to the judge.

Decision

I find no material error of law established in the decision of First tier Judge Fox. Consequently, that decision, dismissing the appellant's appeal shall stand.

Deputy Judge Farrelly

5th July 2017