Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/33955/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 November 2017	**On 22 December 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

N L O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr W M Reiss of Counsel instructed by Reiss Edwards Solicitors
For the Respondent: Ms A Holmes, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 10 March 1968 who appeals the decision of the Secretary of State on 19 October 2015 to refuse her leave to remain in the United Kingdom. She arrived in this country as a visitor on 7 August 2005 and was subsequently granted a further visit visa until 25 October 2007. Her latest arrival was on 2 November 2007 when she arrived with a visa valid until 22 October 2009. She applied for leave to remain on the basis of her private life on 29 October 2013. This application was refused on 10 January 2014 with no right of appeal. The appellant had married a British citizen (Mr P G) on 2 January 2015 and the decision under appeal follows the representative's request to grant the appellant an appealable decision.

2. It was accepted by the respondent that the appellant's relationship with her husband was genuine and subsisting but it was considered that the couple could live together in Nigeria and the requirements of EX.1.(b) were not met. In relation to paragraph 276ADE the appellant had spent 37 years in Nigeria and did not meet the age and length of residence requirements nor was it accepted there would be very significant obstacles to the appellant's integration on return to Nigeria. In considering exceptional circumstances the respondent noted that the appellant and her husband were both HIV positive and suffering from depression but the Secretary of State considered that suitable medical care was available in Nigeria. In the grounds of appeal it was noted that the appellant's husband had never been to Nigeria and was British born and working in the UK as a scientist for a pharmaceutical company. His parents were in the UK and his daughter was a witness at the appeal hearing. He also had other siblings in the UK.

3. The First-tier Judge, having heard oral evidence from the parties and the sponsor's daughter, noted the submissions of the representatives. It was submitted on behalf of the appellant that the cases of **Agyarko [2015] EWCA Civ 440** and **Chikwamba v Secretary of State [2008] UKHL 40** held the key to the correct decision. There were insurmountable obstacles to family life in Nigeria. In paragraphs 23 to 29 the judge referred to the relevant authorities dealing with the correct approach to the Rules and Article 8 issues and reminded herself of the statutory changes introduced by the 2014 Act. The judge accepted that there was no evidence that the sponsor had been to Nigeria nor that he had any family connection with Nigeria apart from through the appellant. He had suffered personal losses and his second wife had died in April 2013. She had been found to be HIV positive and the sponsor discovered that he too was HIV positive. He had suffered depression and the side effects of prescribed medication. He had turned to online forums and friendship sites through which he had made contact with the appellant. They had begun to date in March 2014 and he had proposed marriage in July 2014 and they had got married on 2 January 2015.

4. The judge noted that the appellant had had medical treatment following an HIV diagnosis in 2012. The judge observed that there was no evidence that any contribution towards the appellant's treatment had been given. The judge commented:

> "In his oral evidence the sponsor appeared to consider that the fact that the appellant's treatment in Nigeria would be expensive is a compassionate circumstance and an insurmountable obstacle that should entitle her to remain although this appears on the face of it at odds with his income and ability to provide for the appellant."

5. The judge noted that the only issue raised under the Immigration Rules was the availability of relocation as a family to Nigeria. The Secretary of State had not accepted that there were insurmountable obstacles to family life outside the United Kingdom. The refusal left it open to the appellant and sponsor to decide if they wish to return to Nigeria, alternatively the appellant could return to apply for an entry

clearance. The judge did not find that the appellant was estranged from her family as claimed. The sponsor had married the appellant in the full knowledge that she did not have status. In relation to the medical evidence the judge observed there was no up-to-date material indicating that the appellant could not obtain in Nigeria the treatment she required. The judge then considered the case of **Agyarko [2015] EWCA Civ 440** and the reference to **Jeunesse v the Netherlands (application number 12738/10)**. The judge concluded her analysis of the appellant's case under the Immigration Rules as follows:

> "44. The respondent's submission was that there was nothing to prevent the appellant from returning to Nigeria to apply for entry clearance, which given the sponsor's employment, should be a relatively smooth application. Weight should be attached to the fact that the parties had entered into the relationship and marriage knowing that the appellant's immigration status was precarious. The sponsor has a support network and there are adequate healthcare available in Nigeria. As set out above, to counter this the appellant's representative submits that the sponsor is British, does not know Nigeria, cannot speak the local language, cannot find a job commensurate with the one that he has with a commensurate income, cannot visit the UK very often and that removal to Nigeria would have devastating consequences for his health, medical care and for his family in the United Kingdom.
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> 45. I find that the fact that the sponsor would have to change jobs and may not have the same level of income are not insurmountable obstacles. English is an official language and the fact that he cannot speak a local language is not an insurmountable obstacle. There is no independent evidence that the drug regime prescribed for either cannot be accessed in Nigeria. The presence of the sponsor's adult relatives in the United Kingdom is not an insurmountable obstacles. The respondent accepts that there may be some difficulty relocating but there is evidence of family in Nigeria and the appellant lived in Nigeria and was sufficiently well established there to able to obtain visits visas including two, two year multi-visit visit visas valid 2005/2007 and 2007/2009. The visas were granted on the basis that the appellant intended to return to Nigeria. The appellant did not return and instead remained unlawfully for almost six years before making her first application for leave to remain,
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> 46. The appellant is undertaking medical treatment in the UK but their medical conditions and the medical treatment currently prescribed is not an insurmountable obstacle to the couple going to Nigeria. If they choose to do so, it is a matter for them. Nobody can require the sponsor to leave the United Kingdom but if the sponsor and appellant want to enjoy family life together in the United Kingdom, they are only entitled to so if the[y] satisfy the requirements of the Immigration Rules, which they do not because they have not shown with sufficient, satisfactory evidence that the

requirements of EX.1.(b) are met namely there are insurmountable obstacles to family life together outside the Immigration Rules.

47. Turning to private life and the requirements in paragraph 276ADE of the Immigration Rules, the appellant may have some initial difficulty upon her return to her country of nationality but she lived in Nigeria until the age of thirty-nine and is therefore fully familiar with society, language, customs and life in Nigeria. Although the appellant claims that she may be accepted by family on return, the witness who knows her family makes no mention of family issues in his letter. I find that the appellant has not discharged the onus of proof and shown with sufficient satisfactory evidence that there would be very significant obstacles to her integration into Nigeria, the country of return."

6. The judge then turned to consider Article 8 outside the Rules. She noted that since the appellant's family life with the sponsor had been established when she had no right to be in the UK it was precarious. The judge referred to **SS (Congo) [2015] EWCA Civ 387** and **Jeunesse v the Netherlands** and the need in a case involving precarious family life to establish that there were exceptional circumstances.

7. The judge summarised her findings in the following extract from her decision:

"50. The medical evidence that I have been provided with does not provide sufficient evidence of compelling, compassionate or exceptional circumstances but does advocate the appellant's case. I do not have medical evidence from the GP to show medical history or from the hospital to show the frequency of appointments or current viral load. The last detailed medical report on the appellant is dated 08 October 2013 when her viral load was undetectable and she had no sign of toxicity. A problem was anticipated if the appellant were unable to obtain antiretroviral therapy but the country information from 2013 shows that this therapy is available in Nigeria and the appellant has not shown that her particular treatment is not available there including for example by ordering her particular therapy from outwith Nigeria. The other health problems referred to generally in the letter of 22 September 2015 are the general ones of hypertension, persistent headaches and iron deficiency anaemia and there is certainly no satisfactory evidence that these health problems cannot be adequately treated in Nigeria. There is no psychiatric evidence. It follows that I find that the appellant has not shown with sufficient satisfactory evidence that she cannot access adequate health care in, or from Nigeria.

51. The sponsor, a British Citizen cannot be removed but if he chooses to follow the appellant to Nigeria then it has not shown with sufficient, satisfactory evidence that the sponsor cannot similarly access adequate health care when in Nigeria or by travelling to and from Nigeria. The health risk identified for him arises if he stops taking his medication. This

would of course be a voluntary action that is within his control and I do not have any risk assessment or psychiatric history or evidence for the sponsor. The fact that the sponsor may elect to stop taking medication is not a compelling, compassionate or exceptional circumstance.

52. Weight has to be attached to the fact that the relationship was commenced in the full knowledge that the appellant did not have status so that return has always been a realistic possibility as of course has been the possibility that the health of the appellant and/or sponsor may deteriorate whether being treated in the UK or in Nigeria and the sponsor has first hand knowledge of this, his second wife having died in the UK from complications arising from her HIV positive status.

53. The fact that the appellant and sponsor met on an internet site for those who are HIV positive and both not only knew that the appellant did not have status, but they were aware of the implications for this for accessing what I was told is costly NHS healthcare free of charge in the United Kingdom. The appellant was also fully aware that her previous application that appears to have been based on a different relationship with a man who was not HIV positive, had been refused so that there was no legitimate expectation that a further application based on a new relationship would be granted. The relationship of the appellant and sponsor was therefore clearly and admittedly established in the full knowledge that the appellant's status was precarious and that the appellant and sponsor may well have to decide whether to pursue family life in Nigeria or, by dividing their time between Nigeria or by application for entry clearance from Nigeria. It must also have been clear to both that because of her lack of conferred status the appellant has not shown entitlement to free NHS health care although this health care appears to have been provided by two NHS Foundation Trusts.

54. The appellant is not a settled migrant so that in striking a fair balance when deciding if to grant leave to enable pursuit of a family and private life or if to require the appellant to return to Nigeria to make an application for entry clearance if this is the route that she chooses to take, the United Kingdom Government has a wider margin of appreciation. The refusal of leave will not necessarily lead to the rupture family life. There is a background history by the appellant of breaches of the immigration laws by overstaying her visit visa.

55. The issue of lack of evidence of private life was raised in the refusal. The appellant has not responded to this for example by providing a chronology to show where she has lived or how she has supported herself or to show any activities carried out in the United Kingdom to demonstrate added value or integration into the wider community. There is a testimonial letter from a couple who met her in 2006 but this lacks

detail as does the further updated letter from a couple who have known the appellant for five years and know her family in Nigeria.

56. The issue of threats from family was raised in the refusal along with the availability of relocation and the appellant has not provided any additional evidence to support her claims and there is countervailing evidence from a witness. I find that the appellant has not made out any claim that she is at risk on return or that internal relocation is not available or would be unduly harsh for this competent, resourceful and capable woman who was able to obtain multi-visit visas for the UK and has survived in the UK without status since overstaying following her arrival in the UK in November 2007.

57. As an overstayer who did not comply with the duty of aliens to leave and comply with immigration controls, the appellant is an immigration offender. In making this finding I note that the appellant's previous application was refused in January 2014 yet in the face of this and in the full knowledge of her obligation to comply with immigration law and leave the United Kingdom, the appellant commenced a new relationship in the UK via a chatroom forum and on this foundation has made a further application for leave on human rights grounds. The fact that she and the sponsor chose to establish a relationship in this way after the refusal of the appellant's application does not on the fact of it countervail against the public interest in the maintenance of effective immigration controls.

58. Having considered Article 8 outside the Immigration Rules, I have noted and considered all the factors set out in section 117B of the 2002 Act (as amended). I have to have regard to the public interest in the maintenance of effective immigration controls, noting the appellant's immigration history and the public interest. I have noted that a fair balance has to be struck between the competing interests, which include the personal interests of the appellant and sponsor."

8. The judge then turned to consider the question of temporary separation in the light of the relevant authorities including **Chikwamba**. She concluded as follows:

"61. Having balanced all relevant factors, I find that the appellant's case, even when the circumstances of the sponsor and the appellant are taken fully into account, has not been shown by sufficient, satisfactory evidence to be a case of the kind imagined in *SS Congo* with reference to *Huang*. There are no circumstances that have such force in Article 8 terms so as to oblige the Secretary of State to grant LTE outside the Immigration Rules in the exercise of her residual discretion particularly when an application can be made from Nigeria. The appellant has not discharged the burden of proof and shown that removal pursuant to the refusal of leave would breach Article 8 because the parties have a choice and the sponsor is an independent adult who is working, has supportive family and friends in

the United Kingdom and is in a position to support the appellant in Nigeria or alternatively support her in making an application for entry clearance.

62. Balancing all relevant factors and noting the findings in all the case law that I was referred to including that in the skeleton argument, I find that there is nothing that so countervails against the public interest in the maintenance of effective immigration controls so as to justify finding that the public interest balance is tipped in the appellant's favour, when taking full account of the circumstances of the appellant and sponsor. Having also found that there are no insurmountable obstacles to family life outside the United Kingdom, or compelling or compassionate or exceptional circumstances, when answering the public interest question in section 117A of the 2002 Act (as amended) in the affirmative, I find that an interference with a person's family and private life is justified under Article 8(2) and proportionate."

9. Accordingly the judge dismissed the appeal under the Rules and on Article 8 grounds.

10. There was an application for permission to appeal which was refused by the First-tier Tribunal. However the application was renewed and the Upper Tribunal Judge in granting permission commented that the grounds were poorly drafted. While it appeared that the decision had been challenged on Article 8 grounds, the points were difficult to understand and did not coherently advance the grounds on which permission was sought. However it was arguable that the judge had erred in respect of Article 8 in the light of **Chikwamba** and the weight to be attached to the public interest – reference was made to **Agyarko** [2017] UKSC 11 (judgment had been given shortly after the promulgation of the judge's determination) at paragraph 51.

11. Mr Reiss adopted the analysis of the grounds given by the Upper Tribunal Judge when granting permission. He accepted the observations made about the grounds when permission was granted. Counsel referred to the argument based on EX.1. and EX.2. as well as the rejection of the claim under paragraph 276ADE(1)(vi). The third argument was based on Article 8 outside the Rules.

12. While the judge had referred to a report on 22 September 2015 there had been a further report dated 13 October 2016.

13. There were multiple health problems which demonstrated there were exceptional circumstances. Article 3 was not argued but the medical considerations were relevant to Article 8. There would be unjustifiably harsh consequences involved in removing the appellant. Reference was made to **Beoku-Betts v Secretary of State [2008] UKHL 39**. Reference had been made in the grounds to **Razgar** and **Huang**. Counsel referred to **VW (Uganda) [2009] EWCA Civ 5**.

14. The appellant's case concerned removal rather than being a deportation case. There were clearly very significant obstacles preventing the return of the sponsor. On the issue of temporary separation the judge had relied on **Chen [2015] UKUT 189** however there would be a serious impact involved in temporary separation and the appeal should be allowed.

15. Ms Holmes considered that the judge had put forward a detailed and careful determination and had looked at the legal situation in the light of the changed statutory framework which postdated many of the elderly cases relied on in the grounds of appeal. The judge had plainly given consideration to the case of **Chikwamba** which had been referred to in paragraph 49 of the decision. **Chikwamba** had been referred to in paragraph 51 of **Agyarko**. There it was said that if 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." No guarantees could be given about the outcome of an entry clearance application.

16. Reference had been made to the medical letter in October 2016 but there was not much difference between that and the proceeding letter and there was nothing about treatment in Nigeria. The judge had carried out a very careful and detailed analysis and Ms Holmes went through the salient paragraphs in the determination. While another judge might have reached a different decision the conclusion of the judge in this case was open to her. The case of **Agyarko** had taken a hard line and reference was made to paragraph 43 – insurmountable obstacles was a stringent test. The judge had carefully directed herself by reference to the issue of exceptional circumstances as dealt with in **Agyarko**. Ms Holmes referred to paragraph 54: the Convention was not intended to undermine the right of a state to control the entry of non-nationals by enabling non-nationals to evade immigration control by establishing a family life "while present in the host state unlawfully or temporarily, and then presenting it with a *fait accompli*." When faced with such a situation "the removal of the non-family member by the authorities would be incompatible with Article 8 only in exceptional circumstances". There were no exceptional circumstances in this case given the careful analysis by the judge. The appellant had family in Nigeria and was an immigration offender and the sponsor had married the appellant knowing that she was an overstayer. There had been substantial cost to the NHS. The findings were open to the judge.

17. Counsel again referred to the question of significant obstacles as defined and the issue of the judge overlooking the latest medical evidence. The couple would face very severe hardship, the judge had not applied **Chikwamba** correctly. There were compelling, compassionate circumstances – the appellant's husband had never been to Nigeria and he had an important job in the UK and there was much more than a mere obstacle involved in this case. Counsel accepted that there had been a statutory change introduced by the 2014 Act but submitted that "little weight" did not mean "no weight". The determination was materially flawed in law.

18. At the conclusion of the submissions I reserved my decision. I have carefully considered all the material before me. As the Tribunal commented when granting permission the grounds of appeal were not particularly helpful. The only point that appeared to emerge was the point based on **Chikwamba** and the weight to be attached to the public interest.

19. I agree with the points made by Ms Holmes that the determination is a very careful and thorough one spanning some sixteen pages and I am conscious that I have not done justice to it in my summary above. The judge considered the last detailed medical report in paragraph 50 of her decision. I am not satisfied that the absence of a reference to the 2016 report indicates an error in the judge's approach and indeed it was not a matter that was raised in the grounds of appeal. The 2016 report appears to follow a similar pattern to the report that the judge expressly refers to and like the earlier report it did not deal with the issue of the availability of treatment in Nigeria. Counsel concluded his submissions by making the point that the words "little weight" in the statutory test under s 117B did not mean "no weight". However the judge expressly reminded herself in paragraph 26 of her decision of this distinction: "It should be recalled that although the statutory provisions state that little weight is to be given, it does not state that no weight is to be given to such factors even limited weight can tip the balance." I see no evidence of any misdirection.

20. Ms Holmes makes the point that **Agyarko** sets out a more testing approach than that previously applied. Lord Reid, referring to **Jeunesse** stated as follows in 43:

> "…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."

Family life was entered into in precarious circumstances and the issues of precariousness and exceptional circumstances are considered in paragraphs 49ff of Lord Reid's decision. I do not detect any error in the approach of the First-tier Judge to the issues before her.

21. In relation to the **Chikwamba** point I have already referred to paragraph 51 of **Agyarko**. As Ms Holmes submitted it cannot be said that the appellant "was otherwise certain to be granted leave to enter" if she applied from overseas. No guarantees could be given. There were various public interest issues in the instant appeal which the judge explored very carefully. I am not satisfied that the judge misdirected herself on this aspect in the particular circumstances of this case.

22. It was properly accepted by Ms Holmes that another judge might have reached a different decision but I do not find that she erred in her consideration of the appellant's case under the Rules or in relation to Article 8. The grounds which are poorly drafted as counsel acknowledged in large measure simply express disagreement with the outcome.

Anonymity Order

The First-tier Judge made an anonymity direction in this case and in the circumstances I am satisfied that it is appropriate to continue that order.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 21 December 2017

G Warr, Judge of the Upper Tribunal