



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/11499/2014**

APPEAL NUMBER:

THE IMMIGRATION ACTS

Heard at: Field House

**Determination
Promulgated**

On: 11 September 2014

On 8 October 2014

Prepared: 2 October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

**MS ODINACHI JANE-FRANCES OKWARA
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr C Emezie, Chipatiso Associates LLP

**For the Respondent: Mr S Kandola, Senior Home Office Presenting
Officer**

DETERMINATION AND REASONS

1. The appellant is a national of Nigeria, born on 9th June 1971. Her appeal against the decision of the respondent dated 15th February 2014 refusing her application for indefinite leave to remain in the UK on the basis of domestic violence was dismissed by First-tier Tribunal Judge Fox in a determination promulgated on 23rd May 2014.
2. The appellant appealed against the respondent's decision asserting that it was not in accordance with the law and that it breached Articles 3 and 8 of the Human Rights Convention.
3. At the commencement of the hearing before Judge Fox the appellant's counsel, Mr Karim, accepted that the safeguards against domestic

violence did not apply to this appellant as she was dependent upon a temporary migrant.

4. It was however contended before the First-tier Tribunal that although she did not qualify for consideration in terms of the respondent's approach to domestic violence, it still needed to be assessed when considering the reasonableness of the appellant's return to Nigeria.
5. Judge Fox noted that in cross examination, the appellant stated that she was granted three years' leave to remain in 2008 on the basis of a relationship with her ex-husband which had ended in 2007. She confirmed that she had ceased cohabiting with her ex-husband in 2007.
6. However, she did not inform the respondent of this material fact. She did not know that she needed to tell the respondent that her relationship was no longer subsisting [16].
7. She contacted the respondent in 2009 as she needed to return to Nigeria to attend her father's funeral. She did not inform the respondent of the change in her circumstances. She believed that she might reconcile with her ex-husband. She did not know that a genuine and subsisting marriage with her ex-husband was a condition of her continued immigration status.
8. Judge Fox noted that the appellant's father was named Peter. Reference to the name Tony on the appellant's marriage certificate 'signifies her pseudo-father is in fact her uncle' [18]. When the appellant's attention was drawn to the death certificate which demonstrated that her father died in 2010, she denied that she had stated that she approached the respondent in 2009 to facilitate her attendance at her father's funeral. She stated that her father was sick in 2009 [19].
9. The appellant and her partner were unaware of the possibility that the appellant may be required to return to Nigeria as the appellant did not give "this possibility any thought" [20]. Her partner has always been aware of her immigration status.
10. Her partner gave evidence and confirmed his name, address and date of birth. He provided details of his relationship with the appellant, their marriage in accordance with Nigerian customary law and his inability to continue his marriage in Nigeria should the appellant return there.
11. In his examination in chief, her partner stated that he cannot return to Nigeria as he has lived in the UK for more than 20 years. He has integrated into the UK culture and his friends and employment are in the UK.

12. The appellant stated that she began IVF treatment with her partner in 2007 (paragraph 10 of her witness statement) although she claimed that her marriage did not end until 2009. It was submitted that the appellant and her partner were aware of the appellant's precarious immigration status.
13. It was submitted on her behalf that she had clarified the confusion relating to the evidence concerning her father's death. Her cultural explanation has been provided when referring to her uncle as her father.
14. It was also submitted by counsel on her behalf that the appellant's partner is a British citizen and it would be difficult for him to re-integrate into Nigerian society. He has been resident in the UK for more than 20 years which elevates his right to remain in the UK.
15. It was also submitted that as the appellant and her partner are having IVF treatment on a privately funded basis, relocation was unreasonable and Exception EX.1 had been accordingly satisfied.
16. Reliance was also had on the social worker report supporting the contention that the appellant should continue to reside in the UK.
17. Judge Fox found that the appellant was a dishonest witness¹. He found that the 'discrepancy' regarding the communication with the respondent in 2009 to facilitate her attendance at her father's funeral in Nigeria with the death certificate itself which stated that he died in 2010, damaged her credibility. The record of proceedings clearly demonstrated that she provided oral evidence that she wished to attend her father's funeral in 2009 [36].
18. She had also stated that she believes she may reconcile with her ex-partner, notwithstanding her decision to cohabit and engage in IVF treatment with her current partner [37].
19. Judge Fox found that the evidence demonstrated that she obtained leave to remain by deception. She applied for further leave to remain in 2008 when the evidence demonstrated that she entered into a relationship with her partner in 2007 and was receiving IVF treatment. It was reasonable to conclude that the appellant applied for leave to remain on the basis of a marriage which no longer existed [38].
20. The Judge thus concluded that when the evidence is considered in the round, it is reasonable to conclude that the appellant is a dishonest

¹ At paragraph 34 of the determination, the Judge stated that "the appellant is not a dishonest witness." In fact, as agreed by both parties before me, it is evident from the determination that the Judge clearly intended to find that the appellant is indeed a dishonest witness. This was an obvious typographical error.

individual who cannot be relied upon to provide a reliable account of her circumstances [39].

21. She moreover failed to discharge the burden of proof that she was the victim of domestic violence. She cannot be relied upon to produce honest evidence. The report was of no probative value, being self serving, generic and lacking objective reasoning [41].
22. The Judge did not accept that the appellant should be entitled to resist return to Nigeria because she was infertile. There was no evidence that she would be unable to live in Nigeria in the circumstances. This constituted 'weak attempts' to resist her departure from the UK [42].
23. Judge Fox considered Article 8 and applied the five stage test set out in **Razgar**. He found that the appellant is not entitled to remain in the UK under the rules. He applied **Gulshan (Article 8 - New Rules - correct approach) [2013 UKUT 640 (IAC)]**. Nor was she entitled to rely upon family or private life whilst resident lawfully to establish a claim under Article 8 outside the rules [44].
24. The appellant had resided in the UK as a temporary migrant and had no legitimate expectation that she would be entitled to settle in the UK. Nor has her partner any legitimate expectation that the relationship should be facilitated in the UK [45].
25. It did not assist the appellant that she is paying for IVF privately [46].
26. There was no reliable evidence demonstrating that her partner had lost cultural and social ties with Nigeria. The personal convenience of his residence in the UK is not a matter which causes the balance to fall in favour of the appellant [47].
27. Judge Fox then found that for the reasons given, the appellant has conducted herself in a manner which makes her departure from the UK "an imperative." Nor was there any reliable evidence showing that her partner cannot be expected to conduct his relationships with the appellant in Nigeria [47].
28. He found that the appellant's departure from the UK would not have a detrimental impact on wider society. Accordingly, the interference proposed was proportionate to the legitimate aim pursued. There was no reliable evidence demonstrating that her moral or physical integrity would be compromised by her return to Nigeria. Nor was there any reliable evidence demonstrating that the UK is the only country where the appellant can obtain access to IVF [53].
29. In the circumstances, the appeal was dismissed.

30. On 23rd July 2014, Upper Tribunal Judge Gill granted the appellant permission to appeal. She expressly confined permission as limited to paragraphs 4(i) and (ii) of the original grounds and paragraph 3.
31. Judge Gill stated at paragraph 2 of her grant that under paragraph 276ADE (iii), a person is to be granted leave if he or she has lived continuously in the UK for at least 20 years. If this 20 year residence requirement is sufficient, in the view of the respondent, to merit the grant of leave to an individual on the basis of Article 8, it is arguably a relevant consideration in assessing whether it is reasonable to expect the partner of an appellant to relocate where the partner has lived continuously in the UK for at least 20 years but the appellant has not.
32. At the hearing on 11th September 2014, Mr Emezie relied on the relevant grounds of appeal, submitting that there is “a simple point”. He referred to paragraphs 3 and 4 of the grounds prepared by counsel who represented the appellant before the First-tier Tribunal. It is contended that whilst the Judge made credibility findings in respect of the appellant, he did not make any findings in respect of her partner, who also gave evidence, especially on important issues such as relocation and IVF treatment. The Judge erred in failing to set out and make reasoned findings in respect of that evidence. It is axiomatic that a determination should disclose clearly the reasons for a Tribunal decision.
33. He submitted that in assessing whether it is reasonable to relocate, the Judge placed the most emphasis on the appellant's circumstances. He made one reference to the partner and concluded that there was no reliable evidence that he cannot relocate. In so doing, he erred.
34. The partner provided “numerous reasons” why he could not relocate, including his employment, lawful residence and ties to the UK. The Judge appeared to have ignored this.
35. Further, the evidence was that he had been in the UK for more than 20 years. The new rules themselves recognise that 20 years' residence is worthy of protection. The rules constitute the respondent's policy and they are said to be Article 8 compliant, which means that great weight should have been given to the partner's lawful residence and length of residence of some 20 years plus in the UK.
36. Further, evidence was advanced that any disruption to the IVF treatment at this stage would be undesirable. The Judge failed to give “adequate weight” to this factor.
37. Mr Emezie asked whether it would be reasonable for the sponsor, a British citizen, to relocate. He submitted that the Judge had not properly looked at the partner's interests. He had been in the UK for 22 years. This

is evident from his witness statement before the Tribunal at paragraph 2 of his statement.

38. The witness statement of Mr Olubamidele Akindede referred to the fact that he is a security officer and that he has been resident in the UK since 1992. He is a British national born on 10th October 1965. He confirmed that "I am a Nigeria by heritage (sic)."
39. He has known the appellant for over five years and they decided to marry and live together as man and wife. He refers to his familiarity with Nigerian culture and practice regarding the importance of children in marriage relationships. This could prove traumatic for a married woman who is unable to bear children for her husband (paragraph 6).
40. He also referred to Nigerian culture in the context of reporting a husband to the authorities when there are "problematic marital relations." That is "deeply frowned upon."
41. They have both attended the fertility clinic at Guy's Hospital. They commenced procedures for IVF treatment. When the appellant's previous husband was informed that he was the new partner, the former resumed threats against the appellant. As a result, he "ceased to relate to the appellant for some time" for fear of his own safety.
42. He resumed relations with her in 2010 when they were studying together at the same university. They moved in together in 2012 and they married under Nigerian custom in February 2013.
43. Her application to regularise her stay was made on her behalf via the partner route but the application was refused. She did not have a right of appeal against the decision. She then made a fresh application which was refused but she was given a right of appeal, which is the current appeal.
44. He stated in his witness statement that if his wife were asked to return to Nigeria at this time, he would be devastated. He is concerned about her health.
45. He stated that he would not be able to relocate to Nigeria "due to my commitments here." He has been staying with his wife for over two years. If his wife were asked to return to Nigeria, it would be difficult for her to come back to the UK as he will not meet the income threshold. This will mean that they will be separated indefinitely and that would affect her IVF treatment. He is not in the position to afford two homes, one here and one in Nigeria.

46. On behalf of the respondent, Mr Kandola submitted that the appellant is “barking up the wrong tree.”
47. There is no basis for referring to a reasonableness test when applying the provisions of EX.1. That paragraph applies where 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 and there are insurmountable obstacles to family life with that partner continuing outside the UK.
48. Mr Kandola referred to the findings of the First-tier Tribunal Judge and particularly at paragraph 37, 38, 39 and 46. He was entitled to have regard to the appellant's deception. This constitutes a weighty factor in an Article 8 assessment.
49. The Judge stated that he applied **Gulshan** and went on to consider Article 8 pursuant to the “traditional” five stage test set out in **Razgar**. Long residence in this case was a factor but was not determinative. The finding of deception which has not been challenged, constitutes a factor that would have to be weighed as part of the proportionality exercise.
50. The Judge went on to find that there was no reliable evidence demonstrating that the partner had lost cultural and social ties in Nigeria. The mere fact that he is a British citizen was not in itself capable of constituting a determinative factor.

Assessment

51. I have set out in detail the evidence and the findings of the First-tier Tribunal Judge.
52. On the evidence before him Judge Fox was entitled to conclude that the appellant had obtained leave by deception. Further, proper reasons were given for giving no weight to the social worker's report.
53. In effect the appellant contends that the Judge erred in failing to take into consideration the appellant's partner's Article 8 rights. Mr Emezie submitted that **Beoku-Betts** should have been considered. The criticism is that the Judge failed to take into account that her current partner's length of residency has been over 20 years. That is seen by the respondent as constituting a relevant and significant period for those who have no status.
54. However, the Judge had to consider whether the provisions of EX.1 of Appendix FM were applicable in this case. In that regard, the Judge was required to consider whether there were insurmountable obstacles to family life with that partner continuing outside the UK. That is in contrast to paragraph (a) of EX.1 which applies in the case of an applicant having

a genuine and subsisting parental relationship with a child who is a British citizen or who has lived in the UK continuously for at least seven years, and that it would not be reasonable to expect the child to leave the UK.

55. The Judge has considered and taken account of the sponsor's circumstances and interests in this case. He has noted and considered the sponsor's evidence that he has integrated into UK culture and that his friends and employment are in the UK.
56. He has also had regard to the submission that it would be difficult for the partner to re-integrate into Nigerian society. He had been resident here for more than 20 years. He also had regard to the submission that the appellant and her partner are having IVF treatment. It was submitted that "relocation is unreasonable" and that EX.1 has been satisfied.
57. Judge Fox found that there was no reliable evidence that the appellant would be unable to live in Nigeria in the circumstances. He also had regard to the need to strike a fair balance between the competing interests of the individual and the needs of wider society [43]. He considered that the appellant's partner had no legitimate expectation that the relationship should be facilitated in the UK.
58. Finally, the Judge found that there was no reliable evidence to demonstrate that the partner had lost cultural and social ties with Nigeria. The personal convenience of his residence here is not a matter which causes the balance to fall in favour of the appellant. There was no reliable evidence demonstrating that her partner could not be expected to conduct his relationship with the appellant in Nigeria.
59. The Judge had regard to the evidence from the appellant's partner. It is evident that he is a Nigerian by origin. Furthermore, he stated at paragraph 6 of his witness statement that he is familiar with Nigerian culture and practice, both in the context of children in marriage relations and when it comes to problematic marital relations. He was 27 years old before he came to the UK. He had also stated that he would not be able to relocate to Nigeria on account of his commitments here. He is not able to afford two homes.
60. Although the Judge might have given a more detailed analysis in arriving at his findings and conclusions, he has nevertheless taken into account the appellant's partner's interests, finding that there was no reliable evidence demonstrating that he could not be expected to conduct his relationship with the appellant in Nigeria.
61. The Judge has in effect found that there are no insurmountable obstacles to relocation. In arriving at his conclusion he has considered the

appellant's poor immigration history and personal credibility, stating that it is correct in the circumstances to expect her to return to Nigeria.

62. I find that that was a decision that the Judge was entitled to arrive at on the evidence before him. The findings are not shown to be irrational or perverse.

Decisions

The determination of the First-tier Tribunal Judge did not involve the making of any material errors of law. The decision of the First-tier Tribunal shall accordingly stand.

No anonymity direction made

Signed

Date: 2/10/2014

C R Mailer
Deputy Upper Tribunal Judge