



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/08719/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 24th April 2015**

**Determination Promulgated
On 6th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**EVERISTUS ONYEKA UGOCHUKWU
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr G Harrison, Senior Home Office Presenting Officer
For the Respondent: Mrs A Stull of Lloyds Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appealed against a decision of Judge of the First-tier Tribunal Herwald promulgated on 9th July 2014.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to him as the Claimant.

3. The Claimant is a male Nigerian citizen born 23rd October 1983 who applied for leave to remain in the United Kingdom as the spouse of a British citizen, Sarah Coker, to whom I shall refer as the Sponsor.
4. The Claimant entered the United Kingdom on 20th September 2009 with leave as a Tier 4 Student valid between 21st July 2009 and 22nd September 2010. He was subsequently granted further leave to remain until 30th November 2013.
5. The Claimant met the Sponsor in April 2011 and they started a relationship within two weeks of meeting. They married on 26th November 2013 and have lived together since their marriage. The Claimant's application for leave to remain was made on 30th November 2013.
6. The application was refused on 28th January 2014. It was not accepted that the Claimant satisfied the English language requirements of Appendix FM. It was accepted that he had produced an IELTS certificate with a score of 5.5, but this test was taken on 19th February 2011 and had expired.
7. The Secretary of State considered section EX of Appendix FM. EX.1(a) was not applicable because the Claimant and Sponsor did not have a child, and in relation to (b) the Secretary of State did not accept that there were insurmountable obstacles to family life continuing outside the United Kingdom. It was acknowledged that the Sponsor suffered with chronic pain, but the Secretary of State did not accept that this meant that the couple would be unable to live together in Nigeria. Although relocating to Nigeria may cause a degree of hardship for the Sponsor, the Secretary of State did not accept that there were any insurmountable obstacles that would prevent the relationship from continuing in Nigeria.
8. In relation to the Claimant's private life, the Secretary of State considered paragraph 276ADE and decided that the Claimant had no right to remain in the United Kingdom in reliance upon that paragraph. The Secretary of State considered whether there were any exceptional circumstances which would merit a grant of leave to remain outside the Immigration Rules, and decided that there were not, as the Sponsor's medical condition was not a barrier to family life continuing in Nigeria. There was no evidence to show that the Sponsor would be denied medical treatment outside the United Kingdom.
9. The Secretary of State subsequently issued a further reasons for refusal letter dated 26th June 2014 refusing the application for leave to remain in relation to the financial requirements of Appendix FM. The Claimant had indicated that he earned an annual income of £17,000, and it was therefore found that the annual income threshold of £18,600 was not met. In addition the specified evidence required by Appendix FM-SE had not been submitted.
10. The Claimant's appeal was heard by Judge Herwald (the Judge) on 2nd July 2014. The judge allowed the appeal under the Immigration Rules, finding that although there were no insurmountable obstacles to the couple living in Nigeria, there were

insurmountable obstacles to the Sponsor travelling to Nigeria, because of her medical condition.

11. The Secretary of State was granted permission to appeal, and the appeal came before me on 18th November 2014. I rejected two of the three Grounds of Appeal relied on by the Secretary of State, but found that the judge had erred in law by making findings in relation to the issue of the Sponsor travelling to Nigeria, which were not sustainable and not open to the judge to make on the evidence before him. Medical evidence relied upon by the Sponsor did not support the conclusion that the Sponsor could not travel. I also found that the judge had failed to give adequate reasons for findings, and had not followed the guidance in Budhathoki (reasons for decisions) [2014] UKUT 00341.
12. Full details of the application for permission, the grant of permission by Judge Andrew, and my reasons for finding an error of law are contained in my decision dated 24th November 2014 which was promulgated on 28th November 2014. The decision of the First-tier Tribunal was set aside with no findings preserved. The hearing was adjourned so that further evidence could be given.

Remaking the Decision

The Upper Tribunal Hearing

Preliminary Issues

13. I ascertained that I had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed. I had received the Secretary of State's bundle with Annexes A-B, together with the supplementary refusal letter dated 26th June 2014. I had also received the Notice of Appeal, and the Claimant's bundle which had been before the First-tier Tribunal, comprising 107 pages. In addition I had received the Personal Independent Payment decision dated 11th July 2014 addressed to the Sponsor. I had also received a letter from the Sponsor's general practitioner Dr Bacall dated 4th February 2015.
14. Both the Claimant and Sponsor attended the hearing. I was told that the Sponsor would be called to give evidence.
15. Mrs Stull told me that the Claimant relied upon EX.1(b) of Appendix FM, and in the alternative Article 8 outside the Immigration Rules. I was told that the Claimant had not been able to take a further English language test because his passport had expired and without a valid passport by way of identification, he was not allowed to undertake the test.

Oral Evidence

16. I heard evidence from the Sponsor who adopted her witness statement dated 21st May 2014. In summary the Sponsor confirmed that she was born in the United

Kingdom and had always lived in this country. In 1993 she was involved in a helicopter crash while in the Air Training Corps in which the helicopter crashed into deep water. The Sponsor was the only cadet to survive.

17. The Sponsor suffered broken vertebrae and a broken ankle and burns on 20% of her body. She spent four months in hospital.
18. She has been diagnosed with post-traumatic stress disorder and suffers depression, anxiety, panic disorders and chronic lower back and hip pain.
19. The Sponsor is under the supervision of a trauma therapist, a physiotherapist and an orthopaedic consultant. She takes medication for depression and anxiety disorder.
20. Her condition was aggravated by being involved in a motor vehicle accident in 2011.
21. The Sponsor is currently unable to work because of her disabilities. The Sponsor does not believe it would be possible for her to travel to Nigeria as she has a phobia of flying, and in addition she would not have access to the medical support and treatment that she has in this country. She is not able to be driven for distances further than fifteen minutes, and any jarring causes pain in her spine. The Sponsor's close family are in the United Kingdom.

The Secretary of State's Submissions

22. Mr Harrison had no oral submissions to make but relied upon the reasons for refusal letters.
23. I observed that the refusal letters did not make any reference to the Claimant leaving the United Kingdom to make an entry clearance application from abroad. Mr Harrison indicated that he would not submit that this would be appropriate or reasonable. It was accepted that the Claimant would be able to pass the required English language test without any difficulty, and because the Sponsor now receives a Personal Independence Payment (PIP) the annual income requirement of £18,600 would not have to be met. Therefore if an application was made for leave to remain as a spouse, it was accepted that it would succeed. On that basis, Mr Harrison felt that he could not make a submission that it would be appropriate for the Claimant to leave and make an entry clearance application from abroad.

The Claimant's Submissions

24. Mrs Stull still relied upon her skeleton argument. I was asked to find that the Sponsor's physical and mental health problems meant that there were insurmountable obstacles to family life continuing in Nigeria.
25. I was asked to take into account both the physical difficulties that the Sponsor faced, and also the post-traumatic stress disorder and anxiety from which she suffered. I was asked to find that medical evidence supported the contention that there would be insurmountable obstacles to her living in Nigeria.

26. Mrs Stull accepted that the medical evidence did not prove that the Sponsor would be unable to travel but I was asked to accept the Sponsor's evidence on that issue.
27. I was asked to allow the appeal with reference to EX.1(b). If the appeal was not allowed on that basis, I was asked to then consider Article 8 outside the Immigration Rules, and to find that the Claimant's removal, in the circumstances of this case, would be disproportionate.
28. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

29. I have taken into account all the evidence, both oral and documentary that has been placed before me, and taken into account the submissions made by both representatives. I have considered the evidence in the round, and taken into account that in considering the Immigration Rules, such as EX.1(b) the burden of proof is on the Claimant, and the standard of proof is a balance of probability.
30. It is accepted by both parties that I should consider EX.1(b) which I set out below, together with EX.2;

“EX.1(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.

EX.2

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.”

31. I note that EX.2 was introduced into the Immigration Rules after the First-tier Tribunal decision had been made in this case, and I am also aware that the PIP decision is dated 11th July 2014, which was after the First-tier Tribunal hearing had taken place.
32. There is no dispute that the Claimant and Sponsor are in a genuine and subsisting relationship and that they are married. The issue is whether there are insurmountable obstacles to their family life continuing outside the United Kingdom, in Nigeria, the country of which the Claimant is a citizen.
33. It is accepted on behalf of the Secretary of State, that if an application was made for leave to enter or remain as a spouse, it would succeed.
34. In assessing the issue of insurmountable obstacles, I note that the Sponsor was born in this country and has family members here. She is a British citizen. If she moved to

Nigeria there would be considerable difficulties in language and culture but these alone do not amount to insurmountable obstacles.

35. The Sponsor married the Claimant in the knowledge that he did not have indefinite leave to remain in this country. The couple must have been aware that his immigration status was precarious.
36. I am satisfied that the Sponsor has significant physical disabilities. These are outlined in the report by Mr Doyle a consultant orthopaedic surgeon dated 13th April 2014. Mr Doyle refers to the accident suffered in 1993, and comments that the Sponsor "is probably somewhat more affected than I thought she might be." In page 2 of his report he comments that the Sponsor is "much less than mobile than I was hoping she would be at this stage." He comments that some of her immobility is due to the effect of the fracture to her spine and the fracture to her ankle, and refers also to her depression and weight gain.
37. Mr Doyle notes that the Sponsor has to have the help of the Claimant to get in and out of a motor vehicle, and cannot get out of bed without the Claimant's help. The Claimant is also described as having to carry her shopping. Mr Doyle concludes that the Sponsor is "relatively disabled due to the effects of the injuries she sustained while a member of the Air Training Corps."
38. In relation to the Sponsor's mental health, I have seen a report from Rowene Newton, a group psychotherapist with Greater Manchester West NHS. She also refers to the accident in 1993 and confirms that the Sponsor was first referred in November 2012 having previously been in treatment at Salford Primary Care Psychology Service between November 2011 and March 2012.
39. The Sponsor is described as having suffered a significant traumatic situation having been trapped under water in a helicopter crash. She suffered symptoms of post-traumatic stress disorder for many years until she sought help. The Sponsor is described as lacking confidence, lacking self-esteem, and with chronic depression, chronic anxiety and significant difficulties in her day-to-day functioning. Her treatment began in October 2013 and is expected to be completed in January/February 2016.
40. The conclusion is that if the Sponsor is unable to complete her psychotherapy it would pose a risk to her mental health, her psychological functioning, and she could become a risk to herself in terms of self-harm or suicidal acts.
41. I have also read a letter dated 24th March 2014 from Anthony Schofield a mental health advocate with Mind in Salford, confirming that the Sponsor has been diagnosed with post-traumatic stress disorder, chronic depression, anxiety and panic disorder.
42. The PIP decision dated 11th July 2014 confirmed the Sponsor is entitled to the Daily Living component, and the Mobility component. The decision indicates the Sponsor needs help to prepare or cook a meal and that she needs prompting to manage her

medication, and that she needs assistance in order to bath, toilet and dress. It is accepted that due to her anxiety she needs prompting to be able to engage with other people and it was accepted that she needed prompting to be able to undertake any journey to avoid psychological distress. It was accepted that the Sponsor could stand and then move more than 50 metres, but no more than 200 metres aided or unaided.

43. I find that the Sponsor does have very significant physical and mental disabilities for which she is currently receiving medication and treatment.
44. I conclude that the cumulative effect of this evidence proves on a balance of probabilities that the Sponsor would experience very significant difficulties if she lived in Nigeria because her treatment would be interrupted, and she would not receive the income that she currently receives to assist her in dealing with her disabilities. There may be medical facilities available in Nigeria, but these would be provided at a cost, and the medical facilities would not be at the same level as the Sponsor currently receives in the United Kingdom. I find that it is probable that the Claimant would be able to find employment in Nigeria which would be able to provide some form of accommodation, but given the Sponsor's medical problems and difficulties, I am not satisfied either that the accommodation would be suitable for her, or that suitable medical treatment would be available. I find that the very significant difficulties which would be experienced by the Sponsor, would entail very serious hardship for her.
45. I therefore conclude that this appeal should be allowed with reference to EX.1(b). If the appeal was allowed on this basis, it was indicated on behalf of the Claimant that it would not be necessary for me to go on and consider Article 8 outside the Immigration Rules, and therefore I do not do so.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is allowed under the Immigration Rules in relation to EX.1(b) of Appendix FM.

No anonymity direction was made by the First-tier Tribunal. There has been no application for anonymity and I see no need to make an anonymity order.

Signed

Date 29th April 2015

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

The appeal has been allowed and I therefore considered whether to make a fee award. I conclude that the appeal has been allowed due to additional evidence provided to the Tribunal, which was not provided to the initial decision maker. I therefore conclude that it is not appropriate to make a fee award.

Signed

Date 29th April 2015

Deputy Upper Tribunal Judge M A Hall