Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34777/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th November 2015	**On 11th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS AYODELE EMILY OREUGA
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Marian Owoyinfa, Representative
For the Respondent: Ms S. Sreeraman, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of both Nigeria and the United States. She was born on 6th April 1930 and is now 85 years old. She appealed against a decision of the Respondent dated 12th August 2014 to refuse to vary leave to remain in the United Kingdom and to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. Her appeal was allowed at first instance by Judge of the First-tier Tribunal Stokes sitting at Taylor House on 24th March 2015. For the reasons which I

set out in more detail below, I have set that decision aside on the grounds of a material error of law and have reheard the substantive appeal. Although this matter came before me initially as an appeal by the Respondent I therefore continue to refer to the parties as they were known at first instance for the sake of convenience.

2. The Appellant had visited the United Kingdom on a number of occasions as a visitor from 1980 onwards complying with her visa conditions on each occasion. On 12th September 2013 she last entered the United Kingdom using her United States passport with a visit visa valid for six months. Shortly before that visa was due to expire she made an application on 25th February 2014 for indefinite leave to remain in the United Kingdom outside the Rules on the grounds that the refusal of the application would breach this country's obligations under Article 8 of the European Convention of Human Rights (right to respect for private and family life).

3. The basis of the Appellant's application was that she was suffering from Alzheimer's disease and also diabetes. She required the constant care of her five children living in the United Kingdom and required daily doses of insulin. She had been a widow for the last 24 years. A daughter lived in the United States but was working full-time and was not in a position to look after the Appellant. If returned to the United States the Appellant would not be able to afford the required level of care needed and there would be an adverse impact upon her children remaining in the United Kingdom. She had developed an emotional attachment and dependency on her five children which amounted to exceptional and compassionate circumstances.

The Refusal

4. The Respondent refused the application taking into account a letter received dated 4th February 2013 from the Appellant's daughter who resided in the United States, Ms Funke Toyin-Lugbile ("Funke"). Funke had stated that the Appellant had been residing with her in the United States and if the Appellant were granted leave to remain it was her intention to visit the Appellant in the United Kingdom at intermittent periods to provide respite care for her siblings the Appellant's five UK based children. The Appellant could access appropriate medical treatment and support care in the United States. Whilst the Appellant might have to pay a percentage of the costs it was noted that the Appellant's five children in the United Kingdom had stated that they were willing to pay for the Appellant's financial needs without resorting to public funds.

5. Whilst Funke would not be able to provide the Appellant with day-to-day care due to her own full-time employment she could provide the Appellant with emotional and psychological support and the Appellant could be visited by her family based in the UK. The Appellant would not be living alone in the most exceptional circumstances if she were to return to the United States. There would be no breach of Article 3 (prohibition of torture) as the Appellant would be able to obtain suitable medical care in

the United States. The Appellant's adult children could not be considered as the Appellant's partner(s) for the purposes of Appendix FM. As the Appellant did not have a child or partner in the United Kingdom Appendix FM did not apply. Turning to the issue of the Appellant's private life the Respondent stated that the Appellant could not satisfy paragraph 276ADE of the Immigration Rules as she had not lived continuously in the United Kingdom for at least twenty years. The Appellant had resided in Nigeria and the United States for the majority of her life and there would not be significant obstacles to her integration into the country to which she would have to go if required to leave the United Kingdom.

The Decision at First Instance

6. The Appellant attended the hearing before the Judge with the support of members of her family and gave very limited evidence. The principal oral testimony came from five of the Appellant's children who attended and whose evidence was summarised in the determination. The only medical evidence produced to the Judge were two letters from a general practitioner at the South Street Medical Centre dated 17th January and 6th February 2014 which stated that the Appellant was registered with that GP practice. The letters confirmed that the Appellant was suffering from Alzheimer's disease and was very forgetful as her memory was very poor. The Judge noted at paragraph 23 that both Alzheimer's disease and diabetes were incurable but whereas diabetes could be controlled Alzheimer's was a progressive disease although not necessarily terminal.

7. The Judge noted that after the Appellant's husband died in December 1989 the Appellant had taken over his petrol station business and had been relatively well-off. She then sold the business and used the proceeds to build herself a house which she still owned. She travelled regularly between Nigeria, the United Kingdom and the United States visiting her children. The Appellant had lived with Funke in the United States for many years and successfully applied to become an American citizen in 2009.

8. In his findings the Judge first dealt with the question of whether the Appellant could return to Nigeria. The Judge quoted from the Country of Origin Information Report on Nigeria June 2013 re-issued February 2014 noting the limitations on health provision and the difficulties faced by females in Nigeria. The Appellant would encounter problems as a lone woman and as someone with a mental health condition which influenced her behaviour. She therefore met the requirements of paragraph 276ADE(vi) if she were to be returned to Nigeria that is that there would be very significant obstacles to her integration into Nigeria.

9. At paragraph 29 the Judge turned to the alternative of the Appellant returning to the United States. The Appellant had produced no evidence to show she could not return and continue to live with her daughter Funke despite her diagnosed medical conditions. There was no evidence to show she would be unable to access appropriate medical care in the United States. She would have the support of Funke and her family for both the

Appellant's emotional and medical needs. The children in the United Kingdom had previously contributed towards the Appellant's financial support but the Judge found they could continue such support despite their denials to him. I pause to note here that that remark at paragraph 29 of the determination sits uneasily with the Judge's earlier statement at paragraph 21 that no issues of credibility had been raised by the Respondent or before him. The Judge did not accept that the Appellant's medical conditions met the high threshold for Article 3 on medical grounds. Save in exceptionally compelling cases the humanitarian consequences of returning a person to a country where his or her health was likely to deteriorate terminally did not place the returning state in breach of Article 3. The Judge concluded at paragraph 29 that the Appellant did not meet the requirements of paragraph 276ADE(vi) if she were to be returned to the United States.

10. The Judge proceeded to consider the matter outside the Rules under Article 8. The Appellant had an established family life with her daughter Mrs Kola-Ojo with whom she had lived for the past eighteen months. She was totally dependent on Mrs Kola-Ojo for her physical and day-to-day care and as a sufferer from Alzheimer's was a vulnerable person. At paragraph 35 the Judge quoted the evidence he had received from Mrs Kola-Ojo that there had been no prior warning signs of the Appellant's mental condition and that Funke in the United States had noticed nothing amiss. Alzheimer's had been diagnosed two months after the Appellant had arrived and had deteriorated over the last few months. The Judge noted the care arrangements made by the family for the Appellant and also noted that the Appellant was at present receiving free NHS care.

11. At paragraph 41 the Judge considered Home Office guidance to caseworkers where an applicant does not meet the requirements of the Immigration Rules. Leave can be granted outside the Rules where exceptional circumstances apply. The Judge found that the Respondent's decision to refuse leave to remain outside the Rules would result in unjustifiably harsh consequences. As the Appellant's condition deteriorated further the toll would be borne by Funke and her relatively young family if the Appellant were to return to the United States. Removal would adversely impact on the lives of the Appellant's children remaining in the United Kingdom to the extent that it rendered such removal disproportionate. He allowed the appeal.

The Onward Appeal

12. The Respondent appealed against this decision arguing that the Judge had misdirected regarding Section 117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 which provided that little weight should be given to a private life established by a person at a time when their immigration status was precarious. The Appellant's presence in the United Kingdom was always precarious she had temporary leave to enter and after that was an overstayer. The Judge's statement at paragraph 40 of the determination that the Appellant had "established her family and

private life whilst she was living here lawfully so weight can be placed on it" was incompatible with the clear wording of the section. The Judge appeared to have allowed the appeal on the basis that the Appellant's children in the United Kingdom would be upset if the Appellant were being cared for effectively in the United States. This could not possibly amount to compelling circumstances. It appeared that the Appellant had deliberately come to the United Kingdom to overstay thereby avoiding the need to make an application which would not have succeeded under Appendix FM or FM-SE. There was no reference in the determination to the cost to the public purse of the Appellant's continued residence and care in the United Kingdom which the Judge was required to engage with.

13. The Respondent relied on the Upper Tribunal decision of **Akhalu [2013] UKUT 400** at which it was said:

> "The consequences of removal for the health of a claimant who would not be able to access equivalent healthcare in their country of nationality as was available in this country are plainly relevant to the question of proportionality. But when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interest in removal".

14. The application for permission to appeal came on the papers before First-tier Tribunal Judge Nicholson on 1st September 2015. In granting permission to appeal he noted that nothing in Section 117B(4) and (5) stated that weight should be placed on family or private life simply because a person had been in the United Kingdom lawfully. On the contrary the Appellant's private life was arguably established at a time when her immigration status was precarious given the Tribunal's finding in **AM [2015] UKUT 260** (that a person's immigration status is precarious if their continued presence in the United Kingdom will be dependent upon their obtaining a further grant of leave). In those circumstances the Judge was arguably obliged by Section 117B(5) to give the Appellant's private life little weight.

15. Following that grant of permission directions were sent to the parties by the Upper Tribunal that they should prepare for the forthcoming hearing on the basis that if the Upper Tribunal decided to set aside the determination of the First-tier Tribunal any further evidence including supplementary oral evidence that the Upper Tribunal might need to consider if it decided to remake the decision could be so considered at that hearing.

The Error of Law Stage

16. For the Respondent it was argued that it was unclear why the Judge thought there were compelling circumstances outside the Rules which

would permit the appeal to be allowed under Article 8. There were no obstacles to reintegration into the United States the Appellant was a US citizen and had family there. There was no evidence the Appellant would be unable to access medical facilities in the United States and would continue to receive financial support from her UK based family. There was no evidence of harsh circumstances. What had happened was that the Judge had conducted a free-standing Article 8 assessment. There was a clear mistake when the Judge had said that the Appellant's Article 8 claim was strengthened by reason of her lawful residence. The Appellant was in receipt of public funds.

17. For the Appellant it was argued that there were five children based in the United Kingdom but only one in the United States. Funke had explained why she could not handle her mother in the United States given the diagnosis of dementia. The Appellant had been coming to the United Kingdom for the last 30 years and there were significant obstacles to her to return to Nigeria or the United States. At this point I observed to the Appellant's representative that the Judge had found against the Appellant under paragraph 276ADE(vi) finding that there were no significant obstacles to the Appellant returning to the United States. There had been no cross appeal by the Appellant against that part of the Judge's decision.

18. The Appellant's private and family life had been built up over the years whilst she has been travelling between the United States, Nigeria and the United Kingdom. The case of **AM (Malawi)** was not relevant to this Appellant. The Appellant's medical condition had changed within the time she had been in the United Kingdom. The Appellant had been unable to answer any questions beyond her name at the hearing before the Judge at first instance. The Judge had gone through the **Razgar** checklist and had done justice to the case because of the exceptional circumstances of the matters in question. Even if the Appellant did not qualify under the Rules the appeal was properly allowed outside the Rules under Article 8.

19. I considered the submissions and announced my decision that I found a material error of law in the Judges' determination. The Judge had decided that the Appellant could not succeed within the Immigration Rules and had therefore proceeded to consider Article 8 outside the Rules. As such he had to find that there were compelling reasons why the appeal should be so allowed. There were difficulties in the case for the Appellant. The first was that her private life had been built up at a time when her status here was precarious and thus little weight could be afforded to it. The Judge was plainly wrong in stating that weight could be attached to a private life established while a person was lawfully present. In this case the Appellant had had leave as a visitor and thereafter 3C leave. The Judge's misunderstanding of the effect of Section 117B appears to have significantly affected his proportionality assessment.

20. The proportionality assessment was also flawed in that the Judge omitted to take into account a number of relevant factors such as the burden on public funds which the Appellant represented and the fact that the

Appellant could not succeed under the Rules a s the Judge had found. It is difficult to see what weight could reasonably be attached to the views of the Appellant's United Kingdom based children in the circumstances of this case. Their preference that the Appellant should stay in the United Kingdom rather than return to a country of which she was a citizen could only carry little weight in the balancing exercise. These errors amounted to material errors of law leading to the determination to be set aside. I indicated that and that I would proceed to rehear the appeal bearing in mind the directions that the parties should be ready to give oral testimony. As the Appellant's UK based children were present in court it was possible to proceed there and then with the rehearing. The witnesses were able to supplement the earlier evidence given at first instance. In particular they could explain what NHS care the Appellant was or was not receiving at the present time.

The Substantive Rehearing

21. I first heard evidence from the Appellant's daughter Mrs Kola-Ojo who stated that when the Appellant arrived in 2013 the Appellant had become very confused. Because Mrs Kola-Ojo worked in a hospital she knew what dementia was and the family had taken the Appellant to a GP. Her mother was doubly incontinent. The family paid privately for the Appellant's care. Her mother was now very confused calling her daughter her sister and her son her brother. The Appellant had been discharged from NHS care and was being coped within the family. She the witness did everything for the Appellant with her brother and sisters. The Appellant's family in the United Kingdom were better placed than the Appellant's grandchildren in the United States to look after the Appellant.

22. In cross-examination Mrs Kola-Ojo conceded that the family were not paying for the Appellant's diabetes treatment for which the Appellant was receiving prescriptions. Funke had come over from the United States in February 2015 and then again later on this year leaving two weeks ago. She came for a month each time. It would affect the jobs of the UK based family if they went over to the United States to give Funke respite care for the Appellant. Funke had no insurance to cover the Appellant's care. It was put to the witness that if there were costs of care in the United States the witness and the other UK based children could contribute. Mrs Kola-Ojo replied that the Appellant was better off in the United Kingdom than in the United States because they could see her any time. She accepted that her mother had a house still in Nigeria that people were living in although no rent was being charged for that.

23. Her mother had come over for a family wedding but had not returned because she had started behaving peculiarly at the wedding. There was no evidence of dementia before the Appellant came to the United Kingdom. I invited the witness in the light of that remark to comment on a statement made by her sister Modupe Orenuga dated 24th February 2015 which had stated "Over the past five years, but more importantly the past two years I have witnessed my mother's health deteriorate rapidly as a

result of her unfortunate diagnosis of dementia added with type 2 diabetes". That statement appeared to suggest that the Appellant's dementia had been known for a considerable period of time before the Appellant made her last visit to the United Kingdom. The witness replied she did not know why her sister had said that.

24. As the maker of the statement referred to above was present in court I invited the Appellant's representative to call Ms Modupe Orenuga to give evidence on of how long the Appellant's diagnosis of dementia had been known. Ms Modupe Orenuga stated that what was put was a mistake in her statement for which she apologised. She had been writing the statement at night. No-one else had referred to the Appellant suffering from dementia for the last five years. It was just an error on her part. She confirmed the contribution towards the Appellant's care that she made and that the family did not want the Appellant to go to the United States they wanted her to stay here. Last December the witness had visited Funke in the United States to help with the household.

25. In cross-examination she said that the Appellant was diagnosed with dementia once here. The Appellant had displayed unusual behaviour at the wedding. It was quite disturbing. The Appellant went to a hospital but the witness did not know if the clinic had given a diagnosis. The only evidence was the letter from the GP of 6th February 2014 (see above). They had not been asked to provide any other medical evidence. They had also found out about the diabetes in the United Kingdom.

Closing Submissions

26. In closing the Presenting Officer relied on the refusal letter. The Appellant had equally strong ties to the United States as she did to the United Kingdom indeed she was a United States citizen and could avail herself of all the facilities there. She was part of her daughter Funke's household. What this case was about was a preference for the Appellant to remain in the United Kingdom. There was no evidence adduced to show that the Appellant's health would deteriorate rapidly if she were returned to the United States. Nor was there evidence that respite care would be unavailable. Although the Appellant's daughter Funke held down two jobs she had nevertheless been able to come to the United Kingdom on two occasions in 2015 staying for a month each time. There was no explanation why the five UK based children could not offer Funke respite care when travelling to the United States. There were weighty factors that went against the Appellant remaining in the United Kingdom. There were public interest considerations since the Appellant had been availing herself of public funds. She was not financially independent. There was little weight to be placed on her private life as her stay here had been precarious. The Appellant's removal would be proportionate to the legitimate aim pursued.

27. In closing for the Appellant reliance was placed on the skeleton argument in the Appellant's bundle which had contended that the Appellant met the

requirements set out in paragraphs E-ECDR2.4 and 2.5 of Appendix FM. Although the Appellant had not made a valid entry clearance application in this category her circumstances had changed in the course of the last two years when her health had considerably and suddenly deteriorated. Paragraph E-ECDR2.4 stated that an applicant must show that as a result of age, illness or disability they require long-term personal care to perform everyday tasks. They must be unable even with the practical and financial help of the Sponsor to obtain the required level of care in the country where they were living because it was not available and there was no person in that country who could reasonably provide it or it was not affordable.

28. The Appellant was at present living with one of her daughters in Greenwich, London her daughter was currently working part-time and was able to offer care for her mother. Funke was not in a position to look after the Appellant. If returned to the United States the Appellant would be deprived of care provided at present by her five children in the United Kingdom. People with dementia improved if they were actively involved with their loved ones. If allowed to remain in the United Kingdom the Appellant would not become a burden on the public health system the care would be shared amongst the family. That would not be the situation if the Appellant returned to the United States. It would be far too expensive to obtain the same level of care in America that the Appellant was currently receiving in the United Kingdom. Consideration ought to be given to the impact that removal of the Appellant would have on her five UK based children. In the two years she had resided in the United Kingdom the Appellant had developed an emotional attachment and dependency on those five children. The skeleton argument also referred to an unreported decision of a deputy in the Upper Tribunal involving a different unrelated Appellant, the country in question in that case being Canada.

29. In oral submissions it was argued that Funke had made a statement saying she could not look after the Appellant. The Appellant was not having a negative impact on public funds. The Tribunal should take into account the fact that this was an exceptional case and it should be looked at favourably. This was an old lady who had diabetes and had developed dementia. The illness attacked her memory. The only thing which could help her was her family network which was to be contrasted with what was available to her in the United States. It was relevant to consider the instructions given to caseworkers by the Respondent regarding the grant of leave to remain outside the Rules. This case had been shown to be exceptional and the appeal should be allowed.

Findings

30. The Judge in this case found that the Appellant could not meet the Immigration Rules. Although an argument was made that the Appellant could succeed under the Rules for a dependent relative, an application under that section of Appendix FM could only be made if the Appellant was

outside the United Kingdom. I agree that given the Appellant's condition it appears that she does need assistance with everyday tasks but the Appellant would also have to have shown that suitable care was unavailable in the United States and there was no objective material to establish that (see paragraph 32 below).

31. I do not accept the evidence I have been given that the Appellant's condition was only diagnosed two months after she arrived in the United Kingdom or how long the family have known about the Appellant's condition. It is clear from the evidence of Modupe Orenuga that the family had known for a considerable period of time that the Appellant was not well. I do not accept the explanation that that statement was made late at night as being one that I can place any weight on. It only emerged before me and no attempt had been made previously to amend the statement. There is a dearth of medical evidence as to when the Appellant's medical condition was first diagnosed in this country and the oral testimony given by both witnesses to me was itself somewhat confused. It may well be that the family decided that better arrangements could be made for the Appellant if the burden of caring for her was shared between five relatives in the United Kingdom rather than one relative in the United States supplemented by visits of the others to the United States. That however is merely a preference of the Appellant's relatives not a significant factor which weighs in the proportionality exercise.

32. The Appellant was unable to satisfy the requirement of paragraph 276ADE(vi) for the reasons given by the Judge. Adequate medical treatment was available to the Appellant in the United States. The cost of such treatment could be afforded with contributions from the Appellant's UK based children which the Judge found as a fact would be made available. No evidence was produced to the Judge and no evidence was produced to me to show that either medical care was unavailable in the United States or would be at such a prohibitively expensive cost that it could not be afforded. Thus even if the Appellant were in the United States and making an application to come to the United Kingdom from there, she would not be able to succeed under E-ECDR2.5 in any event.

33. The case fell to be decided outside the Immigration Rules and as such the Appellant had to show that there were compelling circumstances why her case should be allowed. The situation might have been different if it could be shown that she was unable to return to the United States just as she was unable to return to Nigeria. However for the reasons given by the Judge at first instance the Appellant was far from being able to show that.

34. Given the Appellant's age and the care she was receiving from her family there would be an interference with the Appellant's private and family life by requiring her to return to the United States. That interference would be pursuant to the legitimate aim of immigration control since she had come as a visitor in circumstances where I find that more was known about her medical condition at the time she arrived than the witnesses were

prepared to say. The Appellant appears to have access to substantial NHS care very shortly after first arriving, care to which she was not entitled.

35. The question therefore is whether the interference caused by requiring the Appellant to return to the United States is proportionate to the legitimate aim pursued. On the Respondent's side of the scales is the fact that the Appellant's private life in this country has been built up at a time when her status here was precarious. I disagree with the submissions made that the case of **AM (Malawi)** is not relevant, it is particularly applicable in this case as the Judge granting permission also thought (see paragraph 14 above). The Appellant has been and continues to be a burden on public funds. Not only was she diagnosed with and given treatment from her GP for her Alzheimer's condition but she continues to receive treatment for her diabetes on the NHS. On the Appellant's side of the equation is the fact that at her age and in her medical condition there will be disruption to her if she were required to travel to the United States.

36. I do not accept the evidence that adequate day-to-day care is unavailable to the Appellant in the United States. Although the Appellant's daughter Funke is in employment, she is also able to take lengthy leaves of absence from that employment to come to the United Kingdom to assist with the care of her mother. I see no reason why such an arrangement could not be put into effect the other way with the Appellant's UK based children, who also visit the United States, doing so and at the same time assisting Funke. In those circumstances there is in truth very little on the Appellant's side of the equation which can outweigh the public interest in the Appellant's removal.

37. The Tribunal is very mindful of the difficulties which arise in Article 8 health cases. The point was concisely set out in the case of **Akhalu** which I have quoted above (see paragraph 13). The Appellant has only been in the United Kingdom for a relatively short period of time during which she has had access to NHS facilities to which she was not entitled. She is a citizen of the United States, a country with one of the best healthcare systems in the world which she would be able to access. She has a family network in the United States just as she has in this country. The preference of her United Kingdom based children for the Appellant to remain with them is not I find a significant factor to be weighed in the proportionality exercise. In my view any interference caused to the Appellant's private and family life in this country by her removal is proportionate to the legitimate aim pursued. I dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have remade the decision by dismissing the Appellant's appeal against the Respondent's decision to refuse to vary leave.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 2nd day of December 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 2nd day of December 2015
.....
Deputy Upper Tribunal Judge Woodcraft