Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00532/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 February 2016	**On 23 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOSEPHINE AWUNLIKA ONWOCHEI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr T Bahja, Counsel, instructed on direct access

DECISION AND REASONS

Introduction

1. For ease of reference, I shall refer to the parties as they were before the First-tier Tribunal. The Secretary of State is the Respondent, and Ms Onwochei is once more the Appellant.

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge G Clarke (the judge), promulgated on 7 August 2015, in which he allowed the Appellant's appeal on Article 8 grounds. That appeal to the First-tier Tribunal was against the Respondent's decision of 5 December 2014 to remove the Appellant from the United Kingdom by way of directions under section 10 of the Immigration and Asylum Act 1999.

3. The Appellant is a Nigerian citizen who has been in this country since 2008. Although she arrived with leave, the majority of her time here since has been spent as an overstayer. Her claim was based squarely upon her fairly long-term relationship with Mr O'Connell, a British citizen.

The judge's decision

4. In a well-structured decision the judge sets out the evidence and the respective arguments of the parties. In considering the Article 8 within the framework of the Immigration Rules, the judge finds that because of an accepted outstanding NHS debt of £5,951.36, the Appellant was precluded from succeeding under Appendix FM to and paragraph 276ADE of the Rules (by virtue of section S-LTR.2.3 of Appendix FM and paragraph 276ADE(1)(i)).

5. The judge goes onto consider the claim outside of the Rules. She finds that the Appellant has family members in this country and Nigeria. She finds that the Appellant was in a genuine and subsisting relationship with Mr O'Connell and that they had cohabited for some years. Family life is found to exist, as it private life. In assessing proportionality, the various factors in section 117B of the Nationality, Immigration and Asylum Act 2002 are considered. It is concluded that, despite some points tending the other way, it would by unreasonable for Mr O'Connell to move to Nigeria, given his ties in the United Kingdom (in particular his continued employment at the age of seventy-six).

6. For the purposes of the appeal before me the final passage in paragraph 64 of the decision is relevant:

> "The Respondent states that the Appellant could make an out of country application for entry clearance but given the existence of the NHS debt it is unlikely that such an application would succeed. I also remind myself of the provisions of *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 and particularly their Lordship's comment, "Better surely that in most cases the Article 8 claim be decided once and for all at the initial stage. If it is well-founded, leave should be granted. If not, it should be refused." In all the circumstances, I find that it is unreasonable to expect Mr O'Connell to relocate to Nigeria."

7. The judge goes on to conclude that in his view the Appellant's case was "exceptional", and could be distinguished from that of Mrs Agyarko (see R (on the application of Agyarko and Others) [2015] EWCA Civ 440). In so dong, reliance is placed on the findings made in paragraph 63 of the judge's decision.

8. As a result of the findings and conclusions reached, the appeal was allowed (presumably on the basis of the relationship with Mr O'Connell only).

The grounds of appeal and grant of permission

9. The concise grounds assert that the judge erred in considering the possible outcome of an entry clearance application, and that he also erred in his approach to Chikwamba.

10. Permission to appeal was granted by First-tier Tribunal Judge P J M Hollingworth on 10 December 2015.

The hearing before me

11. Mr Whitwell commented that there were apparent shortcomings in the judge's decision on matters not specifically raised in the grounds. However, there was no attempt to seek to amend the grounds.

12. Mr Whitwell's core submission was that the judge had erred in the manner set out in the grounds. The judge should not have taken the possibility of an entry clearance application being refused into account (relying on SB (Bangladesh) [2007] EWCA Civ 28). The decision of the Upper Tribunal in R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM – *Chikwamba* – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) was relied on before the judge, but he had failed to consider it. There had been no evidence from the Appellant to show that returning to Nigeria to make an application would entail disproportionate consequences. There is no legal test of whether a "sensible reason" existed for making such an application but in any event, there were such reasons on the face of the evidence: the Appellant was an overstayer and had a significant NHS debt. I was also referred to paragraph 30(c) of Hayat [2012] EWCA Civ 1054.

13. Mr Bahja relied on his detailed rule 24 response. He submitted that the judge had dealt with the Chikwamba point properly in light of RP (Zimbabwe) [2008] EWCA Civ 825. The Presenting Officer had only raised the issue in submissions before the judge. There was no error in this case.

Decision on error of law

14. Although in large part the judge's decision is sound, I find that he has materially erred in respect of the entry clearance and Chikwamba issues.

15. There is nothing wrong with the judge's findings and conclusions on the Appellant's relationship with Mr O'Connell and her other personal circumstances. These have not been challenged and were in any event clearly open to the judge. In addition, whilst perhaps a touch generous, the conclusion that it would be unreasonable for Mr O'Connell to move to Nigeria has not been challenged either and again it was open to him.

16. The difficulty lies in the passage from paragraph 64 quoted earlier. I am satisfied that the issue of whether an application by the Appellant from abroad could be made with the support of Mr O'Connell was raised in questioning before the judge. This is clear not only from the Record of Proceedings but also what is stated in paragraph 55 of the decision itself. I am satisfied too that the matter was relied on by the Presenting Officer in submissions, with specific reference to the case of Chen (again having regard to the Record of Proceedings). Therefore, whilst I accept that the point had not been stated in the reasons for refusal letter or at the outset of the hearing, it was properly raised both in evidence and submissions. Given this and the evidence from Mr O'Connell that he would readily support an entry clearance application it was incumbent upon the judge to address the issue in adequate detail.

17. The first point of substance is that relating to the prospects of an entry clearance application. With reference to the contents of Mr Bahja's rule 24 response, I acknowledge the *obiter* comments of Sedley LJ at paragraph 13 of RP (Zimbabwe). However, as I have said already, the issue of making an application from abroad was a real one, and could not simply be "brushed" aside by the judge.

18. In addition, SB (Bangladesh) may not lay down an unmoveable proposition of law, but its *ratio* has never been disapproved (having been cited in Chikwamba). In the present case it appears to me from a fair reading of paragraph 64 as though the judge was relying on the fact that an application from abroad would probably fail as being a factor in the Appellant's favour when assessing proportionality. In effect, he was saying that the weaker the Appellant's case for re-entry might be (due to the NHS debt), the stronger the Article 8 claim became. This was impermissible and an error of law.

19. The second, and interconnected point, relates to Chikwamba. The quotation from this case by the judge does not reflect the true effect of Chikwamba. There is no rule of law to the effect that there is a presumption against the possibility or expectation of making an application from abroad, or that the particular facts of a case are irrelevant. In my view, the judge has failed to engage with a fact-sensitive approach to the Chikwamba question. There is no reference to factors in favour of the Appellant returning to Nigeria to make an application. There is no reference to any evidence (such as there was) militating against this course of action. Further, the reference at the end of the paragraph to the unreasonableness of Mr O'Connell emigrating to Nigeria is rather missing the point of the Chikwamba principle. Finally, the absence of any consideration of the Chen case (and the references therein to Hayat) is unfortunate, and further indicates that the whole issue has not been adequately considered. Overall, there is another error of law here.

20. Are the errors material? In my view they are. First, the obstacles in the path of an entry clearance application should not have been taken into account. Second, on the face of the evidence there were arguably "sensible reasons" for the Appellant to be expected to return to Nigeria and make an application from there. Third, the reference to exceptional factors in paragraph 65 do not relate to anything connected to the Chikwamba point (in terms of difficulties with the Appellant going to Nigeria

to make an application). Further, I find it difficult to understand how the judge distinguishing the Agyarko case from the present with reference to the findings in paragraph 63 when these are all completely adverse to the Appellant.

21. For the reasons set out above, the decision of the judge is set aside.

Remaking the decision: the evidence and submissions

22. Both representatives were agreed that if I found material errors of law to exist I should remake the decision on the evidence before me. This I now do.

23. I take into account the bundles from the Respondent and the Appellant (paginated 1-144). Mr Whitwell provided me with a document setting out visa processing times for the Lagos post, and I have regard to this.

24. Both representatives made submissions at the hearing on the hypothetical basis that I found errors of law to exist. Mr Bahja stated that an entry clearance from Nigeria would probably fail because of the NHS debt. There was, he said, no possibility of that debt being paid off prior to any application from abroad. The Article 8 claim should be dealt with in the United Kingdom.

25. Mr Whitwell submitted that there was no evidence on whether or not the NHS debt could be paid off. The Appellant has family in Nigeria and was educated there. Mr O'Connell would support any entry clearance application. There were sensible reasons to require the Appellant to return to Nigeria and make an application.

Remaking the decision: findings and conclusions

26. The judge's findings as to the Appellant's connections to Nigeria, her relationship with Mr O'Connell, his personal circumstances, and the unreasonableness of him moving to Nigeria are preserved. On this basis, I find the following facts:

    a) the Appellant's mother and sister live in the United Kingdom and she has four brothers in Nigeria;
    b) she has no accommodation of her own in Nigeria;
    c) she has an NHS debt of £5,951.36;
    d) she has been an overstayer since approximately 2010;
    e) she used a false Belgian passport to obtain employment here;
    f) her relationship with Mr O'Connell is genuine and subsisting;
    g) they have been cohabiting since 2009;
    h) Mr 'Connell continues to work and earns approximately £26,500 per annum;
    i) the couple are both healthy;
    j) it would be unreasonable for Mr O'Connell to move to Nigeria permanently;
    k) he would support an application by the Appellant from Nigeria.

27. In addition, I accept that the visa processing times set out in the document provided by Mr Whitwell are accurate: 88% of application will be processed within sixty days.

28. There is no actual evidence as to the ability of the couple (through Mr O'Connell and/or other relatives) to repay the NHS debt immediately or in the near future.

29. It is common ground that due to the NHS debt the Appellant cannot satisfy the Rules as they relate to Article 8. The appeal therefore fails on this basis.

30. I find that the Appellant has a private life in the United Kingdom encompassing her relationships with Mr O'Connell, her mother and sister. I find that she had family life with Mr O'Connell.

31. The Appellant's removal from the United Kingdom would constitute an interference of sufficient gravity such as to engage Article 8.

32. I turn to proportionality. Bearing in mind the factual matrix of this case, the relevant case-law already cited in my decision, and section 117B of the 2002 Act, I find that it would not be disproportionate for the Appellant to leave or be removed from the United Kingdom and, if she so wished, make an entry clearance application from Nigeria. I base this conclusion on the following matters.

33. First, there is of course a genuine and subsisting relationship with a British citizen who cannot reasonably be expected to move to Nigeria permanently. This is a factor in the Appellant's favour.

34. Second, there is no evidence from the Appellant to show this course of action would have consequences of particular gravity for the couple (see paragraph 42 of Chen). It is likely that a decision on any application would be forthcoming within a fairly short timeframe.

35. Third, the Appellant has a poor immigration record, having overstayed for a significant period and engaging in illegal employment with the use of a document to which she was not entitled. In addition, she has a not insignificant NHS debt, a matter that relates to the maintenance of the economic wellbeing of the United Kingdom. These factors combine to constitute fact-sensitive "sensible reasons" for expecting the Appellant to return to Nigeria. This is consistent with the Chikwamba principle.

36. Fourth, Mr O'Connell will support an application from abroad.

37. Fifth, the Appellant has family remaining in Nigeria to assist her (there being no evidence to the contrary).

38. Sixth, the Appellant has failed to satisfy the Rules as they relate to Article 8. That failure is certainly not on a merely 'technical' basis (i.e. a lack of status only): the NHS debt goes to the issue of suitability as recognised in the Rules and approved by Parliament. This is an important factor against her.

39. Seventh, the Appellant's position in this country has always been either precarious or unlawful.

40. Eighth, the Appellant has been maintained by Mr O'Connell and does speak English. However, these are in effect neutral matters.

41. Last but by no means least, the strength of the public interest in maintaining effective immigration is undimmed by any factors in the Appellant's favour.

42. The appeal therefore fails on free-standing Article 8 grounds as well.

Anonymity

43. No direction has been sought and none is appropriate.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by dismissing the appeal under the Immigration Rules and on human rights grounds.

Signed Date: 8 March 2016

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date: 8 March 2016

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal