Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19680/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 7 September 2015	**On 26 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O O
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Fijiwala, Senior Home Office Presenting Officer
For the Respondent: Ms S Jahi, Counsel, instructed by Nathan Aaron Solicitors

DECISION AND REASONS

1 The present appeal is brought by the Secretary of State for the Home Department against the decision of the First tier Tribunal (Judge Behan) dated 17.3.15 allowing OO's appeal, on human rights grounds, against the Respondent's decision of 10.14.14 to administratively remove him to Nigeria. In this decision, I shall refer to the parties as they were identified before the First tier, that is that OO is the Appellant, and the Secretary of State for the Home Department is the Respondent.

2 The Appellant had made an application for leave to remain on family life grounds, being in a relationship with TO (née A), a British national, and being married to her since 15.7.11. In his application for leave to remain, he had also argued that his removal would amount to a breach of his rights under Article 3 ECHR on the grounds that there would be inadequate treatment available for him in Nigeria for his HIV infection and kidney disease.

3 Findings made by the Judge include the following:

(i) although the Appellant claimed to have entered the United Kingdom in 2002, the Appellant was lying about the circumstances of his arrival, and the earliest that the Judge was satisfied the Appellant was present in the UK was in 2005 (based on medical records) [30] and [46];

(ii) the Appellant has several serious medical conditions [32];

(iii) the Respondent accepted that the Appellant and TO are in a genuine and subsisting relationship [33],

(iv) their relationship was started at a time when the Appellant was in the UK illegally [35];

(v) the evidence of the Appellant and TO was not entirely frank in all matters and they both exaggerated the claimed position of having no relatives in Nigeria to help them; the Appellant would be able to stay with his sister or his mother-in-law temporarily whilst he found other accommodation [35];

(vi) the Appellant did not satisfy the requirements of leave to remain under paragraph 276ADE (private life) [37];

(vii) under Appendix FM, there were a number of reasons why the Appellant would need to satisfy the requirement of Section Ex1(b) to demonstrate that there were insurmountable obstacles to family life with his partner continuing outside the UK: the Appellant was an overstayer (and thereby did not meet the immigration status requirement E-LTRP.2.2(c)) [13]; the Appellant had not provided evidence as to his satisfaction of the financial eligibility criteria which met the requirements of Appendix FM-SE [44]; and the Appellant had not provided a relevant English language certificate [45];

(viii) TO (who is also from Nigeria) has considerable knowledge of Nigerian culture, having lived there for many years, has family there and she has two properties in the UK that she could sell or rent out to provide an income; there were no insurmountable obstacles to the Appellant continuing his family life with his wife outside the UK [38]; it would be reasonable for TO to return to Nigeria with the Appellant [47];

(ix) any interference caused to the family life existing between TO's adult son, the Appellant and TO caused by the Appellant's removal would not be disproportionate [47];

(x) in respect of the Appellant's claim that his removal would be in breach of Article 3 ECHR on health grounds, the Judge noted that the Appellant no longer pursued that argument before her [17];

(xi) further, in relation to the claim that the Appellant's removal would breach Article 8 ECHR on health grounds, the Judge held that the Appellant had not provided any detailed evidence to support his claim that, even with the help of his wife, he would not be able to obtain treatment in Nigeria [43]; neither party had produced any detailed evidence about what moving to Nigeria would really mean for the Appellant's treatment [49];

(xii) in any event, a high test applies to appeals based on medical conditions alone both as regards Article 3 and Article 8, and even if the Appellant could not access treatment in Nigeria and thus his life would be considerably shortened, he would not meet the test [43] (NB both parties before me agreed that the word 'not' had been inadvertently omitted by the Judge in that sentence before 'meet the test', and that it was clear, contrary to an observation made by Judge Levin in granting permission to appeal, that the Judge had not intended to allow the appeal under Article 3 ECHR);

(xiii) the weight to be given to the Appellant's family life with TO was substantially reduced by the fact that the relationship was entered into at a time when the Appellant had no leave to remain in the UK [46];

(xiv) the Appellant's removal has the potential to separate him from his family for an indeterminate period or require his family to move to Nigeria to be with him [41];

(xv) the Appellant ought to have produced evidence about how long it takes for spousal entry clearance applications from Nigeria to be processed - no such evidence had been provided [49];

(xvi) some matters set out in s.117B Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') reduce the weight to be given to the Appellant's family life; some of them reduce the weight to be given to the need for immigration control [42];

(xvii) a factor that was significant was the extent to which the Appellant meets the criteria in the rules for leave to remain as a spouse; although the relevant evidential requirements were not met, the Appellant would have little difficulty in satisfying the maintenance criteria in Appendix FM [44];

(xviii) the Appellant speaks English - this factor reduces the weight the Judge was require do give to the need for immigration control [45];

(xix) it was reasonable to suppose that the removal of the Appellant had the potential to interrupt his treatment and monitoring [49];

(xx) any interruption to the Appellant's medical treatment may have potentially serious effects [50];

(xxi) it was reasonable to suppose that entry clearance applications in Nigeria may take some weeks [49].

4 The Judge's ultimate reason for allowing the appeal on human rights grounds [52] is contained in the following passage at [50]:

> "Having balanced the factors in this case I find the combination of the fact that the substance of the criteria in the immigration rules are met, which has the effect of reducing the need for immigration control, and that any interruption to the appellant's medical treatment has potentially serious effects leads me to be satisfied that the need for immigration control is outweighed by the effect of removal on the appellant's family and private life."

5 The Respondent sought permission to appeal to the Upper Tribunal against the Judge's decision on grounds, in summary, that:

(i) it was for the Appellant to demonstrate that there would be some lengthy delay in obtaining entry clearance and that he would not be able to obtain the medication he requires in Nigeria, or would be unable to purchase a sufficient supply in the UK before returning to Nigeria; there was a paucity of evidence as to whether any short or long term stay in Nigeria would in fact adversely affect the Appellant's health;

(ii) the Judge could not assume that there would be such a detriment, and had not given proper or adequate reasons as why there would be an adverse affect on the Appellant's health.

6 Permission to appeal was granted by Judge Levin on 19.5.15. It is now common ground (and contrary to Judge Levin's reading of the Judge's decision) that the Judge did not intend to, and did not, allow the appeal under Article 3 ECHR at [43]. However, Judge Levin observed at [3]:

> "It is arguable that the Judge's conclusion in para 49 of her decision to the affect that the Appellant's HIV condition tipped the balance of proportionality in his favour was irrational as it runs counter to the Judge's earlier finding at para 38 that it would not be unreasonable to expect his wife to return to Nigeria with him and to her observations and findings between paras 39 and 47 with reference to Article 8 generally."

7 I heard submissions from both parties. These are recorded in the record of proceeding. There is no Rule 24 response from the Appellant and no appeal brought by him, for example, on the grounds that the Judge erred in law in dismissing the appeal under immigration rules. The findings of fact made by the Judge are unchallenged.

Discussion

8 I find that there is a material error of law in the Judge's decision. There is no actual finding at [50] that the Appellant's removal would on a balance of probabilities result in an interruption of the Appellant's treatment for his HIV infection and kidney disease. At [49] the Judge merely finds that the Appellant's removal has the 'potential' to interrupt his treatment and monitoring, without any further assessment as to likelihood of that potential scenario arising. There was therefore no finding of fact as to what (with reference to the issue set out by the Judge in the last sentence of

[50]), the *effect* of removal would be on the Appellant's family and private life, so as to outweigh the need for immigration control.

9 There was therefore no adequate finding of fact supporting one of the two factors which combined to result in the appeal being allowed at [50] (the other being the Judge's apparent finding that the substance of the criteria in the immigration rules being met had the effect of reducing the need for immigration control).

10 If the Judge is deemed to have held that the mere potential (of unknown probability) of the Appellant's treatment being interrupted represented an adequate basis (in combination with the second factor mentioned above) for finding removal to be disproportionate, this was an error of law. The merely hypothetical occurrence of an event is not an adequate basis for such a finding, especially given the Judge's own observations at [43] that the Appellant had not provided any detailed evidence to support his claim that, even with the help of his wife, he would not be able to obtain treatment in Nigeria; at [49] that neither party had produced any detailed evidence about what moving to Nigeria would really mean for the Appellant's treatment [49]; and also at [49] that the Appellant ought to have produced evidence about how long it takes for spousal entry clearance applications from Nigeria to be processed, but had not done so.

11 I find that the making of the Judge's decision involved the making of a material error of law; that there was no relevant finding of fact supporting one of the two reasons advanced by the Judge for allowing the appeal.

12 I set the decision aside. The error identified above is a sufficient basis to do so; one of two reasons for allowing the appeal involved the making of an error of law. I also doubt that the judge was entitled to treat the importance of maintaining immigration control as diminished merely on the basis that the Appellant appeared to meet some of the eligibility criteria for leave to enter under Appendix FM (the other issue identified at [50]). However, having already had grounds to set the decision aside, it is not necessary for me to rule that her approach to that issue involved the making of an error of law, but I will re-visit that issue when re-making the decision, below.

Re-making

13 At the hearing, I heard submissions from the parties as to re-making the decision. I re-make the decision as follows.

14 I apply the findings of fact made by the Judge as set out in paragraph 3(i)-(xiii) above, none of which are challenged or vitiated by any error of law.

15 Although there was no Rule 15(2A) application from the Appellant, I take into account two documents submitted at the hearing before me:

(i) A discharge summary from Newham University Hospital dated 12.8.15 indicating that TO had attended at the emergency department that day complaining of a numb sensation to her upper lip on the right side which had

subsided over 30 minutes to an hour, and a mild headache. She had had a similar episode in July. She was assessed, and discharged the same day with advice that her GP consider medication for migraine.

(ii) An appointment letter dated 17.8.15 for TO to see a Dr O'S of Newham University Hospital at the 'Health Central (Outpatient Department)'. No other details were given as to what the appointment was for.

16 I am entitled, indeed obliged, when determining the proportionality of the proposed removal, to consider the extent to which the Appellant fails to meet the immigration rules for leave to remain as a Partner under Appendix FM. There are four reasons:

(i) the Appellant is an overstayer (and thereby does not meet the immigration status requirement at E-LTRP.2.2(c));

(ii) the Appellant has not provided evidence as to his satisfaction of the financial eligibility criteria meeting the requirements of Appendix FM-SE;

(iii) the Appellant has not provided a relevant English language certificate;

(iv) there are no insurmountable obstacles to family life continuing outside the UK.

17 The fact that TO had, shortly before the hearing before me, experienced two episodes of symptoms which appear to be suspected to be migraine, makes no material difference to the assessment that there are no insurmountable obstacles to family life continuing outside the UK. Although migraine, if serious and frequent, can be debilitating, the evidence I have been shown does not establish that TO has any significant problem with that condition, if she has it at all.

18 Where the immigration rules are not satisfied, compelling circumstances must exist to outweigh the public interest in the maintenance of immigration control: *SSHD v SS (Congo) & Ors* [2015] EWCA Civ 387, paras 33 and 40. Further, I must have regard to the considerations in s.117B NIAA 2002. Also in the present case, it is suggested that the requirement for the Appellant to leave the United Kingdom to apply for entry clearance is unreasonable and disproportionate. Both parties referred me to paragraph 24 of *Agyarko & Ors, R (on the application of) v SSHD* [2015] EWCA Civ 440, in which the Court of Appeal accepted when considering Section EX.1(b) under the Rules, that the 'insurmountable obstacle' criterion is not merely a factor to be taken into account; however, in the context of making a wider Article 8 assessment outside the rules, it is a factor to be taken into account, not an absolute requirement. Also, in *Chen, R (on the application of) v SSHD* (Appendix FM – Chikwamba – temporary separation – proportionality) (IJR) [2015] UKUT 189 (IAC), I note that "There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate."

19 Applying s.117B NIAA 2002 in the present case, I find that:

(i) The maintenance of effective immigration controls is in the public interest (s.117B(1)).

(ii) Even if the Appellant can speak English and is (by being supported by his wife) financially independent, he does not therefore gain a positive right to a grant of leave to remain from either s117B (2) or (3) *(AM (S.117B)* [2015] UKUT 260 (IAC)). Also, *Forman (ss 117A-C considerations)* [2015] UKUT 412 (IAC) provides that "The public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified."

(iii) Little weight is to be given to the Appellant's relationship formed with his wife, as it was established at a time when the Appellant was in the United Kingdom unlawfully (s.117B(4)).

20 Further, although the First tier Judge held at [44] that:

> "This appeal cannot be granted on the basis the appellant meet the immigration rules and a near-miss principle does not apply to the assessment of article 8 claims, but the extent to which he meets the rules is relevant to the weight to be given to he need for immigration control"

I fear that the second part of that sentence offends against the authority of the Supreme Court in *Patel & Ors v SSHD* [2013] UKSC 72 at [56]:

> "Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised "near-miss" or "sliding scale" principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart also of article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit."

21 I do not find the fact that the Appellant might, if he organises his paperwork appropriately, satisfy the substantive and evidential requirements regarding financial eligibility and English language for an application for entry clearance or leave remain as a partner under Appendix FM is a factor which, by itself, militates against the importance of maintenance of immigration control.

22 As to the issue of whether the Appellant ought to be expected to leave the UK to make an application for entry clearance from Nigeria, I refer to *Chen,* para 39:

> "In my judgement, <u>if it is shown</u> by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would <u>be significant interference with family life by temporary removal</u>, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family

> life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was "precarious". In other words, in the former case, it would be easier to show that the individual's circumstances fall within the minority envisaged by the House of Lords in Huang or the exceptions referred to in judgments of the ECtHR than in the latter case. However, it all depends on the facts." (Emphasis added)

And the headnote of that decision provides:

> "1. ... In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40."

23 I return to the issue of what evidence there was before the First tier (there being no difference in that evidence before me) of the likelihood of a significant interference with family life (or indeed any other protected right) arising from a requirement that the Appellant leave the United Kingdom to make an application for entry clearance. The Respondent referred to evidence in her refusal letter dated 10.4.14 that all the medications that the Appellant requires (listed in a letter from Kings College Hospital discussing the Appellant's HIV infection and kidney disease) are available in Nigeria. The Appellant, as noted by the Judge, did not provide any country information seeking to contradict that proposition. The only document in the Appellant's bundle on that issue, at page [63], entitled 'Vanguard: Nigeria: HIV/AIDS - Stigma, Discrimination and Helplessness of Victims' does not discuss the availability of medication at all - but discusses in rather general terms that stigma exists in Nigeria for those known to be infected with HIV. The Appellant's skeleton argument prepared for the First tier accepts at paragraph 7 that '... it is accepted that there may be treatments available in Nigeria for HIV, but likewise there is also a huge stigma attached to HIV."

24 The Appellant has known for at least 10 years that he has HIV. His wife is aware of his illness. He is well accustomed to being HIV positive. There is stigma attached to being HIV positive in the UK. The Appellant asked that the First tier decision be anonymised so that his HIV status would not become widely known. I find that the existence of stigma attached to persons with HIV in Nigeria is not a factor which results in it being unreasonable to require the Appellant to return to Nigeria for the purpose of making an application for entry clearance.

25 As observed by the Judge, the Appellant has not provided any detailed evidence to support his claim that, even with the help of his wife, he would not be able to obtain treatment in Nigeria; there is no detailed evidence about what moving to Nigeria would really mean for the Appellant's treatment; there is no evidence about how long it takes for spousal entry clearance applications from Nigeria to be processed. Applying the FtT's unchallenged findings, he has accommodation available to him on arrival in Nigeria.

26 Applying *Chen*, I find that the Appellant has failed to provide adequate evidence that a temporary separation will interfere disproportionately with his protected rights.

There are no compelling circumstances outweighing the public interest in the maintenance of immigration control. The Appellant's removal would not amount to a disproportionate interference with his rights under Article 8 ECHR.

Decision

27 (i) The decision of the First tier involved the making of an error of law

(ii) I set aside the decision of the First tier.

(iii) I remake the decision, dismissing the Appellant's appeal on human rights grounds.

28 The direction for anonymity made by the First tier Tribunal continues to apply. No report of these proceedings shall directly or indirectly identify the Appellant or any member of his family. This direction applies to both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings.

Signed:

Deputy Upper Tribunal Judge O'Ryan

Date: 24.1.16