Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01358/2018

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 22nd July 2019	**On 05th August 2019**

Before

Upper Tribunal Judge Chalkley

Between

OSARETIN [O]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Timpson of Counsel, instructed by A B James Solicitors
For the Respondent: Mr Tan, the Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria and he was born on 14th August, 1979. The appellant made application for recognition as a refugee but the respondent decided on 22nd December, 2017 that he did not qualify. The appellant appealed and his appeal was heard by First-tier Tribunal Judge, Judge Siddiqi in Manchester on 25th March, 2019.

2. The judge dismissed the appellant's asylum appeal and that dismissal has not been the subject of any challenge. The judge similarly dismissed the humanitarian protection appeal and that is not challenged either.

3. In considering the appellant's human rights appeal the judge heard evidence that the appellant had been married in the United Kingdom to a lady who on 4th April 2019 had been granted indefinite leave to remain. The judge dismissed the appellant's human rights appeal and the grounds of challenge are quite brief and suggest that the judge failed properly to consider the application of paragraph EX1(b) and EX2, in that the judge did not use language that even appropriated to the language used in EX1 and EX2.

4. EX1 and EX2 of course deal with the question of "insurmountable obstacles". The appellant's wife had only just shortly before the hearing been granted settlement in the United Kingdom and at paragraph 9 of the determination the judge noted that the Presenting Officer agreed that the question of the appellant's wife's grant of leave be treated as a new matter, since she had been granted leave on 4th April, 2019 and not at the date of the Secretary of State's decision. At paragraph 30 of the determination under the heading "Appendix FM" the first sentence says "It is not in dispute that the appellant does not meet the requirements of the Rules as a partner as he is an overstayer". The appellant could not, therefore, at any stage meet the requirements of the Immigration Rules.

5. It was forcefully argued by Mr Timpson that the judge had failed to consider the wording of EX1 and EX2 and had she done so she might very well have found that there were insurmountable obstacles to family life with the appellant's partner continuing. EX2 says

> "For the purpose of paragraph EX1(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 appellant or partner".

6. In paragraph 30 the judge noted that the appellant's partner argued that she could not live with her husband in Nigeria and he would not be able to live in St Lucia. Quite why she would not be able to live in Nigeria is not made clear. It was submitted that the parties therefore met the requirements of EX1. The judge made it clear that she was not persuaded by that argument. The judge reminded herself of Sections 117A to Section 117B of the 2002 Act and noted that the appellant and his wife had been undergoing IVF treatment over a number of years. Tragically the appellant's wife has suffered seven miscarriages over the years. The judge accepted that the appellant's wife had given birth to twins who were stillborn. They are buried in Liverpool and of course the parties have an attachment to the grave. The judge took that into account but found that it would be disproportionate to allow the appellant to remain in the United Kingdom, solely for the purpose of enabling him to visit the grave. In

paragraph 37 the judge found that there was no reason at all why the appellant should not return to Nigeria and make an application for settlement from there. Thus not leapfrogging applicants who properly make their settlement applications from abroad. The judge said

> "In assessing the reasonableness of the appellant being separated from [his wife] whilst he makes such an application I take into account that the appellant may only be returning to Nigeria for a short period of time. The appellant's scenario can be distinguished from *Chikwamba and the Secretary of State for the Home Department* [2008] UKHL 40. I remind myself that in *Agyarko* [2017] UKSC 11 the Supreme Court held that if an applicant was otherwise certain to be granted leave to enter then there might be no specific interest in his or her removal even if they had been residing in the UK unlawfully. I am not persuaded that the appellant's application is certain to be granted at this time, taking into account that he has not established this nor was it considered by the respondent in the asylum decision. I am also reminded that in *R on the application of Chen v the Secretary of State for the Home Department (Appendix FM Chikwamba temporary separation proportionality) IJR* [2015] UKUT 00187 (IAC) it was held that it will be for an individual to place before the Secretary of State evidence that temporary separation would interfere disproportionately with his projected rights. I consider that the appellant has not established that any temporary separation would interfere disproportionately with his protected rights".

7. Mr Timpson argues that if the judge had properly considered EX1 and EX2 she might very well have come to a different conclusion in respect of Article 8, because she would have focused then on whether or not there was going to be insurmountable obstacles 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 appellant or partner.

8. With very great respect to Mr Timpson I believe that there is no material error of law in this determination and the judge has quite properly considered whether there would be any disproportionate interference with the appellant's Article 8 rights and concluded that there would not be. Mr Tan confirmed today that were the appellant to return to Nigeria and make an application for leave to return as a spouse his application would be dealt with ordinarily in the course of twelve weeks. It might be unpleasant for the parties to be separated for that length of time, but it cannot by any stretch of the imagination amount to an insurmountable obstacle to the family life with the partner continuing.

9. The parties hold the key to their future in their own hands. They could easily overcome any hardship that they might suffer as a result of being separated by the husband making an application for settlement to return to the United Kingdom. I concluded that on the evidence before the judge, the judge was entitled to find as she did and that her determination does not contain any material error of law. I uphold her decision. This appeal is dismissed.

Richard Chalkley
Upper Tribunal Judge Chalkley

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

Richard Chalkley
Upper Tribunal Judge Chalkley

Dated 26 July 2019