



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04214/2020**

THE IMMIGRATION ACTS

**Heard at Field House
On the 16th May 2022**

**Decision & Reasons Promulgated
On the 06th October 2022**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Oghenerukevwe Joan Akoreh

Appellant

And

Secretary of State for the Home Department

Respondent

**For the Appellant: Mr Nwaekwu, Moorhouse Solicitors
For the Respondent: Ms Lecointe, Senior Home Office Presenting
Officer**

DECISION AND REASONS

1. The Appellant is a national of Nigeria born in 1981. She seeks leave to remain in the United Kingdom on Article 8 grounds. She wishes to remain here to be with her British husband.

Case History

2. This history of this matter is as follows. Ms Akoreh has lived in the United Kingdom since 2009 when she was given leave to enter as a student. Although she was subsequently granted further leave under

the Points Based System she has not had any valid leave to remain since 2013.

3. In June 2017 Ms Akoreh met and embarked on a relationship with Mr Andrew Anderson, a British national. They were married in September 2019. On the 16th December 2019 she applied for leave to remain. The Secretary of State refused her application on the 11th March 2020.
4. The Appellant duly appealed, but the pandemic intervened and it was not until the 8th April 2021 that her case was heard.
5. The matter in issue before the First-tier Tribunal was whether the Secretary of State's decision to refuse to grant the Ms Akoreh further leave to remain in the UK as the partner of a British national amounted to a disproportionate interference with her family life. The Secretary of State accepted that she and her husband were in a genuine and subsisting relationship but having regard to the requirements set out in Appendix FM did not accept that she met the requirements for leave on that basis. Her problem was that she was an overstayer. This meant that she could not meet the 'immigration status eligibility requirement' at E-LTRP.2.1. Paragraph EX.1 provided that she would nevertheless be granted leave if there were "insurmountable obstacles" to her family life continuing elsewhere, ie Nigeria, but this was found not to be the case and leave was accordingly refused.
6. By a decision dated the 26th April 2021 the First-tier Tribunal (Judge MM Thomas) took a different view, and allowed the appeal.
7. Judge Thomas heard evidence from Ms Akoreh and her husband Mr Andrew Otis Anderson. They told her that there were five obstacles to them taking up life in Nigeria together. First, they were undergoing fertility treatment in the UK; second, he runs an engineering company here; third, he has recently recovered from cancer and requires ongoing access to the NHS services that he is entitled to; fourth, he requires a carer and fifth they have no family or other connection in Nigeria to whom they could turn for support.
8. The Tribunal did not consider that the first reason was a good one, since the evidence did not demonstrate that the couple were far advanced into treatment or that they could not access the same in Nigeria. Nor was the second, since on his evidence Mr Anderson left much of the day to day running of his business to an employee. The Tribunal did not accept that the Appellant was required as a carer for her husband in the UK, nor that her entire family had left Nigeria to move to Canada. All of these matters went against her.
9. The Tribunal then turned to consider the question of Mr Anderson's health. He had blood pressure problems, vertigo, varicose veins and a detached retina. More significantly he was still under review because in 2015 he had been diagnosed with, and treated for, prostate cancer.

The Tribunal found Mr Anderson's evidence about his medical conditions credible and unembellished. He told the Judge that about two days per week he suffers from such severe pain and weakness in his legs that he is unable to function. He can't go to work and suffers low mood and feels "very poorly". He has ongoing problems with his sight and mobility due to blurred vision and vertigo. The supporting documentation established that as a result of all of this Mr Anderson requires continuing review and medication for several ailments. He has a good therapeutic relationship with his GP. His conditions are presently stable because he is able to access the NHS: this access is not dictated by his financial circumstances. That would not be the case in Nigeria:

"I accept that in Nigeria to obtain this level of medical health treatment would be expensive. It has not been challenged that Mr Anderson would not be in a financial position to pay for it himself"

10. On this narrow basis, the appeal was allowed 'under the rules'. For good measure the Tribunal went on to conduct a *Razgar* proportionality balancing exercise 'outside of the rules', which it found in Ms Akoreh's favour for the same reason.
11. The Secretary of State sought, and was granted, permission to appeal against the decision of Judge Thomas.
12. The matter came before me on the 21st December 2021. By my decision dated the 2nd January 2022 I held, for the following reasons, that the First-tier Tribunal had erred in its approach to the proportionality balancing exercise it was required to undertake:

"This was not, in general terms, a decision favourable to the evidence presented on behalf of Ms Akoreh. As I set out above, the First-tier Tribunal rejected all of the arguments advanced on her behalf bar one. Set in that context, it must be assumed that the Tribunal considered the "credible and unembellished" evidence about Mr Anderson's medical issues to be compelling. Whilst the Tribunal did not find him to be in need of any urgent treatment, it did accept that he has "long term health problems that require continuing review and the ability to access medical treatment if required": if his condition is presently stable, he has the NHS to thank for that. I am satisfied that these findings were open to the Tribunal on the evidence before it, and I did not perceive {SPO} Mr Tan to argue otherwise. I am further satisfied, having had regard to the evidence about the extent of Mr Anderson's need, that the absence of such treatment and monitoring could as a matter of law amount to an "insurmountable obstacle": if he were unable to access such care in Nigeria he would not be able to live there. It would follow that there would be an insurmountable obstacle to family life continuing in that country, and the requirements of EX.1 would be met.

There does not appear to have been any great debate that the kind of check-ups and interventions required by Mr Anderson are,

as a matter of fact, available in Nigeria. The crux of this appeal lies in the Tribunal's finding [at §49]: "it has not been challenged that Mr Anderson would not be in a financial position to pay for it himself". Mr Tan makes two points about this finding, and they are both made out.

The first is that it represents a misunderstanding about the Secretary of State's position, which before me she states in certain terms: there was no concession made regarding medical treatment in Nigeria. The Secretary of State's entire case was that there were no obstacles to this family life continuing elsewhere, and in those circumstances it could not logically be inferred that she accepted that Mr Anderson was unable to pay for required medical treatment. The 'reasons for refusal letter' expressly states that he would be able to get the treatment he needs in Nigeria, and if he couldn't, he would always be entitled to come back to the UK and resume treatment on the NHS. I can see nothing in the note of the hearing to indicate that the HOPO on the day argued otherwise.

The second point is that the finding itself is at odds with findings elsewhere in the decision. The Tribunal finds that Mr Anderson owns his own engineering company but because he has an employee he can trust to run it, he only need actually go in about 50% of the time. The Tribunal further found that if returned to Nigeria, the Appellant would be able to work, and Mr Anderson could continue to collect his pension as if he were in the UK. Mr Tan rightly submits that the decision contains no analysis of whether these income streams would be sufficient to meet the costs of the monitoring etc required by Mr Anderson.

I am therefore satisfied that the decision must be re-made insofar as it relates to Mr Anderson's medical needs. His evidence was found to be wholly credible and in those circumstances there is no need for him to be called again, unless of course there has been some development in his condition since the hearing before Judge Thomas in April 2021. In this regard I note that Mr Anderson's witness statements go in to some detail about the extent to which he relies on his wife to assist him during periods of severe pain, particularly at night. Notwithstanding the Tribunal's rejection of the submission that she is required as a full-time carer, a finding unchallenged and so preserved, those passages in the statements will nevertheless be pertinent to matter (iii) below. The parties are expected to be prepared to address the following matters at the final hearing:

- (i) The rough cost of the treatment/monitoring required by Mr Anderson if he were to be returned to Nigeria
- (ii) Whether he can afford it
- (iii) Would it be disproportionate to expect the Respondent to return to Nigeria in order to make an application for entry clearance?

13. Having regard to those matters in issue I granted the parties leave to submit any further evidence/submissions going to those issues.
14. A further hearing took place at Field House on the 16th May 2022. I heard oral evidence from Mr Anderson and submissions from both representatives. The parties have my apologies for the length of time it has taken for this decision to be promulgated.

The Re-Made Decision

15. As I note above the operative legal framework is Article 8. There being no dispute that the Appellant has a family life in the UK, or that the decision to refuse her leave interferes with that family life, the only matter in issue is whether that decision is a proportionate response to the need to maintain a fair immigration system. Appendix FM of the Immigration Rules must be my starting point, since that has been approved by parliament as appropriately reflecting where the balance should be struck.
16. It is not in dispute that the Appellant cannot succeed under the ‘five year route to settlement’ envisaged in those rules, because she cannot meet the eligibility requirement at E-LTRP.2.2 (ii) (b), since she remains in the UK in breach of the immigration rules.
17. The only way in which she can succeed under the rules is by meeting the requirement at EX.1 (as elaborated by EX.2) of Appendix FM:

EX.1. This paragraph applies if ...

(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.

18. In Agyarko v Secretary of State for the Home Department [2017] UKSC 11 the Court found the test of “insurmountable obstacles” to derive from the jurisprudence of the European Court of Human Rights. It is a stringent test to be interpreted in a sensible and practical way rather than as referring solely to obstacles which make it literally impossible for the family to live together in the applicant’s country of origin.

19. The Appellant submitted an updated witness statement for the purposes of this appeal. She states that although her husband is now thankfully clear of cancer he continues to attend hospital every six weeks. He suffers from vertigo, high blood pressure, blurry vision and pain in his leg. He suffers from low mood - he continues to attend counselling services at St Georges Hospital in London, and she accompanies him to these every six weeks.
20. The Appellant's main concern is the cost of living in Nigeria compared to the family income, and especially the high costs of monitoring her husband's condition. She has read an article online by a Nigerian doctor and one in a reputable newspaper and extrapolating from the figures they give she estimates they will need between £400 and £600 per month just on his healthcare. This would not leave them enough to live on. She has not included in that figure the medication that her husband needs, or things like the counselling he receives at the Survivor Clinic.
21. Mr Anderson adopted his undated witness statement. He first met his wife in June 2017; they were living together from August of that year and were married in September 2019. He describes her as his "rock and foundation". She has been his "backbone" and has supported him through the most depressing period of his life - when he has been ill and going through the pain of cancer. Mr Anderson speaks in detail of the pain that he and his wife have suffered at the loss of several pregnancies through miscarriage. They would very much like to have a child together and are seeking fertility treatment.
22. Mr. Anderson explains that since he has recovered from prostate cancer he has continued to have physical problems. He still suffers from recurring pain, particularly at night. When he has had a bad night, his wife gets him up early, helps him to bathe and cleans his soiled clothing. She will often be up two or three times during the night on such occasions. Mr. Anderson speaks of being afraid that if she is removed to Nigeria he will be left to die alone.
23. In his oral evidence Mr. Anderson confirmed that his current income from his company is about £650 per month. He produces a P60 showing that last year he earned £7800. It used to be more but things have got worse since the pandemic. He still has two members of staff who need to be paid so he draws down less. Mr Anderson was candid in his oral evidence that there is nothing preventing his wife from working should the two of them relocate to Nigeria. It is simply his position that at his age, and his state of health, he is unable to contemplate such a move. He does not know the country: "it just isn't feasible"
24. Both parties referred me to country background material dealing with the availability of healthcare in Nigeria. As before Judge Thomas, there was no attempt to persuade me that there is *no* treatment available for prostate cancer in Nigeria, should Mr Anderson's illness

re-occur, which is obviously a significant concern for the couple. It is however submitted on the Appellant's behalf that it may not be available for Mr Anderson, since the costs are high: see for instance CPIN *Nigeria: Medical treatment and healthcare*:

5.1.4 The MedCOI CFS 2017 noted that 'most public and private hospitals do not stock cancer drugs. Patients have to buy them from private pharmacy stores.'

5.1.5 The same MedCOI CFS 2017 citing various sources stated: 'The cost of chemotherapy and radiotherapy is high and in most cases not affordable to the majority of patients... 'Patients that require surgery spend on the average N 15,000 [£27,104] on lumpectomy, while mastectomy cost on the minimum about N 50,000 [£89,105]. Twenty sessions can cost up to N 100,000 [£178,106] and above.

25. The article referred to by the Appellant in her statement is 'Addressing the high cost of cancer treatment in Nigeria' from the Guardian Nigeria, and published on the 5th February 2018. The information in this article tallies with what is said in the CPIN in reporting that cancer treatment is unavailable in Nigeria for all but the very wealthy. As a result, death rates from the disease are 80%: one of the worst outcome rates in the world. Care is not available everywhere, requiring patients to travel; treatment machines are often broken and medications are prohibitively expensive. The article also states that the Ministry of Health has launched a Cancer Control Plan with the aiming of reducing the incidence and encouraging testing. The piece by the doctor focuses on the cumulative costs of treatment for a woman with breast cancer. Again it reports the extremely high costs of treatment, and that the survivor now pays N50,000 for check-ups every 4-6 weeks. The writer concludes that without health insurance, even a doctor or university professor would be left facing a lifetime of poverty after paying for treatment.
26. A letter dated 27th January 2021 from Dr Gulbash Singh, the family GP, repeats the information provided in the witness statements about Mr Anderson's conditions. The pain in his leg can be so severe that it leaves him immobile and his wife needs to provide personal care at that point.
27. There is no dispute as to the nature of the family life in this case. It is accepted that this is a genuine and subsisting marriage and having had the opportunity to hear directly from Mr Anderson myself I am in no doubt that he very much loves his wife, and that he relies on her heavily to support him cope with the physical and emotional aftermath of suffering from a serious illness. It was obviously not easy for Mr Anderson to give the deeply personal evidence that he did. As he put it to me, he is someone who has always paid his way, who has not only worked himself to pay taxes and contribute to this country, but he is someone who has also created a business which gives others employment and stability. He appeared somewhat at a loss to

understand why anyone should object to him being able to live in his own house with his wife, for whom he is going to provide, asking nothing of the state. He told me that he has “waited a long time to find her” and asked me to make a decision that would allow them to remain together.

28. The insurmountable obstacles test in EX.1 is a stringent test, although it is not one that must be interpreted to mean that there are literally obstacles that cannot be overcome. As EX.2 sought to explain post-*Agyarko*, it is a test that requires the applicant, in the alternative, to demonstrate that there would be “very significant difficulties which... would entail very serious hardship for the applicant or their partner”.
29. There are certainly elements of this case that weigh in the Secretary of State’s favour when considering that test. There is nothing preventing the Appellant from working in Nigeria, a country with which she is obviously very familiar. As Ms Lecointe pointed out, none of the medical evidence about Nigeria could be determinative since there are daily flights between Nigeria and the UK and it would always be open to Mr Anderson to return to the UK to access check ups and treatment on the NHS, to which he will continue to be entitled. His fears about not getting affordable, or effective, healthcare in Nigeria do not appear to have taken that matter into account. I accept that. I also note that I am entirely unable to square the Appellant’s estimate of £400-£600 per month on check up costs for her husband in Nigeria, given his present needs.
30. That said I have given careful consideration to the practical consequences for this couple should they relocate to Nigeria. Mr Anderson is not of Nigerian heritage himself. He has never been to the country, and as was clear from his evidence, does not relish the prospect of going to live somewhere he is completely unfamiliar with. He is 63 years old and has always lived in the UK. Letters in the bundle from his family show that he has a close and ongoing relationship with his adult children and their families who live here. His business and home are here. He has suffered from persistent low mood since he became ill, and has come to rely on the support of a survivors group that he attends at the hospital where he was treated, including receiving counselling every six weeks. Although now clear of cancer, he continues to experience several physical ailments: vertigo, high blood pressure, blurry vision due to a detached retina and pain in his leg. Having heard his evidence I am quite satisfied that the cumulative pressure of these factors mean that Mr Anderson is not going to move to Nigeria, whatever the outcome of this appeal is.
31. That reality is not however something that can inform my analysis of whether there would be very significant difficulties for the couple if they *were* to relocate. It is that notional scenario that the rules require me to evaluate. In doing so I first observe that it does not seem that Mr Anderson is going to get any better. I accept that he is incredibly

anxious about the possibility of moving to Nigeria and that he is likely to find that move very stressful. Should the Appellant be compelled by their circumstances to have to go out to work that is likely to compound those feelings, since he has become accustomed to having her around to assist him when the pain in his leg and other ailments effect his mobility. Should she feel constrained to remain at home with him (as she is at present) obviously that would have serious ramifications for their finances.

32. This brings me back to the point raised by the Secretary of State on appeal. Much of the focus in this appeal has understandably been on Mr Anderson's fears that his cancer will re-occur. This has given rise to a debate about costs of treatment. I am satisfied that the costs of cancer treatment in Nigeria are, on the evidence before me, extremely high, and unaffordable for this couple. I am also satisfied that Ms Lecointe's neat solution - flying home as and when required - is also something that could be prohibitively expensive, given that return flights to the UK start in the region of £700 and go up to £2000 at busy times like Christmas. For a family on a current income of £7800 per annum this is a lot of money. Even if the Appellant were to find work this additional income would likely be eaten up by the costs of relocation, renting accommodation etc. If Mr Anderson's cancer were to return I have no doubt that they would find themselves facing very serious hardship. This is all, however, something of a red herring.
33. Mr Anderson is not currently suffering from cancer. All of the debate about costs and accessing care is therefore entirely hypothetical. He is however currently suffering from a multitude of other ailments, both physical and psychological, for which he needs regular monitoring and interventions where necessary. It does not seem, on the evidence before me, that any of those conditions are likely to improve. They are making him anxious and depressed and increasingly reliant on his wife. He will be isolated from his family in the UK, his business and friends. If she goes out to work by day it is difficult to see how his isolation, anxiety and depression will not be made worse. Taking all of these factors in the round I have concluded that there would be very serious hardship for Mr Anderson if he had to relocate to Nigeria. The test at EX.1 is therefore met and the appeal must be allowed.

Decisions

34. The decision of the First-tier Tribunal is set aside to the limited extent identified above.
35. The decision in the appeal is remade as follows: the appeal is allowed on human rights grounds.

CBE

Upper Tribunal Judge Bruce
29th September 2022