IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001801

First-tier Tribunal Nos: HU/53785/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 7th of March 2024

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

Olubunmi Otubu
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Youssefian, Counsel
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

Heard at Field House on 19 February 2024

DECISION AND REASONS

1. By my decision promulgated on 21 December 2023, I set aside the decision of the First-tier Tribunal. I now remake the decision.

Background

2. The appellant, who is a citizen of Nigeria, applied in May 2021 for leave to remain in the UK on the basis of her private and family life. Her application was refused in June 2022. She appeals against this decision on the only ground available to her, which is that to remove her is unlawful under Section 6 of the Human Rights Act 1998.

3. The appellant argues that:

(a) there are insurmountable obstacles to her relationship continuing with her British national partner Mr Ijaduola in Nigeria (and therefore the

conditions of paragraph EX.1 of Appendix FM of the Immigration Rules are satisfied);

(b) she would face very significant obstacles integrating in Nigeria (and therefore the conditions of paragraph 276ADE(vi) of the Immigration Rules are satisfied); and

(c) that removing her to Nigeria would constitute a disproportionate interference with her right to family and private life and therefore that, even if she does not satisfy the requirements of the Immigration Rules, it would violate article 8 ECHR for her to be removed.

Factual circumstances and evidence

4. Although there are some areas of factual dispute, the overall factual matrix is agreed by the parties. The salient facts, which are taken primarily from the written statements and oral evidence of the appellant and Mr Ijaduola, are as follows:

(a) The appellant entered the UK in May 2007 on a visit visa valid until March 2009. She did not leave the UK when the visa expired and since March 2009 she has lived in the UK unlawfully. In 2008 she applied for an EEA residence card but this was refused in November 2009. It was not until she made an application in May 2019 that she engaged again with the respondent in order to seek to regularise her position in the UK.

(b) The appellant has lived in the UK for a long time (over fifteen years). Between 2009 and 2015 (which was when she met her partner) her evidence, which was not disputed, is that she spent much of her time in the UK assisting at her church and with friends. She does not claim to have worked or studied, or to have undertaken any significant activities beyond participating and assisting in her church and being with friends.

(c) The appellant is in a genuine and subsisting partnership with a British citizen (Mr Ijaduola), who she met in 2015. They undertook a religious marriage in 2015. This was not registered because it was their understanding that there would be difficulties due to the appellant's immigration status. Mr Ijaduola's evidence was that he was aware at the time he met the appellant of her immigration status.

(d) Mr Ijaduola has three children, all of whom are adults. Two of his children live ten minutes away from him and the appellant; the other lives further away, but also in the UK. He sees his children between two to four times a month.

(e) The appellant has a close relationship with Mr Ijaduola's children, seeing herself as having a parental role in their lives – although they are all adults living independent lives.

(f) Mr Ijaduola works full-time as a security guard. He has total savings of around £5,000, which is for his pension and also potentially for funding fertility treatment. The appellant has previously had fertility treatment and it is something they say that they will consider doing again in the future.

(g) Mr Ijaduola has some medical issues. These are high blood pressure, high colestoral, trigger finger (for which he receives injections) and knee pain (for which he receives physiotherapy treatment). He takes medication for the blood pressure and colestoral.

(h) The appellant was in an abusive relationship before she left Nigeria. Her parents were killed in a car accident shortly after she left Nigeria and the family home was taken by extended family members that she does not know. She has no siblings or close relatives in Nigeria, nor does she have any friends with whom she has maintained contact.

(i) There was no medical evidence about the appellant's mental health but her evidence (which was not challenged) is that she suffers from depression and anxiety. She believes that relocating to Nigeria will worsen these health problems.

(j) The appellant was asked about her education and work experience in Nigeria. She stated that she attended school until she was 18 and after leaving school she assisted her mother selling drinks.

(k) Mr Ijaduola is originally from Nigeria although he has not been back to the country for over 30 years and has lived most of life in the UK. He believes that he would have great difficulty relocating to Nigeria because, inter alia, he would not be in a position to obtain work and would not have the sufficient funds to live in Nigeria without working.

(l) The appellant and Mr Ijaduola are active members of a church in the UK that has a connection to Nigeria.

Legal Framework

5. The first issue to address is whether there are insurmountable obstacles to the relationship between the appellant and Mr Ijaduola continuing in Nigeria, which is the test in paragraph EX.1 of Appendix FM.

6. There is a considerable body of case law considering what the phrase "insurmountable obstacles" means in this context. In *Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 11 the Supreme Court explained:

> 43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to "un obstacle majeur" (Sen v The Netherlands (2003) 36 EHRR 7, para 40), or to "major impediments" (Tuquabo-Tekle v The Netherlands [2006] 1 FLR 798, para 48), or to "the test of 'insurmountable obstacles' or 'major impediments'" (IAA v United Kingdom (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could "realistically" be expected to move (Sezen v The Netherlands (2006) 43 EHRR 30, para 47). "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In Jeunesse, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of

> hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119.
>
> 44. Domestically, the expression "insurmountable obstacles" appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws, and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "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." That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.

7. The second issue is whether the appellant would face very significant obstacles integrating in Nigeria, which is the test in paragraph 276ADE(1)(vi). The term “very significant obstacles” was succinctly explained in paragraph 14 of *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813, in these terms:

> “[…] The idea of “integration” calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual’s private and family life.”

8. If the appellant meets either the conditions of paragraph EX.1 of Appendix FM or of paragraph 276ADE(1)(vi) that will be dispositive of the case and she will succeed. In the event that she does not succeed under either of these routes to leave, the third issue arises, which is whether refusing the appellant leave would result in unjustifiably harsh consequences for her and/or her family, such that it would be disproportionate under article 8 ECHR. This requires a balancing exercise weighing all relevant factors (to which in principle there is no limit), including those specified in Part 5A of the 2002 Act.

Insurmountable Obstacles to Integration

9. It was not argued that there is a legal impediment to Mr Ijaduola relocating to Nigeria with the appellant. This is not a case where there are “literally” insurmountable obstacles. Rather, the argument advanced on behalf of the appellant was that the insurmountable obstacles threshold is met because both Mr Ijaduola and the appellant would face very serious hardship in Nigeria.

10. Mr Iajadulo would undoubtedly face difficult challenges in Nigeria. The most significant of these are: (a) he does not have sufficient savings to retire and therefore will need to find work, and it will be extremely challenging to find a job in Nigeria; (b) he is currently receiving medical treatment on the NHS and would most likely need to fund similar treatment privately in Nigeria (which will be

difficult because his financial situation is likely to deteriorate due to a lack of employment opportunities); (c) he will be far from his adult children, with whom he has a close relationship; and (d) although he has some familiarity with Nigeria, he has not lived there for very many years and does not have family and friends in the country.

11. In addition, the appellant will also face difficult challenges in Nigeria. She has not lived in Nigeria for many years, and moving to Nigeria is likely to negatively impact her mental health (one of the reasons for this is that the last time she was in Nigeria in the country she experienced domestic abuse). In addition, she does not have any family or friends in Nigeria.

12. However, there are some factors that would make relocating to Nigeria less challenging than would otherwise be the case. These are that: (a) the appellant and Mr Iajadulo are Nigerian citizens, and therefore have the benefits that flow from citizenship in Nigeria; (b) they both practice a mainstream religion and will be able to make some connections through their church, which is linked to Nigeria; (c) they have a familiarity with the culture and languages of Nigeria; (d) there are no legal barriers to them obtaining employment; and (e) no evidence has been adduced indicating that they would be unable to obtain medical treatment for any of their conditions in Nigeria (although as previously mentioned they may need to fund this privately). I therefore proceed on the basis that their health conditions can be adequately treated in Nigeria.

13. Balancing the factors described above, I am persuaded that the appellant and Mr Iajadulo would face challenges and difficulties in Nigeria, but I do not accept that this could not be overcome, or that they would entail very serious hardship. Accordingly, paragraph EX.1 is not satisfied.

Very Significant Obstacles to Integration

14. The appellant left Nigeria as an adult (35 years old). She is familiar with the language, culture and society of Nigeria where she has lived most of her life. She will, in my view, clearly be "an insider" in Nigerian society in the sense discussed in *Kamara*. She may face challenges and obstacles in Nigeria, as summarised above in paragraph 11, but these are not *very* significant; they are also not obstacles to her *integration*.

Article 8 Outside the Rules

15. The appellant has lived in the UK for a long time and is in a genuine and subsisting relationship with a British citizen. I therefore have no hesitation in finding that she has a private and family life in the UK that engages Article 8 ECHR. The issue to be determined is whether her removal would be disproportionate.

16. In evaluating the proportionality of her removal, I have balanced factors weighing for and against the appellant; including the considerations set out in Part 5A of the 2002 Act.

17. Weighing against the appellant is the public interest in effective immigration controls (as stipulated in section 117B(1) of the 2002 Act). In my view, this public interest weighs heavily against the appellant given (a) she has no basis under the Immigration Rules to be in the UK, and (b) she has lived in the UK unlawfully for a

long period of time. With respect to the latter, Mr Youssefian argued that the public interest is diminished because the respondent failed to remove her and tolerated her presence. I accept that inactivity by the respondent can affect the weight attached to the public interest in effective immigration controls. However, the appellant, in the full knowledge she was not entitled to do so, entered the UK as a visitor and never left. Such conduct undermines the integrity of the immigration system and, even though the respondent can be criticised for not taking steps to remove her, the public interest in her removal is high.

18. Paragraphs 117B(2) and (3) of the 2002 Act require consideration to be given to the public interest in financial independence and people speaking English. Neither of these factors weigh against the appellant given that she is not a burden on the taxpayer and speaks English.

19. Weighing for the appellant are the following considerations:

(a) The appellant has been in the UK for a lengthy period of time, where she has established a private life. However, her private life was established when she was either in the UK with a precarious immigration status (as a visitor, prior to March 2009) or unlawfully (after March 2009). In the light of her immigration status, paragraphs 117B(4) and (5) of the 2002 Act require that only little weight should be given to her private life. I recognise that in exceptional circumstances this can be overridden (and also that there is a degree of flexibility in the concept of "little weight"), but no submissions have been made or evidence adduced that identifies an exceptional feature of the appellant's private life in the UK such that more than little weight should be attached to it. Accordingly I attach only little weight to the appellant's private life in the UK.

(b) The appellant's relationship with Mr Ijaduola is an important factor weighing in her favour. However, applying paragraph 117B(4)(b), I attach only little weight to it given that it was established when the appellant was in the UK unlawfully. Moreover, Mr Ijaduola entered into the relationship in the full knowledge that the appellant had no lawful basis to be in the UK. Given that only little weight is attached to the relationship I attach only little weight to the appellant and Mr Ijaduola being less likely to be able to undertake fertility treatment if this needs to occur in Nigeria rather than the UK.

(c) The appellant's relationship with Mr Ijaduola's children also weighs in her favour. However, I attach only little weight to these relationships given that the appellant was in the UK unlawfully when they were established.

(d) The difficulties the appellant will face, and the challenges to her relationship with Mr Ijaduola continuing, in Nigeria are factors that weigh in the appellant's favour. The findings above made when considering Appendix FM and para. 276ADE(I)(vi) are incorporated into this assessment and weigh in the appellant's favour.

20. Cumulatively, the factors weighing on the appellant's side of the scales are significant. However, as explained above, I have attached substantial weight to the public interest in the maintenance of effective immigration controls. In my view, this public interest significantly outweighs the factors weighing in the appellant's favour. The appeal is therefore dismissed.

Notice of decision

21. The appeal is dismissed.

D. Sheridan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

29.2.2024