Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08663/2019

THE IMMIGRATION ACTS

Heard at Field House
On 6th January 2020

Decision & Reasons Promulgated
On 13th January 2020

Before

UPPER TRIBUNAL JUDGE COKER

Between

VIVIAN NKIRUKA OFFIAJIAKU

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Malik instructed by Victory Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Ms Offiajiaku's human rights claim, made on 11th March 2019 was refused by the Secretary of State for reasons set out in a decision dated 1st May 2019. Her appeal against that decision was dismissed for reasons set out in a decision of First-tier Tribunal Judge Hawden-Beal promulgated on 13th August 2019. Ms Offiajiaku sought and was granted permission to appeal on the following, briefly summarised, grounds:

   (i) The First-tier Tribunal judge failed to make clear credibility findings;

(ii) The First-tier Tribunal's approach to the appellant's claim under EX1 was legally flawed in that she failed to make clear findings in relations to the test of whether there were insurmountable obstacles and failed to engage with the policy guidance in relation thereto;

(iii) Failed to assess properly the available evidence and to engage properly with the principles in *Chikwamba* [2008] UKHL 40 and *Hayat (nature of Chikwamba principle) Pakistan* [2011] UKUT 00444 (IAC);

(iv) Failed to attach any weight to the considerations set out in paragraph 117B Nationality Immigration and Asylum Act 2002, and

(v) Failed to deal adequately with the relevant test in paragraph 276ADE (1) (vi) namely whether the appellant would face very significant obstacles to reintegration upon her return to Nigeria.

2. Before me, Mr Malik reduced his grounds, confirming he would not be relying on (iv); (v) would be subsumed in his submissions on (ii) and that the focus of his submissions would be on (iii) – the *Chikwamba* point.

Background

3. Ms Offiajiaku is a Nigerian citizen, born on 10th November 1971 who came to the UK in 2008 as a student and had leave to remain as a student until 16 December 2012. In May 2012 she had sought leave to remain in the UK as a dependant of her sister who was settled in the UK. That application was refused and she appealed that decision, withdrawing her appeal on 10th May 2012 prior to its determination. On 8th May 2012 she sought leave to remain on compassionate grounds, such application being refused on 4th September 2013. She remained unlawfully in the UK. On 23rd December 2013 she applied for leave to remain as the spouse of her husband Vincent Page; the application was refused with no right of appeal. She did not leave the UK. A further similar application made on 25th October 2016 and was refused under paragraph 353 on 3rd July 2017. It seems that application was reconsidered and the current refusal decision taken; a refusal of a human rights claim with a statutory right of appeal exercisable in- country.

4. The appellant's husband, Mr Page was born in France in 2003 and moved to the UK. He is now a British Citizen; he works as a healthcare assistant.

5. The couple met at the beginning of November 2012; Mr Page proposed to her in January 2013 and they started living together in October 2013. They were married on 9th December 2013 and remain living together. There is no dispute but that the couple have a genuine and subsisting relationship and intend to continue living together. Nor is there any dispute but that the couple meet the financial requirements of the Immigration Rules.

First-tier Tribunal decision

6. The First-tier Tribunal judge set out the evidence before her, the submissions made and her findings. The appellant had not sought to challenge the summary of evidence given or record of submissions made but rather her challenge was, essentially, to what she stated was an incorrect application of the relevant jurisprudence.

7. The First-tier Tribunal decision, in so far as relevant to the issues before me is as follows:

> 22. The appellant cannot meet the immigration status requirements of the rules because she has not had any leave to remain in the UK since 2012 and therefore cannot succeed under the 5-year route to settlement. She may meet the requirements for the 10-year route to settlement if she does not meet all the eligibility requirements, which is the case here, but she can meet EX.1(b) and show there are insurmountable obstacles to family life with her partner continuing outside the UK in Nigeria, which could not be overcome or would cause her or her husband serious hardship.
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> 23. There is no evidence that there are any insurmountable obstacles which could not be overcome or would cause the appellant serious hardship. She was born and raised in Nigeria, speaks the language and worked there as a nurse until she came here in 2008. She has placed no evidence before me to indicate that she could not go back to Nigeria. Her husband supports her now financially because she is not allowed to work and there has been nothing put before me to indicate that he could not or would not support her whilst she was in Nigeria waiting for a decision on an application for entry clearance as a spouse. She has worked there in the past and has placed no evidence before me to indicate that she would not be able to obtain employment there again.
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> 24. In so far as her husband is concerned, again there is nothing which demonstrates that there would be insurmountable obstacles to him continuing family life with the appellant in Nigeria. He came to the UK, never having visited before and knowing little English and yet managed to find himself a job and has adapted to life here in the UK. He speaks English which is widely spoken in Nigeria and the appellant would be able to assist him adjust to life over there. He works in the healthcare sector and I see no reason why he could not obtain similar employment over there, with the assistance of the appellant. In the alternative there is nothing before me to indicate that the sponsor could not maintain the appellant whilst she waited for a decision on her entry clearance application.
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> 25. …There is no evidence of any significant difficulties which cannot be overcome or any serious hardship which the appellant and her husband would suffer if they had to go to Nigeria. I have considered the respondent's policy guidance and note that the appellant and her partner have provided no evidence to suggest that her partner would not be permitted entry into Nigeria or have they provided any evidence to suggest that there are any serious cultural barriers in Nigeria, which would put the appellant's partner at a disadvantage

and which could not be overcome. I am therefore satisfied that the appellant and her partner cannot take advantage of EX.1(b).

26. In so far as private life under paragraph 276ADE is concerned, the appellant has not been here for at least 20years and has not shown that there are very significant obstacles to her integration into Nigerian society. …

27. I am satisfied that the appellant would have no problems integrating back into Nigerian society. She was born, raised there and educated there and had gainful employment as a nurse until she came here in 2008. There was nothing specific put before me to say what problems she would have when she went back….she has not provided any evidence to show what would stop her taking up employment or the reins of her life again in Nigeria.

28. I am satisfied that the decision was justified because the maintenance of effective immigration control is in the public interest under sections 117A and B of the 2002 NIA and therefore refusing entry or leave to remain to a person who does not meet the requirements of the immigration rules is justification for exclusion.

29. That leaves the final question as to whether the decision is proportionate…

30. I have also given consideration to section 117B(4) and note that she has established a family life here with a qualifying partner….the relationship with her partner was established when her status was precarious and she knew that she could be forced to leave the UK at any time.

31. But balanced against that is the fact that she meets all the requirements of the rules other than the fact that she is an overstayer and so, if she returns to Nigeria to make the appropriate application for entry clearance, the question is she likely to succeed? CHIKWAMBA (supra) made it clear that there was little point in sending someone back to apply for entry clearance for no other reason that it was normal procedure under the rules. But in CHIKWAMBA, there was a child involved and a husband who could not go back to Zimbabwe with the appellant. That is not the case here. And I am satisfied that CHIKWAMBA can be distinguished.

32. I am satisfied that there are no insurmountable obstacles to their family life continuing in Nigeria, but I acknowledge that the husband is a British Citizen and cannot be forced to leave the UK. I am satisfied that there are no exceptional circumstances in this case and in dismissing her appeal, I am satisfied that a few months enforced separation will not result in unjustifiably harsh circumstances for herself or her partner. There is no reason why she cannot make an application for entry clearance in the usual way from Nigeria.

33. In the circumstances I am satisfied that the evidence before me does not outweigh the public interest considerations which justify maintaining the decision. Given the above I am satisfied that the decision to refuse leave to remain is proportionate…

Discussion

8. Mr Malik submitted that the First-tier Tribunal judge had failed to have any or any adequate regard to the policy guidance of the respondent in relation to the issue of 'insurmountable obstacles' and/or 'very significant difficulties. He drew attention to the section of the policy guidance headed 'Serious cultural barriers to relocation overseas' and submitted the judge had failed to engage with potential barriers to relocation such that the appellant's partner would face insurmountable obstacles to relocation. He acknowledged that there had been no significant evidence put to the judge other than that the sponsor had never been to Nigeria and was employed in the UK. It was, he submitted, unreasonable to expect the appellant's husband to leave the UK. He was not able to draw my attention to any evidence that was before the First-tier Tribunal judge that could have impacted upon a decision made with regard to serious cultural or other barriers; he acknowledged that no evidence had been put before the First-tier Tribunal judge of any limitation or restriction on the ability of Mr Page to enter, remain, live or work in Nigeria. I note that the First-tier Tribunal judge specifically considered the appellant's evidence in the context of the policy guidance (see paragraph 25 of the First-tier Tribunal decision). The appellant did not take issue with the summary of the evidence considered by the First-tier Tribunal judge in determining whether there were such obstacles to the partner relocating (see paragraphs 23 and 24 First-tier Tribunal decision).

9. Mr Malik submitted the First-tier Tribunal judge had failed to apply the correct test in reaching her findings under paragraph 276ADE (1) (vi) and failed to have regard to the respondent's policy guidance. Mr Malik submitted that the threshold to meet paragraph 276ADE(1)(vi) was lower than that required to meet the 'insurmountable obstacle' threshold. The threshold however is relevant to a different test. In paragraph 276ADE(1)(vi) the issue under consideration is the potential interference in the private life of the appellant which, although it may also include her family life, is primarily targeted at that. In this case the evidence relied upon is in any event the same in so far as her family life is concerned and also involves consideration of her personal immigration history and status. The First-tier Tribunal judge set out in her decision these factors and no issue was taken with that summary. In paragraph 27 the judge says in terms that there are no problems in her returning to Nigeria and gives detailed reasons for that finding. The submission by Mr Malik that the judge should have expressly stated that there 'were no very significant obstacles' and the failure to do so is an error of law is difficult to comprehend. It is difficult to see how the judge could have expressed herself in clearer terms that the appellant did not meet 276ADE(1)(vi).

10. The judge examined the evidence, took account of the policy guidance and relevant jurisprudence and reached a conclusion that was manifestly open to her that the appellant did not meet the required criteria set out in the Immigration Rules. There is no error of law by the First-tier Tribunal judge finding that the appellant and her spouse would not face very significant difficulties in relocation or that she would not face significant obstacles to reintegration.

11. As stated by Mr Malik the main thrust of his submissions and what he considered to be his strongest ground was what he claimed was a failure by the First-tier Tribunal judge to properly apply the '*Chikwamba*' principles. The appellant would, he submitted, be granted entry clearance on application because the fact that she had married and formed her relationship with her husband whilst she was unlawfully in the UK would not impact adversely upon an application for entry clearance where she met all the other criteria – as found by the First-tier Tribunal Judge. There would therefore *'be no point'* in requiring her to leave the UK, as supported by the findings of *Chikwamba*.

12. The First-tier Tribunal judge is correct in paragraph 31 in describing the factual matrix of *Chikwamba* as involving a child and a husband who could not return to Zimbabwe. But Mr Malik's reduction of *Chikwamba* to the bare essential that if a person meets the Immigration Rules for entry clearance then removal to apply for such entry clearance is disproportionate is incorrect. The position is far more nuanced.

13. Paragraph 60 of *Lal* [2019] EWCA Civ 1925 explains,

> "the policy embodied in the Immigration Rules made by the Secretary of State and approved by Parliament for granting leave to remain as a partner of a British Citizen (or settled person) attaches importance to the partner's immigration status and distinguishes between different categories of person whose immigration status is precarious, rather than treating them al in the same way. Thus, the eligibility requirements for leave to remain as a partner quoted at paragraph 8 above distinguish between (i) a person who is in the UK with leave to enter or remain of more than six months, (ii) a person who is a visitor or has limited leave to enter or remain for a period of six months or less, and (iii) a person who is on temporary admission or release (arrangement now replaced by immigration bail) or present in breach of immigration laws. This is consistent with an approach which, in determining whether refusing leave to remain would be disproportionate, gives greater weight to a genuine and subsisting relationship formed by a person who has been permitted by the Secretary of State to reside in the UK for a significant period for the purpose of study or work than to a relationship entered into by someone who is merely admitted for a short visit or whose presence is tolerated only because they have made an asylum claim or other application which has not yet been determined."

In paragraphs 68 and 69, the Court considered the weighing of relevant factors in assessing the proportionality of the decision:

> "68. A further error of law in the reasoning of the Upper Tribunal (quoted at paragraph 48 above) is that the judge applied the wrong test by asking whether the couple would be able to live in India "without serious hardship". As discussed earlier, that is a relevant criterion in deciding whether there are "insurmountable obstacles" to continuing family life outside the UK. In considering, however, whether there are "exceptional circumstances", the applicable test is whether refusing leave to remain would result in "unjustifiably harsh consequences" for the applicant or their partner, such that refusal would not be proportionate: see the passage from the Secretary of State's instructions to officials quoted at paragraph 11 above and the *Agyarko* case at paras 54-60. The essential difference (reflected in the word "unjustifiably") is that the latter test requires the tribunal not just to

> assess the degree of hardship which the applicant or their partner would suffer, but to balance the impact of refusing leave to remain on their family life against the strength of the public interest in such refusal in all the circumstances of the particular case.
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> 69. The Upper Tribunal did not undertake such an assessment. This was another error of law which flowed from the errors already identified. From the judge's point of view, the question of proportionality had in effect already been answered by his mistaken understanding that he was required by law to attach little weight to the couple's relationship and his previous finding that there were no insurmountable obstacles to Ms Lal continuing family life with her husband outside the UK. As a result of those errors, the judge failed to assess the factors relevant to the question of proportionality in the circumstances of this case."

14. Paragraph 11 of *Lal* reads:

> "Since August 2017 the obligation to consider whether there are exceptional circumstances requiring leave to be granted on article 8 grounds has been contained in the Immigration Rules themselves. But at the time of Ms Lal's application, this element of the Secretary of State's policy was embodied in instructions issued to officials. The version then current was "Immigration Directorate Instruction, Family Migration: Appendix FM Section 1.0b", published in July 2014. This stated:
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> > "In every case that falls for refusal under the Immigration Rules, the decision maker must go on to give full consideration to whether there are any exceptional circumstances."
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> The following further explanation was given:
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> > "'Exceptional' does not mean 'unusual' or 'unique'. Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional just because the criteria set out in EX.1. of Appendix FM have been missed by a small margin. Instead, 'exceptional' means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate under article 8. … Cases that raise exceptional circumstances that warrant a grant of leave outside the rules are likely to be rare.'"

15. In this case the First-tier Tribunal judge made findings with regard to insurmountable obstacles, very significant difficulties and concluded, rationally and lawfully with detailed reasons that those criteria were not met and thus the appellant did not meet the requirements of the Immigration Rules.

16. Ms Cunha submitted that paragraph 31 of the First-tier Tribunal decision could not be read in isolation to the decision as a whole.

17. Although paragraph 31 read in isolation could indicate that the First-tier Tribunal judge had merely been looking at whether the appellant's factual circumstances were similar to those in *Chikwamba*, I do not accept that to be the case. Paragraph 32 of the decision makes clear that the judge has considered the circumstances of the appellant as a whole. She specifically finds that there are no exceptional circumstances in the appellant's case and is

satisfied that a few months enforced separation would not result in unjustifiably harsh consequences – the language of the test required to be considered under the respondent's policy guidance, as endorsed in *Lal*. Read as a whole the judge has undertaken a detailed analysis of the evidence relied upon and reached findings that were open to her; she has applied the correct test for each element and has properly assessed, weighed and given reasons for the conclusion reached on the proportionality of the decision to refuse the human rights claim.

18. There is no error of law.

Addendum

Although not raised before me and if it had, it could not have been considered, it may be that if Mr Page holds dual French and British Nationality, this may impact upon the appellant – see *Lounes (Citizenship of the Union: Border checks: Judgment)* [2017] EUECJ C-165/16 (14 November 2017) and *R (on the application of Zekri) v Secretary of State for the Home Department* [2019] EWHC 3058

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision; the decision of the First-tier Tribunal stands.

Date 7th January 2020

Upper Tribunal Judge Coker