Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/50936/2020
UI-2021-001134; IA/02355/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th August 2022	**On 18th November 2022**

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

ADEBOWALE OPEOLUWA DAVIES
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Solomon (Counsel)
For the Respondent: Ms A Ahmed (SPO)

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Athwal, promulgated on 16th August 2021, dismissing his appeal against the refusal of leave to remain on human rights grounds.

2. Permission to appeal was granted by Upper Tribunal Judge Kamara on the grounds it was arguable the judge erred in law in concluding that removal was proportionate having found that the Appellant would be granted entry clearance and the Appellant's wife was awaiting surgery.

The Appellant's claim

3. The Appellant is a citizen of Nigeria born on 20th April 1973. He appealed against the Respondent's decision dated 23rd October 2019, refusing his application for leave to remain in the United Kingdom on the basis of his family life with his wife, Nobuhle Ncube Davies, and his private life.

4. The basis of the Appellant's claim was his relationship with his wife, which the Respondent accepted was genuine and subsisting, but where his wife was faced with insurmountable obstacles, which fell under paragraph EX.2. of Appendix FM, for the following reasons. First, although the Appellant had come to the UK initially as a visitor on 22nd October 2014 and had then overstayed his lawful leave when his visa expired on 21st April 2015, he had in March 2015 met with his wife. She had never lived in Nigeria (being a citizen of Zimbabwe), had no family nor employment prospects there, and did not wish to leave the UK, were it to be the case that the Appellant was refused further leave to remain, and had to return back to Nigeria.

5. Second, she had two particularly important medical conditions. Her HIV condition was controlled by medication and her concern was that the necessary medication would not be available in Nigeria. Her surgery required to treat a fistula was imminent and she would require two weeks to recover. She was vulnerable and there was written evidence to suggest that this was the case. In addition, the Appellant's own private life, pursuant to paragraph 276ADE(1)(vi) was such that in the six years since his arrival in the United Kingdom, he had lost all connection with his home country in Nigeria.

The Judge's Findings

6. The judge had regard to the basis upon which the Appellant's claims had been rejected by the Respondent. For example, it was noted that although the Appellant's wife had never lived in Nigeria, Article 8, according to the Respondent, did not oblige the UK to accept the choice of country the couple would prefer to reside in.

7. The judge observed that although the Appellant's wife was receiving HIV treatment, neither the Appellant nor his wife had researched the issue as to whether such treatment would be available to her in Nigeria. Further, if the Appellant's wife required two weeks to recover from her surgery, she could be assisted by the NHS care in the community, or by her brother who was a mental health nurse, or by her friends. The judge also noted that insofar as it was the case that the Appellant's wife was a vulnerable person, the Respondent had observed that she had continued to work throughout 2020 and 2021 and that there were wage slips indicating that this was the case, notwithstanding the fact that this was the period of the coronavirus epidemic. In any event, she was now fully vaccinated.

8. As for the Appellant's own private life, the Respondent had especially noted that the Appellant was an educated person who retained a degree of

knowledge of the culture and society of his country. He had family in Nigeria, together with assets and property. He would be able to find employment and accommodation in Nigeria. Should his wife wish to accompany him to that country she would have the support of her husband and his family. It is true that she originated from Zimbabwe herself but she had demonstrated that she had the ability to adapt and thrive in the UK and she would be able to do so again, in a country like Nigeria, the official language of which was English.

9. Against the background of the above, the judge proceeded to make her findings. In refusing the appeal, she drew the following conclusions. First, although the HIV condition of the Appellant's wife was managed through medical treatment in this country there was no reason why such treatment would not be available in Nigeria, because neither the Appellant nor his wife had researched whether treatment was available or the cost of it, and the Country Policy and Information Note: Nigeria medical and healthcare issues, version 3.0 (January 2020) ('CPIN'), stated (at paragraph 6.7.4), that free treatment may be available in all public facilities, as well as in designated private facilities, with no eligibility criterion being required of a patient.

10. Second, with respect to his wife's other medical condition, namely, that she has a fistula that is due to be operated on soon, it was not the case that no-one else apart from the Appellant would be able to assist her because her own brother was a mental health nurse who lived in Coventry. Moreover, the Appellant and his wife had stated that they had strong ties with friends they have made in this country, particularly in the church, who would be able to help in this regard. Indeed, in the worst case scenario, the Appellant's wife would be eligible for healthcare assistance at home if she had no-one else who could help her (see paragraph 36).

11. Third, the judge rejected the Appellant's claims that he no longer had any meaningful ties to Nigeria, with no accommodation, no employment, and no network of support. The Appellant had a brother, a mother, and a 15 year old son in Nigeria. He was in contact with all of them. He had only left Nigeria at the age of 41. He was a graduate from a university with a degree in geography and regional planning. He had been employed as a transporter and car dealer. He had rented his home. He had properties, stocks and a bank account. He would easily be able to pick up the threads upon return in his own home country. He had only been in the UK for five years and "he was educated to a high standard and was able to achieve financial stability" (at paragraph 39). Finally, whilst it was accepted that the Appellant's wife, did not have cultural or social links with Nigeria (having come herself from Zimbabwe), the fact was that English was the official language of Nigeria and was widely spoken and she would have no difficulty "in adapting to life in Nigeria and in forming a new social network" (paragraph 40).

12. The Appellant could not succeed under the Immigration Rules and the judge considered Article 8 adopting the balance sheet approach at paragraph 50. She came to the conclusion that if the Appellant's wife did not wish to accompany him to Nigeria, it was open to the Appellant to subsequently apply to re-enter the United Kingdom as a partner of his wife from Nigeria.

13. The judge noted that his wife's operation "has already been delayed because of the COVID-19 pandemic" and that "this could amount to a significant impediment that would prevent her accompanying the Appellant to Nigeria for a short period" (paragraph 54). Nevertheless, should the Appellant apply for entry clearance from abroad, this would likely be granted because the Appellant's wife earned in excess of £18,600 and their relationship was accepted by the Respondent as being genuine and subsisting.

14. The Appellant's wife, in any event had stated that she would support the Appellant's application in this regard (paragraph 55). This was a case where the Appellant had established his relationship with his wife after his visa expired. He then remained in the UK for a number of years without attempting to regularise his status. The judge observed that "the public interest in the Appellant's removal from the United Kingdom is strong and the public interest is not significantly diminished because he would be able to re-enter the UK" (paragraph 56).

15. In coming to these conclusions, the judge had regard to the well-known decision in Chikwamba v SSHD [2008] UKHL 40 and the subsequent decision in Younas (section 117B(6)(b): Chikwamba; Zambrano) [2010] UKUT 129. In the end, according to the judge, the interference with the Appellant's and his wife's Article 8 rights was only a "temporary interference" which would be "proportionate". Furthermore, Nigeria was not on the red list of countries with regard to the COVID-19 pandemic and the High Commission was "open for business". If necessary, the Appellant's wife could join the Appellant, after she had recovered from her surgery, whilst he waited for his visa (paragraph 57).

Grounds of Application

16. The grounds of application stated that the judge erred in law both with respect to the finding that there were no insurmountable obstacles under EX.1. and EX.2. and her finding that the decision to refuse the Appellant's application was a proportionate one under Article 8 when that was considered outside the Immigration Rules.

17. First, with respect to the judge's decision that there were no insurmountable obstacles to family life continuing outside the UK there were two issues. The first one was the judge's finding that HIV treatment would be available in Nigeria. Although the judge had cited the CPIN, she had neglected to refer to paragraph 1.1.6, which recorded that vulnerable groups may sometimes benefit from free healthcare services but, "they

largely have to pay for healthcare services" because they "are often politically motivated, are poorly implemented, and do not become fully operationalised and sometimes only last a few years".

18. On the matter of the Appellant's wife requiring her fistula operation, the judge had contradicted herself because she had earlier said that the pending operation could amount to a "significant impediment" that would prevent the Appellant's wife from accompanying the Appellant to Nigeria for a short period of time (see paragraph 54).

19. With respect to the judge's decision that Article 8 was not breached, the judge had also fallen into error. She had not carried out a proper balancing exercise identifying the factors in favour of the Appellant (see paragraphs 50 to 51). There was no consideration of the reasonableness of relocation, the impact of relocation on the Appellant's wife, the delay in granting entry clearance, or indeed the Appellant's valuable contribution made to date.

20. Furthermore, the judge materially misdirected herself in stating that, "I must attach significant weight to the maintenance of effective immigration control" (at paragraph 52(i)). The reference in section 117B of the Nationality, Immigration and Asylum Act 2002 ('section 117B') is to 'little weight'. It was also not the case, as the judge implied, that there was a high threshold for a breach of Article 8 "outside of the Rules" (at paragraph 21) because no such threshold existed. Indeed, the use of the word "exceptional" in the context of Article 8 is not to be used as setting up a particularly high threshold.

21. Second, the judge held that the Appellant was likely to be granted entry clearance if he made an application from Nigeria to join his wife (paragraph 55) but had materially erred in stating that it was proportionate to require him to do so because there is a strong public interest in him being required to leave the UK (paragraph 58). The finding that the Appellant had entered the UK with the intention of remaining permanently (paragraph 56) was insupportable given that the Appellant entered on 22nd October 2014 but only met his wife in March 2015, so the conclusion reached by the judge in that respect could not be upheld.

22. Finally, there were the circumstances in relation to the ongoing global COVID-19 pandemic. The judge had accepted that the Appellant's wife fell into the vulnerable group (paragraph 42). She had accepted that the pandemic had greatly impacted on the UK as well as on Nigeria (paragraph 42). There existed coronavirus concessions, including a policy which permitted visitors to switch in-country based on family life and this had not been given sufficient consideration by the judge. The headnote to the decision in BH (policies/information: SOS's duties) Iraq [2020] UKUT 189 makes it clear that the Secretary of State has a duty to reach decisions that are in accordance with her policies.

Submissions

23. Mr Solomon relied on the grounds and submitted the judge had erred both with respect to the finding that there were no insurmountable obstacles and in the finding that there was no breach of Article 8. He submitted that the decision was disproportionate. The judge had actually found that there would be insurmountable obstacles in the sense that there would be a "significant impediment" should the Appellant's wife undergo the operation because this would prevent his wife from accompanying the Appellant to Nigeria for a short period of time.

24. However, it was not just in relation to his wife's fistula operation that there was an error. There was also an error in relation to the suggestion that HIV treatment would be available in Nigeria given that the CPIN in terms refers to Nigeria's "inability to effectively address the country's numerous public health challenges". The judge had failed to consider the CPIN as a whole. The fact was that the availability of treatment was not so clear cut as the judge implied.

25. Second, the judge failed to carry out a balancing exercise. It was very difficult to discern how the assessment of Article 8 was undertaken in relation to EX.1. and EX.2. with respect to the insurmountable obstacles that the Appellant had set out. These were to do with the fact that the Appellant would be absent during the time when his wife was undergoing a serious operation. It was he who was supporting her during this difficult time. The judge was in any event wrong to state that she "must attach significant weight to the maintenance of effective immigration control" at paragraph 52(1)(i). Section 117B(1) states "the maintenance of effective immigration control is in the public interest".

26. In fact, the judge was also wrong when applying the 'Chikwamba test'. The judge came to the conclusion that entry clearance would be granted when the Appellant applied for it in Nigeria to return back to the UK. Whilst the judge accepted that removal would be temporary, she had failed to consider what the timescale would be in which the Appellant could return because of the impact of the pandemic on the processing of entry clearance applications. In any event, the judge had failed also to consider the changing public interest with the promulgation of a concession by the Respondent which allowed visitors to switch their status 'in country' because of their family life and which in turn would have an impact on how proportionality was assessed. Moreover, the judge was wrong to have inferred that the Appellant always had an intention to remain permanently in the UK when coming on a visitor's visa (at paragraph 56) because although he entered on 22nd October 2014, he only met his wife some eight months later in March 2015 and this is what led to his decision to remain here many months later.

27. Mr Solomon went on to explain that the 'Chikwamba test' had been misapplied given what had been said in Younas which established a four stage approach in undertaking the proportionality exercise. The judge had recognised (at paragraph 54) that the Appellant's wife "is due to have an operation at any time" but which had only be delayed because of the

COVID-19 pandemic. This was a matter which "could amount to a significant impediment that would prevent his wife accompanying the Appellant to Nigeria for a short period," such that, even if the Appellant was temporarily removed, this "would interfere with the Appellant's family life with his wife". The High Commission was not "open for business" during the pandemic. The Appellant and his wife are in a subsisting relationship. Mr Solomon submitted the waiting time for entry clearance was at least six months.

28. Mr Solomon ended with the submission that "it will be to her benefit physically and emotionally to have her husband with her. It is the emotional support at this difficult time" which the Appellant's wife needed from the Appellant. The balance of considerations in the proportionality exercise fell in favour of allowing the Appellant to remain in the United Kingdom with his wife.

29. Ms Ahmed relied upon the Rule 24 response dated 17th March 2022 in which it was submitted the judge had given proper consideration to the 'Chikwamba test' and correctly applied the guidance in Younas. The judge had found at paragraph 56 that the Appellant's immigration history pointed to a strong public interest in his removal. It was clearly open to the judge to find that the public interest considerations outweighed other factors.

30. Ms Ahmed submitted that there was no error of law in the judge's decision. At paragraph 37 the judge, having considered the evidence before her, came to the conclusion that "the Appellant has not provided me with any information about whether the operation is available in Nigeria, the timescale for surgery, or the cost of it". The judge was therefore not satisfied that the treatment for his wife's fistula was something that would not be available or accessible to her in Nigeria. The Appellant and his wife had the opportunity to provide the information about the fistula operation but failed to do so. It was not appropriate to say that treatment was not available for the Appellant's wife, who was not a Nigerian national, if the matter had not been enquired into.

31. The fact was that, even in the UK, there was as yet no fixed date for the operation. The judge had rightly found that there were no insurmountable obstacles to the Appellant's family life continuing in Nigeria and neither would there be any unjustifiably harsh consequences to the Appellant and his wife if he was not granted leave to remain in the UK (at paragraph 47).

32. The judge had considered the COVID-19 pandemic issue, and noted that the Appellant's wife fell into the vulnerable group during this time, but concluded that once again the Appellant had not provided any country information that established that COVID-19 would have a more drastic impact on him and his wife in Nigeria than in the UK (paragraph 42). In short, therefore, matters had been properly considered and there was no error of law in the judge's decision. Ms Ahmed asked us to dismiss the appeal.

Conclusions and reasons

33. We find the judge did not make an error of law for the following reasons. The judge's finding that there was insufficient evidence to show the Appellant's wife could not access treatment for her medical condition was open to the judge on the evidence in the CPIN.

34. The Appellant failed to submit evidence to show that treatment would not be available or accessible to his wife in Nigeria. With respect to her HIV medication, the judge observed that "neither the Appellant nor [his wife] had researched whether the treatment was available or the cost of it (paragraph 35). Paragraph 1.1.6 of the CPIN does not assist the Appellant. It is not the Appellant's case that his wife cannot afford treatment, but that she will be denied access to treatment because she is not a Nigeria national.

35. With respect to his wife's surgery, the judge noted that after the surgery the Appellant's wife would find herself in a position where "during this time her dressings would need to be changed on a daily basis", and although the Appellant had greatly assisted his wife in the past, she was "not satisfied that others would not be able to assist in his absence" (paragraph 36).

36. Accordingly, the judge was of the view that she was not satisfied that the Appellant must remain in the UK to support his wife after her operation. On the other hand, it was open to his wife to accompany the Appellant to Nigeria and have the operation there and once again "the Appellant has not provided me with any information about whether the operation is available in Nigeria, the timescale for surgery, or the cost of it" (paragraph 37). Were the Appellant's wife to accompany the Appellant to Nigeria the position was that the Appellant's brother, his mother, and his 15 year old child remained there (paragraph 38). There would be family support in that country for both the Appellant and his wife.

37. In summary, the judge had proper regard to EX.1. and EX.2. of Appendix FM, and the decision in Agyarko v SSHD [2017] UKSC, where the Supreme Court stated (at paragraph 45), that by virtue of paragraph EX.1.(b) "insurmountable obstacles" was a requirement where leave to remain would not normally be granted in cases where an Applicant under the partner route was in the UK in breach of immigration laws, unless the Applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. For the reasons that the judge amply gave, this hurdle could not be overcome in this appeal given the evidence that was before the Tribunal.

38. The Appellant cannot satisfy the Immigration Rules. He entered the UK as a visitor in 2014 and overstayed. The weight to be attached to the public interest is significant. The judge did not misdirect herself on section 117B. She set out this section at [49] and properly directed herself on the

balance sheet approach at [50]. Having concluded there were no insurmountable obstacles the judge was entitled to attach significant weight to maintenance of immigration control at [52(i)].

39. The judge's findings were not contradictory. Her reference to a "significant impediment" was in relation to whether Article 8 was engaged. In any event, the judge went on to consider whether it would be disproportionate for the Appellant's wife to remain in the UK if she had her operation. The judge's finding that she could be supported by other family members or friends was open to her. Mr Solomon accepted the Appellant could not benefit from the concession to allow in-country applications due to Covid 19.

40. The judge's finding that the Appellant intended to remain in the UK after his visit visa expired was open to her on the evidence before her. In any event, it was not material given the Appellant's lengthy period of illegal residence and his inability to satisfy the Immigration Rules. There was insufficient evidence before the judge to show that the Appellant's family and private life outweighed the public interest.

41. The judge properly applied the four stage approach in Younas. The Appellant's wife, is earning in excess of £18,600 per annum and is willing to support the Appellant's application to return to the UK (paragraph 55). The judge found the High Commission in Nigeria was open and the temporary separation caused by the Appellant's return to Nigeria was proportionate in the circumstances. These findings were open to the judge on the evidence before her.

42. We find there is no material error of law in the judge's decision dated 16 August 2021 and we dismiss the Appellant's appeal.

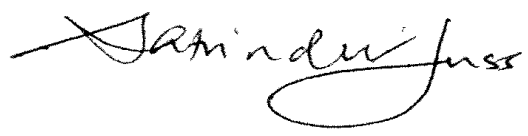
Notice of Decision

Appeal dismissed

No anonymity direction is made.

Signed

Date



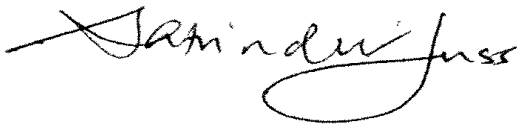
6 October 2022

Deputy Upper Tribunal Judge Juss

TO THE RESPONDENT
FEE AWARD

As we have dismissed the appeal, we make no fee award.

Signed Date



Deputy Upper Tribunal Judge Juss 6 October 2022

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.