



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05456/2015

THE IMMIGRATION ACTS

Heard at Field House
On 26 May 2017

Decision & Reasons Promulgated
On 19 June 2017

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

PRINCE AKINOLA ADESANYA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Aly, instructed by Bestway Solicitors
For the Respondent: Mr Tarlow, Senior Presenting Officer

DECISION AND REASONS
(Delivered Orally on 26 May 2017)

Introduction

1. This appeal comes before the Upper Tribunal by way of permission granted by Judge P J M Hollingworth on 17 March 2017. The appellant appealed to the First-tier Tribunal, against a decision made by the Secretary of State for the Home Department ("SSHD") on 28 August 2015 refusing him leave to remain, both under the Immigration Rules and on Article 8 grounds outwith the Rules. The appeal was dismissed by Judge Ross in a decision promulgated on 11 October 2016.

2. The appellant entered the United Kingdom on 31 July 2006 as a visitor. He has not been lawfully in the United Kingdom since the expiry of that leave, i.e. for around ten years. He submitted an application for leave to remain in 2012, which was refused the following year. On 19 July 2013, the appellant married a British citizen and on 18 March 2014 he submitted an application for leave to remain based on the fact of that marriage, as well as other relevant circumstances of his life in the United Kingdom. This application was refused on 6 May 2014. The appellant did not leave the country at that stage (as he ought to have done). On 17 June 2015, the appellant was served with a decision to remove him. This led to the making of further submissions by the appellant, which included evidence and submissions to the effect that he and his wife wished to start a family and intended to do so with the assistance of IVF treatment. This application was refused in the decision under challenge.

FtT's Decision

3. The appeal came before Judge Ross on 27 September 2016, at which time the appellant and his wife gave oral evidence – summarised in paragraphs 8 and 9 of Judge Ross' decision. The appellant gave evidence to the effect that (i) he has three brothers and one sister in Nigeria, with whom he speaks once per month (ii) he has a child in Nigeria, aged 13 and (iii) his wife has an uncle, sister and brother in the United Kingdom. He further asserted that he could not return to Nigeria without his wife.
4. The appellant's wife gave similar evidence. She moved to Nigeria when she was 2½ years old and lived there for sixteen years before returning to the United Kingdom when she was 18. She has only been back to Nigeria three times since then. She has a number of close family members in the United Kingdom. Her brother and sister live in Nigeria but they have their own commitments. She has lived in a council flat in the UK for 25 years and she has been saving money in order to pay for private IVF treatment. In paragraph 10 of its decision the FtT summarised the medical evidence that was before the Tribunal relating to that IVF treatment.
5. Ms Radford, who appeared on behalf of the appellant before the FtT, produced a lengthy skeleton argument to the FtT setting out a detailed chronology, the relevant legal framework (including the Immigration Rules and the provisions of the 2002 Act) as well as citing from well-known case law relating to Article 8 of the Human Rights Convention. Her submissions in relation to the instant appellant are found in paragraph 32 of the skeleton argument, which I have had full regard to.
6. The FtT turned to make its findings in paragraphs 13 onwards of its decision. It observed that the appellant's presence in the United Kingdom had been, for the most part, unlawful and identified that the only issue under the Rules was whether there were insurmountable obstacles to the appellant and his wife carrying on a family life together in Nigeria. The phrase 'insurmountable obstacles' is derived from paragraph EX.1 of Appendix FM, with paragraph EX.2 of Appendix FM providing the following definition thereof:

“Insurmountable obstacles means the very significant difficulties which would be faced by the applicant or their partner in continuing family life together outside the United Kingdom which could not be overcome or would entail very serious hardship for the applicant or their partner.”

7. The First-tier Tribunal dealt with the appellant’s claims within paragraphs 16 and 17 of its decision, stating as follows:

“16. The appellant’s return to Nigeria in order to make an entry clearance application would inevitably result in a temporary separation of the couple however, contact would be maintained by other methods of communication and the appellant’s wife could visit him in Nigeria if necessary. I accept the evidence that if the appellant’s wife left the UK, she would lose her council flat in which she has lived for 25 years. However, whilst that may present a difficult choice for her it is not unduly harsh when weighed against the public interest.

17. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh before making a freestanding Article 8 assessment (Nagre). The appellant and his wife are both perfectly healthy. There are no children involved. I accept that the appellant and his wife are desirous of beginning IVF treatment, however this treatment is available privately in Nigeria, so they would be no worse off there.”

There is subsequently a reference to, and consideration of, section 117B of the Nationality, Immigration and Asylum Act 2002.

Decision and Discussion

8. The grounds in support of the application for permission to appeal are discursive and lengthy. The grant of permission focuses on just one of those grounds (as indeed did Ms Aly before the Upper Tribunal today) in the following terms:

“The judge’s analysis of the existence or otherwise of insurmountable obstacles is arguably insufficient given the extent of the submissions made on behalf of the appellant set against the extent of the judge’s analysis effectively encapsulated in the summary provided at paragraph 16 of the decision. The judge has proceeded thereafter at paragraph 17 of the decision to consider whether removal would be unjustifiably harsh in relation to a freestanding Article 8 assessment.”

9. Today Ms Aly elucidates on that ground by focusing on two claimed errors in the decision, which can be summarised as (i) a failure to give adequate reasons given the information that was before the Tribunal and (ii) a failure to take into account relevant features when coming to its conclusion.
10. In developing her submissions focus was placed on three aspects of the claim before the FtT, the first being that the appellant’s wife is engaged in IVF treatment in the United Kingdom. It was asserted that this should have been viewed by the FtT as a significant reason as to why there would be insurmountable obstacles to her relocating to Nigeria and, consequently, that the FtT’s decision was irrational given this feature.

11. A second significant feature of the case was said to be the appellant's wife's relationship with her family members in the United Kingdom which, it was claimed, the FtT failed to have regard to. Finally, it was asserted that the FtT failed to engage with the extensive citation of case law in the appellant's skeleton argument.
12. I take these points in turn.
13. The evidence before the FtT in relation to the IVF treatment was limited. It is not in dispute that the appellant's wife is undertaking IVF treatment. It is also disputed by the appellant, or at least my attention was not drawn to any dispute, that the possibility of the appellant's wife becoming pregnant is so limited that she has been required to obtain IVF treatment privately in the United Kingdom - the NHS refusing to fund the treatment primarily as a consequence of her age and the fact that she has fibroids.
14. Ms Aly submitted that because of the aforementioned complications the IVF procedure could not properly be conducted in Nigeria, a matter that she asserted the FtT had failed to take into account. The difficulty with this submission, however, is that there was no evidence before the FtT that such treatment could not be undertaken in Nigeria, even given the appellant's wife's specific complicating circumstances.
15. The SSHD put evidence before the FtT that IVF treatment is available in Nigeria. As I have indicated, there was no evidence before the FtT to contradict that fact or support the contention that it would not be available to the appellant's wife, given her particular circumstances.
16. For these reasons, in my conclusion the FtT was entitled to say at paragraph 17 that:

"I accept that the appellant and his wife are desirous of beginning IVF treatment, however this treatment is available privately in Nigeria, so they would be no worse off there."
17. The FtT treated this as a neutral feature when considering whether there would be insurmountable obstacles to the appellant's wife moving to Nigeria to live with the appellant. In my conclusion, it was entitled to do so on the limited evidence that was available.
18. It may be, and I have been drawn to some additional evidence today that was not before the FtT, that evidence can be obtained to support the contention put forward on behalf of the appellant. At this stage of the proceedings, however, I am required to determine whether the FtT erred in law. It cannot be said that it erred in failing to take account of evidence that it did not have before it, and the evidence that has been produced is not evidence that demonstrates a clear error of fact by the FtT.
19. Moving on, the second submission raised by Ms Aly is the, claimed, failure of the FtT to consider the circumstances of the appellant's wife's family in the United Kingdom, which is of course also a family that the appellant himself is engaged with.

20. It is clear that the FtT was fully aware of the fact that the appellant's wife has family members in the United Kingdom. This can be seen from paragraph 9 of its decision. The witness statements relied upon in support of this submission by Ms Aly, (i.e. those drawn by the appellant's wife and by the appellant), provide very limited evidence as to the nature of the relationship between the appellant, his wife and the appellant's wife's family members. The highpoint is the assertion by the appellant's wife that she has "*a close relationship with [her] siblings*".
21. Absent the provision any specific evidence as to the consequences of a separation between the appellant's wife and her UK-based family, the relevance of these familial relationships to the issue of whether there exist insurmountable obstacles to the appellant and his wife having a family life together in Nigeria is, at best, limited. The FtT plainly looked at the evidence as a whole and it was not required to deal with each and every point raised or piece of evidence produced. I see no requirement in the circumstances of this case for the FtT to have engaged specifically with the aforementioned feature
22. The third point relied upon by Ms Aly is the claimed failure of the FtT to engage with the extensive citation of case law set out in Ms Radford's skeleton argument. In this regard, I observe that the case law is well-known to those in the immigration field. There is nothing therein which is remotely contentious. Of most significance, however, is the fact that there is nothing in the FtT's decision that, on its face, is inconsistent with the case law binding on it, neither was my attention drawn to any specific inconsistency with such case law. I accept that the FtT's direction to the decisions in MF [2012] UKUT 393 and Izuazu [2013] UKUT 45 is out-dated, those decisions having been overtaken by more recent decisions of the Court of Appeal and the Supreme Court but, nevertheless, the position remains that there is nothing in the FtT's decision which identifies that it applied an approach inconsistent with binding case law.
23. When the FtT's decision is looked at as a whole I do not accept that the reasons provided therein, albeit limited, can be said to be unlawfully inadequate in the circumstances of this case.
24. Turning to Article 8 outwith the Rules, in this regard the case law is quite clear, the starting point is whether the Rules can be met and, if they cannot, then one looks at the features of the claim overall to see whether there is anything compelling in the case that would require leave to be granted. This consideration also has to be viewed in the context of Section 117B of the 2002 Act, which the FtT took full account of in paragraph 19 of its decision.
25. The appellant has been in the United Kingdom unlawfully for almost the entirety of the time he has spent here. The FtT had that in mind but, nevertheless, went on to look at the relevant circumstances as a whole, the most significant of which, it was said, was the appellant's wife's need for IVF treatment, the fact that she would be required to give up of her council flat if she moved to Nigeria, and the fact that the appellant had been in the United Kingdom for a lengthy period of time.

26. All of these features were taken into account by the FtT and, in my conclusion, the FtT's findings were open to it given the limited evidence made available by the appellant. Indeed, I have considered the evidence that was before the FtT for myself and, having done so, I cannot see that any Tribunal considering such evidence could rationally come to a different conclusion than that which Judge Ross came to.
27. For all these reasons, I find that the FtT's decision does not contain an error of law capable of affecting the outcome of the appeal.
28. I make one further observation. There is now further and better evidence available to the appellant, which was not contained within the bundle put before the FtT. It may be when that evidence is considered that a different outcome will be reached, but that is for the SSHD to consider should a further application be made in reliance on such evidence.

Notice of Decision

The First-tier Tribunal's decision does not contain an error of law and remains standing.

Signed:



Upper Tribunal Judge O'Connor Date 16/6/2017