



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005317
First-tier Tribunal No:
HU/53998/2021
IA/10370/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 29 April 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

PRINCE TOCHUKUWU MGBEMENA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mark Allison of counsel, instructed by Londonium Solicitors
For the Respondent: Tony Melvin, Senior Presenting Officer

Heard at Field House on 7 March 2023

DECISION AND REASONS

1. The appellant is a Nigerian national who was born on 21 October 1967. He appeals, with permission granted by Upper Tribunal Judge Grubb, against the decision of First-tier Tribunal Judge Row. By his decision of 1 July 2022, Judge Row dismissed the appellant's appeal against the respondent's refusal of his human rights claim.

Background

2. The appellant entered the UK lawfully in 2005 but he overstayed when applications to extend his leave to remain ultimately failed in November 2010. He made further applications as an overstayer, the second of which was on the basis of his relationship with a British woman, NOM, who was born in 1985. That application was refused and an appeal against the decision was dismissed by Judge Birk in 2019.

3. On 6 January 2021, the appellant made a further application for leave to remain based upon his relationship with NOM. The application was supported by detailed representations from his current solicitors and by medical evidence which showed that the appellant and NOM had been trying unsuccessfully to conceive a child. It was clear from that evidence that she had sadly suffered a significant number of miscarriages. It was submitted that there were insurmountable obstacles to the continuation of the relationship in Nigeria and that the appellant's removal would be in breach of Article 8 ECHR.
4. The appellant's application was refused on 16 July 2021. The respondent did not accept that there were insurmountable obstacles to family life continuing in Nigeria. She was satisfied that Judge Birk's conclusion in that regard remained relevant. She concluded that the appellant was unable to meet paragraph 276ADE(1)(vi) of the Immigration Rules and that the appellant's removal would not be in breach of Article 8 ECHR.

The Appeal to the First-tier Tribunal

5. The appellant appealed, and his appeal was heard by the judge, sitting in Birmingham, on 29 June 2022. The appellant was represented by counsel, the respondent by a Presenting Officer. The judge heard evidence from the appellant and the sponsor and submissions from the representatives before reserving his decision.
6. The judge noted that there was no dispute about the relationship between the appellant and the sponsor: [17]. He considered what was said by the appellant and the sponsor about their difficulties in relocating to Nigeria. He did not accept that the appellant's hearing problems would cause additional difficulty: [17] and [20]. He noted that the sponsor said that she was undergoing IVF treatment and that she had suffered nine miscarriages by the date of the hearing. He accepted that the sponsor was undergoing fertility treatment in the United Kingdom, but he considered that it would be available in Nigeria. It would have to be paid for, he observed, but that was also the case in the UK, where it was 'paid for in a different way'. He did not accept, therefore, that there were insurmountable obstacles to family life continuing in Nigeria.
7. At [21], the judge explained why he did not accept that there were very significant obstacles to the appellant returning to Nigeria and, at [22]-[36], he reasoned that the interference with the appellant's Article 8 ECHR rights was a proportionate one.

The Appeal to the Upper Tribunal

8. Permission to appeal having been refused by First-tier Tribunal Judge Komorowski, the appellant's solicitors renewed their application to the Upper Tribunal. The grounds are not properly delineated but may be summarised as follows:
 - (i) The judge left material matters out of account in concluding that EX1(b) was not met, or gave insufficient reasons for reaching that conclusion.
 - (ii) The judge misdirected himself in law in considering proportionality under Article 8 ECHR, specifically with regard to s117B NIAA 2002 and Gen 3.2 of the Immigration Rules;

- (iii) The judge failed to consider whether the public interest in the appellant's removal was reduced by reference to the fact that he was certain to be granted entry clearance, with reference to Chikwamba v SSHD [2008] UKHL 40.
9. Permission to appeal was granted by Judge Grubb on the first two points but expressly refused on the third.
10. The respondent filed and served a skeleton argument on the day before the hearing. Mr Allison filed and served his skeleton very shortly before the hearing and I took time at the outset to read that document.

Submissions

11. Before hearing from Mr Allison, I noted that I might not have had all the papers which were before the FtT, as a result of the different computer systems which are in use in the FtT and Upper Tribunal. I asked Mr Allison to confirm that I should have an appellant's bundle of 82 pages and a respondent's bundle of 79 pages. He did so. I asked him whether there was any evidence, whether it was to be found in those bundles or elsewhere, of the sponsor's IVF treatment. Mr Allison confirmed, on instructions, that there was no such evidence. He added that he had been told by the sponsor (who was present at court with the appellant) that she had not been asked to provide any such evidence by the appellant's solicitors. His instructions were that she had received some treatment in 2021 and that she was in the 'preliminary stages' of a further round of such treatment.
12. Having confirmed the position in relation to the evidence, Mr Allison made one short submission, noting that permission had been refused on the Chikwamba point¹. He noted that the judge had accepted that the sponsor was in receipt of fertility treatment and submitted that the judge's consideration of the significance of that issue was deficient. The availability of treatment in Nigeria was by no means the end of the enquiry. The right to become a 'genetic parent' had been recognised to be protected by Article 8 ECHR in Dickson v UK (2008) 46 EHRR 41, and the judge's treatment of the issue inside and outside the Immigration Rules was wholly inadequate.
13. Mr Melvin submitted that there was no evidence of the sponsor being in receipt of fertility treatment and it was very difficult to see, in those circumstances, how the judge's consideration of this issue could be said to be inadequate. The appellant had advanced the same argument in the first appeal, before Judge Birk, and had failed. The burden was on him to adduce evidence which was capable of persuading the FtT to reach a different decision. There had however been a dearth of evidence on the point before both judges. The reality was that there was no evidence in support of the principal argument advanced before the FtT and the Upper Tribunal.
14. Mr Allison responded briefly. Matters had moved on, he said, since the appeal in 2019. The appellant and the sponsor had commenced treatment in 2021 and there was an express finding on the part of the FtT that fertility treatment was underway. The key feature of the case was how long it would take for the appellant and the sponsor to establish themselves in Nigeria and how long it

¹ I should perhaps note, in any event, that the decision of the Court of Appeal in Alam & Rahman v SSHD [2023] 4 WLR 17 would have put paid to any such argument.

would take for them to be in a position in which they could afford comparable treatment.

15. I reserved my decision as to whether or not there was an error of law in the judge's decision.
16. Mr Allison asked whether he could address me on relief. I permitted him to do so. In the event that the judge's decision was set aside, Mr Allison indicated that it was the appellant's intention to adduce further evidence of the sponsor's IVF treatment and expert evidence about availability of such treatment in Nigeria. That indication might be relevant, he noted, to the question of whether the appeal should be remitted to the FtT or retained in the Upper Tribunal.

Analysis

17. It is very clear from the evidence which was before the FtT that the appellant and the sponsor have suffered greatly in recent years. She initially suffered from a large polyp, which was eventually removed under general anaesthetic. They tried before and after that operation to conceive naturally but the sponsor has sadly suffered a significant number of miscarriages. It was said to Judge Birk in 2019 that they were planning to embark on fertility treatment. By the time the second appeal came before Judge Row, the sponsor said in her statement, at [6], that they had undergone one fertility treatment, which failed, and that they were preparing to undergo another one.
18. Mr Allison submits, and I accept, that the right to found a family life by becoming a 'genetic parent' through IVF has been recognised to be part of Article 8 ECHR by the Strasbourg court. He cites Dickson v UK in that regard but I have no doubt that that is one of several authorities in which the same point has been made and accepted.
19. There was no documentary evidence about the sponsor's IVF treatment but the judge accepted the evidence given by the appellant and the sponsor that the sponsor was 'undergoing fertility treatment in the United Kingdom.' The critical question in this appeal is whether the judge's subsequent consideration of that issue, inside and outside the Immigration Rules, was legally adequate. Given its centrality, I shall reproduce in full what the judge said on the subject, at [20] of his decision:

Such treatment is available in Nigeria. It would have to be paid for. The treatment is not free in the United Kingdom. It is merely paid for in a different way. There are no insurmountable obstacles to the family life of the appellant and the sponsor continuing in Nigeria. The appellant does not meet the requirements of paragraph EX1.
20. It is submitted by Mr Allison that this was wholly inadequate, in that it leaves unanswered questions which naturally arose. He notes at [11] of his concise and helpful skeleton argument that the judge failed to consider how long it might take the appellant and the sponsor to fund treatment in Nigeria and the fact that time might be limited for the sponsor, given that she is fast approaching the age of 40. He submits that the failure to engage with questions such as these amounted to an error of law on the basis of inadequate reasoning.
21. Whilst the judge's reasoning was undoubtedly rather compressed, the fact remains that there was no evidence before him which could have brought about a

different conclusion. There was no medical evidence to show what treatment the sponsor was receiving and the likelihood of any such treatment succeeding. There was no documentary evidence before the judge to show how any such treatment was being funded in the UK. Nor was there any documentary evidence before the judge about the likely position in Nigeria; whether the treatment in question was available in Nigeria and how much it was likely to cost.

22. The judge was entitled to conclude that the appellant and the sponsor could obtain employment in Nigeria. In the absence of any evidence about the cost of treatment there, there was no proper basis on which he could have concluded that they would not be able, within a reasonable space of time, to raise the sums required to fund the necessary treatment. At the risk of stating the obvious, the burden was on the appellant to establish the obstacles to him returning to Nigeria and he could not have hoped to do so without proper evidence of the medical position in the UK and the likely medical position in Nigeria. Insofar as the appeal to the First-tier Tribunal was brought in reliance on the sponsor's desire to continue her fertility treatment in the UK, therefore, it was not an appeal which was capable of succeeding, given the failure to adduce the evidence which was obviously required in support of that submission.
23. The correctness of that analysis is underlined by Mr Allison's observations at the end of the hearing. In tacit recognition of the evidential shortcomings before the FtT, he asked me to note that there would be evidence of the sponsor's treatment in the UK and the availability and cost of such treatment in Nigeria, in the event that the judge's decision was set aside. I make no criticism of Mr Allison for making that submission; he was merely seeking to ensure that his client had time in which to do that which should have been done before. The reality of this case, however, is that there is simply no proper basis on which to set aside the decision of the judge. The only proper conclusion he could have reached on the evidence before him, whether inside or outside the Immigration Rules, was that the appellant could not succeed. As Lewison LJ observed in *Fage v Chobani* [2014] EWCA Civ 5,

"The trial is not a dress rehearsal. It is the first and last night of the show."

24. To set aside the decision of the FtT in this case in order that the appellant could adduce evidence which should undoubtedly have been before the FtT in the first place would be to ignore that reminder. Since there was no material legal error in the decision of the First-tier Tribunal, its decision will stand.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed. The decision of the FtT, dismissing the appellant's appeal, stands.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 March 2023