IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000949

First-tier Tribunal No: HU/07947/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 4th November 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLUTOBI TOPE OGUNBAWO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Mr J Babarinde, Legal Representative; Masons Solicitors

Heard at Field House on 15th October 2024

DECISION AND REASONS

1. Although this is the Secretary of State's appeal, for ease of comprehension, we shall refer to the parties as they were constituted before the First-tier Tribunal.

2. On 25 October 2019 at Manchester Crown Court, the Appellant was convicted of conspiring/assisting unlawful immigration and seeking to obtain leave to enter/remain in the UK by deception, for which he was sentenced to 3 years imprisonment. On 22 November 2019 the Appellant was issued with a notice of decision to deport in accordance with section 32(5) of the UK Borders Act 2007. On 16 October 2020 a Deportation Order was signed and the Appellant's human rights claim was refused which is the subject of this appeal.

3. The Secretary of State appeals against the decision of the First-tier Tribunal Judge Malone promulgated on 23rd January 2023 allowing the Appellant's appeal on human rights

grounds. The Secretary of State sought permission to appeal which was granted by Deputy Upper Tribunal Judge Murray in the following terms:

> 1. The Respondent alleges that First-tier Tribunal Judge Malone (FTTJ) erred in making a material misdirection and or/failing to provide adequate reasons for finding that the Appellant had demonstrated 'compelling circumstances' over and above the exceptions set out in paragraph 399 and 399A of the Immigration Rules and that the Appellant's removal would be unduly harsh. It is submitted that the FTTJ erred in finding that IVF was unavailable in Nigeria on the basis of the oral evidence of the Appellant's wife only, erred in speculating that the chances of her conceiving would be 'non-existent' in Nigeria and erred in placing reliance on a report regarding her mental health when it was not confirmed that it was an independent expert medical report. It is asserted that the FTTJ failed to provide adequate reasons for finding that the elevated threshold in HA v SSHD (Iraq) [2022] UKSC 22 was made out in relation to his children given that there was no evidence in relation to formal arrangements with them and the independent social worker's report was considered to be too generalised to be reliable. It is further submitted that FTTJ 'undermined the seriousness of the Appellant's offences'.
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> 2. It is arguable that the findings in relation to the absence of IVF treatment in Nigeria are unsupported by reliable evidence and should have not been made in the absence of such evidence and that consequently the finding that the 'unduly harsh' test and the finding that there are 'very compelling circumstances above the exceptions' are perverse/inadequately reasoned. It is further arguable that the FTTJ makes no findings on whether the report from Zenith Psychology (referred to at paragraph 63) meets the requirements of an expert's report. It is also arguable that having found that the Appellant's removal would not be unduly harsh on his children, the finding that very compelling circumstances had been demonstrated is not adequately reasoned. Whilst the FTTJ clearly refers to the seriousness of the Appellant's offences, it is arguable that the proportionality assessment is flawed in light of the fact that too much weight is arguably placed on flawed findings and the absence of a consideration that the Appellant's wife is from Nigeria.

4. In advance of the hearing, Mr Babarinde provided a Rule 24 response by way of a Skeleton Argument on behalf of the Appellant dated 14th October 2024 which was provided to the Secretary of State and to us. All concerned had the opportunity to consider and which we have taken into account in reaching this decision.

Findings

5. In respect of the Secretary of State's grounds, the key issue appears to be the Judge's assessment of the evidence of Ms A, the appellant's wife, regarding the availability of IVF treatment in Nigeria and whether the Judge's findings upon the same are sustainable. This finding is central to the decision, given that the unavailability of IVF treatment lies at the heart of why the Judge has decided that the decision to deport the Appellant will be unduly harsh.

6. The Secretary of State argues that the Judge erred in finding that IVF treatment in Nigeria is unavailable based solely upon the Appellant's wife's ("Ms A") oral evidence that she believed there to be no fertility treatment available in Nigeria, whilst noting that the CPIN is silent as to the availability of IVF treatment.

7. We conclude that the Judge erred in exclusively relying upon Ms A's personal evidence when finding as a fact that IVF treatment is unavailable in Nigeria. In circumstances where neither party filed objective evidence as to the availability of IVF treatment in Nigeria, the Judge failed to address in his reasoning as to how Ms A had formed her personal view. Whilst it may have been her subjective view that the treatment is unavailable, the Judge was required to assess and determine the objective fact of whether IVF treatment is available in Nigeria or not. For example, we cannot discern from the Judge's decision whether he concluded that IVF treatment is unavailable based upon a bald assertion from Ms A without her having performed any research into what IVF treatment is available in Nigeria, or equally whether his finding based upon oral evidence detailing efforts she made in contacting hospitals and clinics in Nigeria about offering fertility treatment. We observe the Secretary of State's unchallenged assertion before us that even the most basic Google search reveals the existence of IVF treatment in Nigeria.

8. We are grateful to Mr Babarinde who pragmatically accepted the pitfalls in defending the appeal and who conceded that the decision suffered from the above material omission. Equally, Mr Babarinde quite rightly did not seek to argue that IVF treatment was unavailable in Nigeria.

9. In addition, we do not know whether the IVF treatment available in Nigeria is apt or suitable for the Appellant's and his wife's needs, given that their witness statements are surprisingly silent on this issue. We note that the Judge did consider Ms A's fertility issues with some care at paragraphs 57-62 and 64-65. However, given that the letter that we have seen from the London Women's Clinic dated 18th July 2022, mentions that "the best treatment option" for the couple would be to "an egg donation treatment cycle", this requires a different treatment plan to IVF and would require an egg donor and the findings are thus incomplete in respect of the availability of this treatment in Nigeria, if this is the course of treatment that the Appellant and Ms A are intent on pursuing etc..

10. Thus, we find that Ground 1 establishes a material error of law that infects the entirety of the decision and requires it to be set aside in its entirety as the assessment of the availability of IVF treatment formed the basis for the Judge's finding that his removal would be unduly harsh, which also requires re-assessment.

11. As we have found for the Secretary of State in respect of Ground 1, and set aside the decision of the First-tier Tribunal in its entirety, we are not required to consider Ground 2.

12. We therefore find that the First-tier Tribunal has materially erred in law for the reasons given above.

Remittal

13. Both representatives requested that the matter be remitted to the First-tier Tribunal. We observe the guidance in Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC). As the appellant has not to date enjoyed adequate assessment of his appeal, we consider it fair and just to remit this matter to the First-tier Tribunal.

14. The appellant and his wife presently reside in the South-East. We consider it appropriate to transfer the hearing of this appeal to Taylor House.

Directions

15. The appeal is to be remitted to IAC Taylor House.

16. Upon remittal each party is at liberty to seek any further direction that may assist in the further management of this appeal.

Notice of Decision

17. The Secretary of State's appeal is allowed to the extent that the decision of the First-tier Tribunal is set aside in its entirety.

18. The appeal is to be remitted to the First-tier Tribunal to be heard by any judge other than First-tier Tribunal Judge Malone.

P. Saini

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 October 2024