Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46554/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 July 2014	**On 11 July 2014**

Before

Deputy Upper Tribunal Judge Pickup
Between

Secretary of State for the Home Department

Appellant

and

Olushola Atanda Owolabi
[No anonymity direction made]

Claimant

Representation:

For the claimant: XX, instructed by YY
For the appellant: Mr J Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Olushola Atanda Owolabi, date of birth 28.10.75, is a citizen of Nigeria.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Devittie, who allowed the claimant's appeal against the decision of the respondent to refuse his application for leave to remain in the UK as the spouse of a person present and settled in the UK, pursuant to Appendix FM of the Immigration Rules.

3. The Judge heard the appeal on 2.4.14.

4. First-tier Tribunal Judge Reid granted permission to appeal on 20.5.14.

5. Thus the matter came before me on 10.7.14 as an appeal in the Upper Tribunal.

Error of Law

6. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Devittie should be set aside.

7. The grounds of application for permission to appeal submit, inter alia, that the First-tier Tribunal Judge erred in law by not following the approach set out in Gulshan [2013] UKUT 00640 (IAC) that an article 8 assessment outside the Rules should be carried out only where compelling circumstances exist, and that following Nagre [2013] EWHC 720 (Admin) an appeal should only be allowed where there are exceptional circumstances, where refusal would lead to an unjustifiably harsh outcome.

8. However, in reality the appeal comes about because of an error in the wording of the decision part of the determination. In granting permission to appeal, Judge Reid stated, "The judge's conclusions in relation to the human rights limb of the appeal outside the Rules are set out clearly at paragraphs 15 to 18. The conclusions summarise why removal would be proportionate. It is unclear therefore why the judge summarised the decision as allowing the appeal on human rights grounds. The grounds disclose a material error of law."

9. I am satisfied that the judge gave very careful consideration to the appellant's case. I am satisfied that the decision in respect of the Immigration Rules was properly made and I note that the claimant has made no application to appeal that part of the decision. I have carefully considered the article 8 aspects. I note that the judge, in the claimant's favour, considered that the facts of the case justified a consideration of the article 8 claim outside the Immigration Rules, having earlier referenced Gulshan at §7 of the determination. However, it is clear from §17 and §18 that the judge was not satisfied that it would be unreasonable to expect the claimant and his spouse to continue family life outside the UK. They married and developed their relationship at a time when his immigration status was precarious. They are not entitled to settle together in the UK just because that is their choice. The judge carefully considered the IVF aspect of the case but found there was no evidence that the claimant's spouse would not be able to access such treatment from outside the UK.

10. Ultimately, the judge concluded that whilst there will be a measure of hardship and inconvenience, the factors in favour of the claimant and the degree of interference engaging article 8 private and family life, as well as that of his spouse, did not outweigh the public interest considerations, namely the legitimate aim of the state to protect the economic well-being of the UK through the application of immigration control. In other words, the judge found the decision of the Secretary of State proportionate to the claimant's and his spouse's article 8 private and family life rights. I find that is a conclusion which the judge was entitled to reach and for which

cogent and sustainable reasons have been given in what in almost all senses can be regarded as a careful determination.

11. Unfortunately, the judge then made what I consider to be no more than a slip at the very end of the determination in stating that the appeal is to be allowed on human rights grounds. It was an error of just one word in the whole of the determination. It is clear from the fee award decision that the judge intended to dismiss the appeal, stating "I have dismissed the appeal and therefore there can be no fee award." It is unfortunate that this tiny but crucial error was not drawn to the judge's attention when it was promulgation, as it could have been corrected without the need of the Secretary of State to appeal. It is also unfortunate that it was not corrected under Rule 60 at the permission stage.

12. Mr Shoye sought to argue that the wording of the first sentence of §18 of the determination was contradictory to the rest of the paragraph, but accepted that it is clear that the judge intended to dismiss the appeal on both immigration and human rights grounds. The wording of that sentence involved the acceptance that there would be a measure of hardship and inconvenience, but as held in previous case authority, some hardship and inconvenience does not render a decision unjustifiably harsh, or unreasonable, or disproportionate. He also told me that they would have sought to appeal the decision had it been dismissed. However, I am satisfied that the decision dismissing the appeal on all grounds was open to the judge and sustained by cogent reasoning. In the circumstances, there was no merit in Mr Shoye's submissions.

Conclusions:

13. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside. I am satisfied that the judge intended to dismiss this appeal on all grounds.

I set aside the decision, preserving all the findings of fact and conclusions other than the wording of the decision itself.

I re-make the decision in the appeal by dismissing it on both immigration and human rights grounds.

Signed: Date: 10 July 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: the appeal has been dismissed

Signed:  Date: 10 July 2013

Deputy Upper Tribunal Judge Pickup