Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03267/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 January 2022	**On 3 March 2022**
Extempore decision	

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DEBORAH OLUWATOYIN AVEREHI
(NO ANONYMITY DIRECTION IN FORCE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr M Fazli, Counsel instructed by Chris Alexander Solicitors

DECISION AND REASONS

1. This is an appeal of the Secretary of State. For convenience we will refer to the parties as they were before the First-tier Tribunal.

Factual background

2. The appellant is a citizen of Nigeria. She arrived in the United Kingdom in February 2012 on a visitor's visa, valid for less than one month. The appellant did not leave the country upon the expiry of her visa, and, on 30 September 2019, she made a human rights claim to the Secretary of State. That claim was refused on 19 December 2019 in circumstances which initially did not attract a right of appeal. The Secretary of State took a fresh decision to refuse the application on 21 February 2020. The appellant appealed against that decision

and her appeal was heard before the First-tier Tribunal on 2 September 2020. By a decision promulgated on 21 September 2020, First-tier Tribunal Judge Mehta allowed the appeal. The Secretary of State now appeals to this Tribunal against Judge Mehta's decision.

Factual Background

3. The basis of the appellant's human rights claim was that she is in a relationship with her British partner. The couple had been together for some time and could not relocate to Nigeria. Although her partner is of Nigerian descent, he has no experience of the country and all his ties are within this country.

4. A significant feature of the private and family life application advanced by the appellant related to the medical conditions that she claims her partner experiences. It is not necessary in this decision to go into the level of detail that features in the decision of the First-tier Tribunal, other than to observe that her partner's medical conditions relate to the apparent infertility of the couple, and their unsuccessful attempts to conceive a child. The appellant's human rights claim and her case before the First-tier Tribunal was that she should be permitted to remain in this country in order to allow the fertility treatment currently underway to continue, as well as to continue her relationship with her sponsor here.

5. In addition, the appellant claimed that having been out of Nigeria for so long, she would encounter "very significant obstacles" to her integration upon her return. It would be disproportionate for her to be removed in light of those factors, she contended.

6. The Secretary of State refused the human rights claim on the basis that she did not consider there would be insurmountable obstacles to the couple continuing their family life in Nigeria. The appellant's partner would be able to find employment in Nigeria, and fertility treatment would be able to continue there. As for the appellant's own position, she would not face very significant obstacles to her integration. She had lived in Nigeria for the entirety of her life before coming to this country, and would have sufficient connections to the culture and customs of Nigeria to be able to continue to do so upon her return.

Decision of the First-tier Tribunal

7. The judge directed himself as to the relevant law and principles concerning leave to remain as a partner under Appendix FM of the Immigration Rules. He set out the test contained in paragraph EX.1, which is in this context satisfied where an applicant demonstrates that there would be "insurmountable obstacles" to family life continuing with their partner in the proposed country of removal. The judge also set out the private life provisions contained in paragraph 276ADE(1)(vi) of the rules, concerning the requirement that an applicant demonstrate that they would face "very significant obstacles" to their integration in the proposed country of removal.

8. The judge directed himself concerning the burden and standard of proof applicable in human rights based claims, and concerning the approach that he should adopt in the event that he were to find Article 8(1) were engaged, see [24]. At [25] the judge said this:

> "If the appellant does not meet the Rules, I move on to consider proportionality using the 'balance sheet approach'. After finding the facts, I set out those factors that weigh in favour of immigration control – the 'cons' – against those factors that weigh in favour of family and private life – 'the pros' – giving reasoned weight to each. I then give a reasoned conclusion as to whether the 'pros' have outweighed the 'cons' such that the refusal decision is disproportionate. If it is, the appeal succeeds. If it is not, the appeal must be dismissed."

9. The judge's operative reasoning begins at [27]. In unchallenged findings at [27] to [30], he found that the appellant's residence in this country and the relationship with her British partner was sufficient to engage Article 8(1) of the European Convention on Human Rights ("the ECHR"). He found that the appellant's private life established in this country would be sufficient to engage Article 8(1). At [31] and [32] the judge identified that the issue for his initial consideration would be whether the appellant would face "insurmountable obstacles" to her relationship with her partner continuing in Nigeria. He quoted from *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 at [48], in which the Supreme Court said:

> "If the applicant or his partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the 'insurmountable obstacles' test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are 'exceptional circumstances'."

10. The judge rejected the appellant's case that the medical treatment that would be required for the fertility programme to continue in Nigeria would be too expensive, stating at [35] that there was no evidence in relation to the cost that would be likely to be incurred. At [36] the judge stated that the appellant had not satisfied him that the fertility problems the couple claimed to encounter were challenging, and observed that there was no evidence of how severe those problems were, how much the chances of the couple conceiving would be diminished upon their prospective return or relocation to Nigeria, in contrast to the treatment that would be available in the United Kingdom.

11. Then, at [37] the judge considered the appellant's partner's evidence in relation to the claimed mental health conditions of which he had given evidence. The judge rejected his evidence that he experienced anxiety and sleeplessness, and gave reasons which had not been challenged by the appellant for reaching that finding.

12. At [38] the judge outlined the evidence of the appellant and her partner concerning her partner's claimed suicidal tendencies. The judge accepted that evidence, in the following terms:

> "I accept this account and place significant weight on the evidence given by the appellant and her partner in relation to this as their accounts were consistent with each other's and I formed the view

> from the way in which the appellant's partner gave his evidence when asked about his mental health that he was telling the truth. His evidence was not exaggerated or overegged in any way. Both the appellant and her partner were consistent about this issue."

13. The judge then directed himself in relation to the respondent's *Country Policy and Information Note Nigeria: Medical and Healthcare Issues* at [6.9.1], which concerns mental health provision available in Nigeria, and [6.9.2] concerning the widespread availability of mental health treatment in that country. At [41] the judge noted that the appellant's partner would have the support of the appellant upon their return to Nigeria. That analysis led to the judge concluding as follows in relation to the claimed "insurmountable obstacles" to the couple's family life continuing in Nigeria, at [43]:

> "On balance, looking at the circumstances, I am not satisfied, on the balance of probabilities, that there are insurmountable obstacles to family life continuing in Nigeria I find that the appellant and her partner's desire to stay in the UK and continue their relationship is through choice and convenience as opposed to facing very significant difficulties. Thus, I find the high threshold set by paragraph EX.1 has not been met in this case."

14. The judge subsequently addressed whether the appellant would face very significant obstacles to her own integration in Nigeria. Directing himself pursuant to *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813 at [14] and *Parveen v The Secretary of State for the Home Department* [2018] EWCA Civ 932 at [9], the judge considered that the appellant would not face "very significant obstacles" to her integration. At [51] the judge found that the appellant had lived most of her life in Nigeria, including time during her adult life. She had worked in the country previously, in two different roles. She had brothers who still lived in Nigeria and she would have retained knowledge of the life, language and culture in the country. Those would all be factors, found the judge, that would help the appellant to re-integrate in Nigeria upon her return. At [52] the judge found that the appellant had not demonstrated that there would be very significant obstacles to her re-integration upon her return.

15. Having essentially found that the appellant failed to meet the requirements of the Immigration Rules in relation to her relationship with her British partner and concerning her own private life and prospective re-integration in Nigeria, the judge adopted a so-called "balance sheet" approach to the question of the proportionality of her removal. He set out favours that weighed in favour of the maintenance of effective immigration controls at [54] to [57]. He again directed himself pursuant to *Agyarko*, and recalled some of the factors to which regard must be had under Section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). He observed at [56] that the appellant's stay in this country has been unlawful. Accordingly, pursuant to Section 117B(4) of the 2002 Act, little weight should be given to a private life or relationship formed with a qualifying partner that was developed when a person's immigration status was unlawful. Finally, at [57], the appellant was fully aware when she developed her private and family life in this country that she could have no expectation of remaining in the United Kingdom indefinitely.

16. The judge turned to the "pro" factors, those that weighed in favour of private and family life. At [58] he stated that the appellant had engaged with her church

community and assisted vulnerable members of her community; at [59], he found that she did not have any criminal convictions; and at [60] the judge found that the appellant had supported her partner when dealing with his mental health as well as his physical health. The judge said:

> "The appellant's partner is a 52 year old man who has lived his whole life in the UK. He suffers from poor mental health and physical health issues. He has no family support of his own in Nigeria and will have to deal with the trauma of living in a country in which his mother met an untimely death. The appellant's partner is in full-time employment in the UK as a customer service assistant at Forest School and is unlikely to be able to transfer those skills in Nigeria."

17. At [61] to [65] the judge reached his global conclusions in relation to the proportionality of the appellant's prospective removal, finding that the factors in favour of the appellant outweighed the public interest factors militating in favour of her removal. He stated at [63]:

> "63. Balancing all the factors and the considerations I have outlined above I consider that the 'pros' are cumulatively sufficient to outweigh the public interest engaged. Taken together they can properly be described as 'very strong' and 'compelling'.
>
> 64. In my judgment the public interest in this case is outweighed by the appellant's interests and there is a disproportionate interference with the appellant's private and family life."

The judge allowed the appeal.

Grounds of appeal

18. The grounds of appeal advanced by the Secretary of State are as follows. They feature under a generic heading of "lack of adequate reasons/making a material misdirection of law". The grounds contend that, having concluded that the appellant and her partner would not face insurmountable obstacles to continuing their family life in Nigeria, and having concluded that the appellant personally would not face very significant obstacles to her re-integration in Nigeria, it was not therefore clear upon what basis the judge was able to conclude that the appellant and her partner returning to Nigeria would be disproportionate.

19. The second ground of appeal is that the judge erred by making contradictory findings. It is said that having rejected some elements of the appellant's partner's evidence concerning his claimed mental health conditions, the judge then reached contradictory findings concerning his suicidal tendencies. On that basis it is unclear, submit the grounds of appeal, the basis upon which the judge was properly able to conclude that the appellant's removal would be disproportionate.

20. Permission to appeal was granted by Upper Tribunal Judge Martin, sitting as a Judge of the First-tier Tribunal.

Discussion

21. By way of preliminary observation, we observe that the hearing below took place in the absence of a presenting officer, or other representative of the Secretary of State.

22. The judge addressed the non-attendance of the Secretary of State's representative at [10] of his decision. There had been no application to adjourn. The judge gave unchallenged reasons for deciding that it would be consistent with the overriding objective of the First-tier Tribunal to proceed in the Secretary of State's absence.

23. Where an appeal hearing takes place in the absence of a representative for the Secretary of State, the approach that a judge should adopt is now well-established by the *Surendran* guidelines (see *MNM (Surendran guidelines for Adjudicators) (Kenya)** [2000] UKIAT 00005). In summary, the role of a judge is not to formulate the Secretary of State's case that could have been formulated had the Secretary of State chosen to attend. It is simply to put the points set out in the impugned decision to the appellant or their representative. If additional written representations had been provided by the Secretary of State, then those too must be considered by the judge. But the extent of the Secretary of State's case, and therefore the ambit and scope of the issues to be addressed by the judge, are limited to the matters set out in the impugned decision. As will be seen, the way in which the Secretary of State has advanced her grounds of appeal before this Tribunal demonstrates what can happen where the Secretary of State fails to attend the hearing and then seeks to re-argue the case in this appellate tribunal because she disagrees with the outcome of the hearing.

24. We turn therefore to the first ground of appeal. Expanding upon ground 1 before us, Mr Tufan submits that having found that the appellant failed to meet the requirements of the insurmountable obstacles test in relation to the family life she enjoys with her partner. Having failed to demonstrate that she would face very significant obstacles to her own integration in Nigeria, it was therefore an "error" for the judge to take account of those very same factors when conducting the overall proportionality assessment.

25. In our judgment, that submission is misconceived. By definition, having conducted his analysis in relation to the Immigration Rules and concluded that the appellant could not succeed under those rules, it was incumbent upon the judge to perform a broader assessment of Article 8 *outside* the Rules. The judge directed himself at [24] and [25] as to the need to take that approach and the authority for doing so, namely *TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department* [2018] EWCA Civ 1109. To the extent the Secretary of State contends the judge should not have taken into account the findings that he reached when conducting that analysis, properly understood, that is a disagreement of fact and weight. The Secretary of State has not demonstrated that the judge, approaching the analysis of Article 8 outside the rules on the basis of the (limited) matters raised in the Secretary of State's decision, reached findings that no reasonable judge could have reached, or that he approached his analysis on the basis of some other legal error. There is therefore no merit to the first ground of appeal.

26. Pursuant to ground 2, the Secretary of State contends that the judge reached contradictory findings. Mr Tufan submits that at [37] and [38] the judge accepted some features of the evidence given by the appellant and her partner as to the mental health conditions of the partner, but rejected other aspects of it, thereby

reaching contradictory findings. In our judgment, properly understood, there is no contradiction between the findings reached by the judge. At [37] the judge stated that there were some features of the appellant's partner's evidence concerning his mental health that he did not accept. By contrast, at [38] he found that there were other features of it that he did accept. We recall that in this appellate tribunal we do not have the same benefit that a first instance judge will have had when reviewing the evidence in the case. The judge had the advantage of considering the "whole sea of evidence", to adopt the terminology of Lord Justice Lewison in *Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5* at [114]. This Tribunal would be "island-hopping" were we to seek to dissect the findings reached by the judge.

27. Mr Tufan advanced a range of additional submissions which went beyond the grounds of appeal upon which the Secretary of State had permission to challenge the decision of the judge. He submitted that there was no evidential basis for the judge to reach the findings he did at [38] concerning the appellant's husband's mental health. While we accept that there was no medical evidence before the judge, and again recalling that this was not an issue in relation to which the Secretary of State enjoyed permission to appeal, we consider that it was entirely open to the judge to accept the oral evidence of the appellant and her partner concerning the perceived difficulties and suicidal tendencies that he claimed to experience. While another judge may well have concluded that in the absence of independent medical evidence such evidence could only attract minimal weight, in our judgment, it was open to the judge to accept the evidence for the reasons she gave.

28. Mr Tufan also submitted that, in his proportionality assessment, the judge took into account the very same factors that he had already relied upon as a basis to *reject* the appellant's case under the Immigration Rules. Putting to one side the fact that this was not a ground of appeal advanced by the Secretary of State, in our judgment, there is no merit to this criticism. Of course, had the sole factor on the appellant's side of the scales been the *significant* but not *very significant* obstacles she was likely to encounter to her integration in Nigeria, or the *surmountable* obstacles that any couple seeking to relocate internationally will inevitably encounter, then there would have been some force to this criticism. However, at [58] to [60] the judge set out a range of additional features which he was rationally entitled to have regard to. He considered the length of the appellant's residence in the country and the private life that she has established in that time. He ascribed significance to the engagement the appellant has had with her church and with the work that she has done to assist vulnerable members of the community. It cannot be said that the sole features on the appellant's side of the scales related to the very factors in relation to which she had failed under the Immigration Rules: they formed part of it, but the judge gave other reasons, too.

29. Mr Tufan criticised one of the "pro" factors in favour of the appellant, at [59], in which the judge stated that the appellant does not have any criminal convictions. We agree that, in isolation, that would be a factor capable of attracting little weight. We accept that it is a description of the societal expectations placed on all members of the community. However, *little* weight does not mean *no* weight and it was rationally open to this judge to ascribe some, albeit minimal, weight to that feature.

30. Finally, at [60] the judge ascribed significance to the support the appellant has provided to her partner to deal with his mental and physical health. Again, those were factors that the judge was rationally entitled to take into account. Not all judges would have ascribed significance to those factors, but in so doing we do not consider that this judge reached a conclusion that no reasonable judge could have reached, that was perverse, or was otherwise unlawful.

31. The final strand to Mr Tufan's submissions straying beyond the grounds of appeal related to the judge's use of the balance sheet process, and his "failure" to adopt the terminology of *Agyarko* concerning the high threshold for appeals to be allowed outside the Immigration Rules. In our judgment, there is no merit to this submission. As we have already set out, at [24] and [25] the judge highlighted the balance sheet approach and its endorsement by the former Senior President of Tribunals in *TZ (Pakistan)*. He was also fully aware of the extent of the requirements of Article 8 outside the Rules, having directed himself concerning the need for there to be exceptional circumstances at [32], and also at [42] pursuant to *VW and MO (Article 8 - insurmountable obstacles) Uganda* [2008] UKAIT 00021. Properly understood, Mr Tufan's submissions concerning the judge's application of the balance sheet assessment conducted by the judge amount to a disagreement of fact and weight, and do not demonstrate that this judge reached conclusions which were not rationally open to him.

32. Drawing this analysis together, therefore, in our judgment, the judge heard evidence, reached findings of fact he was entitled to reach on the evidence that he heard, correctly directed himself as to the appropriate legal framework and the relevant considerations he was to take into account and concluded his analysis by conducting a "balance sheet" assessment, arriving at a reasoned conclusion in favour of the appellant.

33. We return to the observation we made earlier. The judge was without the benefit of a presenting officer at the hearing before the First-tier Tribunal. He resolved the issues in the appeal by reference to those matters raised in the decision, and, appropriately, did not stray beyond its boundaries. It was not an error of law for the judge not to consider arguments that the Secretary of State did not advance before him, as a result of her decision not to attend the proceedings. Had the Secretary of State chosen to appear at the hearing before the First-tier Tribunal, she would have had the opportunity to make submissions along the lines of those advanced by Mr Tufan before us. Having not done so, she cannot now seek to reargue the appeal before this tribunal.

34. This appeal is dismissed.

Notice of Decision

The appeal is dismissed.

The decision of Judge Mehta did not involve the making of an error of law such that it must be set aside.

No anonymity direction is in force.

Signed Stephen H Smith Date 7 February 2022

Upper Tribunal Judge Stephen Smith