Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04230/2019

THE IMMIGRATION ACTS

Heard at Leeds Combined Court Centre	**Decision & Reasons Promulgated**
On 17 January 2020	**On 24 February 2020**
Decision given orally at hearing	

Before

THE HON. MR JUSTICE LANE, PRESIDENT

Between

LEANDRO [S]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mutebuka, Mutebuka & Co Immigration Lawyers
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought by the appellant to challenge the decision of First-tier Tribunal Judge Monaghan who, following a hearing on 24 July 2019, dismissed the appellant's appeal against the respondent's decision to refuse the appellant's human rights claim. Permission to appeal to the Upper Tribunal was granted by Judge E M Simpson on 19 November 2019.

Although the decision of Judge Monaghan is both lengthy and detailed, it is nevertheless the subject of criticism by the appellant through his representative, Mr Mutebuka.

2. The judge's decision records that the appellant had previously entered the United Kingdom as a visitor on various occasions from 2009 to 2015. He had applied for leave on the basis of UK ancestry in 2015 but that was refused in 2016. He entered the United Kingdom most recently on 1 November 2016. On 13 October 2017 he made an application for leave to remain on human rights grounds. That was refused by the respondent on 20 February 2019.

3. The judge at paragraph 7 of her decision set out the reasons why the respondent took the view that the human rights claim should be refused. In particular, she noted that the respondent had not seen any evidence that there were insurmountable obstacles in accordance with paragraph EX.2. of Appendix FM to the Immigration Rules, which would mean very serious difficulties would be faced by the appellant or his partner in continuing family life together in Barbados, that being the country of the appellant's nationality.

4. The respondent noted submissions that had been made relating to the health issues of the appellant's partner; in particular, following a road traffic accident, which had resulted in her sustaining serious injuries. There was, however, no evidence at the time to indicate that the partner was still receiving treatment. Nevertheless, the partner was said to suffer from depression; but the respondent considered that treatment, including counselling and medication, was, if necessary, available in Barbados. The respondent noted the appellant's partner's health issues overall but considered those were not life threatening. She noted that they had not prevented the partner from working at the relevant time and providing assistance to her father; and to her brother, who was said to need her assistance. Any assistance for the appellant's partner's father and brother could be provided, in the view of the respondent, by the NHS or Social Services.

5. The respondent took the view that the appellant and his partner were both of employable age and there was nothing to indicate that they would be unable to support themselves in Barbados. The fact that the appellant's partner had employment in the United Kingdom did not constitute an insurmountable obstacle, in the view of the respondent. The respondent also noted that a wish, desire or preference to live in the United Kingdom did not constitute an insurmountable obstacle.

6. For all those reasons, the respondent took the view that the appellant did not meet the requirements of paragraph EX.1. or paragraph 276ADE of the Rules nor in the respondent's view were there any exceptional circumstances which meant that, notwithstanding a failure to comply with the Rules ,the appellant should nevertheless be given leave because not

to do so would result in a breach of section 6 of the Human Rights Act 1998.

7. The judge then turned to the relevant law. She noted that the issue for her in respect of whether the appellant satisfied the Rules was to be adjudged on the balance of probabilities. If the matter involved Article 8 outside the Rules, then the judge stated that the standard of proof was whether there were substantial grounds for believing the evidence, which was the same thing, she said, as the question of whether it was reasonably likely to be true.

8. The judge then reminded herself of the case of Agyarko v Secretary of State [2017] UKSC 11 on the issue of insurmountable obstacles. The judge recorded the oral and written evidence. In particular, she noted that the appellant's partner was at the date of the hearing heavily pregnant and treated her as vulnerable in that respect, making appropriate provision for the partner when giving her evidence.

9. At paragraph 22, the judge began her findings. She noted the appellant accepted that he entered the United Kingdom on a visit visa and that he had married his partner in 2016 in Barbados. She then recorded further matters relating to his immigration history. She noted that the appellant did not return to Barbados after the expiry of his visa on 1 May 2017 and therefore became an overstayer. The judge noted at paragraph 24 that the appellant stated he had to stay beyond the terms of his visa because the sponsor has suffered a bereavement of a close family relative. The mother of the sponsor had passed away on 25 October 2016, and that prompted the appellant to arrange the visit to support the sponsor in her distress. The judge noted that she had no reason to doubt that explanation. It is, however, important, in view of the emphasis placed by Mr Mutebuka on paragraph 24, to note the ambit of that passage. The judge was accepting that the appellant came as a visitor in 2016 at a time when he considered that his partner needed his support as a result of her bereavement.

10. The judge then noted that the appellant said his intention was to offer the sponsor support within the terms of his visa, which of course was time limited; but when he arrived in the United Kingdom, he found that the sponsor could barely function. She needed support in a variety of respects. There was then some issue relating to a letter from Victim Support but that did not take matters further and has certainly not featured in submissions today.

11. The judge found that there was no independent medical evidence to support the appellant's account that, when he arrived in the United Kingdom the sponsor was suffering from either an exacerbation of mental health problems or some severe bereavement reaction. In so finding, the judge noted that the appellant had provided the respondent with some of the sponsor's GP records, which dealt with the sponsor's injuries in relation to the road traffic accident in May 2017. The judge noted that the

appellant was therefore aware that obtaining medical evidence which might support his case would be important.

12. Overall, the judge, on considering the evidence, did not find that it had been established that the sponsor had been so functionally impaired as had been described by the appellant as at November 2016. If she had been, she would, in the judge's view, have visited her GP and there would have been a record of that.

13. The appellant said that the sponsor's paternal grandfather passed away on 3 February 2017, which increased her grief and her reliance on him. The judge noted that she had not been provided with a death certificate relating to the loss of the sponsor's grandfather.

14. The appellant's case was that, despite the bereavements and the sponsor's poor functioning, they both sought legal advice with a view to seeing whether they could apply for settlement. The judge said that no evidence had been put forward to support a finding regarding when such advice was sought and whether that was done promptly when the visit visa had expired. It was not even said in the witness statements when such evidence was taken; only that it was.

15. At this point, it is perhaps convenient to note that Mr Mutebuka pointed to a document in the respondent's bundle, to be found at page B60. This is a copy of an authority to act, signed by the appellant and relating to Mutebuka & Co Immigration Lawyers, on 29 November 2016. Mr Mutebuka submits that the judge overlooked that document when making her finding. I shall return to this in due course.

16. In any event, the judge found that further delay then occurred before the application was made because the appellant said he had to save up for the fees demanded by the respondent in respect of the application.

17. The judge found that she had been given insufficient evidence in relation to the extent of the mental health problems of the sponsor and the death of her paternal grandfather. She found that the main cause of the sponsor being unable to work was the injuries suffered in the road accident and she noted wage slip evidence in that respect. At paragraph 34, the judge considered there were some mitigating circumstances in relation to the delay in submitting the application for leave to remain. Nevertheless, the judge found that the appellant was a person who was present in the United Kingdom unlawfully after his visa expired and at all times his leave had been precarious. She further found that the sponsor's road traffic injuries were not sustained until 30 May 2017, which was almost a month after the appellant's lawful leave as a visitor had expired. Therefore, at that time the judge found the appellant should have returned to Barbados. Although she noted the factors that influenced the appellant's decision to remain unlawfully, these did not include those injuries or the resulting hospital treatment but were based on two family bereavements. As to that, the judge considered she had substantiating evidence for one but not

for the other. So far as the sponsor's claimed mental health problems were concerned, there was little contemporaneous independent evidence. Such evidence as existed, the judge considered, was not helpful to the appellant.

18. The judge then looked at evidence from a Carer's Support Worker that had been put forward on behalf of the appellant. The judge explained why she placed only limited weight on that material. She also saw a Community Neurological Rehabilitation Referral Form for the sponsor of June 2017. This was written shortly after the road traffic accident and around five weeks after the appellant's leave as a visitor had expired. It was a core element of the appellant's claim that, in overstaying, the appellant had been concerned that the sponsor was hardly able to function on account of her mental health problems. However, the rehabilitation referral documentation did not, in the judge's view, bear that out. The past medical history at that point was recorded as asthma and mild anxiety/depression. The sponsor's mental health problems were, the judge considered, recorded as being mild at that time. Reference was made in the referral to supporting the sponsor's graded return to her ballet classes, which was a meaningful hobby. The judge considered it reasonable to find that her return to them was important to her and that this had not been in the long distant past. It was therefore reasonable to find that the sponsor stopped them as the result of her physical injuries in the accident.

19. The sponsor was a person who had been working full-time as a team leader for a national well-known mobile telecommunications company and she had also been undertaking the important hobby to her of ballet lessons. That level of functioning did not suggest to the judge that the sponsor was an individual who was suffering from severe mental health problems at the time that the appellant had decided to overstay his visa. The judge did accept that the appellant's partner had suffered sad family bereavements, including the loss of her mother, and would have required support in relation to that bereavement, which could have been given within the six month period of the visit visa.

20. Overall, at paragraph 39, the judge concluded that the appellant had greatly exaggerated the sponsor's health problems at the time he decided not to return to Barbados. The judge at paragraph 40 reminded herself however that this was a human rights claim and that she had to make findings of fact in relation to the circumstances appertaining at the date of the hearing. Mr Mutebuka rightly confirmed that this was the correct course for the judge to take.

21. The judge then went on to look at the sponsor's current physical health. She did this in a number of paragraphs, beginning at paragraph 42. She considered that the appellant's sponsor's mental health was, as she had said, not severe at the time the appellant's visa expired, and there was little evidence to suggest that her mental health problems were still

exacerbated by the road traffic accident. Although she had suffered close family bereavements and had been subjected the threats, the judge found overall that the position was nevertheless not such as to entitle the appellant to succeed.

22. In so finding, the judge had regard to an expert report of Dr Rozmin Halari, a Chartered Consultant Clinical Psychologist. She noted that the doctor had described the sponsor as developing long standing depression which had been managed by anti-depressant medication. She was not currently taking this due to her pregnancy. The expert noted that the sponsor was suffering from moderate anxiety and moderate levels of depression. The opinion was given that if the appellant were to leave the United Kingdom it would cause a deterioration in the sponsor's emotional well-being and it would have a detrimental impact on her pregnancy and the unborn child.

23. At paragraph 56, the judge said that whilst she acknowledged the opinions of the expert, she had decided to place very little weight on them. This was because whether deliberately, mistakenly or otherwise, the expert had not been provided with an accurate account of the sponsor's family background and, importantly, that she has family in the United Kingdom who might be available to support her. The expert report noted that the sponsor had told the expert that the family consisted of a half brother and that she said this was the only family she had left. She said that the appellant was her carer. The judge held at paragraph 57 that those statements were simply not true. The sponsor had a father in the United Kingdom to whom she claimed to be close, but she had not told the expert of that. She had therefore provided inaccurate detail for this core part of the psychological assessment.

24. At paragraph 59 the judge said:-

> "I further find that there is little convincing evidence before me that the Sponsor could not access the relevant medication or treatment for her mental health problems in Barbados if she decided to continue her family life there with the Appellant."

We shall come back to that paragraph in due course.

25. The judge did not consider that there was an absence of relevant healthcare in Barbados, despite what the appellant had said. She noted the objective evidence in that regard. She then considered the position of the sponsor's brother. Again, this was in some detail. She found that the sponsor had not provided a credible account in relation to the relationship between her and her father. The judge gave her reasons for so finding. Although she considered that the sponsor may have given some emotional practical support at times when she was not working, her father and brother were able to manage for the majority of the time and without her day to day care, when the sponsor was at work.

26. Further adverse credibility findings followed, beginning at paragraph 86 of the decision. So far as the brother was concerned, although the judge was aware that there was more evidence of the part played in his life by the sponsor than there had been in the case of the father, she noted that as a British citizen he would be entitled to care and support by the NHS and Social Services. She then made findings about the appellant's ability to work and sustain himself if returned to Barbados. She did not find that the appellant was credible insofar as his evidence on that aspect was concerned.

27. Finally, the judge said that she had been asked to have regard to the respondent's own policy guidance, which was found at page 165 of the bundle. She was particularly referred to the part of the guidance on assessing insurmountable obstacles concerned with the impact of a mental or physical disability or of a serious illness, which requires ongoing medical treatment. The guidance stated that independent medical evidence could establish that a physical or mental disability or a serious illness which requires ongoing medical treatment would lead to very serious hardship. An example was given of a lack of adequate healthcare in the country where the family would be required to live. At paragraph 102, the judge found that the independent evidence presented to her did not establish that there was a lack of adequate healthcare in Barbados.

28. At page 201 of the bundle relating to the same guidance, the judge observed at paragraph 103 of her decision that she was also asked to consider compelling compassion circumstances. An example might be when an applicant or family member had suffered a bereavement and requests a period of stay to deal with their loss or to make funeral arrangements. The judge said:-

> "Whilst the Sponsor has experienced loss and family bereavement, I find that this Guidance deals more with the immediate period after the loss, which has not passed by and is no longer relevant to the decision I have to make."

She therefore found that the appellant could not meet the requirements of the Immigration Rules, including paragraph EX.1 and 276ADE and that the Secretary of State was therefore correct to refuse the application on that basis.

29. Then, at paragraph 105, the judge turned to the assessment of Article 8 outside the Rules. She noted the appellant's claim that work in Barbados would be difficult for him. She found, however, that no background evidence had been put forward in that regard. The appellant was said to be a qualified chef who had worked on cruise ships. This emerged from a letter written by an individual and put forward on behalf of the appellant. She noted that appellant had not mentioned this aspect of his employment in his own evidence. She found that the appellant was a highly skilled individual who had worked in a variety of settings in Barbados as a private chef. The sponsor was also a highly qualified experienced and skilled

individual with an impressive work record. This was despite the fact that she had suffered from mental health problems. Whilst the judge accepted that the sponsor had faced challenges in terms of family bereavements, the loss of her first child, a road traffic accident and that in the past she had been a carer for close family members, it was to her great credit that she had still managed to hold down employment to a managerial standard. She was currently vulnerable in that she was expecting her second child. Overall, the judge found the sponsor to be an extremely resourceful and highly resilient person.

30. Looking at all matters in the round, the judge found that there had been some major inconsistencies in the appellant's claim and that there were credibility concerns about some key elements of it. She found that, whilst there would be a period of adjustment if the appellant and the sponsor were to live in Barbados and continue their family life there, and that there would be an element of hardship for the sponsor in having to leave her brother and father in the United Kingdom, nevertheless the judge considered that these did not amount to insurmountable obstacles.

31. Overall, the judge found that the interference with the family and private life of the appellant and the sponsor which would be occasioned by the appellant's removal was not such as to give rise to a disproportionate interference with their Article 8 rights. The judge then ended her decision by directing that it should be communicated in a particular way, so as to avoid any undue concern to the appellant and the sponsor in the late stages of the sponsor's pregnancy.

32. The grounds of challenge to the decision asserted that there had been procedural unfairness on the part of the First-tier Tribunal Judge. I do not consider that there is any merit in this ground. It is plain that the judge addressed in detail the considerable oral and written evidence before her. That was what she was required to do. I cannot discern any place where the judge has made a finding that she was not entitled to reach in all the circumstances.

33. It is contented that the First-tier Tribunal Judge reached contradictory findings in paragraphs 27 and 34 of her decision. Again, I do not consider that there is any merit in this. If one reads both paragraphs, it is plain what the judge was finding. The fact that the judge made some positive findings both there and at paragraph 24 of her decision is not to be taken as an indication that the judge's negative findings are thereby likely to be wrong. Particularly in a complex case such as this, a judge can find certain matters which tend to favour the appellant, and yet conclude that the appellant must fail. That, I consider, is precisely what happened in the present case.

34. The issue is taken in the grounds relating to what the judge found about Victim Support takes the appellant's case nowhere, given that the focus was properly on whether the family could live in Barbados rather than in the United Kingdom.

35. Reference is made to the authority to act given by the appellant to Mr Mutebuka in late 2016. Mr Mutebuka developed this in submissions before me. The authority to act tells us little or nothing about the precise reason why the appellant went to Mr Mutebuka at that time. It also occurred before certain of the events concerning the sponsor, to which I have made reference. But, importantly, the appellant did not apply for leave to remain until 13 October 2017, almost a year later. The First-tier Tribunal Judge was well aware of the submissions relating to financial difficulties in putting forward the application when she made her findings.

36. Mr Mutebuka's submissions, however, go somewhat further. He submits, if I understand him correctly, that the bereavement suffered by the sponsor meant that the appellant should have been treated compatibly with the Secretary of State's policy in the following way. The respondent should have regarded the fact that the appellant overstayed his visit visa as a matter which should be disregarded and that in some way he should be treated as if he still had leave to remain, which meant that he would be able to satisfy the substantive requirements of the Immigration Rules. Mr Mutebuka points to the following passages from the respondent's guidance at page 160 of the appellant's bundle.

> "Where the applicant is in the UK as a visitor, it means that they have undertaken to remain in the UK for up to 6-months before leaving. In all cases, visa or non-visa nationals have satisfied the entry clearance officer or immigration officer that they will do so. Those wishing to come to the UK to settle here as a partner or parent should apply for entry clearance under the family Immigration Rules. In view of that, a visitor cannot meet the requirements of the family Immigration Rules to remain in the UK in another category in the Immigration Rules.
>
> Where an application is made by a visitor to remain, it is only where there are exceptional circumstances while the visitor is in the UK, that a person here as a visitor can remain on the basis of their family life. Further information on considering exceptional circumstances is contained in the 5-year partner, parent and exceptional circumstances guidance …"

37. Mr Mutebuka's submissions fall down for the following reason. This guidance is talking about what a person should do if, during the currency of their visit visa, there are exceptional circumstances, which can include bereavement, that mean they need to prolong their stay. It is not dealing with somebody who overstayed and now seeks to argue that this was because of bereavement or any other matter. There is, accordingly, no basis for Mr Mutebuka's submission that the Secretary of State misapplied her policy or otherwise failed correctly to engage with the issue of exceptional circumstances in the application made to her by the appellant.

38. Indeed, it would be remarkable if a person in the position of the appellant could fall to be treated as if they had never overstayed their leave. The respondent therefore correctly engaged with the matter, as put to her by the appellant. So too, I find, did the First-tier Tribunal Judge. She correctly noted towards the end of her decision that the issue of bereavement had

fallen away and that she was required to address matters in relation to what the current situation was for the appellant and the sponsor. As I have said, Mr Mutebuka does not dissent from that.

39. The grounds of challenge assert that the First-tier Tribunal Judge's assessment of proportionality was "glaringly inadequate". It is said that she disproportionately assessed the mental health aspect of the appeal strictly by reference to the presence/absence of adequate mental health facilities in Barbados, rather than carrying out what is described as a "sensitive wider inner circle approach". It is difficult to understand what that is intended to mean. Insofar as it is a challenge to the First-tier Tribunal Judge's overall assessment of the evidence, I find that it fails to disclose any error of law.

40. Mr Mutebuka submits that the judge, in particular, failed to have proper regard to the expert report. With respect, that is manifestly unsustainable. As I have been at pains to indicate, the judge dealt in detail with the report and made findings in respect of it that were clearly open to her in all the circumstances. Here and elsewhere, the grounds are upon proper analysis no more than a series of disagreements with the findings that the judge was entitled to reach. Mr Mutebuka is of course permitted to disagree with those findings; but the issue for me is whether there is an error of law in the judge's decision. It is plain to me that there is no such error.

41. The judge who granted permission said that "by way of Robinson observation" the First-tier Tribunal Judge was likely to have made findings "premised on a standard of proof greater than the balance of probabilities". In that regard she pointed to paragraph 59 of the judge's decision. It was there that the judge found that there was little convincing evidence that the sponsor could not access relevant medication or treatment for her mental health problems in Barbados.

42. It was, in my view, quite wrong of the judge to grant permission by reference to this so-called Robinson point. Judicial fact finders are not to be criticised merely because, in the course of a long decision, they happen to use a word such as "convincing". As I have already noted, the judge correctly directed herself at the beginning of her decision to the burden and standard of proof, both in relation to the Rules and in relation to Article 8. It is, in my view, apparent that in saying what she did at paragraph 59 she was not requiring anything other than proof by reference to the relevant standard.

43. It is regrettable that Judge EM Simpson decided to grant permission by reference to that mistaken observation. Mr Mutebuka placed weight on Judge EM Simpson's grant of permission generally; but upon analysis, paragraph 2(i) and (ii) of her grant is no more than a recitation or summary of provisions in the grounds of application for permission. For the reasons I have given, those grounds do not disclose an error of law. If the judge who granted permission had taken to time to consider the

grounds by reference to this detailed and immensely careful decision of the First-tier Tribunal Judge, she would have seen, as is apparent, that there was nothing of substance in them.

44. I turn to an important and, from the point of the appellant and his partner, positive development. As I have said, at the time of the hearing before the First-tier Tribunal Judge the appellant's partner was pregnant. Happily, she gave birth to a son on 9 September 2019 in Leeds. I have seen both the birth certificate relating to that event and a copy of pages of the baby's British passport. As I pointed out at the beginning of the hearing, this evidence plays no part in my consideration of whether the First-tier Tribunal Judge erred in law. The baby obviously was not born at the time of the hearing in the First-tier Tribunal. What it does do, of course, is change the legal landscape, so far as the appellant and the sponsor are concerned. There is now a British child and I have no doubt, in the light of this fact, that the appellant may well be pursuing a fresh application for leave.

45. But the present proceedings are concerned with whether the First-tier Tribunal Judge erred in law. For the reasons I have given, she did not.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date: 21 February 2020

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber