IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005638

First-tier Tribunal Nos: HU/55318/2021
IA/13342/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 23rd of February 2024

Before

UPPER TRIBUNAL JUDGE OWENS

Between

Oluwasanmi Oluwashola Akangbe
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Garrett, Counsel instructed by TMC Solicitors
For the Respondent: Ms Rushforth, Senior Presenting Officer

Heard at Cardiff Civil Justice Centre on 8 February 2024

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Lester ("the judge") sent on 11 August 2022 dismissing his appeal against a decision of the Secretary of State dated 6 September 2021 refusing his human rights claim.

2. The appellant is a citizen of Nigeria who entered the United Kingdom on 7 September 2016 as a Tier 4 Student. He was granted leave to remain as a student until 25 September 2018 and applied to remain in the United Kingdom on the basis of his marriage on 28 March 2018. That application was refused on 11 December 2018 on the basis that it was not accepted that the appellant's relationship with his partner is genuine. The appellant did not appeal. His most recent application made on the basis of his relationship is dated 16 November 2020. The decision in respect of that decision was taken on 6 September 2021, almost two and a half years ago. There was no explanation for the delay in hearing this appeal.

3. The appellant is married to a British national who originates from Zimbabwe. The couple married on 31 July 2018. In 2019, the sponsor had an ectopic pregnancy. Although the respondent accepts that the appellant and his partner are now in a genuine and subsisting relationship and meet the suitability, relationship, financial and English language requirements of the Rules, the respondent considers that the appellant does not meet the immigration status requirement because he was unlawfully in the United Kingdom when he made the application. He does not meet E-LTRP.2.2. of Appendix FM of the Rules. The respondent considered that EX.1 does not apply because there are no insurmountable obstacles which would be faced by the appellant or the sponsor in continuing their family life together outside the United Kingdom. There were no other exceptional circumstances which would render the refusal a disproportionate breach of Article 8 ECHR, which would result in unjustifiably harsh consequences for the appellant or his partner.

4. The appellant asserts that his wife has no connection with Nigeria, she has been resident in the United Kingdom since the age of 8 and has a close family in the United Kingdom. Further, she had an ectopic pregnancy, which has affected her ability to conceive and she is on the cusp of having fertility treatment. She has also been diagnosed with chronic fatigue as a result of the complications following the ectopic pregnancy and is finding it difficult to work, as well as needing assistance with her personal care. The appellant claims to have little family in Nigeria and that it would be difficult to find employment.

The Decision of the First-tier Tribunal

5. The judge set out the decision of the respondent, the appellant's skeleton argument, the appeal review, the Immigration Rules and generic law in the first eight pages of the decision. The judge then, in a section headed "Evidence and Findings of Fact" at [27] onwards sets out the witness's evidence. From [39] onwards, the judge sets out the submissions of both representatives. At page 12 of the decision, from [51] to [55], the judge makes his overall findings. At [54] the judge's ultimate conclusion is "There was no evidence presented which established that there would be insurmountable obstacles caused by the appellant returning to Nigeria". The judge dismissed the appeal under Article 8 ECHR.

The Grounds of Appeal

Ground 1

6. EX.1.(b) insurmountable obstacles, failure to give adequate reasons.

The judge failed to explain why the sponsor's lack of knowledge and links to Nigeria, the cessation of her fertility treatment and ill-health and inability to pursue her course of nursing would amount to insurmountable obstacles. Further, the judge has failed to take these factors into account at all when assessing the issue of insurmountable obstacles.

Ground 2

7. Failure to consider Agyarko (Agyarko v SSHD) [2017] UKSC 11.

The judge misapplied the law by failing to take into account that the test is to be applied in a way which is "practical and realistic" rather than referring solely to

obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned.

The Rule 24 Response

8. Ms Rushforth confirmed that there was no Rule 24 response but indicated that the appeal is opposed.

Documentation

9. I checked that both parties had sight of the relevant documentation. This included the grounds of appeal, the grant of permission, the decision of the judge, the original respondent's bundle and original appellant's bundle, as well as the skeleton argument and respondent's review.

Ground 1

10. Mr Garratt's argument is that the judge failed to take into account those factors which might amount to insurmountable obstacles to the appellant's spouse.

11. Insurmountable obstacles are defined in the immigration rules as follows:

> "EX.2. of Appendix FM means the very significant difficulties which would be faced by you or your partner in continuing your family life together outside the UK in the country of which you are a national or as stated in your passport and which could not be overcome or would entail very serious hardship for you or your partner."

12. Mr Garratt took me through the decision, which he asserted primarily involved the judge setting out the position of both of the parties. He acknowledged that this included setting out that the sponsor's evidence that she would have difficulties in relocating to Nigeria, including learning difficulties, chronic fatigue and depression, an ectopic pregnancy and at [47] the judge alluded to the very real difficulties that the sponsor would face. He submitted that it was not clear from[54] whether the judge has factored these difficulties into account when finding that there were no insurmountable obstacles to the couple relocating to Nigeria. He also asserted that the judge misapplied the test by failing to take a "practical and realistic" approach.

13. Ms Rushforth submitted that the grounds amount to a disagreement with the decision. The judge was entitled to reach the conclusion that there was no evidence before him to suggest that there were insurmountable obstacles. He accepted that there would be difficulties and that the couple would prefer to remain in the United Kingdom, but these findings were open to the judge. She drew my attention to Volpi v Volpi v SSHD [2022] EWCA Civ 464 and submitted that it is not necessary for the judge to refer to all of the evidence or set it all out. In her submission, the findings at [54] were adequate to confirm that the evidence has been taken into account. The judge's conclusion is not irrational, nor is it inadequately reasoned. She further submitted that there is a reference to Agyarko earlier in the decision at [19] and that it is inconceivable that an experienced Immigration Judge would apply the wrong test.

14. I make a general comment at the outset. In this thirteen-page decision, eleven and a half pages consist of the judge cutting and pasting the skeleton argument, the respondent's review, various standard paragraphs on the law and setting out

the appellant's evidence and submissions. The findings come at [51] to [55] of the decision in five very brief paragraphs.

15. The issue in dispute in this appeal was whether there were insurmountable obstacles to the appellant and his wife relocating to Nigeria together. It is clear that the judge found that there would be no insurmountable obstacles to the appellant himself returning to Nigeria because he had qualifications, including a partial degree in IT, a qualification in Nigeria and because he has some family in Nigeria, although they live in modest circumstances. This is consistent with the evidence before the judge.

16. However, the evidence before the judge was that the appellant's wife would face considerable difficulty. She was born in Zimbabwe and relocated to the United Kingdom at the age of 8, her family are all resident in the United Kingdom, and she has no connection with Nigeria. In her statement, the sponsor states:

> "I moved to the United Kingdom since I was 8 years old so therefore my formative life has developed here which makes it impossible for me to adapt to a new life in a place where different languages are spoken that I don't understand and coupled with the fact that I have learning difficulties which would even make it much more difficult to adapt."

17. Her evidence is that there are no jobs and unemployment is on the rise in Nigeria. There is also insecurity and ritual killing. Her husband's parents are old and retired and rely on their own children for financial support. The sponsor then goes on to talk about the ectopic pregnancy she had in February 2019. The appellant almost lost her life as a result of this pregnancy because she went into cardiac arrest and was resuscitated. She had one of her fallopian tubes removed. She then states that she has an endocrine problem, affecting her fertility and ability to conceive and she was waiting for an appointment.

18. She also states that she is very stressed with carrying on working to ensure that the couple keep up with the rent, bills and food. She says:

> "All of this is too much for me to bear and I believe if my husband is able to support me things would be much easier".

19. She confirms that she has been offered a place to study adult nursing at the University of West England starting in September 2022 but requires her husband to assist her. She states:

> "I have been diagnosed with depression and chronic fatigue, which will only get worse if I can't be with her husband."

20. She states that her husband does the laundry, cleaning, cooking and many other domestic affairs in the house because of her chronic fatigue and this would be too much for her to handle if separated from him.

21. In her oral evidence, she repeated that she had chronic fatigue and depression. She has not taken up pharmaceutical treatment but is waiting for therapy and she is also waiting for fertility treatment. She stated that her husband sometimes assists her to bathe. She is now only able to work three days a week and sometimes that is too much. She is no longer able to cook or shop due to chronic fatigue.

22. At [50] The judge records the submission that the wife has "very real difficulties".

23. When the judge turns to the issue of "insurmountable obstacles", this is dealt with in one paragraph at [54] which I replicate below:

> "54. From the evidence of the appellant and his wife it is clear that she has undergone difficulties. Furthermore, while the appellant and his wife would prefer to remain in the UK and that is a perfectly understandable desire. There was no evidence presented which established that there would be insurmountable obstacles caused by the appellant returning to Nigeria. Both of them have qualifications. The wife has a degree in public health. The appellant has a partial degree in IT, plus a qualification from Nigeria. He still has supportive family in Nigeria although they live in modest circumstances. All of this suggests that if they both went to Nigeria, they would be able to integrate and live. Further their qualifications would in my view place them at an advantage to those who did not have such qualifications in seeking employment in Nigeria."(My emphasis)

24. I take into account Ms Rushforth's reference to Volpi v Volpi however, in this appeal, it is not so much that the judge has not set out the evidence, it is more that the judge has set out the evidence in detail, but has failed to make findings on that evidence. I am unable to ascertain from the decision at all whether the judge accepts that the appellant's spouse had an ectopic pregnancy and whether he accepts that she has been unwell with chronic fatigue and depression since then, to the extent that her ability to carry out domestic chores and personal care has been affected. There is a complete lack of any factual findings. Instead, the judge has jumped from the evidence and the submissions to an overall finding that there was no evidence presented which established that there would be insurmountable obstacles. It is not clear to me that the losing party would understand from this paragraph why the judge had come to this conclusion.

25. The appellant had argued that there were insurmountable obstacles and had given evidence of those obstacles. There is no indication that the judge has taken these obstacles into account when finding that there was "no evidence of insurmountable obstacles". It is not totally clear to what extent he found these difficulties to be significant or if they constituted obstacles and how these difficulties might be overcome or mitigated. I am in agreement with the appellant that this ground is made out. This paragraph is inadequately reasoned.

26. My view in respect of this is also enhanced by the fact that at [51], [52] and [53] the judge's focus seems to be on the appellant's intention when he came to the United Kingdom, in that he gave evidence that he had applied for a student visa with an intention of remaining in the United Kingdom if possible by obtaining employment or entering into a relationship. The judge then goes on to look at the public interest and the maintenance of proper immigration control. This is immediately followed by the paragraph on insurmountable obstacles. This also suggest an erroneous approach. Manifestly, the appellant's intentions and immigration history are relevant to the wider proportionality exercise but before carrying this out the judge was mandated to decide whether the appellant met the requirements of the Immigration Rules. The structure of these paragraphs suggests that the judge has taken this factor into account when looking at the issue of insurmountable obstacles rather than the wider proportionality exercise, which is carried out at [55] under the heading Article 8.

27. The primary job of the judge of the First-tier Tribunal is to hear the evidence and to come to reasoned factual findings which then, by applying the relevant law, can be used to resolve the issues in the appeal. In my view, this has not taken place in this appeal. The reasoning is not "tolerably clear". Since Ground 1 is made out, it is not necessary for me to go on to Ground 2.

28. I do note that the judge refers independently to Agyarko at [19] and in general a judge can be said to have directed themselves properly to the appropriate case law. However, at [55] the judge has focused on the points going against the appellant in the balancing exercise and there is little consideration of factors that weight in the appellant's favour.

29. On this basis, I am satisfied that there is an error in the judge's approach and that this error is material to the outcome of the appeal. It cannot be said that another Tribunal would inevitably have come to the same conclusion and indeed there are factual findings that need to be made.

Disposal

30. Both representatives indicated that they thought it would be possible to have the decision remade at the Upper Tribunal. However, this is an Article 8 appeal, the original decision was made by the respondent two and a half years ago in 2021 and the appeal hearing took place over eighteen months ago. The appellant and the sponsor want to give further evidence of their current circumstances, both in the United Kingdom and the difficulties that they would face in Nigeria. Although there are factual findings on the ability of the appellant to obtain employment in Nigeria and his education, there is a general dearth of factual findings in relation to the spouse. There need to be extensive factual findings. It is not clear to what extent the sponsor's health has improved or deteriorated in the last eighteen months and it would be for the appellant to adduce evidence of this. Similarly, the family circumstances in Nigeria may be somewhat different. On this basis, notwithstanding that the normal course is to retain the appeal at the Upper Tribunal, I am satisfied that in this appeal the appropriate course of action is to depart from the normal course and to remit the appeal to the First-tier Tribunal for a de novo hearing.

Notice of Decision

(1) The making of the decision of the First-tier Tribunal involved the making of an error of law.

(2) The appeal is set aside in its entirety with no findings preserved.

(3) The appeal is remitted to the First-tier Tribunal to be heard by a judge other than Judge Lester.

R J Owens

Judge of the Upper Tribunal

Immigration and Asylum Chamber

19 February 2024