Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/16571/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 11 March 2016	**On 5 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

[O Y]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: party
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Bird promulgated on 25 August 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on [ ] 1974 and is a national of Nigeria.

4. On 19 March 2014 the Secretary of State refused the Appellant's application for leave to remain in the UK.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Bird ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 5th January 2016 Judge Hollingworth gave permission to appeal stating *inter alia*

> *"1. At paragraph 28 of the decision the Judge refers to there having been no compelling circumstances put forward, apart from the fertility treatment, to show why this matter should now be considered outside the immigration rules. Further in the decision the Judge has referred to the extent of the available evidence in relation to fertility treatment.*
>
> *"2. Given the reference by the judge at paragraph 28 to finding, in effect, that fertility treatment constitutes compelling circumstances in the circumstances of the case before him, an arguable error of law has arisen in that the judge has not in fact gone on to consider the relationship between the content of the immigration rules and the facts so far as they were established in relation to fertility treatment.*
>
> *"3. Although the judge has applied the criteria in section 117 and has taken into account factors relevant in the proportionality exercise the judge embarked upon this prior to paragraph 28 of the decision. Given that the reference in paragraph 28 of the decision is to the gateway constituted by compelling circumstances through which it is possible to pass in order for a breach of article 8 to be considered, it is arguable that the application of section 117 criteria and the conducting of the proportionality exercise has been carried out in such a way that doubt has arisen as to whether the judge considered the case should have embarked on that exercise or not.*
>
> *"4. In these circumstances an arguable error of law has arisen in relation to the approach taken to the question of whether there would be a breach of article 8 in the light of the fact that the wording employed at paragraph 28 of the decision merely indicates that compelling circumstances were found on the basis of fertility treatment. The judge has also employed the phraseology at*

paragraph 28 as to why this matter should now be considered outside the immigration rules.

"5. At paragraph 26 of the decision the judge has referred to finding that there is little evidence to show that there are insurmountable obstacles to family life continuing in Nigeria. It is unclear whether the judge was continuing to apply the immigration rules or embarking upon a consideration of a breach of article 8."

The Hearing

7. (a) Because the appellant was unrepresented I discussed the appeal with her rather than asking her for detailed submissions. The appellant was accompanied by her partner, [BB], who assisted the appellant. The appellant agreed that the focus in her case is on article 8 ECHR grounds. The appellant argues that there are insurmountable obstacles to reintegration into Nigeria and that there are compelling compassionate circumstances in her case which merit consideration of article 8 ECHR out-with the rules.

(b) The appellant told me that the fulcrum of her case relates to fertility treatment which she and her husband are pursuing. She told me that both she and her partner are now in their early 40s so that her chances of conceiving are diminishing. A cycle of fertility treatment in February 2016 was unsuccessful. The next cycle of treatment is due in February 2017. She told me that the uncertainty surrounding this appeal together with a desire to start a family are causing psychological torment. She agreed with me that the focus in her appeal is on [28] of the judge's decision, where the judge appears to find that compelling circumstances exist, but then declines to consider article 8 outside the rules.

(c) The appellant urged me to set the decision aside and to substitute a decision allowing the appeal. She reminded me to consider not only her rights but the rights of her partner.

8. Mr Tarlow, for the respondent, adopted the terms of the rule 24 response. He agreed that the focus in this case is at [28] of the decision, but told me that that paragraph cannot be read without reference to the notice of decision - which quite clearly dismisses the appellants case. He argued that that amounts to a clear finding that there are no compelling circumstances meriting consideration of this case out-with the rules. He told me that at [25] the Judge clearly records the appellant's arguments, which she goes on to reject. He asked me to dismiss the appeal and allow the decision to stand.

Analysis

9. It is between [19] & [28] that the Judge analyses the appellants case and reaches conclusions. In essence, there are three aspects to the

appellants case. The first is consideration of appendix FM; the second is consideration of paragraph 276 ADE; and the third is consideration of article 8 ECHR out-with the immigration rules. All three of those elements are contained in the decision between [18] and [28].

10. Although each of those elements can be found between [18] and [28], the decision does not make easy reading because those elements are not set out in a logical order.
11. At [20] the Judge finds that the appellant and partner enjoy a genuine and subsisting relationship & that they have lived together since 2009. Immediately thereafter at [21] the Judge launches into a proportionality assessment, reminding herself of the impact of section 117B of the 2002 Act. Between [23] and [26] the Judge returns to consideration of the facts and circumstances pertaining to the appellant and her partner, before reaching the conclusion (in the final sentence of [26]) that there are no insurmountable obstacles to family life continuing in Nigeria (that is not exactly the language the Judge uses, but it is the conclusion the Judge reaches)

12. Whilst the path followed by the Judge is not perfect, the Judge applies the correct legal test and quite clearly comes to the conclusion that the appellant cannot satisfy the requirements of paragraph EX. 1 of appendix FM because the evidence is insufficient to discharge the burden of proving that there are insurmountable obstacles to family life continuing outside the UK.

13. It might have been helpful if the Judge had clearly indicated that the Judge had moved on to consider paragraph EX.1(b) of the rules, but a fair and holistic reading of the Judge's decision leaves no doubt that the Judge's findings of fact drive at appendix FM, and that the correct legal test has been applied.

14. At [27] the Judge considers paragraph 276 ADE of the immigration rules and correctly concludes that, because of a combination of the appellant's age and the length of time that she has been in the UK, the appellant cannot fulfil the requirements of paragraph 276 ADE.

15. A fair reading of [18] to [27] shows that the Judge correctly considered each of the necessary parts of appendix FM and paragraph 276 ADE before reaching the conclusion contained in the final sentence of [27] "*the appellant therefore fails to meet the requirements of the immigration rules with regard to article 8*"

16. [18] to [27] of the decision therefore adequately support the Judge's decision to dismiss the appeal under the immigration rules. The appellant urged me to consider not only her article 8 rights but those of her partner. Her partner is now a British citizen. His home and his job are in the UK. He would leave the UK if the appellant were removed, so the decision could be interpreted as depriving him of his home and his employment.

17. R (on the application of Agyarko) [2015] EWCA Civ 440 considered the phrase "*insurmountable obstacles*" as used in paragraph EX.1 of the Rules. "...*The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the European Court of Human Rights regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so)*. "

18. At paragraph 26 of that decision "*The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so*."

19. In reality appellant's partner finds himself in no different a position to that of Mr Benette in the case of Agyarko. The case-law indicates that the Judge's approach is beyond criticism. The Judge took account of the difficulties that would be faced by the appellant and her partner, but correctly concluded that those difficulties do not amount to insurmountable obstacles. No challenge is taken to the legal test applied by the Judge (which was correct). The challenge is to her conclusion. As her conclusion is entirely in line with the case of Agyarko, the conclusion is well within the range of reasonable conclusions available to the Judge, and is also well founded in law.

20. Even though the decision does not make entirely straightforward reading, there is no error of law in relation to consideration of the appellant's appeal under either appendix FM or paragraph 276 ADE of the immigration rules. There is nothing wrong with the Judge's fact-finding exercise. The Judge correctly directs herself in law.

21. In SS (Congo) and Others [2015] EWCA Civ 387 Lord Justice Richards said at paragraph 33 "*In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of* "*very compelling reasons*" *(as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ*".

22. In a carefully drafted notice of appeal the appellant argues for consideration of this case on compassionate grounds outside the immigration rules. The appellants case was plead before the first-tier and before me entirely on the basis of fertility treatment which she and her partner are now having. It is here that this appeal is clearly focused on [28] of the decision, which says

> "*There have been no compelling circumstances put forward, apart from the fertility treatment, to show why this matter should now be considered outside of the immigration"*

23. Permission to appeal was granted on the basis that at [28] the Judge found that fertility treatment constituted compelling circumstances. That is not what [28] of the decision says. A fair reading of [28] of the decision is that the appellant's case relies entirely on the pursuit of fertility treatment in the UK, and that the Judge does not find that that is a sufficiently compelling set of circumstances to merit consideration of article 8 outside the immigration rules.

24. In R (on the application of Erimako) v SSHD [2008] EWHC Civ 312, Burnton J said that it was not disproportionate to remove the appellant (whose wife was in her 40s & has leave to remain) when they were undergoing fertility treatment here that would not be as effective in his home country, particularly in the case with the prospects were at best uncertain.

25. Although the Judge's findings at [28] is brief, it is correct in law and supports the Judge's finding that compelling circumstances which would require consideration of the appellant's case out-with the immigration rules do not exist, so that the appeal is dismissed under the human rights convention.

26. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

27. In this case, there is no misdirection in law & the fact finding exercise is adequate. The decision is not tainted by a material error of law.

28. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

29. No errors of law have been established. The Judge's decision stands.

DECISION

30. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Date 17 March 2016

Deputy Upper Tribunal Judge Doyle