Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04195/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision&Reasons Promulgated**
on 31 May 2017	**on 2 June 2017**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

O G ASHAYE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr G Robertson, Advocate, instructed by First Law, Solicitors, Manchester
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent refused the appellant's application for leave to remain in the UK based on family and private life for reasons explained in a decision dated 30 July 2015.

2. FtT Judge Devittie dismissed the appellant's appeal for reasons explained in a determination promulgated on 26 September 2016.

3. Deputy UT Judge Chapman granted permission to appeal on 26 April 2017, in a decision which sufficiently summarises the grounds of appeal:

> The grounds assert the judge erred (1) in treating the previous decision by FtT Judge Reid as the starting point, rather than objectively deciding the appeal on the basis of evidence before him; (2) in considering whether there would be insurmountable obstacles to the appellant's wife relocating to Nigeria, failing to consider her medical condition and failing to acknowledge that the appellant's presence in the UK would also be necessary for IVF treatment; (3) in failing to take account of the change in the

> appellant's circumstances since determination of his previous appeal; (4) in failing to engage with the proportionality exercise and determine the article 8 appeal; and (5) in failing to consider the cultural barriers and practical possibilities of relocation with respect to the appellant's wife.
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> While I consider that the judge was correct to apply *Devaseelan* in that the decision of FtT Judge Reid was the starting point, it is arguable that the judge erred … for reasons set out in grounds (2) to (5).

4. Under cover of a letter dated 23rd May 2017 the appellant's solicitors provided a supplementary appeal bundle together with an application for permission to produce further evidence. This comprises a letter dated 22nd May 2017 from a private clinic confirming that the appellant and his wife are currently receiving IVF treatment. Mr Robertson acknowledged that this would be relevant only if error of law were to be shown.

5. Mr Robertson submitted along the following lines. The judge attached insufficient weight to the evidence for the appellant and his partner, and the consequences upon them of the adverse decision. The judge "ticked the boxes" but did not meaningfully engaged with their evidence. On a properly objective judicial view, there were insurmountable obstacles to family life being carried on outside the UK. The judge acknowledged the relevant factors, but only nominally. The appellant and his wife had not been found to meet the criteria to be placed on the waiting list for IVF treatment, as at the date of last hearing. At the time, his wife had been advised to follow certain protocols and was at least in the "potential pool" for treatment. Subsequently, upon advice, they had obtained private treatment. The letter from the clinic demonstrated that both parties required to be available at short notice, which would not be practical if they were living abroad or in different countries. It ought to be factored in that the appellant and his partner are married. His wife owns a property here, was brought up here and has her family here. Any Indian roots are historical and of a holiday visit nature. The appellant did overstay his visa but that matters is also now in the past. His parents are deceased, his brothers are in the UK, and he has only distant relatives and ties in Nigeria. His wife has no familiarity with the culture there. Her parents are not in good health, and she provides them with an element of care. She is their only child. Giving the evidence its full weight, insurmountable obstacles should have been found. The case concerned a young couple seeking to establish a family with IVF the only route available to them. It was highly problematical whether they would be able to secure such treatment in any other environment where they might live.

6. Mrs O'Brien responded as follows. The question was whether there was error of law based on the facts and evidence before the first-tier tribunal, not on any subsequent matters. The weight to be given to various factors was essentially for the judge. The grounds and submissions amounted only to disagreement. The judge had not failed to have regard to the "medical condition" of the appellant's wife. All that was shown at the stage of the previous hearing was that she consulted her GP regarding infertility. The letter from her GP said that apparent infertility might be resolved by

natural means (weight reduction) and might not require IVF. She was not in need of or in line for IVF treatment from the NHS at the date of last hearing; that was at best an aspiration. Even now, it appeared that she was not eligible for treatment from the NHS. In any event, a wish to secure IVF treatment was not capable of amounting to an insurmountable obstacle. Nor were any other of the features pointed to by the appellant. These were simply the ordinary consequences of establishing family life where one party has only precarious status. The judge had not found it necessary to conduct a separate analysis in terms of article 8 outside the rules. That was not an error. In any event, applying the law to the facts, there could only sensibly have been one outcome. Even if the case were to be reassessed on the evidence now available, the outcome could only be the same.

7. I reserved my decision.

8. The appellant's case was advanced as strongly as it properly could be on the evidence in the FtT, and again in the UT; but no error of law has been shown.

9. The discussion in the determination leaves no relevant matter out of consideration. The FtT's conclusion was plainly well within its scope.

10. For readily understandable reasons the outcome is disappointing to the appellant, his wife, and other family members, but it is difficult to see that any judge might sensibly have found that the unwelcome consequences of the respondent's decision reached the level of "very significant difficulties … which could not be overcome or would entail very serious hardship".

11. There was no feature of the case which had not already been considered in terms of the rules, or by which the appeal might sensibly have been allowed outside the rules.

12. The determination of the First-tier Tribunal shall stand.

13. No anonymity direction has been requested or made.

31 May 2017
Upper Tribunal Judge Macleman