



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/10914/2017

**THE IMMIGRATION ACTS**

**Heard at Glasgow**

**Decision & Reasons**

**On 25<sup>th</sup> October 2018**

**Promulgated  
On 27<sup>th</sup> November 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DEANS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**MR OMOBOLAJI [A]  
(No anonymity direction made)**

Respondent

For the Appellant: Mr G Robertson, Advocate, instructed by First Law Solicitors

For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This appeal is brought by the Secretary of State against a decision of Judge of the First-Tier Tribunal McManus allowing an appeal on human rights grounds. The appellant before the First-tier Tribunal is hereinafter referred to as the "claimant".

2. The claimant, who is a Nigerian national, appealed to the First-tier Tribunal against a refusal of leave on the basis of his family life. The claimant is married to a British citizen. The judge considered whether the appellant satisfied the requirements of paragraph EX.1 of Appendix FM of the Immigration Rules. A number of factors were taken into account. The appellant's wife has an Indian background. It was claimed it would be difficult for her to obtain employment in Nigeria and she would be at risk from kidnappers. She was receiving IVF treatment in the UK and it was claimed that treatment of the same standard would not be available in Nigeria. Nevertheless in the absence of country information to support the appellant's claims the judge was not satisfied that there were insurmountable obstacles to the to the appellant continuing family life with his partner outside the UK.
3. The Judge of the First-tier Tribunal then considered the application of Article 8 outside the Immigration Rules. The judge stated there were "no public interest factors weighing against the Appellant in this case". The judge took into account that the appellant helps to care for his wife's parents, as well as having regard to the IVF treatment and other factors. The judge concluded that it would be unduly harsh and therefore disproportionate to return the appellant to Nigeria.
4. Permission to appeal was granted on the grounds that the judge arguably did not give adequate reasons and did not follow the guidance in Agyarko [2017] UKSC 11.
5. In his submission for the respondent Mr Govan relied on the grounds set out in the application for permission to appeal. He submitted that the appellant had a poor immigration history. There were no insurmountable obstacles in terms of paragraph EX.1 of Appendix FM to family life being carried on elsewhere, and no compelling circumstances. There was a strong public interest in refusing the appeal unless there were strong factors in favour of the appellant. Mr Govan drew attention to the seeming omission from the judge's reasoning, at paragraph 24 of he decision, of the weight to be given to the public interest in maintaining effective immigration control. The judge looked at s 117B but did not mention effective immigration control. There were no findings amounting to compelling circumstances. The judge referred to the potential effect if the couple had a child but there was no legal presence of a child. There was a lack of reasoning and the decision was out of keeping with the authorities of the Supreme Court.
6. For the appellant, Mr Robertson referred to the compassionate factors relied upon by the judge. The evidence before her allowed her to form the view she did. If there was a difficulty it was only with some of the language she used, such as referring to removal as

unduly harsh rather than referring to exceptional circumstances. The judge referred specifically at paragraph 10 to the decision in Agyarko. Mr Robertson referred me to the definition of exceptional circumstances given by Lord Reed at paragraph 19. This was related to the concept of what was unjustifiably harsh, the consequences of which would render a decision disproportionate. In the present appeal harshness was at the forefront of the judge's reasoning.

7. Mr Robertson drew to my attention an application dated 3<sup>rd</sup> September 2018 to admit new evidence under rule 15(2A). This evidence showed that the appellant's wife is happily now 3 months pregnant. Sadly there was also medical evidence showing the appellant's wife's mother is seriously ill. Mr Robertson emphasised that the appellant relied on exceptional circumstances to succeed under Article 8.

### **Discussion**

8. The Secretary of State's appeal will succeed only if it can be shown that the Judge of the First-Tier Tribunal made an error of law. At first sight there does appear to be such an error, at paragraph 24, where the judge wrote that there "are no public interest factors weighing against the Appellant in this case." This statement appears to disregard the important requirement of s 117B to have regard to the public interest in the maintenance of effective immigration control. It cannot be maintained, however, that the judge did not have regard to this. The requirement is stated two paragraphs earlier at paragraph 16 (the paragraph numbering in the decision is badly adrift). At paragraph 24 what the judge seems to be referring to is the absence of adverse factors specific to the appellant, such as a history of offending or deception, dependence on public funds, etc. This view is supported by subsequent sentences in paragraph 24, which refer to the appellant having no criminal record, not being dependent upon public funds, speaking English and being fully integrated into British society.
9. The judge was clearly aware, as stated at paragraph 9 of the decision, that in accordance with sub-sections 117B(2) and (3) fluency in English and strength of financial resources would confer no positive benefit on the appellant. Although the absence of other adverse factors would not outweigh the public interest, their absence might be relevant when weighing any exceptional or compelling circumstances in the appellant's private or family life against the public interest. This approach is consistent with the decision of the Inner House in Mendirez [2018] CSIH 65.
10. A further point of contention arises from the judge's reference to IVF treatment. The judge appears to have thought that were it not for the couple's fertility problem they would have had a child

and would have met the requirements of paragraph EX.1(a) of Appendix FM. As the judge had already found that paragraph EX.1 did not apply, this observation seems no more than a somewhat speculative digression. It does not necessarily amount to an error of law such that the decision should be set aside. This depends upon the judge's reasoning in relation to the balancing exercise under Article 8.

11. In this regard the judge has made findings on the personal circumstances of the appellant and his wife and their relationship, and on the appellant's immigration history. The judge has had regard to the relevant case law, including Agyarko [2017] UKSC 11, referred to specifically at paragraph 10. Crucially the judge has had regard to the requirements of s 117B of the 2002 Act and taken into account the relevant provisions. The outcome of the judge's balancing exercise may very well be close to the tipping point where the balance would fall against the appellant, but I am not persuaded that the judge erred in law.

## **Conclusions**

12. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
13. The decision of the First-tier Tribunal allowing the appeal shall stand.

## **Anonymity**

The First-tier Tribunal did not make a direction for anonymity. I have not been asked to make such a direction and there is no need for one.

M E Deans  
November 2018  
Deputy Upper Tribunal Judge

20<sup>th</sup>