Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/23868/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House by Skype	**Decision & Reasons Promulgated**
On 3 December 2020	**On 4 March 2021**

Before

THE HONOURABLE MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT

Between

OSAZUWA ELDGER EHIGIE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Applicant: Mr J. Gajjar, instructed directly, for the appellant.
For the Respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of the First-tier Tribunal (Judge Watson) dismissing the appellant's appeal on human rights grounds against the decision of the respondent refusing him leave to remain in the United Kingdom. Permission was granted by the Vice President following the quashing by the High Court of the Upper Tribunal's previous refusal of permission. We will consider first the substantive matters before us and then the procedural history.

2. The appellant, a national of Nigeria, came to the United Kingdom in 2011 as a student. He met B in 2013 and was granted leave as a spouse

following their marriage on 9 August of that year. On 12 August 2016 he applied for that leave to be extended, but his application was refused on 4 October 2016, his wife having written to the Home Office to say that the relationship had broken down. Two further applications were refused. The appellant appealed. He made a further application on 21 February 2017, before that appeal was decided: the application was invalid by operation of s 3C(4) of the Immigration Act 1971. On 1 March 2017, before receiving the Secretary of State's notice to that effect he withdrew his appeal, which was accordingly never decided; and as he no longer had an appeal pending, his leave expired on that date. He made a further application on 19 May 2017, which was refused with no right of appeal on 10 April 2018. He made a further claim based on human rights grounds on 15 August 2018. That claim was refused: despite what is said in one of the covering letters it was not certified as clearly without merit. The appellant's appeal against the refusal decision is the subject of these proceedings.

3. The claim had been made on the basis of B's health. The solicitors acting for the appellant asserted that B "suffers from multiple health problems … anxiety and depression and is currently on medication and undergoing therapy. It has been reported that she occasionally has thoughts of self-harm". She would "undoubtedly be at great risk/harm if she lived in Nigeria because of the "substandard medical care" there: it is "a foreign country without the medical support in the UK". Further, if the appellant or both of them went to Nigeria, it would interrupt current IVF treatment. The claim was based on the Immigration Rules to the following extent: (a) the marriage had "lasted five years which is the probationary period under the 2012 Immigration Rules"; (b) "it is arguable that if our client's application for leave was successful he would be settled by this date"; (c) the appellant did not meet the eligibility requirements of the Rules because of his current immigration status, but (d) EX.1 applied to him because:

> "(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen … and there are insurmountable obstacles [as defined in EX.2] to family life with that partner continuing outside the UK."

4. The solicitors' letter ended specifically by indicating that the appellant was eligible for leave under the rules for the reasons set out. The grounds of appeal to the First-tier Tribunal set out the history and repeated this claim.

5. The hearing before Judge Watson was on 6 February 2019. There was oral evidence from the appellant and from B. The medical claims were supported by a letter from Guy's hospital confirming the IVF treatment and that there were embryos which could remain in storage until October 2025, and some material showing that B had self-reported in 2017 with severe levels of anxiety and depression, had attended some workshops but had cancelled several appointments and that further referral had been cancelled with her agreement as she did not attend sessions. The most recent letter from her GP, described by the judge as dated 11 July 2018,

said that she found her job stressful at times, suffered from fatigue and low self-motivation, had no current suicidal ideation, had mechanical low back pain with no sinister features, and was currently prescribed a standard dose of the antidepressant Citalopram.

6. The judge considered the evidence and arguments before him. The appellant's immigration status prevented him from complying with the family life provisions of the Immigration Rules unless by way of EX.1; he did not have, nor was he said to have, any private life claim under the Rules. Analysis of the oral evidence led to the judge's finding that although there was no basis for doubting the respondent's acceptance that the relationship of husband and wife was genuine and subsisting, the appellant was not substantially involved in the support of his wife on a day-to-day basis or in running a household with her. B had documented mental health problems, but they had not led to self-harming, nor had they prevented her from maintaining her record of full-time working. In Nigeria there was a functioning health service and no basis in the evidence for supposing that B's antidepressant medication would not be available there. The arguments based on the IVF treatment were speculative in the absence of any evidence about the availability of treatment or the use of the stored embryos.

7. In the circumstances the judge found that although B might not wish to move to Nigeria and might have some inconvenience in adapting to family life there, there were not insurmountable obstacles (within the meaning of the Rules) to her doing so. The appellant had not shown that proper application of the Rules would have led to a grant of leave.

8. The judge went on to consider whether the appellant was entitled to remain in the United Kingdom despite not meeting the requirements of the Rules. She noted that family life began when the appellant was in the United Kingdom lawfully, and she over-generously took the appellant's income and ability to speak English as points positively in favour of his claim. She noted the appellant's claim that it was disproportionate to make him return to Nigeria to apply for entry clearance as a spouse but concluded that B would be able to manage without him (because his support of her was not as intense as he had claimed) and that the appellant's unsupported assertions about the cost of going to and being in Nigeria for the relevant period were not sufficient to outweigh the public interest in the maintenance of immigration control. Finally, the IVF treatment did not tip the balance: there was plenty of time for the appellant and B to consider what they wanted to do and to investigate the options in Nigeria or in the United Kingdom.

9. For all these reasons the judge concluded that there was no breach of Convention rights in the refusal of the appellant's claim.

10. There was an application to the First-tier tribunal for permission to appeal to this Tribunal. The grounds were that the judge had erred in considering that the relationship between the appellant and B was not genuine and

subsisting and had erred in failing to take into account the most recent medical evidence, a GP's letter dated 25 January 2019, which was in the appellant's bundle of evidence before the Tribunal. Permission was refused.

11. There was then an application to the Upper Tribunal, supported by grounds drafted by a barrister, X. These grounds expressly (in paragraph 52) adopt the previous grounds and raise the following additional grounds. First, in relation to the Immigration Rules, the judge had failed properly to assess the relationship between the appellant and B: the fact that they could not agree about the routine of daily life did not mean that he was incapable of supporting her. The IVF treatment would be "almost impossible" for her to continue if the appellant was not in the United Kingdom. It was "physically impossible" to transport her eggs [sic] to Nigeria.

12. Secondly, also in relation to the Immigration Rules, the appellant had previously had leave to remain as a spouse; the Home Office had erred in continuing to consider B's letter of 2016 as justifying the decision to refuse further leave as a spouse; and the sequence of events following that refusal, and including the withdrawal of the appeal were the result of bad advice from his then solicitors, Y, that the appellant was unaware of the consequences of his actions and if he had withdrawn his appeal and made a new application shortly thereafter the overstaying would have been condoned under paragraph 39A: a complaint about Y was "currently pending with the Legal Ombudsman as a result of Y's incorrect actions in respect of withdrawing the appeal after advising the Appellant to put in the application in 2017" (X's emphasis). These circumstances should have been regarded by the Secretary of State as "exceptional" and should therefore have operated to condone the delay (of some 6 weeks) before the May 2017 application was made. In setting out this ground X slips into describing the appellant as having lost his leave on "1 March 2019", which is a mistake for 2017: it is important to draw attention to that because of the risk that it deflects attention from what is being argued here. The argument is not directed specifically to the decision under appeal, but instead to the refusal of leave on 10 April 2018, which had not previously been challenged.

13. Finally, still in relation to the Immigration Rules, X's grounds submit that "in any event … the personal circumstances of the Appellant and his Sponsor clearly fall into the compassionate and exceptional circumstances category and properly consideration was not given to this by the FTJ".

14. Under a further head "Article 8" X argues that the judge erred in failing to appreciate that it was "manifestly unlawful" to seek the appellant's removal from the United Kingdom; the only specific point raised is that "the determination fails to engage with the Sponsor's suicidal ideation".

15. Before us, Mr Gajjar restricted his oral submissions to the matters set out under the heading "Secondly" above. His argument was that but for the

errors of others the appellant would have received earlier grants of leave. First, B's letter to the Secretary of State in 2016 was written at a time of differences between herself and the appellant of brief duration and was not intended to have lasting effect. Secondly, she had withdrawn that letter by a further letter to the Secretary of State on 23 September 2016, so the latter should not have refused leave on 4 October of that year but instead should have granted leave. Then, Y should have given advice that if the appeal against that refusal was to be withdrawn, the withdrawal should precede any new application, so that the application would not be invalidated by s 3C but would benefit from the condonation provisions of paragraph 39A. It followed, in Mr Gajjar's submission that the reason that the Appellant was unable to meet the requirements of the Rules (in that he was in the United Kingdom without leave) was that he had been let down by others, in particular by the Secretary of State and by his solicitors. This was a powerful factor, which ought to have been considered by the judge, and which demonstrated that the balance should be struck in favour of allowing the appellant's appeal.

16. There are at least three formidable difficulties with that argument: (1) it was not part of the claim made to the Secretary of State; (2) it was not raised before the First-tier Tribunal; (3) it is unsubstantiated and of no merit.

17. The first of those difficulties would not in general terms be by itself fatal to the argument now made, but in context it is important. It is an inherent part of the argument that the Secretary of State erred first by not taking into account B's 23 September 2016 letter retracting her previous statement and secondly by not treating that previous error as relevant in dealing with the 2017 application. The truth of the matter is that although the appellant began an appeal against the 2016 refusal, in which he would have had an opportunity to demonstrate the genuineness of the relationship with his wife despite the latter's first letter, he withdrew the appeal before awaiting a decision on it; and although there was no right of appeal against the 2018 decision, he had every opportunity to explain, in making his application, why the fact that he was in the United Kingdom without leave should be condoned in accordance with the Guidance, as well as every opportunity to challenge the decision by Judicial Review if he considered that it had been reached without taking relevant factors into consideration. He did neither. In this context it is not easy to see why the present appeal could properly offer an opportunity for the substantive challenge of either of the previous refusals of leave.

18. The second difficulty we need say no more about, but it is crucial: an appeal to this Tribunal can only succeed on the basis of an error of law by the First-tier Tribunal and, in this case, the appellant's appeal to the First-tier Tribunal did not include the assertions of fact or the arguments now made or evidence supporting them. In order to deal with these issues, Judge Watson would have had to make up a new argument in the appellant's favour on which the appellant did not rely, and would then have had to decide the relevant factual issues in the appellant's favour on

a speculative basis. Judge Watson made no error in not pursuing what would have been a wholly improper course of consideration.

19. Even if those matters had been raised before the First-tier Tribunal, however, we cannot see that they could have been determined in the appellant's favour. Although the appellant's case now is that his wife wrote to the Home Office on 23 September 2016, as Mr Lindsay pointed out, there is little evidence of that (the appellant asserts that the letter was sent; B's witness statement does not mention it) and there is no evidence at all that any such letter was received by the respondent either at the time it was sent or at any later stage (for example in connexion with the appeal against the 2016 decision). Further, although that decision was based on B's earlier letter, there is no proper ground for saying that if the second letter had indeed been written, sent and received, the decision would have been to grant leave: there might well have been further enquiries into the substance of the relationship. So far as concerns the Secretary of State's dealings with the appellant, those factors also remove any possibility of complaint about the recital of the circumstances of the 2016 refusal in subsequent decisions.

20. Further, the complaint now being made by the appellant against his previous solicitors is something to which the Secretary of State is not privy. The Secretary of State is not obliged to take into account unsupported allegations of others' failures even if they are made part of an applicant's or appellant's case. In any event, it does not follow that an application made after the withdrawal of the appeal would have been granted. It would have been an application made in the immediate aftermath of the appellant's decision not to attempt to establish at appeal that the Secretary of State's view of the relationship between him and his wife was wrong: indeed, as it appears to us, there is ample reason to suppose that the decision would have been exactly the same as it was.

21. The other grounds of appeal raised by X were not the subject of submissions by Mr Gajjar. He was right to spend no time on them, although he did not formally withdraw them. There is no merit in them. They appear to display a rather casual attitude to the evidence, the law, and the Judge's decision.

22. So far as concerns the grounds supporting the application to the First-tier Tribunal, the first is obviously without merit: it complains about a finding that the judge specifically did not make. The second is without substance because the later letter is although a little fuller otherwise in almost the same terms as the one to which the judge does refer. In particular, the slight worsening of condition appears to be from a position between the two: the prescription of anti-depressants is recorded in July and again in January, although the January letter says that there was a period when B thought she did not need them. The only substantive difference is that her dose is now two-thirds of what it was in July. That is no basis for saying that the judge erred in failing to take into account evidence showing a

worsening of condition. These grounds should not have been submitted, and should not have been repeated by X.

23. Turning to X's new grounds as summarised above, the first is simply disagreement about the facts: nothing in it begins to show that the Judge was not entitled to reach the findings recorded in the decision, and in any event the question was not whether the appellant was capable of looking after B but whether her actual reliance on him was as alleged. There is no evidence supporting X's assertions about fertility treatment or about the impossibility of B taking her own eggs to Nigeria if she travelled there; nor is there any evidence supporting the unlikely assertion that B could not continue IVF treatment if the appellant was out of the United Kingdom temporarily (for example in order to obtain entry clearance for settlement as a spouse). X's final submission under the head of the Immigration Rules is wholly mysterious as the considered argument of a member of the Bar practising in Immigration Law: there is no "compassionate and exceptional circumstances category" in the Immigration Rules relevant to this appeal; the appellant could not "clearly" fall into such a category, and it should not have been said that he (or he and B) did.

24. Despite the way in which X's grounds are structured, there was no right of appeal directly on the basis that the Secretary of State had not complied with the Immigration Rules or with relevant guidance: the appeal lay on human rights grounds only. It is therefore perhaps surprising that the grounds deal with "Article 8" only in a short supplement to the arguments erected on other matters. In this part of the grounds X asserts that the Judge erred in failing to engage with the "Sponsor's suicidal ideation". The true position is as follows. The GP's letter in July 2018 specifically says that B had no suicidal ideation. The later letter (January 2019) does not mention suicidal ideation. The judge records what is said in the July letter and that she has not self-harmed (which, rather than risk of suicide, was the matter raised in the grounds of appeal to the First-tier Tribunal). The position appears to be that it is X, not the judge, who has failed to consider the evidence on this point.

25. For the forgoing reasons the grounds of appeal do not begin to show any error of law by the First-tier Tribunal: this appeal is dismissed.

26. We need to look now at some features of the procedural history of this appeal. The Upper Tribunal refused permission to appeal by its decision signed on 22 May 2019 but for some reason not sent out until 23 July. On 9 August the appellant began Judicial Review proceedings challenging that decision. The grounds of review repeat the disagreement with the factual conclusions, the unsupported assertions about the IVF treatment, and the argument based on the failure of the previous solicitors, saying that the UTJ "failed to properly grapple with the factual matrix" of the "exceptional circumstances". The conclusion in X's words is that "there is and only always was one lawful outcome in respect of his case and that was that it should have been allowed. There has been a fundamental breakdown in

the exercise of justice in this case. … There is no reason why the Claimant should suffer as the result of such a simple mistake."

27. Permission was granted by Cavanagh J in the following terms:

> "There is only one reason why I have decided to grant permission. This is that the notice of appeal to the Upper Tribunal focused on an argument that the FTT had failed to take any account of the alleged fact that the only reason that the Claimant lost his LTR was because of an error on the part of his solicitor. The Claimant relied on the Mansur case [2018] UKUT 00274.
>
> The decision on PTA by the UT does not refer to or deal with this issue at all.
>
> I do not express a view on the strength of this argument, but in my judgment it is arguable that it is a point that should at least have been addressed by the UT judge at the permission to appeal stage.
>
> The other grounds, relating to the FTT judge's evaluation of the exceptional circumstances, relating in particular to the Claimant's wife's mental health and the IVF treatment, are not arguable. They are just challenges to the findings of fact and conclusions reached by the FTT judge, having directed himself correctly on the law.
>
> However, it is arguable that the UT should have granted leave to explore the question whether the FTT judge erred by failing to take into account the alleged solicitors' error, when considering exceptionality."

28. When we first began to consider this appeal in the light of its history we were primarily concerned with whether the complaint about Y had been properly initiated at all: without a complaint the Mansur argument could not have got off the ground. It appears that X did not understand the way in which a complaint should be made, but following extensive submissions by him it looks as though although he was factually wrong to assert that the matter was pending before the Legal Ombudsman, he may have thought that was right. Having heard and considered the arguments in the appeal in full, however, we are troubled by other aspects of the grounds for review submitted to the High Court. We have already drawn attention to a number of areas (some of them repeated in the grounds for review, others incorporated by implication because of the complaint of failure to deal with the earlier grounds) where X's submissions were based on assertions unsupported by evidence or were simply wrong. What is now clear is that the particular ground upon which most reliance was placed, and on the basis of which the judge granted permission for judicial review, was never put to the First-tier Tribunal at all. Cavanagh J's grant of permission, particularly in the second sentence and the last sentence of his reasons, makes clear that he was in fact misled into thinking that the argument had been put to the First-tier Tribunal.

29. It is the duty of any barrister not to mislead the Court; and there is a particular duty of candour in Judicial Review proceedings. It may be that the latter duty has special importance in Cart proceedings, which are to all intents and purposes ex parte: all practitioners know that the application

for permission will almost certainly be considered without any input from either the defendant (the Tribunal) or the Interested Party (the Secretary of State) and that if permission is granted there will almost certainly be no further process other than an order quashing the decision under challenge. It seems to us that X's failure to draw attention to the deficiencies in his grounds in general, and specifically to the fact that his grounds raise a matter not put to the First-tier Tribunal either in evidence or by way of argument, may have been professionally reprehensible; and in that context his conclusion to his grounds of review cannot be regarded as mere puff but as a clearly untrue statement. We can make no decision on this; but we shall send a copy of this decision to Cavanagh J, who may wish to take appropriate action.

30. What is clear to us is that, for the reasons we have given, when the evidence and the procedural history are properly considered apart from the assertions in the grounds, this appeal against the decision of Judge Watson could not have succeeded. Insofar as any action subsequent to the Tribunal's original refusal of permission has cost the appellant any money, he may wish to consider his position with relation to his present legal advisers.

31. As recorded above, the appeal is dismissed.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 25 February 2021