Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14019/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 January 2022	**On 14 February 2022**
Extempore decision	

Before

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DANIEL FAMAKIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Mr P Georget, Counsel instructed by Sabz Solicitors LLP

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference we will refer to the parties as they were before the First-tier Tribunal.

2. On 3 January 2019 the appellant, a citizen of Nigeria born in 1961, made a human rights claim to the Secretary of State. The human rights claim was refused on 30 July 2019 and the appellant appealed to the First-tier Tribunal. The appeal was heard by First-tier Tribunal Judge Brewer, who in a decision dated 24 June 2021 allowed the appeal. The Secretary of State now appeals against Judge Brewer's decision.

Factual Background

3. The appellant has a relatively lengthy immigration history. He first arrived in this country in September 2000 with entry clearance as a student, and later left. He returned in October 2007, again as a student, with leave renewed in that capacity until 12 December 2010. Thereafter the appellant made a number of unsuccessful applications to regularise his status. He was eventually served with enforcement papers as an overstayer in early 2015. On 21 March 2015 he was granted leave to remain on the basis of his relationship with S, his son, who was born here in 2014. The appellant's leave in that capacity was renewed until 3 January 2019. On that date the appellant applied, in time, for further leave to remain, on the basis of his private life alone. It was that application that was refused and it was the refusal of that application that was under appeal before the judge below.

4. We turn now to the factual background of the case. In recent years the appellant has been working in this country as an accountant with his own small practice. A significant feature of the appellant's life has been his relationship with his son and his relationship with his son's mother, his former partner. The relationship between the appellant and his former partner broke down. His former partner, the mother of their son, initially had custody of their then 9 month old child. The child was taken into care and later placed for adoption pursuant to an order by the Family Court. The District Judge found that neither the appellant nor his former partner would be able to provide suitable care for the child. We observe that, although the final adoption order did not make provision for post-adoption contact between the appellant and his son, the District Judge observed that if the adoptive parents were to agree, such contact would, in principle, be in the child's best interests.

5. The Secretary of State refused the appellant's human rights claim on a number of bases. She considered that the appellant could not meet the requirements of the relevant Immigration Rules; he did not have sole parental responsibility for S. There was no evidence that the appellant lived with S, or had contact with him. S lived with his adoptive parents. He had been refused permission to appeal against the adoption order. So-called "letter box" arrangements had been proposed by the local authority, whereby the appellant would be permitted to communicate once with S on an annual basis, through the local authority, but the appellant had refused to sign the agreement pursuant to which such contact would take place. The Secretary of State observed that the potential for the appellant to resume those arrangements would be possible even in the event the appellant were returned to Nigeria. The appellant's relationship with him was not a favour militating in a further grant of leave to remain, considered the Secretary of State.

6. The Secretary of State addressed the appellant's position personally; he would not face very significant obstacles upon his return to Nigeria. He had spent his formative years there, had grown children there and had returned to Nigeria on a number of occasions. There were no exceptional circumstances meriting a grant of leave outside the Rules.

Decision of the First-tier Tribunal

7. Having summarised the appellant's immigration history at [2] to [3], the judge summarised the case advanced on behalf of the appellant at [6]. The sole basis of the appeal was the appellant's rights under Article 8 of the European Convention on Human Rights ("the ECHR"); that it would be disproportionate for

him to be removed. At [9], the judge stated that it had been accepted on behalf of the appellant that he did not seek to rely on his Article 8 family life rights, as a final adoption order had been made in relation to his son. The judge therefore identified that the sole issue for resolution before her was whether the appellant's Article 8 ECHR private life rights would be breached by his removal to Nigeria.

8. The judge directed herself as to the relevant law at [11]. She commenced her operative analysis concerning whether the appellant would face "very significant obstacles" at [13] to [22]. She directed herself pursuant to Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813 per Sales LJ, as he then was. At [17] to [21] the judge outlined the appellant's case in relation to the claimed very significant obstacles to his integration in Nigeria; the appellant had contended that as a 61 year old man, he lacked the connections and resources to secure employment in Nigeria. He would face age discrimination. The only home that would be available to him would be that of his deceased parents, which is in a rural location with no viable means of obtaining an income. The appellant claimed that he would face stigma from seeking financial support from his younger brothers. He was not on good terms with one of them. His case was that it would be demeaning to seek their support financially. Although the appellant has grown-up daughters in Nigeria, they are not financially self-sufficient; he was the one supporting them, using his savings and some of his income from his work in this country.

9. At [22] the judge found that the appellant had been credible in his summary of the likely difficulties that he considered he would face in Nigeria. That led to her consideration of the substantive very significant obstacles test at [23]. She found that the appellant would face significant, but not very significant, obstacles to his integration. He had networks and property in Nigeria, he had transferable skills, he spoke at least one of the local languages in addition to English. Those factors combined to mean that he did not meet the exacting test for very significant obstacles but, at [24] as we have observed, she found that he would face significant obstacles.

10. Having concluded, therefore, that the appellant did not meet the requirements of the Immigration Rules, the judge found that this was not an appeal that could be allowed on the basis of Article 8 as articulated by the Rules. She analysed his case outside the Rules at [25] and following. The judge found that the Secretary of State's decision to refuse to grant leave to remain to the appellant had engaged his Article 8 rights. At [26], the judge adopted a "balance sheet" approach to the question of proportionality and, at [27], outlined two factors in favour of the Secretary of State's case. First, there was significant weight to be placed on the appellant not satisfying the private life requirements of 276ADE(1)(vi). Secondly, the appellant would have family, accommodation and financial support if he were returned to Nigeria.

11. At [28], the judge outlined the factors in favour of the appellant. In light of the nature of the Secretary of State's grounds of appeal, to which we will turn in a moment, it is necessary to recite [28] in its entirety:

> "28. On the Appellant's side are:
>
> (i) I place some weight on the ties the Appellant has formed through his work with the church and charities. I place

weight on the connections this Appellant has formed with his wider friendship group. The Appellant began forming these links when he first arrived in the UK in 2000, and bar 3 relatively short visits to Nigeria since that date, the Appellant has remained in the UK. However, in assessing weight I note that the Appellant formed these ties when his leave in the UK was precarious, at times he had limited lawful leave and for some periods no leave. The tranches of lawful leave were for limited durations only.

(ii) I place some weight on the Appellant's emotional ties to the UK, specifically in respect of his young son who has been adopted. The adoption has severed this Appellant's family ties within the context of Article 8, however I place limited weight on the Appellant's aspiration that his son once he reaches majority may seek to find him, which will be easier if he is in the UK.

(iii) I place weight on the evidence that if returned to Nigeria, the combination of factors identified at [17] above mean that it is more probable than not that he will no longer be able to continue in employment or be financially independent. The Appellant will have to rely on financial support from relatives which will carry with it a social stigma and will require him to rely on a sibling who consider the Appellant to be a further burden. I find that this will significantly adversely impact on the Appellant, who has strived throughout his adult life to be economically self-sufficient and to provide for both himself and his children."

12. The judge concluded at [30] in these terms: "I find, having weighed the factors on both sides of this case, albeit this was a very finely balanced decision, I do find that the factors set out in [28] taken cumulatively do outweigh those identified in [27] above."

Grounds of appeal and submissions

13. The Secretary of State sought permission to appeal on the single ground that the judge failed to give adequate reasons for her findings on a material matter. Permission to appeal was granted by First-tier Tribunal Judge O'Garro.

14. Expanding upon the grounds of appeal before us, Ms Everett explained that the features relied upon by the judge for allowing the appeal outside the Rules, in particular those listed at [28(iii)] of her decision, were the same factors which, the judge had at an earlier stage in her decision found, did not meet the requirements of the Rules. Thus, having initially found that the appellant did not meet the requirements of the Rules, the judge then used the very same analysis as a basis to allow the appeal outside the Rules.

15. Ms Everett accepted that she did not advance a rationality challenge, but stressed that when reading the decision, it is not clear to the reader the basis upon which this appeal has been allowed. The decision reads as though the judge is gearing up to dismiss the appeal. Consistent with the established

jurisprudence concerning reasons-based challenges, it was not clear to the losing party, the Secretary of State, why she had lost the appeal.

16. Resisting the Secretary of State's appeal, Mr Georget relied on a Rule 24 notice which, with no objection from Ms Everett, we granted him permission to rely on out of time. It simply sets out the matters that any well-written skeleton argument would have featured, and in no way prejudiced either the respondent or undermined the procedural rigour with which proceedings before this Tribunal should be conducted. We consider that it was a helpful document which it was in the interests of justice to admit. We outline Mr Georget's submissions in the course of our discussion, below.

Discussion

17. The Secretary of State has advanced this challenge primarily as a sufficiency of reasons-based challenge. In his skeleton argument, Mr Georget highlights some of the established authorities concerning the approach the Tribunal should take to considering challenges based on an alleged insufficiency of reasons. The principles may be summarised in this way: it must be possible for the losing party to understand why they have lost. That is an insight the losing party is expected to have with the benefit of knowing what the submissions in the case were, what the evidence in the case was, and the likely expected focus of the judge's decision in light of the legal issues to be resolved: see *English v Emery Reimbold & Strick Ltd. (Practice Note)* [2002] EWCA Civ 605 at [26].

18. In our judgment, it is clear why this appeal has been allowed from [30] of the decision, in which the judge stated that the cumulative force of the factors identified on behalf of the appellant to resist his removal outweighs those on the Secretary of State's side of the scales. It cannot be said that this is a decision which lacks sufficient reasons.

19. We explored with the parties at the hearing whether, properly understood, the Secretary of State was advancing a case based on a legal misdirection by the judge. That certainly is the approach that a skeleton argument submitted by Ms Hilary Aboni of the Secretary of State's Specialist Appeal Team appears to contend. In the third to the end unnumbered paragraph on page 2 of the skeleton argument, Ms Aboni submitted that the judge failed to identify what the required "exceptional circumstances" were which would have been necessary to be present in order for the appeal to be allowed outside the Immigration Rules.

20. We reject that submission. It is now established jurisprudence in this jurisdiction that the "balance sheet" approach adopted by the judge is an acceptable method of performing an analysis of whether or not a person's removal would be disproportionate. The so-called "unduly harsh" test to which Mrs Aboni refers in her skeleton argument may be found in paragraph GEN.3.2(2) of Appendix FM to the Immigration Rules. That sets out the exceptional circumstances test in these terms:

> "…exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member …"

21. It is important, in our judgment, to recall that, helpful as the unjustifiably harsh test is, it is not the operative wording of Article 8(2) of the ECHR. Nor does it feature in the established jurisprudence concerning interferences with Article 8 rights as the *only* way in which to articulate a breach of the Convention. The terminology does not feature in Part 5A of the Nationality, Immigration and Asylum Act 2002, which sets out a range of statutory public interest consideration to which a court or Tribunal must have regard when considering the "public interest question" as defined by Section 117A(3) of the Act in the case of an Article 8 analysis.

22. The unduly harsh test says nothing of the operative process which a judge may follow in order to arrive at an assessment as to whether an individual's removal would be disproportionate under the ECHR. The so-called balance sheet approach adopted by the judge has its origins in the immigration context in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 per Lord Thomas CJ at [83], which states as follows:

> "One way of structuring such a judgment would be to follow what has become known as the 'balance sheet' approach. After the judge has found the facts, the judge would set out each of the 'pros' and 'cons' in what has been described as a 'balance sheet' and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders."

There can, therefore, be no complaint about the principle of the balance sheet assessment adopted by the judge. Properly understood, the Secretary of State's concerns with the judge's analysis under the balance sheet approach are that the judge either gave insufficient reasons, misdirected herself as to the law, or reached a decision that was not rationally open to her on the evidence that she heard.

23. We reject those submissions. We recall that Ms Everett specifically disavowed any rationality-based submissions, and did not seek to go beyond the pleaded grounds of appeal. We reject the submission she advanced that the judge's analysis at [28(iii)] simply adopted her reasoning for finding that the appellant failed to meet the requirements of the "very significant obstacles" test under the Immigration Rules and allowed the appeal on that additional basis, with nothing more. If that had been the only factor relied upon by the judge, then there would have been force to Ms Everett's submission. However, as we have set out above, [28] of the judge's decision features a range of considerations among which the "significant", but not "very significant", obstacles likely to be faced by this appellant form a part, but do not constitute the entirety.

24. On the appellant's side of the balance sheet, alongside the likely circumstances awaiting him in Nigeria, was the private life that he established in this country, and also the emotional connection that he has arising from the circumstances of his son being taken into care, later taken away from him permanently pursuant to the adoption order. As identified by the judge, the appellant is now left only with the hope of reconciling with his son once he reaches the age of majority. Those were additional features which the judge was entitled to take into account, and did take into account. In doing so, the judge correctly identified that the private life enjoyed by the appellant in this country attracted little weight. She also noted that the potential for future contact with his son was a factor only

attracting little weight. It is against that background that the judge additionally considered the likely circumstances of the appellant in Nigeria. As the judge then set out at [30], taken cumulatively, those factors combine to outweigh the factors advanced on behalf of the Secretary of State.

25. We should observe two further factors relating to the proportionality assessment conducted by the judge. First, the Secretary of State has not sought to challenge the judge's reasoning at [27]. There has been no challenge to the factors on the Secretary of State's side of the scales. Secondly, we observe that we raised with the parties at the hearing whether the judge's wording in [30] was deficient. The extract from *Hesham Ali* entailed a requirement that reasoned conclusions must be given as to why one side of the scales outweighs the other side of the scales. Although Ms Everett did not raise this as a ground of appeal, out of an abundance of caution we sought the views of the parties on this issue.

26. Mr Georget submitted that the decision should be read as a whole. In his submission, it was clear what the judge's reasons were for finding that the side of the scales with the appellant's interests on outweighed those of the Secretary of State. The fact that one individual factor may attract only little weight does not preclude that factor being combined with other factors to add up to a cumulative force which is greater than the individual weight each consideration would normally attract in isolation.

27. We accept that submission. Little weight is not no weight, and it is possible that the cumulative total of a number of different considerations which, taken in isolation, would attract only little weight may, taken together, amount to a weightier conclusion. That is precisely what the judge did in this case. We accept that, had she given fuller reasons at [30] it may have avoided the need for permission to appeal to be granted, however, once read as a whole, the judge's reasons are tolerably clear. They demonstrate that she had in mind the relevant legal tests, gave sufficient reasons for why she ascribed particular weight in the way that she did, and overall reached a conclusion that was open to her on the evidence and clear in its reasons from the decision read as a whole.

28. For these reasons, therefore, and returning to the grounds of appeal as originally advanced, the judge gave sufficient reasons for allowing this appeal. She directed herself correctly and it cannot be said that in any way she reached a decision that was irrational.

29. This appeal is therefore dismissed.

Notice of Decision

The appeal is dismissed.

The decision of Judge Brewer did not involve the making of an error of law such that it must be set aside.

No anonymity direction is made.

Signed Stephen H Smith Date 26 January 2022

Upper Tribunal Judge Stephen Smith