IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000306
UI-2024-000307

First-tier Tribunal Nos:
HU/50790/2023
HU/50791/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) EKUNDEYO MORUFAT ADESANYA
(2) ZAHIRA OREOFE ABENI RAHEEM
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: None
For the Respondent: Mr Tony Melvin, Senior Home Office Presenting Officer

Heard at Field House on 18 March 2024

DECISION AND REASONS

1. The appellants appeal from the decision of First-tier Tribunal Judge Bart-Stewart promulgated on 5 October 2023 ("the Decision"). By the Decision, Judge Bart-Stewart dismissed their appeals against the decisions of the respondent made on 5 January 2023 to refuse their applications made on 30 March 2022 for leave to remain in the UK on human rights grounds.

Relevant Background

2. The appellants are nationals of Nigeria. The first appellant is the mother of the second appellant, who was born in the UK and who was approaching 4 years of age at the time of the hearing in the First-tier Tribunal.

3. As the first appellant is the main appellant in the appeal, I shall hereafter refer to her simply as "the appellant", save where the context otherwise requires.

4. The appellant was issued with a multi-visit visa that was valid from 8 May 2014 to 8 May 2016. She last entered the UK on 30 January 2016, and overstayed. On 13 March 2022 she applied for leave to remain with her daughter as her dependant. She said that she lived with her cousin sister. She had been in a relationship with the child's father which had broken down and they were no longer in contact. She was supported in the UK by friends, relatives, a food bank and her church. She said that she had no one to go back to in Nigeria. She would not be able to provide for her child's basic needs because of the poor economic situation in Nigeria and her overall circumstances.

5. In the refusal decision, the respondent said that the appellant had not provided any evidence to indicate that she would be unable to maintain her child in Nigeria, or that she would be unable to provide for her safety and welfare. She would be able to return to Nigeria as a family unit and they would continue to enjoy their family life together there. Whilst this might involve a degree of disruption to her private life, it was considered to be proportionate to the legitimate aim of maintaining effective immigration control and it was in accordance with the Secretary of State's section 55 duties.

The Hearing Before, and the Decision of, the First-Tier Tribunal

6. The appellant's appeals came before Judge Bart-Stewart sitting at Taylor House on 7 September 2023. Both parties were legally represented.

7. In her decision promulgated on 5 October 2023, the Judge gave an account of the hearing at paras [6] to [9]. The Judge received oral evidence from the appellant and from Mr Abiodun Abraham Agboluaje, a British citizen with whom the appellant now claimed to be in a relationship. The appellant said they had met in January 2022. They began to date in February 2022, and they underwent an Islamic marriage in March 2022 when she moved to his address. They had booked a date to marry. He was a College Lecturer. They could not relocate to Nigeria, as they had no assets or savings and neither would get employment there.

8. In her oral evidence, the appellant confirmed that her partner was told of her status when they met. In his evidence, Mr Agboluaje was vague with regard to whether he would help the appellant financially if she went back to Nigeria. He said that he did not know that she might have to leave when they moved in together. He knew that she had a case with a lawyer, but he did not know that the plan was to take her to Nigeria.

Asked if he would go with her to Nigeria, he said that he had no parents or anyone there. He had glaucoma, he was diabetic, he had a job and he indicated that his age was an issue. He reluctantly agreed that he could make an application for the appellant to re-join him in the UK. He added that he had a 14-year-old daughter here, and he had lost his links with Nigeria.

9. The Judge's findings and reasons began at para [10]. She observed that even if the appellant was in a genuine relationship with Mr Agboluaje, he did not meet the eligibility rules as a partner. Although they claimed to have been living together and had undergone an Islamic marriage in March 2022, there had been no mention of the relationship in the application or at any stage until the filing of the appellant's skeleton argument a few days before the hearing. Mr Thompson, Counsel for the respondent, was not in a position to take instructions on whether the respondent considered this a new matter to which they might object. But as the eligibility requirements for a relationship with a partner were not met, *"it was decided to proceed without challenge".*

10. The Judge found that EX.1 did not apply, as the evidence did not show that there were insurmountable obstacles to the relationship continuing in Nigeria. Her reasoning was that Mr Agboluaje was aware that the appellant had no status at the time they met and decided to pursue a relationship. The matters raised might be difficulties, but they were not obstacles.

11. At para [12], the Judge held that the appellant was not eligible to apply as a parent under Appendix FM, as the child was not a qualifying child. At para [13], she held that the child had no contact with her father. It was not even clear where he was. The child had always lived with her mother and can do so in Nigeria where she and her mother were both nationals. Both were able to adapt to life in their home country. This included the mother getting a job and the child going to school. The appellant claimed that she had not been able to work in the UK and had relied financially upon her sister, friends, a food bank and a church. She gave no credible reason why her sister, friends and several people who had provided letters stating that they helped her with money, could not continue to provide her with money to help her re-establish herself in Nigeria.

12. At para [16], the Judge said that the decision did not interfere with family life. At the date of the application, neither of the appellants had leave to remain in the UK or any reason under the Rules why they should remain. The second appellant was born when her mother knew that there was a likelihood of her being required to leave the country. She had formed the relationship with Mr Agboluaje in that same knowledge. The first appellant and her child could resume life in Nigeria as a family unit. She found that their circumstances were not exceptional.

13. The Judge concluded at para [17] that the decision was not a violation of Article 8 ECHR.

The Grounds of Appeal to the Upper Tribunal

14. The grounds of appeal were settled by Londonium Solicitors, who were the solicitors who had instructed Counsel to appear on the appellant's behalf at the hearing before Judge Bart-Stuart. In summary, they submitted that the decision of Judge Bart-Stewart was unfair and unreasonable. In particular, they argued that the Judge had erred in her approach to EX.1 and that her proportionality assessment was wrong.

The Reasons for the Initial Refusal of Permission

15. In the reasons for refusal of the initial permission to appeal on 16 January 2024, First-tier Tribunal Judge Parkes held that the grounds disclosed no arguable errors of law. His reasoning was that neither the appellant nor her child had leave to remain, and the relationship with her partner was established in circumstances that attracted little weight. The issues raised in the grounds were considered by the Judge, who took into account the overall circumstances. The decision was open to the Judge for the reasons given, and the grounds were simply a disagreement with the decision.

The Reasons for the Eventual Grant of Permission

16. Londonium Solicitors settled the renewed grounds of appeal to the Upper Tribunal. At para 14 of the grounds, they repeated their earlier submission that the Judge's proportionality assessment was flawed, in that she had failed to take a holistic approach when assessing the appellant's family life in the UK and her bonds with her partner (also referred to in the grounds as "the sponsor"), citing *ZB (Pakistan) -v- SSHD* [2009] EWCA Civ 834.

17. On 12 February 2024, Deputy Upper Tribunal Judge Ian Lewis granted permission to appeal on all grounds, although he did not consider there to be much merit in any of the grounds apart from the ground contained in para 14. This was because, for the most part, they were essentially mere disagreements with the findings and the evaluation of the First-tier Tribunal.

The Hearing in the Upper Tribunal

18. At the hearing before me to determine whether an error of law was made out, the appellant appeared in person with Mr Agboluaje (aka "the sponsor"). Also present in the Court Room was her daughter, and the sponsor's brother.

19. I explained to the appellant and the sponsor that I would be taking into account the grounds of appeal and the reasons for the grant of permission. I also explained that I would not be taking evidence from them.

20. Mr Melvin had prepared written submissions opposing the appeal which were contained in a skeleton argument dated 14 March 2024, and I invited him to summarise the respondent's case for the benefit of the appellant and the sponsor.

21. After Mr Melvin had completed his summary, the sponsor replied on the appellant's behalf. He said that the Judge had not taken into account his

heart condition. The Judge had also not taken into account that he had glaucoma, and that he was diabetic. The Judge had also not given consideration to the fact that his 14-year-old daughter had come from Poland where she had been living with her mother. She was now going to London City Academy. For these reasons, he could not go and live in Nigeria. He also had a mortgage to pay here, and he asked rhetorically how he could get a job in Nigeria when there was age-discrimination there? The reason why the appellants were not represented today was because he could not afford to pay for a lawyer.

22. I reserved my decision.

Discussion and Conclusions

23. In view of the nature of the error of law challenge, I consider that it is helpful to set out the guidance given by the Court of Appeal in *T (Fact finding: second appeal)* [2023] EWCA Civ 475 as to the proper approach which I should adopt to the impugned findings of the Judge that there are not insurmountable obstacles, as defined in EX.2, to family life between the appellant and the sponsor continuing in Nigeria, and that the maintenance of the refusal decision is not disproportionate, having regard, among other things, to the fact that the sponsor agreed that he could sponsor the appellant to re-enter the UK as his spouse in due course:

> 56. The most-frequently cited exposition of the proper approach of an appellate court to a decision of fact by a court of first instance is in the judgment of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5:
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> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many.
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> (i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
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> (ii) The trial is not a dress rehearsal. It is the first and last night of the show.
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> (iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
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> (iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
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> (v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to the evidence (the transcripts of the evidence),

(vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2022] EWCA Civ 1039 [2003] Fam 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] UKCLR 1135."

57. More recently, Lewison LJ summarised the principles again in *Volpi and another v Volpi* [2022] EWCA Civ 464 at paragraph 2:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

24. As the hearing in the Upper Tribunal is not a rehearing of the appeal, but a hearing to decide whether the Judge below materially erred in law, the appellants have to show that the Judge's findings were clearly wrong. I consider that far from her findings being clearly wrong, it is difficult to see how the Judge could have come to a different conclusion, given the agreed starting point.

25. The agreed starting point was that the appellant had not applied for leave to remain on the basis of family life established with a British national partner, and nor had her child applied for leave to remain on the basis of family life established with a surrogate parent. The existence of the relationship was only disclosed a few days before the hearing. In order for the sponsor to meet the definition of a partner for the purposes of Appendix FM of the Rules, he needed to have resided with the appellant in a relationship akin to marriage for at least two years prior to the date of application.

26. The trigger for the grant of permission by Judge Lewis was the finding at para [16] that the refusal decision does not interfere with family life. It is clear from the context that Judge Bart-Stewart was drawing a careful distinction between the position at the date of the application, and what the position might be now. Arguably, the Judge should have made a finding as to whether family life was subsisting between the appellants and the sponsor as at the date of the hearing. But in electing not to make a finding on this, the Judge did not err in her assessment of proportionality. For even if there was family life subsisting between the appellant and the sponsor at the date of the hearing, this could not change the fact that, as the Judge had already found, (a) the sponsor was not a qualifying partner under Appendix FM, and (b) that there were not insurmountable obstacles to family life being carried on in Nigeria. In short, the outcome of the proportionality assessment was going to be the same, whether or not family life was subsisting as at the date of the hearing between the appellants and the sponsor. Moreover, the Judge had already addressed the potential impact on family life as between the appellant and the sponsor in her earlier discussion of whether EX.1(b) applied.

27. The Judge gave adequate reasons for finding that there were not insurmountable obstacles to family between the appellant and the sponsor continuing in Nigeria. The Judge did not err in stating that the sponsor had no assets in the UK, as in his witness statement he said he had no assets or savings so as to be able to fund his relocation to Nigeria with the appellant. If in fact he owns a property on which he is paying a mortgage, this means that he has an asset which he could sell in order to help fund the costs of relocation.

28. Aside from the above alleged error – which is not shown to be an error on the evidence that was presented, and which in any event is not material – the challenge to the finding on EX.1 simply presents as an expression of disagreement. It is not shown that the Judge failed to take into account any material matter or consideration that was brought to her attention. I consider that the sponsor’s response to Mr Melvin’s submissions was an attempt to re-argue a case that was sustainably rejected by the Judge on the evidence that was before her. The same applies to the grounds of appeal.

29. As to the second appellant’s relationship with the sponsor, no reliance was placed on this relationship in the ASA as buttressing the human rights claim, and the Judge was not wrong to give the relationship little weight on

the basis (a) that the sponsor was not her biological father, and (b) was "*recent in her life*".

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
28 March 2024