Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21590/2015

THE IMMIGRATION ACTS

Heard at Field House
On 15 October 2018

Decision and Reasons Promulgated
On 01 April 2019

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLALEKAN [F]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer (Secretary of State)

For the Respondent: Ms C Hulse, Counsel, instructed by Paul John & Co Solicitors (Mr [F])

DECISION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Lucas. At a hearing before me on 4 September 2018, I found that this decision had contained a material error of law and would have to be remade. Much of what I set out in that decision will be incorporated into the present decision. Also, for ease of convenience I shall throughout this decision (as I did in my error of law decision)

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refer to the Secretary of State, who was the original respondent, as "the Secretary of State" and to Mr [F], who was the original appellant, as "the claimant".

2. The claimant is a national of Nigeria who was born in March 1976. He came to this country as a visitor on 20 March 2008 and thereafter did not leave when his leave expired. He has accordingly been an overstayer in this country now for around ten years. In or about 2011 he met the lady who is now his wife, a Ms [MA], and they underwent a religious marriage in June 2012 and a civil ceremony on 9 November 2013. It is not in dispute that this is a genuine and subsisting relationship. The claimant then applied in 2014 for leave to remain on the basis of his family life with his wife in this country, his wife being an English citizen. This application was refused by the Secretary of State in 2015 but the claimant appealed against this decision.

3. The claimant's appeal against this decision was successful but that decision was subsequently set aside by the Upper Tribunal and remitted back to the First-tier Tribunal for reconsideration. The appeal was then reheard before First-tier Tribunal Judge Lucas sitting at Taylor House on 26 February 2018. In a decision and reasons promulgated on 15 March 2018, Judge Lucas allowed the appeal. The Secretary of State appealed against that decision, leave having been granted by First-tier Tribunal Judge Cruthers on 15 June 2018, and as already stated above, I found that that decision had contained a material error of law and would have to be remade.

4. The basis of the claimant's case is that because of gynaecological problems, following earlier operations, the claimant's wife had a hysterectomy.

5. Before this operation, because she was young and would otherwise be unable herself to bear children, in November 2015 her eggs were frozen for future use.

6. At the time of the appeal before Judge Lucas, the couple were claiming that a friend of the claimant's wife, a Mrs [A], had offered to be a surrogate mother for a child which it was intended would be born from one of the frozen eggs of the claimant's wife which would be fertilised with the claimant's sperm. It was said that the surrogate mother could not relocate to Nigeria and that there would for this reason be insurmountable obstacles preventing the couple, and particularly Mrs [F], from returning to Nigeria such that EX.1 was engaged. In the alternative, it was argued that there were very compelling reasons why exceptionally permission to remain should be granted outside the Rules.

7. In his decision, Judge Lucas made a number of findings of fact. In particular, he noted that Mrs [A] had not attended the hearing and at paragraph 22 the judge expressed what could fairly be said to be his scepticism as to the truthfulness of this evidence, finding as follows:

> "22. It is unfortunate to say the least that Mrs [A] has not attended this hearing. It is said that she has offered to be a surrogate mother for the appellant and his wife. This is a life changing decision for both her and the appellant and his partner. Yet, for her own 'child care issues' she has not chosen to attend

this hearing. A hearing which is of some importance for the appellant and his partner. It has been said that her failure to attend this hearing is not at all reassuring of her genuine commitment to being a surrogate mother for the appellant and his partner. There is no explanation at all as to why the husband of Mrs [A] has not attended the hearing. This is important because he is said to be supportive of the project. He has not even made a witness statement."

8. Then, at paragraph 23 of his decision, Judge Lucas continued as follows:

> "23. The decision to be a surrogate mother is life changing and of utmost importance. The Tribunal does not find it credible that Mrs [A] has chosen not to attend this hearing for 'child care issues'. It concludes that there is doubt – on the balance of probabilities – that she has made a genuine offer to be a surrogate mother in this case. It is of note that she is not even mentioned in the counselling letter … from April 2016."

9. In other words, on the balance of probabilities which was the appropriate standard of proof, as the judge noted at paragraph 21 of his decision, the judge made adverse credibility findings as to this aspect of the claimant's case.

10. The judge also considered what the difficulties would be with regard to relocation to Nigeria and noted in particular at paragraph 25 as follows:

> "25. The Tribunal has noted the comment of the hospital (at page 17) about the release of the eggs to another clinic. This confirms that Mrs [F]'s eggs are indeed frozen. However, two issues are troubling in this case. First, the appellant and her partner have made no enquiry at all about the availability of services or surrogates in Nigeria to address the concerns of the clinic. Secondly, and somewhat surprisingly, they have not discussed the possibility of the return to Nigeria of the appellant at all."

11. For this reason the judge concluded at paragraph 26 as follows:

> "26. It is difficult to conclude in all of the above circumstances that the issue of very significant obstacles has been properly or adequately addressed by the appellant. It is not therefore accepted that the appellant has satisfied the requirements of EX.1 and this aspect of the appeal is therefore dismissed."

12. In other words, the claimant had failed to satisfy the Tribunal that he could succeed under the Rules. For this reason the judge then went on to consider whether or not the claimant should be allowed to remain under Article 8 outside the Immigration Rules. It is well established that in order to succeed on this basis (see, for example, the recent Supreme Court decision in *Agyarko and Ikuga v SSHD* [2017] UKSC 11, which was very closely followed this year by the Court of Appeal in *TZ*) it is necessary to show that the consequences of requiring a claimant to return to his or her home country are sufficiently compelling that it could be said that the decision that he or she must return is "unjustifiably harsh". That is not a small hurdle to overcome.

13. In the error of law decision, I noted that any decision maker when considering whether or the grant of leave to remain outside Article 8 is warranted would have to consider the factors set out within Section 117B of the Nationality, Immigration and Asylum Act 2002 (as inserted by Section 19 of the Immigration Act 2014) which is headed "Article 8: Public interest considerations applicable in all cases". This includes at Section 117B(4) that little weight should be given to a private life or a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully (as clearly was the case here) and also at (5) that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

14. Any decision maker also must have in mind what is provided at Section 117B(1) which is that the maintenance of effective immigration control is in the public interest.

15. In other words, before making a finding that an appeal should succeed on Article 8 grounds outside the Rules, a judge must carry out a proportionality exercise and must have regard to all the factors set out in Section 117B.

16. The judge's findings in this regard, which formed the basis of his decision to allow the appeal, were (to say the least) sparse and were as follows:

> "27. The Tribunal has considered Article 8 outside of the Immigration Rules. It relies upon its findings above with regard to EX.1. The appellant has overstayed in the UK since 2008 and has no status to be here. It is accepted that he has a UK citizen wife and there is no challenge as to the genuine and subsisting nature of the relationship. It has noted that there is good evidence of the partner's income in this case, as reflected in the financial evidence at pages 31-71. There is therefore some substance to the submissions of Mr Richardson that there is little public interest in requiring the appellant to leave his wife to apply for a visa to rejoin her in the UK. There is no doubt that she is a UK citizen and the genuine and subsisting nature of their relationship is not in doubt. Given all of the background evidence relating to the medical condition in this case and given the (un-evidenced) prospect of a surrogate (given the above findings, it is only a prospect), the Tribunal concludes that there is little or no public interest in requiring the appellant to return to Nigeria and make an application to rejoin his wife in the UK. She is in employment and there are therefore no financial concerns about a recourse to public funds."

17. In his oral submissions before this Tribunal, at the error of law stage, it was submitted on behalf of the Secretary of State that this decision, or certainly the reasons (or lack of reasons) justifying it were simply "bizarre". In the first place if the judge had in mind (although this was not mentioned in terms) a *Chikwamba* point, there was no evidence that the claimant had an English language certificate, and nor was there any consideration of what was stated by the Court of Appeal in *Hyatt*, which is effectively that a judge will have to consider what the reasons were for requiring somebody who was likely to be granted permission to return to the home country in order to make an application from there. In this case, that must include

the maintenance of effective immigration control and in particular the public interest in making it clear that people who remain in the United Kingdom without leave for a long period of time cannot just then expect to be allowed to remain while their applications are considered. At the very least, so the Secretary of State submits, these are matters which needed to be considered by the decision maker.

18. In this case, the Secretary of State's position is even stronger because the judge had specifically found that the arguments based on EX.1 had to fail on the facts as he found them.

19. So far as the English language certificate is concerned, in the error of law decision, I stated that this did not appear to be the strongest part of the Secretary of State's case. I noted that the claimant had apparently given evidence before Judge Lucas and had been cross-examined in English and that it was not (so far as I was then aware) suggested that his English was not of sufficient quality that he could if he took such a test pass it. Having heard the claimant give evidence at this hearing, however, as will appear below, that is not now my view. The claimant chose, as was his right, to give his evidence through an interpreter, but it was clear from the evidence he gave that his understanding of and ability to express himself in English was sufficiently poor that it cannot be assumed that if he now took the necessary test in spoken English he would pass it.

20. Moreover, in the judgement of this Tribunal, the other arguments made on behalf of the Secretary of State were and remain compelling. It cannot simply be said that just because a person might ultimately be successful in obtaining a visa to rejoin his or her spouse he or she should not be removed in the meantime. This claimant's immigration history is as already noted very poor, and there is clearly a large public interest in removing such people. Also, as is made plain within Sections 117B(4) and (5) of the 2002 Act, little weight can be given either to the private life of the claimant or to his relationship with his wife, which relationship was developed at a time when both of them knew that he had no lawful right to be in this country. (The evidence is not clear as to precisely when the claimant's wife knew that the claimant had no status within this country, which is a matter which will be discussed below). That does not necessary mean that his claim was bound to fail, but it does mean that his appeal could not properly be allowed without the judge giving consideration to these factors.

21. It followed that Judge Lucas's decision would have to be remade and having heard submissions on behalf of the claimant (the Secretary of State being neutral on this point) as to whether or not the appeal should again be remitted (Ms Hulse's submissions, on behalf of the claimant, was that she would prefer the appeal to be remitted again) it was the view of this Tribunal that in this case it would not be appropriate to remit this case yet again. The appeal had already been heard twice in the First-tier Tribunal and the time had now come when a final decision should be made.

22. At this part of the hearing, the Tribunal was informed by Ms Hulse (who has represented the claimant at both the hearings before me) that there had been a change with regard to the plans which the couple now claim to have with regard to potential surrogacy. Apparently the original intended surrogate was no longer prepared to assist but (it was claimed) they had found someone else who was prepared to be surrogate. Obviously, no evidence with regard to that was at that stage before the Tribunal. It was also the case that as Judge Lucas had noted in his decision, the claimant had by that stage failed to provide evidence as to the availability of services or surrogates in Nigeria to address the concerns which had been expressed by the clinic which had frozen Mrs [F]'s eggs. Accordingly, I gave directions as to the time in which such an application which would have to exhibit all the evidence on which it was intended to rely, must be made. I also gave time for the Secretary of State to respond to such evidence if so advised, and in particular to adduce any evidence that he might be advised to adduce with regard to the availability of services or surrogates in Nigeria.

23. Subsequently, further evidence was submitted on behalf of the claimant which is now contained within the file, and the appeal was relisted before me.

The Hearing

24. This appeal was before me on 15 October 2018, following which I gave consideration to all the submissions which had been made and reached a provisional decision. Regrettably, the file was then mislaid and so my decision was not then finalised and communicated to the parties. The file having now been relocated, this decision is now being promulgated. The Tribunal apologises to the parties for the delay.

25. Prior to the hearing the claimant's solicitors submitted a Bundle to the Tribunal. Unfortunately, the Bundle was paginated incorrectly and not all of the pages had been provided to the Secretary of State. However, the missing pages were provided at the hearing, and no further adjournment was necessary.

26. Most of the documents contained within the Bundle had previously been within the file, but there were fresh statements from the claimant and his wife, and also from Ms [LA], who it was intended should be the new surrogate, and also from Mr [A], her partner. There was also a witness statement from Mrs [A], who had not attended the hearing before the First-tier Tribunal when it was said that she had offered to be the surrogate. In her statement, she explained that she had not attended because a babysitter had let her down, and she also stated that she was not now able to be the surrogate, and gave her reasons.

27. A further letter was also provided from Guy's and St Thomas' Hospital dated 10 September 2018, in which the Consultant Gynaecologist, Dr Kopeika had set out, in half a page, the history of Mrs [F]'s egg preservation. In it the doctor said that "we would strongly recommend for her to continue with the treatment with us", and referred to counselling that had previously been undergone by the claimant's wife. In this letter reference was made to an appointment which the new surrogate had

with the hospital on 2 October, some three weeks after the date of the letter but two weeks before the date of this hearing.

28. At the hearing I heard submissions on behalf of both parties and also heard evidence from three of the witnesses, that is the claimant and his wife, and Ms [LA], who were all cross-examined. The other two witnesses, that is Mr [A] (Ms [LA]'s partner) and Mrs [A], did not attend. The evidence which was given and the submissions are set out in my Record of Proceedings and I shall refer below only to such of the evidence and submissions as is necessary for the purposes of this Decision. I have, however, considered carefully everything which was said to me, both in evidence and submissions, and had regard to all the documents within the file, before reaching my Decision.

The Evidence

29. Although the claimant had asked for the assistance of an interpreter, he had originally intended to give his evidence in English, with the Yoruba interpreter being available to translate the odd question which he did not understand. However, it soon became apparent that the claimant's understanding of English was very poor indeed and very soon he started to give all his evidence in Yoruba, and the questions were translated for him as well.

30. The claimant was asked a number of supplementary questions and was also cross-examined. Even making allowance for difficulties the claimant may have had in giving his evidence in his native language, he was a very unimpressive witness.

31. In his witness statement, which was signed on 27 September 2018, that is some eighteen days before the hearing, the claimant explained that Mrs [A], who was to have been the surrogate, had been unable to continue but that they had luckily found another friend, Ms [LA], who was now prepared to be a surrogate. This offer will be discussed below.

32. In cross-examination, the claimant accepted that he had been in this country about six years before he had made an application to remain, and it was during this period that he had met his wife. When asked at what stage he had told his wife that he did not have permission to be in the UK he said that she had found out during their wedding. When asked whether he was saying during the marriage ceremony or the run up to the wedding, the claimant said he did not understand the question, and when asked to explain by reference to a date he said that he could not remember.

33. On being further questioned, he said that he had told her he did not have permission to be in the UK in the house after the religious ceremony at the mosque, which had been on 2 June 2012.

34. However, when he was asked how long after 2 June 2012 he had told his wife that he did not have permission to be in the UK, he changed his story to say that he had discussed it <u>before</u> the religious wedding.

35. After the claimant had confirmed that the religious, Muslim wedding had come before the civil wedding, and he was asked again how long after the religious wedding (on 2 June 2012) he had told his wife he did not have permission to be in the UK, he then replied about two months. When he was asked by the Tribunal why it was in those circumstances that he had said that he had discussed it with his wife before the religious wedding, the claimant then replied that he had discussed it before the wedding because his wife had asked him. He then said that his wife had asked him again after the religious wedding when he had told her that he did not have permission to stay in the UK. He told her that he needed to stay in the UK because he had sold his mother his property in Nigeria. He accepted that he continued to get married legally in the UK, even though by that time his wife had been aware that he had no permission to remain in the UK.

36. The claimant was asked what research he had done with regard to the possibility of transferring his wife's gametes (that is her eggs) to Nigeria, to which he claimed to have done some research. He said that he had had a discussion with a doctor in Nigeria and understood that it would be "delicate" to take the eggs to Nigeria because there was a lack of certainty as to how the eggs would be handled in Nigeria, and whether this would be clean. He had been told this by the doctor in Nigeria.

37. On further questioning it appeared that this was a reference to the doctor at St Catherine's Hospital in Abuja, Nigeria, a photocopy of whose letter is in the Bundle at pages 23 to 24. This letter while referring to the risk of eggs being misplaced, does not mention cleanliness at all. When this was put to the claimant he replied that his understanding was that they were not sure about what contamination would be caused by whoever was going to carry the eggs. I noted at the time that there was no reference to this within his witness statement.

38. The claimant then confirmed that he had not himself sought advice from any other hospital in Nigeria, although he believed his wife had. Further, when asked, he confirmed that he had not himself had any conversation with St Catherine's Hospital either, (which was not the impression he had tried to convey earlier), so it appears that all the evidence he was giving on this was entirely hearsay.

39. When asked whether he had researched the possibility of finding a surrogate mother in Nigeria, the claimant's first response was that they had not, that they had only looked into this in the UK. When asked again he said that he had looked in Nigeria but they could not get anyone. When asked where he had looked, he replied that his wife had gone searching at some hospitals in Nigeria.

40. When asked how they were paying for IVF in the UK, the claimant replied that he did not pay anybody, and when asked further whether that was because the treatment was on the NHS, he replied that it was his wife who was going to the hospital. He was asked then whether the hospital who was doing all the procedures was aware that he did not have status in the UK at which he said he did not know, because his wife was doing it. He had been to the hospital when his wife had had fibroids.

41. The claimant was then asked whether his wife's eggs had been fertilised, to which his initial reply was "Yes", and they had been frozen. When asked again whether the eggs had been fertilised with his sperm, he replied that they had tested his sperm and it would work well with his wife's eggs. When it was put to him that that was not the question and he was asked again whether the eggs had been fertilised, he replied "Not yet".

42. The claimant was then asked why if he had been able to find two surrogates in the UK he should not be able to find surrogates in Nigeria, to which he replied that "Not many woman would be able to divulge their secrets". When it was suggested that as he had not asked anyone in Nigeria he could not know, the claimant replied that his wife had asked her friends in the UK about the same possibility, which did not really answer the question he had been asked.

43. The claimant was then asked whether it was correct that he had supported himself in the UK by being a security guard, to which the claimant's initial reply was that he was not working. When it was suggested that that was not an answer to the question he had been asked, he repeated that he had not worked in the UK. Mr Whitwell then asked in terms whether the claimant had ever worked in the UK, to which he replied that he had not.

44. Following up on that answer, Mr Whitwell asked the claimant why he had recorded his employment on his marriage certificate as "security officer", to which he replied (correctly) that it had been his wife who had been so described. Mr Whitwell then referred to the certified copy of the entry of marriage which is at the second page 18 of the Bundle (the Bundle being numbered somewhat haphazardly) in which the claimant's wife had, as he stated, been described as a "security officer" but in which he had been described as a "cleaner".

45. When this was pointed out to the claimant, he replied that he had done this "for two or three months". It was then put to him that he had then worked in the UK to which he admitted that he had, "for two or three months".

46. The claimant was asked whether when he had said earlier that he had not worked in the UK that was not correct, to which he replied that he had been helping people out, so he did not regard it as a job. He was asked whether he had been paid for the work he had done, to which he admitted that each time he had done a job he received some money.

47. The claimant was then asked whether his intended surrogate had been to a counselling appointment on 2 October 2018, to which he replied that the lady who had been intended to be the surrogate had not come because she had lost her father.

48. It was then put to the claimant that it was Ms [LA] (that is the second, current surrogate) who had been due to have a counselling appointment on 2 October 2018 (see paragraph 11 of her statement) and the claimant was asked whether she had attended. The claimant replied that she did not go, and when asked why not said

that this was because she had lost her father. He then corrected himself and said that Ms [LA] had gone to her appointment.

49. The claimant was then asked whether he had gone to counselling at all, to which he replied that he had in about 2017 but he could not remember the dates.

50. A final question the claimant was asked was what language he spoke to his wife in, to which he replied that it was a mixture of English and Yoruba, which is the Nigerian language.

51. The claimant's wife then gave evidence and also adopted her most recent statement, which is in the Bundle at pages 6 to 10, which statement had been signed about a month earlier than that of her husband, the claimant, on 22 August 2018.

52. The claimant's wife explains in her statement that the original planned surrogate, Mrs [A], had decided not to go ahead because of the death of her father, but that Ms [LA], another friend, had now offered to be her surrogate and that she would be going for counselling on 2 October 2018. She states that Ms [LA] had previously offered to be a surrogate but she had never accepted this because at that time Mrs [A] had already offered.

53. Mrs [F] then gives reasons why she could not relocate to Nigeria, which was first because having agreed with Ms [LA] that she would be her surrogate she could not leave her to undergo this without support from her in this country. She could not leave her friend to go through the surrogacy herself, but "will need our support and we can only provide that for her in the UK". Ms [LA] could not go to Nigeria because she had an established private and family life of her own in the UK and had a British partner and a job in this country.

54. Mrs [F] also claims that because she had lived in the UK now for over sixteen years and had no ties to Nigeria (and nor did the claimant) there would be "insurmountable obstacles" preventing them from returning to Nigeria.

55. She deals in one paragraph (paragraph 10) with why she could not reasonably be expected to have the surrogacy procedure carried out in Nigeria, as follows:

> "10. Further I would like to submit that [the claimant] and I have called a hospital in Nigeria, St Catherine's Specialist Hospital Ltd. I have spoken to a doctor from that hospital and they inform me that they advise the patient to carry out tests in Nigeria to see whether eggs can be frozen. However, in my case my eggs are frozen already and the doctor informed me that they have never had a procedure where eggs have been transferred from another country to Nigeria. The doctor also told me that the patient has to pay around 2.5 million Naira a year, which is equivalent to around £4,000, to store the frozen eggs until a surrogate is found. My husband and I do not have this kind of money, and cannot afford this".

56. I note that nowhere in Mrs [F]'s statement does she refer to any enquiries which she or the claimant made as to what they would have to do to find a surrogate in Nigeria.

57. In supplementary questions, when asked when it was that she had learned that the claimant had no status in the UK, her initial response was that she could not remember the exact date, but she thought she found out when she asked why he had no job. When asked if she could give at least some idea when that was, she thought that would "be late 2011 I think".

58. Mrs [F] was reminded that there had been two ceremonies of marriage, first the religious on 2 June 2012 and then the civil ceremony on 9 November 2011 and was asked with regard to these dates when she thought she had known that her husband had no legal status in the UK. Mrs [F]'s response was that she thought it was before the religious marriage, that is before June 2012.

59. Mrs [F] then said that she had personally known she could not carry a child just before her operation in 2016. She had had one operation in 2005 to remove fibroids, but at that stage her uterus was still there. She had gone to hospital in or around 2013 when she discovered her fibroids had grown and it seems she had had a hysterectomy. They said that they might have to remove her ovaries but because she had not had a child before doing so they would freeze some eggs. They had frozen eight eggs before her second operation. At that time they had not looked for a surrogate.

60. Mrs [F] had become a British citizen in May 2016, having been granted ILR in 2015. She had been granted leave to remain as a spouse of her previous husband.

61. Although at paragraph 9 of her statement Mrs [F] had claimed that "my home and friends and family are all here in the UK" and that "I have no ties to Nigeria as well as my husband not having too", she admitted in cross-examination that her mother lived in Nigeria; however, she was disabled.

62. As already noted, in her statement, Mrs [F] had not mentioned any attempts she had made to discover whether and if so how she could obtain a surrogate in Nigeria, and so she was asked whether she had ever considered getting a surrogate in Nigeria. To this question Mrs [F] claimed that at one point she had gone online, and searched for "surrogates in Nigeria" but having read some statements that girls who had gone on to be surrogate mothers had given she found it was scary and did not see any prospect of obtaining a surrogate in Nigeria. Although it seems that there was some success in Nigeria with IVF treatment, she did not see (from the internet) much prospects of success for surrogacy, which was why she contacted a hospital and, as she put it, "what they told me wasn't what I wanted to hear".

63. When then asked specifically as to what enquiries she had made, whether in this country or in Nigeria as to being able to find a surrogate in Nigeria, Mrs [F] replied that the doctor at the hospital had said they do not help with finding surrogates and that "the law in Nigeria is not good re surrogates". People asked for money, it was like a business, which was not really what she wanted. The doctor had said that she

would need a lawyer, because if eventually she found a surrogate, arrangements would have to be made through a lawyer.

64. When asked whether the Nigerian hospital had given her any advice about her transferring her eggs to Nigeria, Mrs [F] replied that the hospital had told her that they had not had a case where eggs had been transferred to their care, but they would have to refreeze them which would cost her £4,000 "or things like that". To store the eggs would cost her £4,000 a year.

65. Mrs [F] was then asked how her treatment was being paid for at the moment, to which she had replied that they had an appointment to see Dr White on 23 October 2018 (that was eight days after the hearing) who would do the test for her and her surrogate had been for counselling as well to go away and think about it.

66. When Mrs [F] was reminded that that was not the question she had been asked and was asked the question again, she replied that they had not yet reached the point where they had to pay anything. All treatment so far had been on the NHS, although she would have to pay for surrogacy.

67. In cross-examination, Mrs [F] was asked what fees or arrangements she had with her surrogate to which the answer was that she would pay expenses, "but we haven't talked about that because she hasn't been for any tests yet".

68. She was then asked whether the hospital had been able to confirm she would be a suitable surrogate, to which Mrs [F] replied that although the surrogate had had counselling, she had not had any tests yet. That was a process that had to be gone through.

69. When asked whether the surrogate had time to back out, Mrs [F] replied that she had three to six months, and that she had been advised to "think carefully about it". She eventually accepted, after some prevarication, that the surrogate could back out after this appeal.

70. When asked about the extent of her research in Nigeria as to the possibility of surrogacy, Mrs [F] confirmed that this was confined to searching on the internet, and she said that she had done this "more than five times". She also when asked confirmed that she had only made enquiries of the one hospital, which was St Catherine's in Abuja.

71. When asked why she could not find similar surrogates in Nigeria if she was to return there with her husband, Mrs [F] said that because she had left that country seventeen or eighteen years ago, she did not know anyone there now. She also said that having to talk about her situation all the time was very depressing. When asked whether the real reason she did not want to return to Nigeria and find a surrogate there was because it would cost her money, Mrs [F] replied that these people would be strangers and she did not know anything about them. She agreed that there would be additional costs in Nigeria, and that she would have to pay a stranger there, whereas in the UK the surrogate would be a friend.

72. The final live witness was Ms [LA], who was the possible surrogate now relied upon. She also relied on her statement, which was dated 25 September 2018, some three weeks or so before this hearing.

73. The statement is very short and (as will be clear below) was clearly drafted for her by the claimant's solicitors. It refers to the "insurmountable obstacles" in the claimant's case and also how a group of the friends of Mrs [F] had offered to be their surrogate.

74. Ms [LA] describes how she was in a long-term relationship with her partner, Mr [A], a British citizen, and that they are "in a stable, loving and committed relationship". No further details of their relationship are contained within the statement, save that having decided that she wanted to be a surrogate, because she understood how much Mrs [F] wanted a baby, "My partner and I discussed this thoroughly and at the end discussed that I should offer [M] and Olalekan [the claimant] to be a surrogate for them". She then repeats what she was apparently told about why the previous surrogate had felt unable to continue.

75. A paragraph is added as to why she could not move to Nigeria "because I have my own established private and family life here in the UK" and "can only be their surrogate in the UK due to my own private and family life and work being here in the UK". She also adds that "Further, I cannot undergo the surrogacy without [the claimant and Mrs [F]] present with me here in the UK" because "I require their support and help here in the UK".

76. What this witness essentially says in her statement is that because she likes Mrs [F] and her husband (the claimant) so much and feels sorry for them because they had been let down by their first surrogate, she was very happy just to help them, her partner had agreed, but that this would only be possible if the claimant and Mrs [F] remained in the UK. They would be going to counselling and then everything would go ahead. As already mentioned, the statement lacks any details regarding what the personal situation of this witness with her partner actually is.

77. In cross-examination, Mr Whitwell very properly explored these matters.

78. Because there was no mention in her statement of any children, Mr Whitwell asked Ms [LA] whether she had any herself, to which she replied that she did not. She was asked whether as a 36 year old woman who was in a stable relationship she saw herself as having any children with her partner to which she replied that she had, but she had been "on gynaecology for this". When asked to explain what she meant by this, she said that they had been trying for a baby and did not see any reason why she had not become pregnant and was still under that investigation.

79. When asked how long she had been trying for a child, Ms [LA] replied that it was "about six years now".

80. When asked whether the doctors had been able to say whether the reason she had so far been unable to have a child was to do with herself or her partner, the witness replied that "Everything is fine with my doctor". This was not explored further.

81. When asked whether or not any suggestion had been made that Ms [LA] could have IVF treatment, she replied that that had not yet been suggested. When asked whether she had considered this, she replied she had not yet but she wanted them to do more investigations first before she would think of IVF.

82. She was then asked whether she would have to undergo some tests in respect of being a surrogate for Mrs [F] and the claimant, to which she replied that she would, and in answer to another question she said that these tests had not yet been done. She had gone for the interview and they had given her three to six months to think about it, with her partner before coming back.

83. When asked whether they had talked about her own wish to have a baby she replied that they had, and she confirmed also that she was still trying.

84. Ms [LA] was then asked about what was said at paragraph 7 of her statement which was that "A group of [M]'s friends had offered to be their surrogate" and was asked who these people were. Ms [LA] replied that that had been when she went to the hospital to visit her with a friend (that is not with a group). She was asked why she had written "A group of her friends" to which she replied that "they" (that is the claimant's solicitors) had talked to her about these matters and they had written out her statement for her.

85. She was then asked what she meant when she wrote that "there are insurmountable obstacles" with regard to the claimant and Mrs [F] returning to Nigeria together. She was asked what she had meant by that. She had obvious difficulty in answering this question and so she was asked by the Tribunal in terms whether she knew what this meant, to which she replied that she did not.

86. Ms [LA] was then asked about what had been discussed during her counselling session some two weeks or so previously. She was asked first whether the doctors had discussed with her whether or not being a surrogate might jeopardise her chances of having her own child because this would have to be delayed, to which she replied that in her own case she had been trying for a long time unsuccessfully, but this was not mentioned to her. They did mention other things. When asked what other things had been mentioned she replied that she was asked whether she would want the child to know her and whether she would want to have anything to do with the child to which she had said that she did not.

87. When asked what payments she expected to receive, Ms [LA] said perhaps something in place for insurance in case it affected her job. The hospital had apparently told her that they would discuss this with Mrs [F]. There had been no mention of adoption during her counselling.

88. There were two other witness statements, from Mr [A], Ms [LA]'s partner, and from Mrs [A], who had been the prospective surrogate at the time of the hearing before the First-tier Tribunal. Neither of these witnesses were present and so neither were cross-examined. Mr [A]'s statement is exceptionally brief, amounting to five short paragraphs, totalling less than one page, which includes generic evidence such as

that the statement will be used as evidence and that he understands that it is made in support of the claimant's appeal. He says (at paragraph 3) that he and Ms [LA] (whose name is incorrect spelt) "had been in a relationship since 2010, and are in a stable, loving and committed relationship". He then says that he has known the claimant and Mrs [F] through his partner and that he knows that they "are great, genuine and honest people" and that "all they want is to be given the opportunity to start their own family". He then says that he fully supports his partner to be their surrogate mother. What is completely missing from this statement is any consideration (or even acknowledgement) of what impact Ms [LA]'s decision to be a surrogate would have on this couple's desire to have a child of their own, or even any mention that this was something which they wished to do.

89. Mrs [A]'s statement explains that although she had been intending to attend the hearing before the First-tier Tribunal to confirm that she was willing to be a surrogate for the claimant and Mrs [F], she could not attend because she had been let down by a babysitter. It also appears from this statement that the offer had been made before attending any counselling, and that she never had attended counselling because before this could take place her father had been ill and then died and she had been put under stress because she had worked hard to pay for her father's medical bills. It is not entirely clear why, given that her father was now dead, she could no longer be a surrogate, but in any event she said that this was her reason for changing her mind.

90. The claimant also relied on the documents contained within the Bundle, and in particular the correspondence and letters from Guy's & St Thomas' NHS Foundation Trust and St Catherine's Hospital in Abuja. Reference will be made where relevant to these documents.

Submissions

91. On behalf of the Secretary of State, Mr Whitwell, referring to EX.1. (whether there will be insurmountable obstacles to family life continuing in Nigeria) referred first to the quality of evidence which had been given. The evidence had not been given in a straightforward manner. There had been a discrepancy, for example, in the claimant's evidence as to whether or not he had been working, and there were also discrepancies as to when Mrs [F] became aware of the precariousness of the relationship, in particular whether this was before or after the religious ceremony of marriage. This was relevant when the Tribunal had to decide whether or not this was in effect merely a case of someone without status in the UK who had decided to strengthen and solidify his family life where otherwise he had no legitimate basis for being allowed to remain.

92. When considering whether EX.1. would apply, it was necessary to look at the definition of insurmountable obstacles within EX.2., and in the Secretary of State's submission, family life, such as it was, would continue. The claimant and his partner both spoke Yoruba, the language of Nigeria, and both the claimant and Mrs [F] had previously spent their formative life in Nigeria. There is no reason why they could not continue their family life in that country.

93. So far as the evidence with regard to surrogacy was concerned, it was far from clear that IVF through the surrogacy of Ms [LA] would be successful. Ms [LA] was a lady in her late 30s with gynaecological problems, as yet not fully explored, which had so far prevented her from becoming pregnant. In other words there were potential physical difficulties even without taking account of psychological and emotional difficulties. This Tribunal had to consider on the balance of probabilities whether this surrogacy arrangement would in fact be effective, even were the claimant to be allowed to remain in the UK.

94. In any event, surrogacy arrangements could be made within Nigeria. The claimant's wife was saying that she would rather have someone she knew and that she did not wish to incur the financial expense which would be involved in entering into a surrogacy arrangement within Nigeria. It was also said that the process of transferring her eggs from the UK to Nigeria was not straightforward.

95. With regard to this latter point, clearly the transfer of gametes does take place from the UK to other countries as was shown from the letter of 27 September 2017 from Guy's & St Thomas' NHS Foundation Trust, at page 22 of the Bundle. In that letter the Hospital Trust sets out the conditions necessary for the requirements of UK legislation to be met, and there had been no evidence that these conditions could not be met. Indeed, from the letter from St Catherine's Hospital in Abuja, at pages 23 and 24 of the Bundle, it was clear that eggs were on occasion transferred to Nigeria because there is reference within that letter, at the third paragraph, to a case "where the courier service transferring the frozen gametes misplaced the gametes", indicating that these transfers did take place. Also, Mrs [F] had said she had not even researched the position with other hospitals, so the claimant had not established that eggs could not be transferred successfully to Nigeria and nor had he established that surrogacy could not take place in that country.

96. On behalf of the claimant, Ms Hulse submitted that Mrs [F] had a totally natural desire to have a child born with the assistance of a surrogate whom she knew, trusted and liked, and who would be amenable to her suggestions as to how much rest she should have, what food she should have and whether she needed to take time off and so on. This was not like buying a tube ticket, it was a much more personal matter. Financial arrangements were difficult. In this country a surrogate cannot be paid, but can receive expenses. The procedure is not straightforward, even if one has all the eggs and they are fertilised it still may not work. But moving the eggs and taking increased risks was not a good idea.

97. While it was accepted that there was a still long way to go with this surrogacy, it was not proportionate to risk the eight eggs which had so far been frozen. What the Tribunal had to consider is whether to deny the couple the best opportunity of trying for a child would be a seriously harsh consequence as set out within EX.2.

98. With regard to the argument that the claimant and his wife merely wanted to continue to avail themselves of NHS treatment, Mrs [F] had had this treatment and

as a British citizen was entitled to it. The hardship that would be occasioned by the claimant's removal would be suffered by both of them.

Discussion

99. My starting point has to be that none of the requirements set out within paragraph 276ADE(1)(iii) to (vi) of the rules are satisfied. With regard to (vi) there are no very significant obstacles to the appellant's own integration into Nigeria were he to be required to return there. He speaks the language, he was brought up there and there is no special reason why he could not reintegrate into that society.

100. I must then consider whether or not EX.1. if Appendix FM of the Immigration Rules is engaged. The relevant parts of EX.1. and EX.2. are as follows:

> "**Section EX: Exceptions to certain eligibility requirements for leave to remain as a partner or parent**
>
> **EX.1.** This paragraph applies if
>
> …
>
> (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 to family life with that partner continuing outside the UK.
>
> **EX.2.** For the purposes of paragraph EX.1.(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

101. Even if EX.1. does not apply, I would have to consider whether or not leave should be given under Article 8 outside the Rules on the basis the circumstances were sufficiently compelling that exceptionally leave should be granted even though the claimant does not qualify within the Rules.

102. The claimant's case is primarily that EX.1. is engaged because, it is said, the difficulties which would be faced by this claimant and particularly his partner in having a child together are so significant that if they were to move to Nigeria they either could not be overcome or would entail very serious hardship for them.

103. The way the claimant's case has been put is essentially that Mrs [F], who understandably wishes to have a child, is now in a position in this country where that wish can be fulfilled by implanting her egg, which would first have to be fertilised, within Ms [LA], who would act as her surrogate. That chance of motherhood, it is said, would be frustrated (or would at the very least be likely to be frustrated) were the claimant to be returned to Nigeria.

104. In order for this claim even to be arguable, the claimant would need to establish, by credible evidence, first that Mrs [F] currently has a realistic prospect of having a child

through the use of a surrogate in this country, and secondly, that if she were to relocate to Nigeria with the claimant, this relocation would create a very significant difficulty to this aspect of their family life which either could not be overcome, or would entail very serious hardship.

105. I deal first with the realistic prospects of the claimant and his wife having a child through a surrogate within the UK. At the outset, it is right that I record my finding that this claimant was not an honest witness. As already noted above, his evidence was inconsistent with regard to whether or not he had been working. He clearly had, but initially he chose to deny this. When he was challenged in cross-examination, he tried to maintain that when he had said that he had not worked in the UK, whereas on his own admission he had worked as a cleaner for at least two or three months, this had not been a lie, because he was only "helping people out" so he did not regard this as a job. However, as he admitted, he did get paid for all the jobs that he did, and I do not accept that he did not appreciate that he was indeed working, when, obviously, he was not entitled to do so.

106. The claimant's evidence was also inconsistent as to when he had told his wife that he had no status in this country.

107. It also became apparent during cross-examination that when the claimant informed the Tribunal that he had "done some research" (this evidence, as with all his evidence was given in Yoruba with the assistance of an interpreter) he had not actually himself done any research at all. Rather, he was repeating what he understood that his wife had discovered, although the evidence he gave with regard to what St Catherine's Hospital had said (with regard to the possibly of contamination of the eggs) was not what was in fact in their statement.

108. The evidence adduced on behalf of the claimant, within the statements themselves, were also very unsatisfactory, not only for what they left out (in particular with regard to the very relevant personal circumstances of Ms [LA] and her partner, which will be discussed below), but also because Ms [LA] in particular had signed a statement which she clearly did not fully understand. This became apparent during her cross-examination when notwithstanding that she had referred to the "insurmountable obstacles" which the claimant and his wife would face in Nigeria, she admitted that she did not actually understand what this meant, but had just signed the statement which had been prepared for her by the claimant's solicitors. Similarly, she had signed a statement which had included a reference to a group of Mrs [F]'s friends being prepared to act as her surrogate, whereas in fact she had at most visited the hospital with one other person. This also was apparently something which the claimant's solicitors had misunderstood when they wrote the statement.

109. Even without these very unsatisfactory aspects surrounding the evidence adduced on behalf of the claimant, and taking that evidence at its highest, it is clear that there is, in the judgment of this Tribunal very little realistic prospect of Ms [LA] being a surrogate for Mrs [F]. It is clear that she has not yet thought through properly what would be involved, and nor has she received (if her evidence is to be believed)

appropriate counselling. Although this is a matter which only came to light during cross-examination, Ms [LA] has in fact been herself trying to conceive for about six years now, with her partner. She has not yet investigated the possibility of IVF for herself, and nor has she considered what impact her now trying to be a surrogate for Mrs [F] would have on her chances of conceiving her own child. She is a 36 year old lady and clearly time is of the essence if she now wishes to have her own child. Leaving aside the real possibility that there may be physical difficulties in surrogacy (which do not appear to have been explored at all yet), the potential emotional trauma which might be suffered by a lady who is longing to have her own child by bearing another person's baby is something which would need to be explored fully before any surrogacy arrangement was entered into. The impression given from the evidence is that it is just assumed that surrogacy is a simple, easy matter involving very little consideration rather than a potentially traumatic experience, especially for a lady who so far has been unable to bear her own children.

110. When one then considers also that the claimant's case as put before the First-tier Tribunal was that a different lady (who apparently had been unable to attend that hearing because she had babysitting problems on that day) had agreed to be a surrogate, this Tribunal has even less confidence that this prospect has been explored at all thoroughly. Having considered all the evidence, not only do I consider that there is no realistic probability at the moment of Ms [LA] in fact being a surrogate for the claimant and his wife, but I believe it to be highly unlikely.

111. Even if there was a realistic prospect of Ms [LA] attempting to be a surrogate for Mrs [F], this would not occur for some time, because, as already indicated above, something as serious as this could only be undertaken after proper and thorough counselling and medical checks, which have not yet been done. So one would have to consider whether or not there would be any serious or significant difficulty preventing a surrogacy arrangement being concluded within Nigeria. The reasons put forward are first that Mrs [F] would prefer to have a surrogate whom she knew and trusted, and secondly, financial. It is also suggested that there could be difficulties in transferring the gametes.

112. With regard to the transfer of the eggs, it is clear from the (very limited) evidence from the hospital in Nigeria that eggs are transported, because that hospital gave an example of where something had gone wrong in the transportation of eggs. There is an almost total lack of evidence regarding IVF treatment within Nigeria and the transportation of eggs, and on the basis of the evidence adduced, the claimant has not shown that there would be any significant difficulties in arranging this which could not be overcome. Although the couple might prefer, other things being equal, for Mrs [F]'s treatment to continue in this country, EX.1. will only apply in circumstances where there would be significant difficulties which would be faced by the claimant and Mrs [F] in Nigeria which could not be overcome or would entail "very serious hardship". Unless the treatment could not be continued in Nigeria, without "undue hardship", EX.1. will not apply.

113. Even if there is a small risk involved in transporting the gametes, this could be significantly reduced by transporting the eight eggs in two batches of four (at any rate there is no evidence that it could not). Also, there was no evidence as to what this risk actually was; the only "evidence" on this point was a comment from the hospital which had heard of an occasion where something had gone wrong.

114. So far as the surrogacy arrangement itself is concerned, again there has been an almost total absence of evidence as to what difficulties might arise within Nigeria. The highest the claimant's case was put, was that this would be more expensive, because in Nigeria it was believed (without evidence) that a surrogate would expect to be paid in addition to her expenses, and that the claimant and Mrs [F] did not currently know anyone in Nigeria. Absent evidence, one can only speculate as to what difficulties there would be and again the claimant has not made out even an arguable case of there being significant difficulties which could not be overcome without undue hardship.

115. Although the claimant and Mrs [F] would prefer to continue receiving assistance on the NHS, this is not something to which the claimant is currently entitled (although Mrs [F] is) and it is not clear whether or not the hospital in this country appreciated that the claimant had no status here.

116. Accordingly, I do not consider that EX.1. applies.

117. Absent EX.1., there is nothing in the circumstances of this couple that could even arguably be said to be so compelling as exceptionally to warrant the grant of permission to remain under Article 8 outside the Rules.

118. The remaining argument which had been raised on behalf of the claimant before the First-tier Tribunal (but which was not sustained certainly in oral argument before this Tribunal) was that it would not be proportionate to make this claimant go to Nigeria now because (following *Chikwamba*) as he would almost certainly be allowed to return to this country as a spouse, it would not be proportionate to require him to leave the country in order to make that application. In my judgement, such an argument must fail. The decision in *Chikwamba* was clarified by the Court of Appeal in *Hyatt*, in which it was decided that the respondent must show that there is a proper reason why it is appropriate to return an applicant in these circumstances to the country of his nationality, in order for an application to be made from there. In this case that reason is to be found now in Section 117 of the Nationality, Immigration and Asylum Act 2002, inserted by Section 19 of the Immigration Act 2014, the relevant parts of which provide as follows:

"**117A. Application of this Part**

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B …

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

…

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

…".

119. In this case, therefore, the starting point must be (as implicitly recognised in *Hyatt*) the weight which must be given to the public interest in removing persons who have no right to be in this country. Little weight can be given to the claimant's private life, because not only was his immigration position precarious throughout his stay in the UK, but he was also here unlawfully. Similarly, because he was in this country unlawfully, little weight can be given to the relationship he has established with his wife.

120. In these circumstances, even were I to find that it is likely that the claimant would be able to apply successfully from Nigeria to return to be with his wife, I would still not regard that fact as sufficient to render his removal disproportionate.

121. Moreover, there is one further aspect and it is this. As I have already indicated above, it was apparent during the course of the hearing that this claimant's English was insufficient to enable him to understand ordinary conversation. It was also in evidence (unsurprisingly) that he talks to his wife in Yoruba, which is her native tongue as well as his (apart possibly from a smattering of English). In these

circumstances I do not accept that the claimant has established that an application from abroad would be bound to succeed; it may very well not.

122. In these circumstances, there is no reason why this claimant should be allowed now to remain in this country under Article 8.

Decision

I set aside the decision of First-tier Tribunal Judge Lucas as containing a material error of law and substitute the following decision:

The claimant's appeal is dismissed, under Article 8.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 14 March 2019