Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11111/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 22 April 2014	**On 30 July 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

MOSUNMOLA BISI YAKUBU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Siddique, Parker Rhodes Hickmotts Solicitors
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Mosunmola Bisi Yakubu, was born on 8 November 1980 and is a female citizen of Nigeria. I have remade the decision in the Upper Tribunal after Upper Tribunal Judge Taylor found an error of law in the First-tier Tribunal determination. Judge Taylor's decision and directions were as follows:

2. This is the Appellant's appeal against the decision of Judge Mensah made following a hearing at Bradford on 9th January 2013.

Background

3. The Appellant is a citizen of Nigeria who was accepted by the Respondent, in a letter dated 17th February 2011, to be a historic victim of trafficking from Nigeria to the UK.

4. The judge recorded that the Border Agency now raised the issue of the failure of the Appellant to claim asylum within six years after her escape from her traffickers, and inconsistent evidence relating to her claim to be an orphan in her biodata form, to resile from their previous position. The judge said that she agreed that those matters undermined the Appellant's credibility and she concluded that the Appellant had failed to show that it was reasonably likely that she had told the truth about how she came to come here.

5. The Appellant arrived in the UK in February 2006 and claimed asylum on 30th October 2012. She has a child, born on 29th May 2008, who suffers from sickle cell anaemia which requires him to take a cocktail of drugs and to have a blood transfusion every four weeks.

6. The judge relied on a COI document confirming that drugs in Nigeria were available but expensive with "an alarming lack of essential medicines in the private sector." The report said that public hospitals will treat those who cannot pay but will expect payment to follow thereafter, and that there are some clinics providing free drugs to those who suffer from sickle cell and some equipment in a few States in Nigeria. Nigeria ranks first as the sickle cell endemic country in the world with an average of 150,000 infants born every year with sickle cell, and 8% infant mortality attributable to sickle cell death.

7. The judge said that it was clear that treatment for the Appellant's son was available in Nigeria. The issue was whether the Appellant and her son could access the treatment but because she had failed to establish that she was an orphan without family or support in Nigeria she could not establish that she would be unable to do so and the appeal on that basis had to fail.

The Grounds of Application

8. The Appellant sought permission to appeal on three grounds.

9. Firstly, at the Case Management Review hearing, the Appellant made it clear that reliance would be placed on a separate ground i.e. that the decision was otherwise not in accordance with the law in that the Secretary of State had failed to comply with her duty under Section 55 of the Borders, Citizenship and Immigration Act 2009. There was no reference to the arguments in the decision and the failure to determine the ground amounts to an error of law.

10. Secondly, the judge erred in respect of a failure to refer to the best interests of the child, who was born in the UK and had never had any treatment in Nigeria, in relation to the Article 8 decision. The medical evidence indicated that he required specially prepared blood for transfusion every four weeks together with iron chelation therapy and there was no evidence that the treatment was available, accessible or affordable. The COI report ignored the evidence that 100,000 children a year die from sickle cell disease in Nigeria.

11. Thirdly the judge had failed to give adequate reasons for her conclusion that the Appellant was not a victim of trafficking. It was apparent from the fact that the competent authority decision was made in February 2011 that they were aware that the Appellant had not claimed asylum after her escape but this did not cause them to doubt the credibility of her claimed history. Moreover the judge had failed to take into account the Appellant's explanation for the supposed inconsistency in the biodata form in reaching her decision.

12. Finally, there was a lack of anxious scrutiny in this determination since the judge said that she dismissed the appeal on human rights grounds but then said that she allowed it under Articles 2, 3 and 8.

13. Permission to appeal was granted by Judge Vaudin d'Imecourt on 13th February 2011 for the reasons stated in the grounds.

14. On 3rd April 2013 the Respondent served a Reply, in essence defending the determination and stating that the judge reached a conclusion open to her on the evidence.

Submissions

15. Mr Siddique relied on his detailed grounds.

16. Mr Wardle stated that, with respect to ground 1, the Respondent had properly considered the best interests of the child in the refusal letter but otherwise simply relied on the Reply.

Findings

17. The judge did not engage with the argument that the decision was not in accordance with the law, which she ought to have done, but in the reasons for refusal letter dated 23rd November 2012 full consideration was given to the Appellant's Article 8 claim and that of her son. At paragraph 58 of the letter the Respondent states in terms that consideration of the best interests of the child had been taken into account when assessing leave under Article 8. The duty on the Secretary of State is to consider the child's best interests, which she says she has done, and not to necessarily reach a decision in conformity with what the Appellant claims those best interests to be. There is therefore no proper basis for concluding that the decision is unlawful.

18. However the remaining grounds are plainly made out. The judge's consideration of the complex issues in this case was not adequate, and there was no consideration at all in the determination of Section 55. Furthermore the brief credibility findings were reached without regard to all of the relevant evidence.

19. The decision is set aside and the following directions are made.

20. This matter will be set down before a panel of Upper Tribunal Judges after six weeks with a Yoruba interpreter with a time estimate of three hours. The sole issue for determination is whether the Appellant's removal would be a breach of Articles 3 or 8 of the ECHR.

21. The panel will need to make findings of fact both in relation to whether the Appellant is a historic victim of trafficking as claimed and what support, if any, would be available to her on return to Nigeria.

22. Both parties are to provide all evidence upon which they seek to rely seven days before the hearing. The Appellant is also to provide the best evidence available in relation to the treatment of sickle cell disease in Nigeria.

23. The burden of proof in the appeal is on the appellant and the standard of proof is whether the appellant faces a real risk of Article 3 ECHR ill-treatment on return to Nigeria. In the Article 8 ECHR appeal, the standard of proof is the balance of probabilities. At the appeal hearing at Bradford on 22 April 2014 I heard brief evidence from the appellant who spoke in Yoruba with the assistance of an interpreter. She adopted her written evidence as her evidence-in-chief and was briefly cross-examined by Ms Pettersen. After hearing the oral submissions of the representatives of both parties, I reserved my determination.

Trafficking Decision

24. As Judge Taylor indicated in her error of law decision [20], it is important for the Tribunal to make a finding in relation to the appellant's claim to have been an historic victim of trafficking. Competent authority decided the appellant had historically been a victim of trafficking from Nigeria to the United Kingdom. That decision was, in effect, reversed in a refusal letter which accompanied the decision rejecting the appellant's claim for asylum and directing her removal under paragraphs 8-10 of Schedule 2 of the Immigration Act 1971. The later asylum decision (dated 23 November 2012) gave reasons for the reversal of the decision in respect of trafficking at [29], it was noted that,

> On both occasions that you submitted your FLR applications, despite being represented by the Immigration Advisory Service you raised no fear of return to Nigeria on the basis of a fear of Mrs Adjayi [the alleged trafficker]. Taking this into account together with your failure to claim asylum at the earliest opportunity it is not considered appropriate to give you the benefit of the doubt on these issues raised at paragraphs 16 to 20.

25. Paragraphs 16-20 of the refusal letter included an analysis of the account which the appellant had given of past events in Nigeria and her journey to the United Kingdom. The respondent concluded [20] that "whilst this element of your claim [to have been trafficked] is internally consistent, it remains unsubstantiated and cannot be corroborated externally." I find that it was open to the respondent to reverse her decision [or rather that of the competent authority] in respect of the appellant's trafficking claim. By the time the Secretary of State came to consider the appellant's asylum claim, new features of the case had arisen (the appellant's failure to mention her alleged trafficker in her FLR applications and also her delay in claiming asylum) which had not been present at the time of the original trafficking decision in 2011. In light of the change of circumstances, the new decision on trafficking was both possible and appropriate.

26. Even if I am wrong in that regard, and the appellant was trafficked as she claimed, I accept Mrs Pettersen's submission that, upon return to Nigeria, there was no reasonable likelihood that her alleged trafficker would know that she has returned to the country and so will therefore not be in a position to threaten or harm her.

Article 3 ECHR

27. The appellant's child (born 29 May 2008) suffers from sickle cell anaemia. As Judge Taylor noted in her error of law decision [4] it is necessary for the child to "take a cocktail of drugs and to have blood transfusions every four weeks." I refer also to paragraphs 5 and 6 of Judge Taylor's error of law decision (see above). In considering the Article 3 appeal, I am aware of the provisions of Section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that a decision-maker must consider the best interests of a child resident in the United Kingdom as a primary consideration. I have had regard also to the relevant jurisprudence including the opinions of the House of Lords in *N [2005] UKHL 31.*

28. I have no doubt at all that the appellant's child is very sick. At the present time, his sickle cell anaemia is controlled by drugs and blood transfusions administered here in the United Kingdom. As regards Article 3 ECHR, the difficulty for the appellant and her child is that the treatment which is administered to the child in the United Kingdom is also available, albeit at a cost, in Nigeria. It cannot be said that there is a complete or virtual denial of appropriate treatment in the country of origin such that the appellant's child would suffer inhuman or degrading treatment upon return. Consequently, I do not find that the Article 3 grounds are made out in the present case.

Article 8 ECHR

29. Both parties agreed that the appeal on Article 8 grounds turns on the question of proportionality. The appellant asserts that her child's moral and physical integrity would be disproportionately compromised as a consequence of returning to Nigeria. I acknowledge that different considerations may arise from those which were of relevance in the Article 3 ECHR assessment. I have considered the medical evidence relating to the child carefully and I was assisted by the detailed oral submissions made by Mr Siddique, for the appellant.

30. Mr Siddique drew my attention to the medical evidence which indicates that the child's risk of suffering a stroke is increased by the sickle cell condition and that blood transfusions may be required indefinitely. Background evidence relating to Nigeria indicates that opiates are generally not available to outpatients and, if the child cannot access monthly blood transfusions, then stroke risk will increase as a direct result. There is also evidence to show that, not having been born in Nigeria but having inherited the sickle cell condition, the child will be at greater risk than a child born with same condition in Nigeria. The medical evidence indicates that, the greater the risk of complications including stroke, the greater the need for the child to access on a regular basis what may prove to be very expensive medical treatment. The background evidence also indicates that blood transfusions are not routinely screened for malaria infection. The child does not at the present time have malaria but may contract it as a result of the blood transfusions which he will undoubtedly need for the foreseeable future and on a very regular basis. Mr Siddique made the compelling submission that these were factors which were not

related to the availability of treatment in Nigeria or, indeed, the ability of the appellant or his mother to pay for such treatment. They were, however, factors which, whilst they might not lead to serious illness or death, seriously comprised the appellant's moral and physical integrity in ways which would not occur should he remain living in the United Kingdom. The point made by Mr Siddique was that the same treatment (drug therapy and blood transfusions) which the appellant receives in the United Kingdom may, for the reasons indicated above, actually increase the dangers posed by the appellant's condition when delivered to him in Nigeria.

31. I find that these are powerful factors weighing in the Article 8 analysis in favour of the appellant and her child. The increased risks caused to the appellant upon returning to Nigeria may not cross the Article 3 ECHR threshold but they do weigh heavily in her favour as regards proportionality. There is nothing the evidence to show that alternative treatments might be available in Nigeria which would diminish or remove the risk. Problems would be caused not by inferior treatment by the same treatment delivered to the appellant in the United Kingdom but which will affect him differently on account of local conditions.

32. It is important that I should identify the public interest concerned with the removal of the appellant and her child. The appellant claims to have been trafficked and has sought to claim asylum, both claims have failed. The child cannot however, be classified as a health tourist since he was born more than two years after the appellant arrived in the United Kingdom and there was no evidence to show that she was aware that he would be born with a serious medical condition .

33. The child's best interests are served by his remaining in the custody and under the care of his mother. Those best interests must be considered as part of the Article 8 proportionality assessment. The child's best interests are also to be addressed by his continuing to receive appropriate treatment for his medical condition but I have found that the same treatment which he is receiving in the United Kingdom, if administered in Nigeria, will cause him harm. It is that unusual circumstance which I find tips the proportionality balance in favour of the appellant and her child. In the normal course of events, his best interests would be addressed by remaining in the custody of his mother and returning to the country of his own nationality. However, that return, for the reasons I have given above, will compromise his moral and physical integrity disproportionately. Since the child should not be separated from his mother, I have concluded that both the child and his mother should be granted a period of leave to remain under Article 8 ECHR.

DECISION

34. This appeal is dismissed on asylum grounds.

35. This appeal is allowed on human rights grounds (Article 8 ECHR).

36. The appellant is not entitled to a grant of humanitarian protection.

Signed Date 20 June 2014

Upper Tribunal Judge Clive Lane