UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) APPEAL NUMBER: IA/07042/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 13 October 2014
Prepared: 6 November 2014

Determination Promulgated
On 7 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MS SYLVIA OGBONNA
NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr R Layne, counsel (instructed by Greenland Lawyers LLP)
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Nigeria, born on 7th January 1969. She appealed against the decision of the respondent refusing her application made on 14th July 2011 for leave to remain under Article 8 ECHR. It was initially refused on the 25th August 2011. Following a reconsideration request it was finally refused on the 16th January 2014.

2. The appeal against that refusal was dismissed by First tier Tribunal Judge Wiseman in a determination promulgated on 7th August 2014.

3. He noted that the application was considered under Article 8 against the requirements to be met under Appendix FM or paragraph 276ADE of the Immigration Rules [9].

4. He referred to the respondent's reasons for refusal. The appellant did not satisfy the eligibility requirements from her relationship with her children. However for the sake of completeness, this issue had been looked at with regard to paragraph EX.1. It was considered that the children were at an age where they could adapt to life in Nigeria and it was not unreasonable for them to have to return there with the appellant and her partner [11].

5. With regard to her private life claim, the appellant had been resident here for some nine years, more than eight of which had been as an overstayer. She was 36 years old when she entered and thus failed to meet the requirements under paragraph 276ADE. In addition, she failed to establish that she had no social, cultural or family ties to Nigeria remaining. That was the country of her formative years. It was reasonable to expect her to return there. There were no exceptional circumstances [12].

6. The grounds of appeal before the First-tier Tribunal asserted that it was of fundamental importance for the Article 8 claim to be considered outside the immigration rules as well: there were exceptional circumstances applicable and it would be harsh to expect the children to adapt to Nigeria where they had never lived and to which they were not accustomed. The elder child was progressing well at school and was settled. The younger child suffered from a speech disorder for which he receives treatment and his removal "may cause him irreparable damage" [14].

7. The Judge considered the appellant's witness statement presented at the hearing. She gave evidence and was cross examined.

8. When asked about the prospect of returning to Nigeria, she stated that the younger child needed treatment here otherwise he might become unable to speak [25]. She wanted a better life for her children and could not see how she could ever earn a living in Nigeria. She claimed not to have had any discussion with her partner about the possibility of going back. They were just "hoping for the best." Her partner had never worked in the UK or indeed Italy, from where he last came. Nobody would be able to help her in Nigeria. She would be cut off.

9. She said in answer to a question from the judge that although she came to the UK on a visit visa, it had been obtained on a false basis because she was always "happy to come to a better country." She had never had any intention of returning and had just settled down with her partner and in due course they had the children. She felt she should apply for leave to remain for their sakes [26].

10. Mr Layne who also appeared for the appellant before the First-tier Tribunal accepted that the appellant could not meet the requirements of the rules in relation to family life, but "suggested" that she did not really have any continuing ties with Nigeria. There were, he claimed, exceptional circumstances requiring consideration "even after **Gulshan**". The children were "innocent victims." It would be disproportionate to remove them. The whole family should be allowed to remain [31].

11. In his reasons and findings, the Judge noted that she arrived here on 19th February 2005 on a visit visa, but had never had any intention of returning. She had now been here for some nine years without any right to be here for the vast proportion of that time.

12. He found that the history of her partner was even more obscure. He chose not to attend the appeal hearing. There was no contention that he ever had the right to remain here. He too is a Nigerian citizen "and that is no doubt where the respondent would say he should return to." There was no evidence as to whether any application had been made by him [33].

13. From paragraphs 34 onwards, the Judge noted the poor immigration record of the appellant. He had regard to the fact that the children had been drawn into all these problems by the adults caring for them. He noted that the younger child had received significant professional help in relation to his slow development thought to be "possible social communication disorder... severe language delay and moderate general (non verbal delay)... overweight." [35] The Judge stated that he had read the reports in the bundle including the report of the consultant

paediatrician that the child has an autistic spectrum disorder. Much of the information that relates to classic autism does not really apply to him [35].

14. The Judge took into account and noted that the older child had been living here for just over seven years. That did not provide an entitlement for him to continue to live here indefinitely, particularly as neither adult in his life had any right to be here either. The important thing for these children is that they remain "with hopefully both their parents" but certainly with the appellant as the main caring parent. [36]

15. He stated on following **Gulshan**, that it was very doubtful whether the circumstances in this case were exceptional. However, he found it easier to treat this as "an uncertain point" mainly because of the length of time the children have been here and the problems of the younger child. Accordingly, the proportionality decision had to be made in any event [37].

16. Judge Wiseman referred to the matters which he described as favourable to the appellant. However, the positive points that can be made "pale into significance" (sic) against the overall interests of immigration control in a case of this kind. He made comments as to how a decision favourable to the appellant would simply be inviting individuals to "wander into this country," stay for years and somehow expect that a miracle would happen and that they would be allowed to stay at a later stage, perhaps because they are then able to put forward a case involving their children [38].

17. He found that the children would settle back in Nigeria, particularly with both their Nigerian parents who were familiar with the country, who would be able to help them. Although there may or may not be the level of professional help to assist the younger child there, this is something he would have to cope with as best as he could. However, although they have been helped here, this is not the same thing as saying they should be allowed to stay here simply to access such help [39].

18. Even though it is prudent to sometimes look at these kind of cases outside the rules, "for completeness, the decision was not even finally (sic) balanced" [40]. Having looked at the matters outside the rules, he found that the removal of the appellant and inevitably the children from the UK was proportionate in the overall interests of immigration control [40].

19. He found that it is quite clear that the appellant brought these two children into the world in the UK in the full knowledge that she had no right to be here and that one day the problems that she was creating "would come home to roost." [41].

20. He referred to the fact that she admitted at the hearing that she had simply hoped that if she did not come to the attention of the authorities for long enough she would find that the respondent would be prepared to allow her to stay [42].

21. The Judge had regard to the letter to the appellant dated 25th August 2011 where the respondent stated that although it is accepted that the appellant has a family life in the UK with her partner and two children, she is satisfied that it is reasonable for the family unit to relocate together to Nigeria. She and her partner have spent the vast majority of their lives in Nigeria; the children (at that stage) were aged just four and one, and would be able to adapt and that '….the disruption for the lives of [the appellant] and her partner and two children would not go beyond mere hardship, difficulty or obstacle, nor be on matters of choice or inconvenience.....any interference with their private lives is proportionate to the legitimate aim of effective immigration control and there will therefore no breach of their Article 8 rights....' [42].

22. The Judge stated that he had reviewed the situation three years on from there and taken into account a number of other matters dealt with in the preceding paragraphs of his determination. However, he has 'independently' reached the same conclusion [43].

23. On 21st August 2014, First-tier Tribunal Judge Brennan granted the appellant permission to appeal. The grounds in support submitted that the Judge erred at paragraph 36 in that, having noted that the older child had been living here for more than seven years, failed to appreciate the relevance of paragraph 276ADE (1)(iv). It was arguable that in the light of this provision, it was necessary for him to consider whether it was reasonable to expect the child to leave the UK. He failed to do so. Had he found that this would not be reasonable, it might have led to a different outcome. Further, the ground asserting that the Judge failed to consider the best interests of the two children and to treat them as a primary consideration was also arguable.

24. Mr Layne relied on the grounds seeking permission. He contended that the elder child fell within the provisions of paragraph 276ADE(iv) as he had lived continuously in the UK for at least seven years. Accordingly, he became eligible for leave to remain under that paragraph and the

decision was unlawful as he failed to take into account that the child had developed ties and relationships outside his immediate family unit and is an individual in his own right.

25. Mr Layne further contended that the Judge had during the course of the determination "got carried away, perhaps irritated by the main appellant's immigration history, and with respect these are not of laws"(sic). These issues allowed his judgment to become clouded and a proper assessment was not undertaken, and made his finding in this case "....discriminatory and bias" (sic) (paragraph 9a of the grounds). The specific paragraphs in this regard were 33, 35 and 28, which have been referred to above.

26. Nor did the Judge go into any detail when considering the best interests of the appellant's children in accordance with s.55 of the 2009 Act. They would not have any concept of life outside the UK. He failed to have regard to their "fundamental rights" as children, as emphasised by UNCRC, and as held in **ZH (Tanzania) v SSHD [2011] UKSC 4**.

27. It was also wrong for the Judge to devalue what is in their best interests by something for which they should not be held responsible (paragraph 10(d) of the grounds).

28. Nor could they be held responsible for the moral failures of their parents and "....their welfare as a minor children (sic) should be paramount" as held in **EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98** – para 10(e) of the grounds. (However, in that case, the Tribunal held that when neither the children nor the parents have the status of British citizens, the welfare of the children is a primary consideration in administrative action affecting their future and accordingly the balance of competing interests under Article 8 must reflect this factor as a consideration of the first order, albeit not the only one).

29. Finally, Mr Layne contended that the finding at paragraph 40 that the removal of the appellant and the children from the UK would be proportionate in the overall interests of immigration control and the best interests of others who are entitled to be here and need to be able to access professional help, is fundamentally flawed and the finding is perverse – para 11(a) of the grounds.

30. In that respect he referred to the evidence relating to the younger child at pages 84-85 of the appellant's bundle. The report relied on is dated 4th June 2013, and was thus prepared when the child was three years and three months old. The conclusion was that he had some difficulties with

social communication and interaction, demonstrating some repetitive behaviour. He also has quite a severe language delay and his general (non verbal) development currently appears to be moderately delayed.

31. With sufficient educational support, there is reason to hope that he will make good progress. The plan is that he may benefit from additional support in nursery, and in particular regarding the implementation of advice from his speech and language therapist.

32. In a later report, dated 6th February 2014, his speech and language therapist noted that the child's understanding and use of language is significantly below what would normally be expected for a child of his age. He has made some progress in communication skills, both in therapy sessions and his educational environment (pages 94-95).

33. On behalf of the respondent, Mr Duffy contended that the appellant had not in fact met the requirements under paragraph 276ADE(iv) of the rules. The date of the application was 14th July 2011. Accordingly, the elder child had not been here for seven years.

34. With regard to the "second limb" of paragraph 276ADE(iv), that had been dealt with adequately.

35. Further, the best interests of the children had been considered in some detail at paragraphs 35, 36 and 39. The younger child's developmental problems including the social communication disorder and language delay were considered. The Judge had regard to the various reports and has summarised the key findings.

36. He also had regard to the position of the elder child, who had been in the country for over seven years.

37. Mr Duffy submitted that the Judge has considered the right factors. He goes on to state that their removal is "entirely proportionate" [40].

38. The Judge has properly taken into account the three years that had passed since the respondent concluded in August 2011 that it is reasonable for the family unit to relocate together to Nigeria. He took into account a number of other matters that he had dealt with in the earlier paragraphs, and independently reached the same conclusion [43].

39. Mr Duffy also referred to the authority of **EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 (Court of Appeal),** and in particular to paragraph 35, 37 as well as the comments of Lord Justice Lewison at

paragraph 49, where he stated that in the real world, the appellant is almost always the parent who has no right to remain in the UK. The parent thus relies on the best interests of his or her children in order to "piggyback" on their rights. Lord Justice Lewison noted that in the case before the court of appeal, as no doubt in many others, the Judge made two findings about their best interests:

(a) The best interests of the children are obviously to remain with their parents; and

(b) It is in their best interests that education in the UK is not to be disrupted.

40. At paragraph 58, Lord Justice Lewison stated that the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, it is the background against which the assessment is conducted.

41. Thus the ultimate question will be, is it reasonable to expect the child to follow the parents with no right to remain in the country of origin?

42. Mr Duffy fairly noted that the facts in **EV** were not as advantageous in terms of the length of residence of the children in the UK as in the appellant's (Ms Ogbonna's) case.

43. With regard to the contention that the older child had at the date of decision been in the UK for seven years, he relied on the decision in **Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)**.

44. There the Tribunal stated that as a starting point, it is in the best interests of the children to be with both their parents and if both are being removed from the UK, then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary. Further, it is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

45. The Tribunal further noted that lengthy residence in the country other than the state of origin can lead to the development of social, cultural and educational ties that it would be inappropriate to disrupt, in the

absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear but past and present policies have identified seven years as a relevant period.

46. Mr Duffy specifically relied on paragraph 1(iv) of the headnote. Apart from the terms of published policies and rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

47. In reply, Mr Layne submitted that there has been no proper consideration to the s.55 best interests of the children. The decision, he stated, was "finely balanced". However, the language used by the Judge "does not help."

Assessment

48. The assertions are that the Judge erred in not having proper regard to paragraph 276ADE(1)(iv) of the rules in that the older child had been living here for more than seven years, and failed to consider whether it was reasonable to expect that child to leave the UK.

49. However, it is evident from the sub-paragraph that one of the requirements to be met by an applicant for leave to remain on the grounds of private life in the UK is that at the date of application, the applicant must be under 18 and has lived continuously in the UK for at least seven years. That was not the case here. Accordingly, the elder child did not meet the requirements under that rule.

50. It is contended that the Judge failed to consider the best interests of the two children and to treat them as a primary consideration.

51. It is true that the Judge has not in his reasons expressly referred to the need to consider their interests as a primary consideration. However, it is necessary to consider whether, as a matter of substance, he has properly approached the assessment of the children's interests as a primary consideration.

52. Judge Wiseman had regard to the contentions of the appellant as set out in the notice of appeal [13] and [14]. There it had been contended that one of the considerations to be borne in mind was that it would be harsh to expect the children to adapt to a country they had never lived in or were accustomed to. The UK was the only place they knew as home. The elder child was progressing well at school and was firmly established,

and the second child suffered from a speech disorder for which he was receiving treatment, and his removal accordingly might cause him irreparable damage.

53. The Judge also had regard to the appellant's own signed statement, adopted at the appeal, including the evidence relating to the children. It was noted that the children had all their ties in the UK, being the only country they had ever known [14].

54. In oral submissions, it was submitted by the Home Office Presenting Officer [28] that s.55 had been considered but that the family would be returning together, so that their best interests would be served by remaining with their close family. He referred to **EA (Nigeria)**. All four individuals involved in this case are nationals of Nigeria and could equally remain together in Nigeria [28].

55. In his skeleton argument before the Upper Tribunal, Mr Layne submitted at paragraph 8 that the Judge failed to consider properly the best interests of the two children under s.55. The contention is that the Judge failed to take into account that the children are settled in school; that it would be disruptive to their education if removed; that they have developed school friendships and family ties to the UK and have never been to Nigeria. His ultimate contention is that the Judge failed to consider s.55 of the 2009 Act.

56. However, at paragraph 35, Judge Wiseman has referred to and summarised the problems facing the younger child in respect of slow development, as set out in the reports from which he quotes. He has read the reports, including the consultant paediatrician's who works with the younger child.

57. He also had express regard to the fact that the elder child had now lived in the UK for just over seven years. He had regard to the appellant's evidence that her elder child is in primary school and is doing well in his second year. The younger child was not yet at school but would be starting in September 2014. He also noted that the children had all their ties in the UK which was the only country they had ever known. He considered the appellant's contention that their removal would have a devastating impact on them (paragraph 17 and 18).

58. He noted that the fact that the older child had now lived for just over 7 years in the UK did not entitle him to continue living here indefinitely. He found that the "main important thing for both these children is that they remain with hopefully both their parents, but certainly the appellant

as their main caring parent." [36]. He also had regard to the fact that there may or may not be the level of professional help to assist the younger child in Nigeria, and that was something that would have to be coped with as best as possible [39].

59. He found that the children have been drawn into all these problems by the adults caring for them and noted (and accepted) the comments at paragraph 31 made by Mr Layne that the children were "innocent victims."

60. He had regard to whether it would be proportionate for the family unit to relocate together to Nigeria. He also referred to the letter from the respondent dated 25th August 2011 [42] in which she was satisfied that it would be reasonable for the family unit to relocate together to Nigeria. He came to the same conclusion independently despite the fact that he was considering her appeal three years later [43]

61. He considered the positive features favourable to the appellant, and balanced them against the overall interest of immigration control in a case of this kind. He did not find that the decision in this case was even finely balanced [40].

62. In arriving at his conclusions he properly had regard to the appellant's evidence that she had never had any intention of returning home after the expiry of her visit visa six months after her entry into the UK in February 2005. She has had no discussion with her partner about the possibility of going back. They were just "hoping for the best". She told the Tribunal that although she had come here with a visit visa, it had been obtained on a false basis because she was always "happy to come to a better country." She had never had the intention of returning and just settled down with her partner and in due course the children. They had started school and she therefore felt happy to apply for leave to remain "for their sakes" [26 and 32].

63. The judge also noted that there was no evidence at all from her partner who had not come to the hearing to explain his history. There was no claim that he had a right to remain here.

64. I have had regard to the Upper Tribunal decision in **Azimi-Moayed and Others**, supra. The Tribunal has noted that seven years from age 4 is likely to be more significant to a child than the first seven years of his life. Very young children are focused on their parents rather than their peers, and are adaptable.

65. I have also had regard to **EV**, supra, and the need to assess the best interests of the children on the basis of the facts as they are in the real world. In this case, neither parent has the right to remain, and accordingly that is the background against which the assessment is to be conducted. The ultimate question is whether it would be reasonable to expect the child to follow the parent with no right to remain, to Nigeria.

66. Mr Layne's submission in the skeleton argument produced before the First-tier Tribunal was that the interests should be considered as a primary consideration.

67. The Judge had to keep in mind the overall factors making up the best interests of the children. He concluded that "the main important thing for both these children is that they remain with hopefully both their parents, but certainly the appellant as their main caring parent." [36]

68. Although the First-tier Tribunal Judge might have given a more structured determination in respect of the best interests of the children, I am satisfied that he has in fact properly appreciated and considered the significance of all the evidence relating to their circumstances in the UK.

69. Although he might have made certain unnecessary and irrelevant comments, for example at paragraphs 34 and 38, they did not affect his ultimate assessment of the children's best interests. He expressly noted that the children had been drawn into these problems by the adults and that they were, as submitted by Mr Layne during his submissions [31] "innocent victims."

70. Having assessed the determination as a whole, I find that the Judge has properly considered the best interests of the children as required and has concluded that in the circumstances it would be reasonable for them to return to Nigeria with the appellant and her partner, or the appellant alone. The findings were neither irrational or perverse as submitted. He has given proper reasons for the conclusions reached.

Decision

The decision of the First-tier Tribunal did not involve the making of any material error of law. The decision shall accordingly stand.

Signed Date 6 November 2014

C R Mailer
Deputy Upper Tribunal Judge