Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08463/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 November 2014	**On 8 December 2014**

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE
DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS NICKIE OVIEN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Tufan, Home Office Presenting Officer
For the Respondent: No Legal Representative

DECISION AND REASONS
Ex tempore

1. This is an appeal from a decision of the First-tier Tribunal promulgated on 9 September 2014. The grounds of appeal are that the First-tier Tribunal materially misdirected itself in law by allowing the appeal under Article 8 and, in doing so, making the finding that it would be unreasonable for the appellant's child to leave the United Kingdom, and not, therefore, in the public interest for the appellant to be removed to Nigeria, while at the

same time, when considering the appellant's case under the Immigration (European Economic Area) Regulations 2006 finding that "it has not been established that the child could not live with his father if the appellant were to be required to travel to Nigeria".

2. The grounds go on to submit that if the appellant were removed to Nigeria the appellant's child would not be required to leave the United Kingdom, as he would be able to remain in the country in the care of his father. It followed that the judge had materially misdirected himself in his assessment of the public interest by reference to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended).

3. The grounds also submit that, while the best interests of the child are a primary consideration, in this case they did not outweigh the public interest in removing the appellant, who would be able to return to Nigeria and apply for entry clearance under Appendix FM.

4. Permission to appeal to this Tribunal was granted by Designated First-tier Tribunal Judge Murray on 21 October 2014. Granting permission to appeal he recorded that the appellant is a citizen of Nigeria and that her appeal in relation to a residence card as the primary carer of an EEA national child had been dismissed by the First-tier Tribunal, but that her appeal under Article 8 had been allowed.

5. First-tier Tribunal Judge Murray then summarised the grounds of appeal which we have just referred to there was an arguable error of law in the judge's determination. In this determination, we refer to the appellant, as she was below, as 'the appellant'.

6. We turn to the determination of the First-tier Tribunal. The background is set out in paragraphs 2 to 8 of the determination. The Tribunal recounted that the appellant apparently entered the United Kingdom in 2004 and that the basis of her entry and stay between that date and 2011 was unknown, on the evidence before the Tribunal. On 17 August 2011 she was issued with a residence card as the spouse of a German national, the father of her son Terence. That relationship broke down on 31 January 2014 and the Home Office revoked her residence card, as she was no longer considered to be a family member of an EEA national.

7. On 25 October 2013 she applied through her legal representatives for a residence card as the primary carer of her EEA national son. That application was refused on 31 January 2014 by reference to Regulation 15A(2) of the Immigration (European Economic Area) Regulations 2006 which we will refer to as the "EEA Regulations". The respondent took the view that the evidence submitted did not show that the appellant's son was self-sufficient, or that the appellant and her son held comprehensive sickness insurance. The respondent further considered that the appellant did not have sole responsibility for her son and had not sufficiently demonstrated that she was his mother. The appellant then appealed that

decision raising issues both under the EEA Regulations and under Article 8 of the European Convention on Human Rights.

8. The Tribunal described the evidence that it had considered. It recorded a concession by the Home Office that the appellant was the mother of an EEA national child and that that issue was no longer in dispute. The judge set out the history of the relationship between the appellant and her former husband and the evidence about insurance policy, who cared for the child, and so on.

9. The findings of the Tribunal were set out in paragraphs 19 to 32 of the determination. In short, the evidence about the financial situation of the appellant was not very clear or satisfactory and that led the Tribunal to conclude, at paragraph 23, that the appellant had failed to show that sufficient regular income would be available to the child to make the child self-sufficient, and, at paragraphs 22 and 25, to conclude that the appellant did not have comprehensive medical insurance as was required by the EEA Regulations.

10. The Tribunal went on to consider whether the appellant was the primary carer of the child. The Tribunal found that the appellant's evidence on this was clear and detailed, and had withstood cross-examination.

11. The Tribunal concluded that it was more likely than not that the child lived with his mother and had always done so, that it was more likely than not that she provided day-to-day care and support for her son, and that the father spent weekends with the child and provided reasonably regular financial support. On that basis the Tribunal accepted that the appellant was the primary carer of the child. There was no real dispute that the child was probably an EEA national, and the Tribunal so found.

12. The next issue was what would happen to the child if the appellant were to leave the United Kingdom. The Tribunal recorded that there were gaps in the evidence. At paragraph 33 it said that the onus was on the appellant, and given that the father of the child provided regular financial support, worked in the UK and lived with his son over every weekend the Tribunal considered that it had not been established that the child could not live with his father if the appellant were to be required to travel to Nigeria. That conclusion in paragraph 33, is one of the building blocks of the Secretary of State's submission about inconsistencies in the decision. The Tribunal concluded on that basis that the claim under the EEA Regulations failed.

13. The Tribunal then went on to consider whether the appellant's claim under Article 8 of the European Convention on Human Rights succeeded or not. We interpose at this point that there was some debate in the hearing about the Tribunal's jurisdiction on this issue. We are satisfied that the Tribunal had jurisdiction to consider, on an EEA appeal, the issue of whether or not section 6 of the Human Rights Act would be breached. The

reason for that is paragraph 1 of Schedule 1 to the EEA Regulations, which incorporates by reference all the grounds of appeal in Section 84(1) of the 2002 Act, save grounds (a) and (f). That means that the ground that the decision would breach Section 6 of the Human Rights Act is incorporated, and the Tribunal had jurisdiction to consider it.

14. The Tribunal went on to consider Article 8. It set out the text of Article 8 and it then set out the classic test in **Razgar v Secretary of State for the Home Department [2004] UKHL 27** and in particular the guidance given by Lord Bingham about the structured approach which should be taken to Article 8 claims.

15. At paragraph 38 of the determination the Tribunal rightly directed itself in accordance with sections 117A and B of the 2002 Act which had recently been inserted in the 2002 Act by the Immigration Act 2014. In particular, the Tribunal paid attention to the public interest considerations which now apply to all cases, as set out in section 117B of the 2002 Act.

16. The Tribunal noted correctly that it was appropriate for it to consider the effect of the decision not only on the appellant but also on her son, who was not an appellant, by reference to the decision in the House of Lords in **Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39**.

17. The Tribunal considered the first of Lord Bingham's questions and decided that there was no reason to question the presumption that there is family life between minor children and their parents, given the finding that the appellant was the primary carer for her son.

18. The Tribunal went on to find that family life was established and that the decision would interfere with it, since it would potentially separate the appellant from her son. We interpose that that was the correct approach. Although the refusal of the EEA residence card is not itself a decision to remove it is one which potentially engaged Article 8 nonetheless. It would be a matter of sufficient seriousness to engage Article 8, the Tribunal went on, the threshold in such matters not being particularly high.

19. The Tribunal went on to consider the appellant's private life and concluded that there was very little evidence about that other than that the appellant had been in the United Kingdom since 2004. It went on to say that the appellant had been living in the United Kingdom lawfully since 2011 although her status during the previous seven years was unknown.

20. The Tribunal went on to say that her private life was not likely to be particularly deep or rich since the appellant had been unable or unwilling to particularise its content. The Tribunal nevertheless accepted that the appellant would have established links over the last ten years or so which would amount to private life. The decision would therefore interfere with her private life and be of sufficient seriousness to engage Article 8.

21. The decision would clearly be in accordance with the law, the Tribunal concluded, because the appellant did not satisfy the requirements for an EEA residence card.

22. The Tribunal recognised the public interest in the enforcement of immigration control as an aspect of the economic wellbeing of the United Kingdom, and that the decision was necessary, at paragraph 45 of the determination. The Tribunal then analysed whether or not the decision was proportionate. In that regard the Tribunal considered, first of all, the best interests of the child, who was 7 years old. At paragraphs 47 to 50 the Tribunal considered in some detail what the best interests of the child were and why. It concluded in paragraph 50 that the return of the appellant to Nigeria would be contrary to the best interests of this child. We consider that the reasons given by the Tribunal for that conclusion are sustainable and we see no reason to interfere with them.

23. The Tribunal correctly recognised, at paragraph 51 of its determination, that the best interests of the child are not a trump card and may be overcome by the public interest. At that point the Tribunal referred in more detail to section 117B of the 2002 Act, which sets out clearly that it is not in the public interest to require the departure of a person where that person has a genuine and subsisting parental relationship with a child and it would not be reasonable to expect the child to leave the United Kingdom.

24. The Tribunal went on to say that the parental relationship was not in dispute, and the child was an EEA national who could not be required to leave the EEA and to travel to Nigeria. If as a matter of law the child could not be required to travel to Nigeria, it could not be reasonable to expect the child to do so.

25. The Tribunal then went on to consider whether the child could reasonably be expected to leave the UK and go to Germany with his father and concluded that that would not be reasonable either. The reasons were that the child had lived his entire life in the United Kingdom and was probably embedded in the community here, with his schooling and relationships having been established here over the last seven years. Seven years was generally regarded as the period after which it would not usually be reasonable to separate a child from its established life in this country. Although the Tribunal was hampered by a lack of detailed and specific evidence in relation to the child the Tribunal nonetheless considered that the yardstick of seven years was a reasonable one in relation to the child becoming embedded in the community.

26. The Tribunal repeated that it was not clear whether the appellant had been here lawfully since 2004, or only since 2011, but she had been here lawfully since 2011. It went on to say that section 117B suggested that there was a reduced public interest in the departure of this appellant to

Nigeria since it would not be reasonable to expect the child to go with them and the best interests of the child in any case weighed against this conclusion.

27. For those reasons, looking at the matter in the round, and taking into account section 117B(6), the Tribunal concluded that requiring the appellant to leave the United Kingdom would be a disproportionate interference both with her rights under Article 8 and with those of her son.

28. It seems to us that there is no inconsistency, as had been suggested, between the findings of the Tribunal in relation to the claim for an EEA residence card and the findings of the Tribunal under Article 8. It seems to us that the Tribunal was required under each limb of its analysis to apply different tests and to take into account different considerations and that under both limbs of its analysis it did so correctly. It follows in our judgment that the approach of the Tribunal was sustainable and we did not detect any error of law in that approach, let alone a material error of law.

29. At the outset of the appeal we were handed a faxed letter from the appellant's legal representatives indicating that the appellant had decided to withdraw her appeal, having submitted another application to the Home Office. It said "Please accept this letter as a withdrawal of the appeal". We considered that letter in the light of the provisions of Rule 17 of this Tribunal's Rules of Procedure. On balance it seemed to us that that Rule is concerned with actions taken by the person who is the appellant before the Tribunal to withdraw his or her appeal. It did not seem to us that that enabled a person who is not the appellant to cause a case before the Tribunal to come to an end. If that is wrong we would not in any event have given our consent to the withdrawal of this appeal. For these reasons, despite the letter, our conclusion is that the appeal by the Home Office is dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 4/12/14

Mrs Justice Elisabeth Laing DBE