



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/50202/2013

THE IMMIGRATION ACTS

Heard at Manchester

Determination

On 9th June 2014

Promulgated

On 26 June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VO

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr G Harrison, Senior Home Office Presenting Officer

For the Respondent: Mr S Singh of South Manchester Law Centre

DETERMINATION AND REASONS

Anonymity

1. Although no anonymity direction was made in the First-tier Tribunal, I have decided that it is appropriate to make an anonymity order. This is because this appeal is concerned with the best interests of a child, and it would be inappropriate for the child to be identified. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal, and I will refer to her as the Claimant. She is granted anonymity unless and until a Tribunal or court directs otherwise. No report of these

proceedings shall directly or indirectly identify the Claimant or any member of her family.

Introduction and Background

2. The Secretary of State appeals against a determination of Judge of the First-tier Tribunal Lea promulgated following a hearing on 11th March 2014.
3. The Claimant applied for leave to remain in the United Kingdom, and her application was refused on 7th November 2013. The reasons for refusal are set out in a letter dated 7th November 2013.
4. The Secretary of State accepted that the Claimant has a child born on 4th November 2002. It was accepted that section EX of Appendix FM should be considered in relation to the Claimant's relationship with her child. It was felt that it would be reasonable to expect the child to leave the United Kingdom, and she could continue her family life with her mother in Nigeria and carry on her education in Nigeria. Therefore the Secretary of State did not accept that the appeal should be allowed with reference to section EX of Appendix FM.
5. The Secretary of State also refused the Claimant's application based upon her private life, on the basis that the requirements of paragraph 276ADE were not satisfied.
6. The Claimant's appeal was heard by Judge Lea (the judge) who recorded that the issue to be decided in the appeal is whether or not it would be reasonable to expect the Claimant's daughter to return to Nigeria with her mother. If it would be unreasonable, then the Claimant would meet the requirements of section EX.1.(a)(ii). The judge concluded, having heard evidence from the Claimant, a friend of the Claimant, and the deputy head of the Claimant's daughter's primary school, that it would not be reasonable to expect the Claimant's daughter to leave the United Kingdom and the appeal was allowed with reference to section EX.1.
7. The Secretary of State applied for permission to appeal contending that the judge had failed to take into account material considerations that being the Home Office guidance in relation to children, published in January 2014.
8. It was contended that the judge had not taken into account that a return to Nigeria would not risk the child's health, and that she would be returning with her mother, and the child had no wider family in the United Kingdom, and the Claimant has existing ties with Nigeria, including contact with her other child, who was living with friends.
9. It was also contended that the judge had erred in law by giving weight to immaterial matters in that she had considered the difference in educational quality between the UK and Nigeria which is stated in the Home Office guidance not to be a relevant consideration. Reliance was

placed upon Holub and it was submitted that education cannot be a determinative factor.

10. Permission to appeal was granted by Judge of the First-tier Tribunal Parkes, who found the grounds arguable.
11. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.
12. The Claimant's representatives lodged a response pursuant to Rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the determination disclosed no error of law and should stand.

The Upper Tribunal Hearing

13. On behalf of the Secretary of State Mr Harrison indicated that he relied upon the grounds contained within the application for permission to appeal.
14. Mr Singh relied upon the Rule 24 response. In summary I was asked to note that the Secretary of State's policy was never produced nor referred to at the First-tier Tribunal appeal hearing and had still not been produced, and the Claimant's representatives had been unable to locate the policy either on the Home Office website or generally via an internet google search engine. It was submitted that it is not an error of law for a judge not to make reference to a policy not brought to his attention, and which is not available in the public domain.
15. With respect to the case of Holub which was referred to in the grounds, there was no citation given and Mr Singh believed that it might relate to a Court of Appeal case decided in December 2000, a few months after the Human Rights Act came into force, and some nine years before section 55 of the Borders, Citizenship and Immigration Act 2009 came into force. It was submitted that this case had no relevance to current cases involving children.
16. Mr Harrison accepted that he could not assist in relation to the policy and could not provide a copy, nor could he add anything further in relation to the case of Holub.

My Conclusions and Reasons

17. In my view the judge did not err in law. I agree with the submissions made on behalf of the Claimant, in that it is not an error of law to fail to take into account Home Office guidance that has never been produced before either the First-tier Tribunal or the Upper Tribunal, and the Respondent has failed to prove that this guidance is available in the public domain.
18. The Secretary of State has been unable to explain the relevance of Holub.

19. The judge took into account all material matters and did not place weight upon immaterial matters.
20. The judge took into account that the Appellant's child was born on 4th November 2002 and had been in the United Kingdom since January or February 2003. Therefore the child had entered the United Kingdom shortly after her birth, and had remained here for a period in excess of eleven years.
21. The judge recognised the best interests of a child are a primary consideration, and also took into account that the immigration history of a parent is not the fault of a child. The judge was entitled to place weight upon the evidence given by the deputy head of the school attended by the Claimant's daughter.
22. The judge had to decide whether it was reasonable to expect the Claimant's child to leave the United Kingdom. The judge took into account that the child had spent all her life in the United Kingdom, apart from a few months after her birth. She had been educated in the United Kingdom, and the judge was entitled to conclude on the evidence that it would not be reasonable to expect the child to leave the United Kingdom and it was not in her best interests for her to do so.
23. The judge was therefore entitled to conclude that the appeal succeeded with reference to section EX.1 and gave adequate and sustainable reasons for the findings made.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision. The appeal of the Secretary of State is dismissed and the determination of the First-tier Tribunal stands.

Anonymity

An anonymity order has been made pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date 16th June 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

No fee award is made for the reasons given by the First-tier Tribunal.

Signed

Date 16th June 2014

Deputy Upper Tribunal Judge M A Hall