Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01780/2014

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 21 January 2015	**On 4 February 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr B Hoshi, instructed by Migrant Legal Project

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal (Judge Archer) dismissing DA's appeal on asylum and humanitarian protection grounds and under Arts 2 and 3 of the ECHR but allowing the appeal under Art 8 of the ECHR.

3. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

Background

4. The appellant is a citizen of Nigeria who was born on 31 December 1978. She came to the UK in 2003 when she was 24 years old. It is now accepted that she was trafficked for sexual exploitation. In October 2011, the appellant's daughter, E entered the UK on a visit visa. On 20 October 2011, the appellant claimed asylum with her children as dependants. The children were born on 1 May 2007, 16 February 2009, 1 February 2011 and 26 January 2012 and are all citizens of Nigeria. Their father, also a citizen of Nigeria separated from the appellant before Christmas 2013. In addition, the appellant's daughter, E (whom I have already referred to as entering on a visit visa in October 2011), was born on 26 December 1998. She has a different father but she is also a Nigerian citizen.

5. The appellant's claim is that she entered the UK in November 2003 as a victim of trafficking. After six months of sexual exploitation, she ran away from her trafficker and started a family with her then partner and gave birth in the UK to their four children. Although the appellant's original claim was based upon a fear as a result of being a Christian woman in a relationship with a Muslim man that claim was abandoned since the relationship broke up in 2013. Her current claim was based upon her history of being trafficked and that she had a history of mental health problems, was uneducated and illiterate and as a single mother of five children returning to Nigeria with no family or other social support she would face severe discrimination and serious harm.

6. On 24 February 2014, the Secretary of State refused the appellant's claim for asylum, humanitarian protection and on human rights grounds. On that date, the Secretary of State also made a decision to remove the appellant to Nigeria by way of directions under s.10 of the Immigration and Asylum Act 1999.

7. The appellant appealed to the First-tier Tribunal.

The First-tier Tribunal

8. Judge Archer rejected the appellant's claim for international protection under the Refugee Convention, on humanitarian protection grounds and under Arts 2 and 3 of the ECHR. That is not challenged.

9. However, the judge allowed the appellant's appeal under Art 8 of the ECHR. The judge accepted that the appellant had been trafficked to the UK for the purposes of sexual exploitation and had been in prison and

compelled to have sex against her wishes for six months. Further, he accepted that the appellant was a vulnerable person with mental health issues, in particular that she suffered from depression.

10. However, central to the judge's conclusions that the appellant's removal would not be proportionate was the "best interests of the children." Before Judge Archer, it was conceded by the Presenting Officer that the oldest child born in the UK on 1 May 2007 met the requirements of para 276ADE(iv) because he was under 18, had continuously lived in the UK for at least seven years and, as para 276ADE(iv) required, it would not be reasonable for him to leave the UK and live in Nigeria. Further, the judge considered an expert report from an Independent Social Worker, Mr Johal dated 16 June 2014 in particular (at para 32 of the determination) that:

> "the family will eventually face severe hardship upon return and the appellant and [E] may be forced into prostitution as a means of survival."

11. The judge also relied upon the expert report's conclusion which he summarised at para 33 of the determination that:

> "there is no doubt that the children's best interests (including meeting their physical, emotional, health and educational needs) are met by them continuing to live in the UK."

12. At para 34, the judge, having considered the objective evidence, concluded that:

> "The appellant and the children face a broadly bleak future if they are removed to Nigeria. I find that it is clearly in the best interests of the children to remain in the UK. I reject the respondent's conclusion that it is in the best interests of the children to be removed to Nigeria. I recognise that the respondent did not have access to the expert report as at the date of decision. I find that it is highly unlikely that any expert would find that it is in the best interests of the children to be removed to Nigeria, given my findings of fact above. The factual matrix cannot support that conclusion."

13. Having set out the proper approach to determine whether the appellant should succeed under Art 8 outside the Rules and the requirement to show that there were "sufficiently compelling" circumstances to outweigh the public interest, and noting that the children's best interests were, "a primary consideration" but were "not necessarily determinative," the judge stated at paras 40-41 his conclusion that a breach of Art 8 was established as follows:

> "40. I am satisfied that the factual matrix in this case (history as a victim of trafficking, return without family support, return as a single mother with five children, mental health issues and the fact that SD has a potential right under the Rules to remain in the UK) amounts to arguably sufficiently compelling circumstances such as to justify consideration of Article 8 outside the Rules.
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> 41. I have carefully considered all of the authorities cited by Mr Hoshi at paragraphs 11-21 of his skeleton argument and do not find it necessary to repeat them here. In the end, this is a clear cut case. Removal is not

> proportionate. The best interests of the children are not outweighed by the legitimate objective."

14. As a consequence, the judge allowed the appeal under Art 8.

The Appeal to the Upper Tribunal

15. The Secretary of State sought permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal (Judge Omotosho) on 24 July 2014. However, on 7 October 2014 UTJ Kekic, dealing with the renewed application to the Upper Tribunal, granted the Secretary of State permission to appeal.

16. Thus, the appeal came before me.

The Grounds of Appeal

17. The grounds of appeal may be summarised as follows:

(1) The judge failed to give adequate reasons for his finding that the appellant had been trafficked to the UK;

(2) The judge failed properly to direct himself as to whether there were "good arguable grounds" for granting leave outside the Rules relying on Gulshan (Article 8 – New Rules – Correct Approach) [2013] UKUT 640 (IAC) and erred in finding that there were sufficiently "compelling circumstances" to grant leave outside the Rules; in particular there was no evidence to support the judge's finding that the appellant suffered from depression and required support;

(3) The judge erred in law in assessing the "best interests" of the appellant's children and in applying the decision of the Supreme Court in Zoumbas v SSHD [2013] UKSC 74 because the appellant's children were not British citizens and had no right to future education or healthcare in the UK.

(4) In addition, reliance was placed upon the Court of Appeal's decision in EV (Philippines) v SSHD [2014] EWCA Civ 874 in particular that, where none of the family is a British citizen, none has the right to remain in the UK it will be entirely reasonable to expect the children to return with the parents.

Discussion

18. Mr Richards, in his oral submissions accepted that he was in some difficulty in pursuing the grounds of appeal. First, he accepted that the appellant had been a victim of trafficking. Indeed I was shown a "conclusive grounds" decision dated 5 September 2014 in which the Secretary of State, as the Competent Authority, accepted that the

appellant had been trafficked. Consequently, Mr Richards no longer pursued a challenge to the judge's finding that the appellant had been trafficked.

19. Secondly, Mr Richards accepted that the judge had found that there were "compelling circumstances" to justify the grant of leave outside the Rules and, although the judge did not refer to Gulshan or R (Nagre) v SSHD [2013] EWHC 720 (Admin), Mr Richards did not pursue ground 2 that the judge erred in law by failing to consider whether there were "good arguable grounds" for granting leave outside the Rules.

20. Mr Richards was undoubtedly correct to do so in the light of the Court of Appeal's view expressed in MM (Lebanon) v SSHD [2014] EWCA Civ 985 at [128] that there was no "threshold" criterion of "arguability" in determining whether a decision was proportionate under Art 8(2) where an individual did not meet the requirements of the Rules (see also R (Aliyu and Aliyu) v SSHD [2014] EWHC 3919 (Admin) at [59]).

21. Mr Richards also accepted that he could not properly argue that the judge's findings were irrational. He made no further submissions other than to state that, subject to the difficulties he had identified, he relied upon the grounds.

22. In response, Mr Hoshi sought to deal with the grounds which Mr Richards continued to rely upon in (3) and (4) above even though Mr Richards made no specific submissions in relation to them.

23. First, in relation to (2) Mr Hoshi submitted that there was an evidential basis for the judge to find that the appellant was suffering from depression. He referred me to the evidence set out at para 16 of the appellant's Rule 24 response as follows:

> "(a) At p.9 of her report, Balwinder Johal (Independent Social Worker), who had seen the appellant's medical records, listed the medication that the appellant had been prescribed "in relation to her anxiety and depression;"
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> (b) at p.20 of her report, Ms Johal wrote in respect of the appellant that "[A] referral to a mental health support worker may be required;"
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> (c) the appellant's medical records appeared at A20-A34 of the appellant's bundle – she had been prescribed with Hydroxizine (Atarax, anti-anxiety medication) and Olanzapine (anti-psychotic medication) (see A23); and
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> (d) the appellant supplied a photocopy of her prescription for Citalopram (anti-depressant medication) at A94 of the appellant's bundle (this prescription did not appear in her medical records because it post-dated the date on which her medical records were supplied to her representatives). "

24. In addition, Mr Hoshi reminded me that the judge accepted that the appellant had been trafficked and sexually exploited for six months and been subject to abuse which was relevant to his finding that she suffered

from depression and might require referral or support from a mental health worker.

25. Secondly, Mr Hoshi submitted that the respondent's grounds, in effect, sought to elevate the decisions in Zoumbas and EV to establish principles that if it is in the best interests of children to remain in the UK, as they are not British citizens their best interests will in all cases be outweighed by the public interest. He submitted that that was not the ratio of either case. The assessment of whether the children's best interests were outweighed required a fact-sensitive assessment which the judge had carried out at para 31 onwards of his determination taking into account the severe hardship that they would face on return. Mr Hoshi submitted that the judge's approach was not erroneous.

26. Mr Hoshi submitted that Zoumbas was correctly distinguished by the judge at para 34 not least on the basis that it did not involve a "single parent" and there was a distinction between the appellant's history in the UK and that of the appellant in Zoumbas who had an "unedifying" or "appalling" immigration history. Here, the judge in contrast, found at para 27 that given that the appellant had been trafficked he would draw no adverse inferences as to her immigration history. There was also the issue of benefit fraud in Zoumbas.

27. Mr Hoshi submitted that there were five children in this appeal, one of whom, it was conceded, if an application were made, would succeed under para 276ADE(iv), not least on the basis that it would not be reasonable to expect him to return to Nigeria. Mr Hoshi reminded me that in Zoumbas there had been a finding that there was "no serious detriment to the well-being" of the children on return.

28. As regards EV, Mr Hoshi submitted that again that case was properly distinguishable as the judge had found that the two parents, on returning to the Philippines, would have accommodation and employment and, despite a finding that it would be in the best interests of the children to remain in the UK, the Court of Appeal simply concluded that in those circumstances that was properly outweighed by the public interest. Mr Hoshi submitted that the passages in the judgment of Lewson LJ, in particular at [60], relied upon in the grounds, were only emphasising that the expense to the public purse of educating children, just as the expense of providing NHS medical treatment, was likely to outweigh the best interests of the children to remain in the UK and the benefit of them remaining with their parents who were to be removed. However, this was not a pure education or pure NHS case as there were "wider" issues because of the impact on the children if returned to Nigeria.

Discussion

29. First, I accept Mr Hoshi's submission that the judge was entitled to find at para 31 of his determination that the appellant suffered from depression and might require referral and support from a mental health worker. The

documents and evidence referred to by Mr Hoshi at para 16 of his Rule 24 reply (which I have set out above) were, in my judgment, sufficient and adequate to support his finding even in the absence of a specific medical report setting out the appellant's diagnosis.

30. Secondly, I accept Mr Hoshi's submissions on the application of Zoumbas and EV.

31. In her grounds, the Secretary of State relies upon [24] of Lord Hodge's judgment in Zoumbas which is as follows:

> "There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being. We agree with Lady Dorrian's succinct summary of the position in para 18 of the Inner House's opinion."

32. I do not understand Lord Hodge to be suggesting that the best interests of a child or children to remain in the UK will necessarily be outweighed where they are not British citizens. In Zoumbas, as Lord Hodge makes clear in the first sentence of [24], the judge had concluded that it was in the children's best interests to go with their parents, in that case, to the Republic of Congo and that was not an irrational conclusion. In this appeal, by contrast, the judge found that it was in the best interests of the children to remain in the UK. That was, in large measure, based upon the effect that removal would have on the appellant and, in particular, E. The judge found, relying on the expert report:

> "the family will eventually face severe hardship upon return and the appellant and E may be forced into prostitution as a means of survival."

33. That finding is not challenged in this appeal and it was, in any event, rationally open to the judge in the light of the expert report. By contrast, in Zoumbas, the decision maker had concluded that the children could return to the Republic of Congo in the care of their parents "without serious detriment to their well-being." I agree with Mr Hoshi that that is a significant difference between the facts of Zoumbas and the present appeal.

34. Lord Hodge does place weight upon the fact neither the children's parents nor the children in Zoumbas were British citizens and the latter had no right to "future education and healthcare in this country."

However, I do not understand Lord Hodge to be stating that being a "British citizen" is a necessary condition to succeeding in an Art 8 claim. That is patently not the case. The point being made is, however, that "all things being equal" none of the individual in the family in Zoumbas had any basis for remaining in the UK, including enjoying free education and healthcare.

35. This appeal is different. It was conceded before the First-tier Tribunal, and Mr Richards accepted that concession before me, that the appellant's eldest child born in the UK on 1 May 2007 would be entitled to leave under para 276ADE(iv) because he had been in the UK for seven years and it was not reasonable to expect him to leave the UK and live in Nigeria. As Mr Hoshi helpfully pointed out to me, although the child would not be entitled initially to ILR but only to 30 months' leave, further leave and ILR would "all things being equal" follow.

36. That fact was a matter which the judge clearly took into account at para 30 of his determination. One of the appellant's children, therefore, has a basis for remaining lawfully in the UK and, of course, enjoying such benefits as education and healthcare that went along with that leave. There is no suggestion in this appeal that the appellant's family should be split. It was therefore, a very powerful and significant factor in determining whether the public interest justified the removal of the appellant and her children.

37. That, also, in my judgment, touches upon the issues raised in the grounds in reliance upon the judgment of Lewison LJ at [58]-[60]. There, Lewison LJ said this:

> "58. In my judgment, therefore, 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, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?
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> 59. On the facts of ZH it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.
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> 60. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

38. The "real world" situation in this appeal is, of course, that one of the appellant's children is entitled to leave to remain for a period of 30 months under para 276ADE. This is not a case where none of the family has any lawful basis for being in the UK. That concession has built within it an acceptance by the Secretary of State that it is not "reasonable to expect" that child to follow the appellant (its only effective parent) to Nigeria.

39. Further, I see nothing in EV to dictate that one of the family should be a "British citizen" in order that a breach of Art 8 may follow if that individual is required to leave the UK. It may be that without any right of abode or "right to remain" (as Lewison LJ states at [60]), the best interests of a child simply determined on the basis that their educational or health wellbeing will be better served in the UK is unlikely to outweigh the public interest in the economic well-being of the country. Here, however, one of the children does have a right to remain and an assessment of their best interests does not rest simply on the basis that their educational and health well-being is better served in the UK. The judge found, as a result of the appellant's history of being trafficked for sexual exploitation, and the circumstances in which she would return to Nigeria that there was a very real prospect of a "severe hardship" being suffered by them on return. That finding is not challenged and it is a significant difference from the factual matrix in EV as well as Zoumbas.

40. Mr Richards did not actively pursue in his submissions the grounds' reliance on Zoumbas and EV. Out of deference to Mr Hoshi's careful submissions why the grounds do not establish an error of law by the judge, I have dealt at some length with the position set out in the grounds. For the reasons I have given, I am wholly unpersuaded that those grounds identify any error of law in the judge's approach to, and findings in relation to, Art 8 and that the best interests of the appellant's children are not outweighed by the public interest and their removal to Nigeria would not be proportionate.

Decision

41. For these reasons, the First-tier Tribunal's decision to allow the appellant's appeal under Art 8 did not involve the making of an error of law. That decision stands.

42. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb

Judge of the Upper Tribunal