Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07762/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 27 January 2015	**On 3 February 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Ayodele Funmilola Adebayo
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr S Medley-Daley, instructed by Broudie Jackson & Canter
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Ayodele Funmilola Adebayo, date of birth 19.6.68, is a citizen of Nigeria.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Ransley, who allowed the claimant's appeal on human rights grounds against the decision of the respondent to refuse her asylum, humanitarian protection and human rights claims and to remove her from the UK as an illegal entrant. The Judge heard the appeal on 6.11.13.

3. First-tier Tribunal Judge Froom granted permission to appeal on 6.12.13.

4. Thus the matter came before me on 22.5.14 as an appeal in the Upper Tribunal.

5. In the error of law decision promulgated 27.5.14 I found that whilst there was no challenge to and no error in the findings and conclusions of Judge Ransley in relation to the asylum and Article 3 claims, the decision to allow the appeal under Article 8 ECHR involved such error of law that the decision could not stand and had to be set aside and remade, preserving the findings and conclusions in relation to asylum, humanitarian protection and Article 3. The error of law decision is annexed.

6. The matter then came back before me on 27.1.15 for a resumed/continuation hearing, restricted to the issue of Article 8 ECHR alone.

7. As set out in the error of law decision, the relevant background to the appeal can be summarised as follows. The appellant arrived in the UK on 29.12.06 as a family visitor, accompanied by her husband and their child. The husband left her in 2007. She gave birth to a second child in 2010, fathered by a Nigerian national with whom she is no longer in contact. The appellant has a father and four siblings in the UK, all British citizens. The appellant claimed asylum on 9.7.13, with her two daughters as dependants. Her claim was based on her fear of mistreatment due to her religion and that her daughter would be forced to undergo FGM. She has also claimed that her younger daughter would face mistreatment in breach of Article 3 on account of the stigma in Nigeria attached to those suffering from epilepsy.

8. At §28 of the First-tier Tribunal decision Judge Ransley concluded that the claimant's alleged fear of her daughter being forced to undergo FGM in Nigeria lacked credibility and dismissed the appeal on grounds of being a member of a particular social group (PSG).

9. At §37 of the First-tier Tribunal decision Judge Ransley also concluded that the claimant had failed to demonstrate that she would be unable to help her daughter access healthcare in Nigeria to manage her epilepsy and thus dismissed the Article 3 ECHR claim.

10. As explained in the error of law decision, the findings and conclusions of the First-tier Tribunal in relation to asylum, humanitarian protection, and Article 3, are sustainable and were unchallenged, and thus the appeal must be dismissed on those grounds.

11. Whilst the older child has now been in the UK for at least 7 years, she does not in fact meet the requirements of 276ADE because the requirement is to be met at the date of application. However, it is relevant to any Article 8 ECHR assessment that that part of the requirement would have been met in a fresh application. Nevertheless, the remaining requirement would have been as to whether it was reasonable to expect the child to leave the UK, even though the 7-year requirement had been met. For the reasons set out herein, I would have found and do find on the facts of this case and for the reasons stated herein that it is reasonable to expect the child to leave the UK.

12. Following recent case law, including Ganesabalan v SSHD [2014] EWHC 2712 Admin), it is clear that there can be no threshold requirement to consideration of Article 8 ECHR, unless the Rules are a complete code, which they are not for

consideration of Article 8 ECHR cases other than deportation. Further, it is likely that Article 8 has to be considered because section 86 of the 2002 Act requires determination of a claim on the basis of human rights. I have therefore gone on to an Article 8 ECHR assessment outside the Rules.

13. I accept that in general terms the claimant and her children established family and private life in the UK and that the removal decision will amount to a sufficiently grave interference so as to engage Article 8. Their family life will continue on removal to Nigeria, though they will be separated from other relatives in the UK.

14. However, for the reasons set out herein, I find after considering Article 8 ECHR, applying the Razgar 5 steps and conducting the proportionality balancing exercise between the rights of the claimant and her children on the one hand and on the other the public interest in the legitimate and necessary aim of the state to protect the economic well-being of the UK by immigration control that the balance comes down in favour of removal. In consideration of all the evidence in the round I find that the claimants have failed to demonstrate either that the removal decision is disproportionate to their rights to respect for their private and family life, or that the decision can be regarded in any other way as unjustifiably harsh (Nagre).

15. In reaching this conclusion, I have taken account of all the documentary and oral evidence, whether or not specifically referenced in this decision, as well as the written and oral submissions of the representatives of the claimant and the Secretary of State, including the skeleton argument dated 5.11.13. As the parties are fully aware of the documents submitted and other evidence adduced, it is unnecessary to list that evidence here.

16. However, I have in particular considered the new evidence, including the social work report and other documents in the claimant's supplementary bundle of 67 pages handed in at the hearing before me, together with a photograph of the claimant with her family and other relatives, including her son and father, said to have been taken at Christmas 2014. I also heard oral evidence from the claimant, relying on her witness statement dated at the hearing.

17. I found the claimant a poor and unreliable witness. She claims that she has another child in the UK, an adult son who lives in London with his British girlfriend. I found the claimant to be disingenuous and not truthful when she claimed that she did not know his actual address. I am satisfied that she does know his address but is unwilling to disclose it, perhaps fearful of immigration authorities finding out. It appears that her son is an overstayer and has no present application to remain in the UK, and thus no reason to consider that there is any valid family life in the UK with that son. She claims that he is shown in the Christmas photograph.

18. In relation to contact with her husband the claimant said that she last spoke with him in November 2014, when he was in Nigeria, and last saw him in 2006 when they all came to the UK together. I was far from satisfied that she was being truthful about her contact with her husband. Later she said it was December 2014 that she last spoke with him. It was pointed out that he has a 5-year multi-visit visa for the UK, which she claimed not to know until told recently. Judge Ransley did not accept that he was not the father of the younger child, whom the claimant referred to as

Stephanie, although she is Eyitayo, and it is clear that his name is on that child's birth certificate. The claimant asserts that the real father of that child has fled and she has no contact with him. I note that when the father, Olayide Adebayo, made his visit visa application he said he was visiting his three children in the UK and Tayo Adebayo with date of birth 24.1.12 is named both in the computer printed part and the handwritten application, although in this second document the date of birth is not given. The claimant denied this was Stephanie, but in the light of all the evidence I am satisfied that he is the father of both children, consistent with the birth certificates.

19. The husband's VAF suggests at 8.8 that he was going to visit a 'relative' named as Babatunde Olufisibe. Asked who this was, the claimant said it might be his cousin. Asked if she had ever met him she said no. When it was pointed out to her that he was her sponsor on her own VAF for application to come to the UK, she then said that on arrival in the UK they stayed with him for 5 days in Dagenham. She accepted that she had met him but declined to explain why she previously said she did not. I found this evidence completely contradictory and reached the conclusion that the claimant was not telling the truth and that I could place no reliance on any part of her evidence, including her assertion that her husband was not the father of Stephanie, the younger child, or that she was not in regular contact and on good terms with him.

20. I have also carefully considered section 55 of the 2009 Act in relation to the best interests of both children as a primary consideration and in particular the length of time, now over 8 years, that the older child has spent in the UK; that she 'felt British;' and that she has been in education in the UK since the age of 5; and that she cannot recall her early life in Nigeria. I accept that lengthy residence in the UK can lead to development of social cultural and educational ties that will be disrupted, but both children remain very young and their primary focus for emotional and social development and support will have centred on the family and the home.

21. In conducting the proportionality balancing exercise and the weight attributable to the children's best interests I have had regard to the judgement of the Supreme Court in Zoumbas v SSHD [2013] UKSC 74. I have to bear in mind that neither child is British and they have no right or legitimate expectation to education, life and career in the UK. On the facts of this case I find that the best interests of the children in this case are to remain with their parent. On the basis that I have found that it is reasonable to expect the claimant to return to Nigeria, it is entirely reasonable to expect the children to accompany her. It is also clear that if either of the children could have succeeded, then both children and the appellant must also succeed in being able to remain in the UK. There can be no question of separating the children from each other or the claimant.

22. Whilst the fear of FGM has been discounted by the preserved findings of the First-tier Tribunal, I have take account of the fact that the younger child has been treated for epilepsy. The First-tier Tribunal rejected for lack of credible reliable evidence the assertion, supported by the report of Mr Foxcroft, that she will face discrimination on return to Nigeria, or that there is a serious stigma attached to epilepsy or risk of being accused of witchcraft. Whilst the evidence presented is insufficient to cross the

high Article 3 threshold, as found by the First-tier Tribunal, I take into account that in MM (Zimbabwe) v SSHD [2012] EWCA Civ 279, the Court of Appeal found that lack of equivalent medical care in a person's country of origin may engage Article 8, but only as an additional factor to be weighed in the balance with other factors which by themselves engage Article 8. In that case the continuing medical care of the appellant suffering schizophrenia depended on the day to day support of his family. That is not the situation in the present appeal. The First-tier Tribunal found that medical facilities for treating epilepsy are available in Nigeria and also found that the first claimant failed to demonstrate that she would be unable to assist her younger daughter to access appropriate healthcare facilities. I have however taken the child's medical condition and needs, as well as a potential for some degree of social discrimination because of epilepsy, into account in the Article 8 balancing exercise.

23. I bear in mind that in Azimi-Moayed and others (Decisions affecting children: onward appeals) [2013] UKUT 00197 (IAC), 7 years residence from age 4 is likely to be more significant to a child than the first 7 years of life. I also accept that the elder child would have no significant memory of life in Nigeria.

24. However, I also have to take into account that neither the claimant nor her children meet the requirements of the Rules for leave to remain as the parent of a child, or as children. That a claimant does not meet the relevant Immigration Rules for leave to remain is a highly relevant factor that should be brought into account in the Article 8 assessment.

25. Having rejected the asylum claim, including the claimant's fear of the child's father and his family in Nigeria I find that it may well be in that child's best interest to have contact with the father in that in general terms it in children's best interests to have contact with both parents. The evidence summarised at §24 of the First-tier Tribunal decision was that the father had made a visit visa application in 2011, showing he was then in Nigeria and applying to visit his children in the UK. The judge rejected the appellant's account that she had not been in contact with him. In the circumstances, I am satisfied that there is a degree of continuing contact with the father which will be better served in Nigeria, rather than by remaining in the UK.

26. I also have to take into account that none of the claimant's family, nor any of their immediate relatives, have settled status in the UK. To that extent, I do not accept that their relationship to such relatives can carry anything more than little weight in the proportionality balancing exercise. Those relatives have no right to be in the UK and should be in Nigeria.

27. In Zoumbas v SSHD [2013] UKSC 74, the Supreme Court pointed out in respect of the best interests of children that in ZH (Tanzania) the court was dealing with children who were British citizens. In that case the children by virtue of their nationality had significant benefits, including a right of abode and rights to future education and healthcare in this country, which the children in this case, as citizens of Nigeria, do not. The benefits of British citizenship are an important factor in assessing whether it is reasonable to expect a child with such citizenship to live in another country. Those factors do not apply to the children in this case. Neither the

claimant nor the children could have had any legitimate expectation of being able to remain in the UK.

28. The Supreme Court also held that, "the decision-maker is required to assess the proportionality of the interference with private and family life in the particular circumstances in which the decision is made. The evaluative exercise in assessing the proportionality of a measure under Article 8 ECHR excludes any "hard-edged or bright-line rule to be applied to the generality of cases": EB (Kosovo) v Secretary of State for the Home Department [2009] AC 1159, per Lord Bingham at para 12. Secondly, as Lord Mance pointed out in H (H) (at para 98) the decision-maker must evaluate the child's best interests and in some cases they may point only marginally in one, rather than another, direction."

29. At §24 the Supreme Court stated on the facts of that case that, "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."

30. In EV (Philippines) the Court of Appeal held that in answering the question whether it is in the best interests of a child to remain the longer the child has been in the UK the greater the weight that falls into one side of the scales. "In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hyopthesi*, the applicants have no entitlement to remain." "If it is overwhelmingly the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast, if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite." "The immigration history of the patents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

31. I find in conducting the balancing exercise that it there is insufficient here to demonstrate an overwhelming best interest to remain. The children are not British and have no entitlement to education or life in the UK at the expense of the tax-payer. All things being equal their best interests would be to remain here and take advantage of the benefits of life in the UK. But, as has been stated, all things are not equal and the UK cannot educate the world. Pursuant to EV (Philippines) and the skeleton argument I confirm that I have considered the following factors:

(a) The age of the child claimants;

(b) Length of time in the UK,

(c) Length of time in education;

(d) To what extent they have become distanced from life and culture of Nigeria. I accept that they have no direct experience of it and there will be a difficult period of adjustment;

(e) How renewable their connection will be. The family will be returning as a whole to a community and life and culture familiar to the first claimant and the children will have her support in the transition;

(f) To what extent they will have linguistic, medical or other difficulties in adapting to their life in that country. As set out herein, I accept that there will be difficulties of integration and adjustment, but as the children are young they will be able to adapt with the support the first claimant;

(g) The extent to which the course proposed will interfere with their family life or rights if they have any) as British citizens. Neither child is a British citizen, but I accept that the decision to remove is a sufficiently grave interference so as to engage Article 8.

32. Although it predates the coming into force of section 117B of the 2002 Act, I have also carefully considered the President's guidance in the case of JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC), and in particular the need to be adequately informed and to conduct a scrupulous analysis of the children's best interests, making a careful examination of all relevant information and factors.

33. In considering the best interests of the children, I have also taken into account all those factors urged upon me by the claimant's representative, as well as those considered by Judge Ransley, including the children's long residence, education and schooling, and the family's desire to settle in the UK, where they have other family members, and social life and activities. The extent of this integration by at least the elder child if not both children is significant and should not be underestimated. I also accept that all the children's friends and associates are in the UK and they speak English fluently. Life as they know it is English and Nigeria must be a remote factor in their background. However, I have to set all of these matters in balance against the public interest and the background facts and history as set out above, including that they have no entitlement to British life.

34. In considering that public interest in the proportionality balancing exercise I am also obliged to have regard to section 117B of the 2002 Act:

> 117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

35. It follows from section 117B that little weight should be given to any private life established by the claimant or her children, given that their immigration status was to say the least precarious, even with 3C leave, and that they overstayed in the UK for several years. It is also relevant that the claimant is not financially independent. These factors are to be taken into the balancing exercise with their private and family life in the UK.

36. Little assistance is gained by the claimant or her children in the terms of 117B(6) as it amounts to the same test for the third claimant under 276ADE: whether it is reasonable to expect the child to leave the UK.

37. In the circumstances, applying the above case law and statutory considerations to the facts of this case, there is no legitimate basis for considering that the best interests of the children are to remain in the UK because of their family or private life, or because of the schooling or associations with friends and teachers derived from such schooling to which they are not entitled.

38. Such private life as either of the children may have established in the UK is no more than one would expect in the circumstances, including the eldest being in school since she was aged 5 and starting secondary school. The natural desires of the claimant and the children to remain in the UK are but one factor to be considered in the proportionality assessment.

39. In respect of the younger child, in the light of MM, referred to above, little assistance in the Article 8 assessment can be derived in relation to her ongoing treatment for epilepsy. There is no reliable evidence of any likely social discrimination, and medical facilities for treating epilepsy are available in Nigeria. This child is not yet at school and no issue arises about the ability of teachers to manage a child with epilepsy.

40. I take into account that the claimant has worked illegally in the UK, despite having children and thus there is no reason why she should not seek work on return to Nigeria.

41. I have considered the medical and schooling records handed in at the hearing of 14.7.14 and the more recent letter of Dr Belderbos, dated 8.10.14. This latter indicates that the second child is being treated with Keppra. It is stated that if she were unable to receive medication or seek emergency treatment in the event of a seizure she would be likely to have recurrent and possibly prolonged seizures, with a risk of death in a prolonged seizure. I note that the last time the child saw Dr Belderbos was in July 2014 and there has been no recent change in medication. In the circumstances, little weight can be ascribed to this issue in the proportionality balancing exercise and I am satisfied that appropriate medical treatment will be accessible to the child in Nigeria, based on the information in the COIS report for Nigeria, which shows the country has a functioning health system. Taken together with the preserved findings of the First-tier Tribunal, there is no genuine basis for any fear or risk of harm on return to Nigeria. Her claimed fear of her in-laws or her husband I find to be a fabrication. Similarly, I am satisfied that she invented the claimed fear of FGM. I am also satisfied on the evidence that her husband, with whom she remains on good terms and in contact, is the father of both her children living with her.

42. It would appear that her husband was also dishonest in his VAF made on 19.12.11. At 4.17 the date of birth of Tayo is deliberately not given, although he had given it correctly as 7.10.12 in a previous application listing Tayo as his daughter, the same date that appears in the birth certificate. At 4.14 he said that his spouse currently lived with him at the address given in Nigeria, when she was in fact living as an illegal overstayer in the UK. 4.18 suggests that all three children were living with him at the same address. If in fact he had admitted that his wife and children were still in the UK, having overstayed their visa, it is most probable that he would not have been granted the visa.

43. In relation to the social work report, I find it unsatisfactory and that limited weight can be ascribed to it, though it is fairly obvious that there will be some sadness and disruption if the family is removed to Nigeria. Amongst a number of concerns, I note that it was based on interviews with 5 people, two of which were by telephone. The author does not appear to have had access to any of the case documents, including the refusal decision, the findings of the First-tier Tribunal, or any witness statements. The report is deficient in that the author is not aware of the correct factual context before making any assessment. It also appears to take everything said at face value; the claimant's account is accepted in its entirety and there is no critical assessment. Some of the information upon which the assessment is based is questionable, such as the claim at §17 that Simisola has a close relationship with her older brother, referred to as Israel. That appears inconsistent with the claimant's account of limited contact with him. More significantly, there is no indication that the author of the report is aware that the son in illegally present in the UK with no basis or even application to remain and thus no reason why he would not be able to return with the claimant and the rest of the family to Nigeria. It necessarily follows that assessments as to

relationships with family members are questionable and cannot be given any significant weight.

44. Some of the comments and opinions in the report, including those at §42 to §45, should be disregarded as they reflect a repeated claim as to FGM and discrimination on the basis of epilepsy, which has been discounted by Judge Ransley. I further note that the only source of information in the report about attitudes to epilepsy appears to be a single, undated, study of one particular secondary school in a part of Nigeria. The child with epilepsy is not at secondary school, or even at school at all, as I understand it. In the circumstances, the value of such a report is questionable. It is not clear on what basis the author of the report can speak with any authority about stigma attaching to epilepsy in Nigeria. This evidence is in reality rather poor. For these reasons, I find that at best the expert report it is a one-sided and incomplete assessment of the claimant's circumstances. Whilst I take it into account in the balancing exercise, I accord it only limited weight.

45. Balancing all these matters together, in the round in the proportionality balancing exercise, I find that the removal of the claimant and her children from the UK is an entirely proportionate decision and whilst it may cause some temporary difficulty and disruption, on the facts of this case it is neither disproportionate nor for any other reason unjustifiably harsh. I find on the evidence that it is entirely reasonable to expect both children and the claimant to return to Nigeria, even though the elder child has now been in the UK in excess of 8 years. The family unit will remain intact as they will leave together. Although there are ties with wider family members in the UK, there is nothing in the evidence to suggest that these are so close and intimate that there is a situation of dependency between these family members and those others, including the claimant's adult son, her father and other relatives. They will be able to maintain contact through modern means of communication and through occasional visits, for which there are immigration provisions.

46. I have to bear in mind that the asylum and Article 3 claims have been dismissed and thus that the claimant has been in the UK deliberately and unlawfully for a long period of time, with no attempt until very late to regularise her stay. Even then her application was rejected and her appeal dismissed. The claimant is not entitled to settle in the UK just because she has chosen to remain her in breach of the conditions of entry and because she has managed to evade immigration authorities for so long. Whilst I have taken full account of the effect of relatively long residence on the children, more than 8 years for the older child, and that this situation is no fault of either child, the fact remains that they have no entitlement to remain here. I take account of the significant length and age at which the older child has established private life in the UK, as well as the evidence of associations and friendships outside the family unit. Mr Medley-Daley submitted in error that Simisola was close to being entitled to British citizenship by virtue of 10 years residence, but that cannot be the case where the child was not born in the UK. In the circumstances, that submission has no relevance to the Article 8 assessment.

47. There are immigration rules for those seeking entry or to remain and it is clear that the claimant cannot meet any of those requirements, which is itself highly relevant to the Article 8 assessment. However, the strongest factors weighing against the

claimant and her children are those which were not in consideration by Judge Ransley and which came into force on 28.7.14. I am required to have regard to the fact that little weight is to be ascribed to any private life accrued whilst the claimant's was present illegally or her status was precarious. Taking these considerations into the balance, it is clear that the balance falls in favour of removal.

Conclusion & Decision:

48. For the reasons set out herein, I find in apply the Razgar 5 step assessment, of which the most crucial is the proportionality balance between on the one hand the rights of the claimant and her two children and on the other the legitimate and necessary aim of the state in the public interest to protect the economic well-being of the UK through the application of immigration control, that the decision of the Secretary of State was proportionate to the private and family life rights of the claimant and her two children, and not unjustifiably harsh. For the reasons preserved from the First-tier Tribunal hearing the asylum, humanitarian protection and Article 3 claims are also dismissed.

The appeal is dismissed on all grounds.

Signed: Date: 2 February 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable in this case.

Signed: Date: 2 February 2015

Deputy Upper Tribunal Judge Pickup

Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07762/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 22 May 2014

Determination Promulgated

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Deputy Upper Tribunal Judge Pickup

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Secretary of State for the Home Department

Appellant

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Ayodele Funmilola Adebayo
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr S Medley-Daley, instructed by Broudie Jackson & Canter
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Ayodele Funmilola Adebayo, date of birth 19.6.68, is a citizen of Nigeria.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Ransley, who allowed the claimant's appeal on human rights grounds against the decision of the respondent to refuse her asylum, humanitarian protection and human rights claims and to remove her from the UK as an illegal entrant. The Judge heard the appeal on 6.11.13.

3. First-tier Tribunal Judge Froom granted permission to appeal on 6.12.13.

4. Thus the matter came before me on 22.5.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Ransley should be set aside.

6. The relevant background to the appeal can be summarised as follows. The appellant arrived in the UK on 29.12.06 as a family visitor, accompanied by her husband and their child. The husband left her in 2007. She gave birth to a second child in 2010, fathered by a Nigerian national with whom she is no longer in contact. The appellant has a father and four siblings in the UK, all British citizens. The appellant claimed asylum on 9.7.13, with her two daughters as dependants. Her claim was based on her fear of mistreatment due to her religion and that her daughter would be forced to undergo FGM. She has also claimed that her younger daughter would face mistreatment in breach of Article 3 on account of the stigma in Nigeria attached to those suffering from epilepsy.

7. At §28 of the determination Judge Ransley concluded that the appellant's claimed fear of her daughter being forced to undergo FGM in Nigeria lacked credibility and dismissed the appeal on grounds of being a member of a particular social group (PSG).

8. At §37 of the determination Judge Ransley concluded that the appellant had failed to demonstrate that she would be able to help her daughter access healthcare in Nigeria to manage her epilepsy and thus dismissed the Article 3 ECHR claim.

9. However, between §38 and §51 the judge reached the conclusion that the removal of the appellant would be disproportionate to her rights under Article 8 ECHR and with reference to section 55 of the 2009 Act in relation to the children. The judge considered it was not in the best interests of the children to be removed to Nigeria. The older child had spent 6 years and 10 months in the UK, 'felt British,' and had established a strong private life, having been in education since the age of 5. The younger child was being treated for epilepsy and it was not in her best interests to be separated from her sister.

10. The grounds of appeal submit that the First-tier Tribunal Judge misdirected herself in law in failing to recognise that the Immigration Rules make clear that children who have spent less than 7 years in the UK will not have developed a strong enough private life in the UK to outweigh the public interest in immigration control, outside of exceptional circumstances rendering such a decision unjustifiably harsh. The Tribunal had no regard to this aspect of the Rules and simply proceeded to consider the appeal on the basis of Article 8 proportionality.

11. It is also submitted that the Tribunal failed to apply the principle in MM (Zimbabwe) v SSHD [2012] EWCA Civ 279, which found that lack of equivalent medical care in a person's country of origin may engage Article 8, but only as an additional factor to be weighed in the balance with other factors which by themselves engage Article 8. In that case the continuing medical care of the appellant suffering schizophrenia depended on the day to day support of his family. That is not the situation in the present appeal.

12. In granting permission to appeal, Judge Froom found it arguable that, "the judge erred in conducting the proportionality balancing exercise and the weight attributable to the children's best interests in the light of the recent judgement of the Supreme Court in Zoumbas v SSHD [2013] UKSC 74, given that, in this case, neither child is British. All grounds may be argued."

13. Ms Johnstone accepted that if one of the children succeeded, then both children and the appellant must also succeed in being able to remain in the UK.

14. No issue was taken that after finding that the appellant failed on her asylum and humanitarian protection claims, as well as Article 3 ECHR, the judge proceeded immediately to consider the appellant's circumstances under Article 8 ECHR, without reference to Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC), and subsequent authority promulgated after the First-tier Tribunal hearing. It was conceded that the appellant did not meet the requirements of Appendix FM and EX1, as the children had not been in the UK for 7 years, and neither could she meet the requirements of 276ADE in relation to private life.

15. At §48-49, the judge relied on Azimi-Moayed and others (Decisions affecting children: onward appeals) [2013] UKUT 00197 (IAC), and the comments that 7 years from age 4 is likely to be more significant to a child than the first 7 years of life. The judge concluded that the elder child, then 11, had spent 6 years 10 months in the UK and had no significant memory of life in Nigeria. The judge concluded that on the basis of section 55 it would not be in the best interests for that child to be removed to Nigeria with her mother.

16. I accept that the judge does not have to set out every factor taken into account, but it must be clear from the determination that appropriate factors have been taken into account and that inappropriate factors have not been taken into account. I also accept that the evaluative proportionality exercise may not have bright, hard-edged boundaries, but has to fairly consider all of the relevant evidence in the round, both those factors in favour of the appellants as well as those in favour of removal.

17. However, it is clear that the judge failed to take into account that the appellant did not meet the requirements of the Rules for leave to remain as the parent of a child, as the children had not been in the UK for the necessary 7 years and it had not been shown that it would not be reasonable to expect the child to leave the UK. That an appellant does not meet the relevant Immigration Rules for leave to remain is a highly relevant factor that should be brought into account.

18. The judge also failed to consider the other aspects of Azimi. Having rejected the asylum claim, including the appellant's fear of the child's father and his family, the judge failed to consider whether returning to Nigeria and to contact with their father might in fact be in the children's best interests, having contact with both parents. The evidence summarised at §24 was that the father had made a visit visa application in 2011, showing he was then in Nigeria and applying to visit his children in the UK. The judge rejected the appellant's account that she had not been in contact with him.

19. The judge also failed to take into account that neither the appellant, nor the children, nor any immediate relative of the appellant, had settled status in the UK, and that it would in such circumstances be peculiar to take into account the children's close relationship to such relatives in the UK. They had no right to be in the UK and should be in Nigeria.

20. In Zoumbas v SSHD [2013] UKSC 74, the Supreme Court pointed out in respect of the best interests of children that in ZH (Tanzania) the court was dealing with children who were British citizens. In that case the children by virtue of their nationality had significant benefits, including a right of abode and rights to future education and healthcare in this country, which the children in this case, as citizens of Nigeria, do not. The benefits of British citizenship are an important factor in assessing whether it is reasonable to expect a child with such citizenship to live in another country. Those factors do not apply to the children in this case. Neither the appellant nor the children could have had any legitimate expectation of being able to remain in the UK.

21. The Supreme Court also held that, "the decision-maker is required to assess the proportionality of the interference with private and family life in the particular circumstances in which the decision is made. The evaluative exercise in assessing the proportionality of a measure under Article 8 ECHR excludes any "hard-edged or bright-line rule to be applied to the generality of cases": EB (Kosovo) v Secretary of State for the Home Department [2009] AC 1159, per Lord Bingham at para 12. Secondly, as Lord Mance pointed out in H(H) (at para 98) the decision-maker must evaluate the child's best interests and in some cases they may point only marginally in one, rather than another, direction."

22. At §24 the Supreme Court stated on the facts of that case that, "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."

23. There was in the present case no expert evidence as to the effect on the children of returning to Nigeria, or other satisfactory evidence of serious detriment to their well-being. Obviously there is a close bond between the mother and the children and one would not be removed without the others. Such private life as the elder child may have established in the UK was no more than one would have expected in the circumstances, including being in school since she was aged 5. The natural desires of the appellant and the children to remain in the UK were but one factor to be considered in the proportionality assessment. The judge highlighted no other significant factor in the private life other than relationship with relatives, whom, as mentioned above, have no apparent right to be in the UK themselves.

24. In all the circumstances I find, for the reasons set out above, that the proportionality exercise in relation to the elder child was flawed in that it failed to bring into account those factors in favour of removal of the children with the appellant.

25. In respect of the younger child, in the light of MM, referred to above, the judge applied too great weight in the proportionality balancing exercise, to the treatment for epilepsy of the younger child. Having found it failed to cross the Article 3 threshold and having concluded that there was no reliable evidence of likely social discrimination, and that medical facilities for treating epilepsy are available in Nigeria. it makes no sense to exclude that as a factor under Article 3 only to bring it back into play in respect of Article 8, without some compelling reason to do so. I further note that at §50 the judge appears to have considered the ability of teachers to manage children with epilepsy, when this child was not yet in school at the date of the determination.

26. Whilst if the decision is remade the Article 8 family and private life considerations would have to be made on the basis of the circumstances then prevailing, including that one of the children would have been in the UK for over 7 years, that does not mean that the appellant would necessarily succeed under EX1 of Appendix FM, as it would still have to be shown that it would not be reasonable to expect the child to leave the UK. 7 years alone is insufficient. In the circumstances, I reject the argument that the errors of law are immaterial because the appeal would have to be allowed.

27. In all the circumstances, whilst there is no challenge from either party to the judge's findings in relation to the asylum and Article 3 decisions, for the reasons set out above, I find for the reasons set out herein that the decision in respect of Article 8 cannot stand and must be set aside to be remade.

28. Having reserved my decision in respect of the error of law, it would not be right to proceed to remake the decision without giving the parties the opportunity to make further submissions as to the Article 8 factors, and I thus adjourn the appeal for a continuation hearing before myself at a date to be fixed.

Conclusions:

29. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision in respect of Article 8 ECHR.

I preserve the findings and conclusions in relation to asylum, humanitarian protection, and Article 3 ECHR.

I adjourn the appeal for a continuation hearing, reserved to myself.

Signed: Date: 22 May 2013

Deputy Upper Tribunal Judge Pickup

Consequential Directions

30. Either party has leave to adduce further evidence, limited to the issue of Article 8 private and family life.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable in this case.

Signed: Date: 22 May 2014

Deputy Upper Tribunal Judge Pickup