Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/11468/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower Birmingham	**Determination Promulgated**
On 3 September 2015	**On 4 September 2015**

Before

UPPER TRIBUNAL JUDGE PITT

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

BO
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Respondent: Not represented

DECISION AND REASONS

The Appeal

1. This is an appeal by the Secretary of State for the Home Department against a determination promulgated on 3 July 2014 of First-tier Tribunal Judge Birk which allowed the Article 8 ECHR appeal of BO.

2. For the purposes of this determination, I refer to BO as appellant and to the Secretary of State as the respondent, reflecting their positions as they were before the First-tier Tribunal.

3. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the children concerned, one of whom has a disability.

4. The appeal was brought on the basis of Article 8 ECHR. BO, her husband and children are citizens of Nigeria. BO and her husband have been in the UK unlawfully for some time. As of the hearing before the First-tier Tribunal they had two children who were both born in the UK but have never had leave. The older child, X, was born on 11 June 2005 and the younger child, Y, on 25 September 2008. Y has been diagnosed with autism.

5. The First-tier Tribunal judge allowed the appeal in a second stage Article 8 assessment. That conclusion was reached after seriously adverse findings were made at [27] to [31] that the appellant was "openly opportunistic in her attempt to try and remain in the UK", had come in order to benefit from the better medical facilities here when she gave birth, that she "openly gave oral evidence that on legal advice she deliberately waited to apply for regularisation of her illegal immigration status when her visa had expired until her oldest child was aged 7.” Both she and her husband had worked illegally in the UK for significant periods of time. The appellant was found not be truthful as to having little contact with her father in Nigeria and it was not accepted that she had lost all ties with Nigeria. The husband was found able to work if he went back to Nigeria and the family not to be at physical risk there. The appellant and her husband could “settle and integrate there without difficulties.” Where the family could return together family life could continue in Nigeria.

6. At [35], having considered the evidence relating to the autism of Y, the judge states:

> “ I do not find that his condition reaches a threshold of Article 3 and do not find that to be a breach, however, I do find that it is of considerable and significant weight under article 8 in respect of his family in private life."

7. The judge goes on to state at [39] that:

> “In assessing proportionality, I take into account the finding is that I have made in paragraphs 24 to 35 above and having balanced all of those various factors, and the decision to refuse the Appellant's application is not a proportionate one and there is a breach of Article 8.”

8. The respondent submits that the best interests of the children were weighed here as a trump card, insufficient weight being given to the public interest.

9. At [33] of ZH (Tanzania) v SSHD [2011] UKSC 4, Baroness Hale provided guidance on to how to approach the best interests of children in an Article 8 case:

> "In making the proportionality assessment under Article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations."

10. The Court of Appeal elaborate on this in EV (Philippines) [2014] EWCA Civ 874 at [36] and [37]:

> "36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in 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.
>
> 37. 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 hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

and at [58] to [60]:

> "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?
>
> 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.
>
> 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."

11. In my view the First-tier Tribunal here did not approach the best interests of the children in line with EV (Philippines) and that was material given the adverse findings about the parents and their ability to relocate to Nigeria without real difficulty.

12. I also referred to the guidance provided by R (Nagre) v SSHD [2013] EWHC 720 (Admin), recently confirmed in the Court of Appeal at [29] of SS (Congo) v SSHD [2015] EWCA Civ 387, thus:

> "It is clear, therefore, that it cannot be maintained as a general proposition that LTR or LTE outside the Immigration Rules should only be granted in exceptional cases. However, in certain specific contexts, a proper application of Article 8 may itself make it clear that the legal test for grant of LTR or LTE outside the Rules should indeed be a test of exceptionality. This has now been identified to be the case, on the basis of the constant jurisprudence of the ECtHR itself, in relation to applications for LTR outside the Rules on the basis of family life (where no children are involved) established in the United Kingdom at a time when the presence of one or other of the partners was known to be precarious: see *Nagre*, paras. [38]-[43], approved by this court in *MF (Nigeria)* at [41]-[42]."

13. The immigration status of the entire family has been unlawful. Their status cannot be described as anything other than precarious and in those circumstances they must show "exceptional" circumstances. The determination also does not show that the judge applied that principle here in the proportionality assessment.

14. There is the additional matter of the need to weigh the failure to meet the Immigration Rules as a starting and central point in the proportionality assessment; see Haleemudeen v SSHD [2014] EWCA Civ 558. The judge here does not weigh the failure to meet the Immigration Rules at all proportionality assessment.

15. An additional matter which I considered to be "Robinson" obvious is that the First-tier Tribunal judge also failed to apply the learning from MM (Zimbabwe) v SSHD [2012] EWCA Civ 279 on Article 8 "medical" cases. MM confirms that the threshold in such cases is as high as it is in Article 3 cases and a case does not succeed under Article 8 where it cannot under Article 3, the comment at [35] suggesting that the First-tier Tribunal did not properly recognise this principle.

16. Further, the Court of Appeal in MM identified how an Article 8 "medical" case could succeed if it did not under Article 3:

> "23. The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

17. There First-tier Tribunal has not identified the "additional factor" that allowed the "medical" aspect of this case to weigh so heavily given the very high threshold still required in such cases and requirement for "other factors which by themselves engage Article 8."

18. For all of these reasons I found an error of law in the proportionality assessment conducted by the First-tier Tribunal such that it had to be set aside to be re-made.

19. At the hearing I was informed that the appellant and her husband have had a third child and the oldest child, X, has applied for citizenship as he was born in the UK and has been here continuously for 10 years. Also, before me the appellant was not legally represented. It was conceded for the respondent that the re-making of the case would have to be made on a significantly different basis to that considered in the decision of Judge Birk and that it was appropriate to remit the appeal to the First-tier Tribunal in line with paragraph 7.2 (b) of Part 3 of the Senior President's Practice Statement dated 25 September 2012.

Decision

16. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside.

17. I remit the appeal to the First-tier Tribunal for the second stage Article 8 assessment to be re-made.

Signed:  Date: 4 September 2015
Upper Tribunal Judge Pitt