Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/25701/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 July 2015	**On 27 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MS EDITH ADESOLA SANNI
(ANONYMITY ORDER NOT MADE)

Claimant

Representation:

For the Appellant: Ms A Holmes, Home Office Presenting Officer
For the Claimant Ms R Chapman, (Counsel instructed by Daniel Cohen, Immigration Law Solicitors)

DECISION AND REASONS

1. This is an error of law hearing. For ease of reference I shall refer to the parties as the Secretary of State, who is the appellant and to Ms Sanni as the Claimant in these proceedings.

2. The Claimant born on 17 April 1953 is a citizen of Nigeria. She first entered the UK in June 1975 and resided lawfully here until late 1984 when she and her family returned to Nigeria. The Claimant re-entered the UK on 4 September 2008 as a visitor and remained in the UK since. She now has three adult children, two of whom (Tolulope and Folushade) are British nationals and Olufonso has leave to remain in the UK as a partner under Appendix FM and is on the 10-year route to settlement. There are also two grandchildren. In October 2008 she applied for ILR as a dependent relative. That application was refused and her appeal was dismissed by Judge Aujla and promulgated on 10 May 2010. A further application was refused under paragraph 317 (dependent relative) and under private and family life Immigration Rules. That appeal was dismissed by First-tier Tribunal Judge Herlihy on 3 March 2014. Permission to appeal was granted. Upper Tribunal Judge Kopieczek found an error of law by the second Tribunal (FJT Herlihy) in assessing credibility by failing to have regard to further evidence and failing to give reasons why that evidence was rejected. The appeal was remitted to the First-tier Tribunal for a hearing de novo with no findings of fact preserved except as agreed by the parties.

3. The appeal came before the First-tier Tribunal (Judge Finch)(FTT). In a determination promulgated on 15 January 2015 the appeal under paragraph 317 was dismissed and the Article 8 ECHR appeal was allowed on the basis of family and private life with three daughters and two grandchildren in the UK.

FTT Decision and Reasons

4. At [10] the FTT referred to that fact that the Tribunal in 2010 had not believed the Claimant's account that she could not return to the family home and live there with her stepson. The FTT found the evidence from the Claimant and her three daughters together with additional witness statements to be credible. It found that the Claimant faced a risk of assault and intimidation from her stepson in the event of a return to her former home in Nigeria. At [15] the FTT considered **Devaseelan** with reference to the findings of fact made by Judge Aujla in May 2010. Further reference was made to the determination of UTJ Kopieczek and the additional evidence that was before the second Tribunal.

5. Clear reference at [16] was made to Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) and the need to take into account public interest factors. Reference was made to the periods of time when the Claimant lived in the UK without leave and to those periods of time with leave. The FTT found that the Claimant could speak English and would not be an economic burden [18].

6. At [22] the FTT considered private and family life and specifically referred to Section 117B as to the weight that should be given to private life established when in the UK in precarious circumstances.

7. At [23] the FTT found family life as between the Claimant and her three adult daughters. Reference was made to relevant case law and it was concluded that there was strong family life as between the Claimant and her daughters [24 to 26].

8. In considering the best interests of the children the FTT found that the Claimant played a significant part in the lives of her grandchildren and that her absence was likely to have an emotional impact on them despite their young age. It was also noted that the fact that the Claimant provided childcare for her children enabled them to accommodate and provide for the Claimant in the UK.

Grounds of Application

9. The Secretary of State sought permission to appeal the decision on the grounds that the FTT materially misdirected itself in law by failing to engage with the findings of the previous Tribunal in 2010 and failing to provide cogent reasons for departing from those findings contrary to the guidelines in **Devaseelan [2002] UKIAT 000702**.

10. A further ground was that the Tribunal erred in respect of Article 8; the fact that her daughters prefer to have the Claimant as a caregiver for their children is not protected by Article 8 ECHR and her rights were not disproportionately breached.

Permission

11. Permission to appeal was granted by First-tier Tribunal (Judge Grimmett) on the grounds that it was arguable that the First-tier Tribunal erred by failing to follow **Devaseelan**. It was not clear from the decision what the findings of the earlier Tribunal were and what the starting point for the appeal was. It was also considered arguable that the Tribunal erred in its assessment of Article 8 in respect of the precariousness of her time in the UK.

Rule 24 Response

12. In a response prepared under Rule 24 the Claimant submitted that the first ground of appeal was misconceived. It was accepted that the FTT did not specifically set out the findings made by Judge Aujla in the 2010 determination. However, reference was made to the determination dated 16 July 2014 by UTJ Kopieczek, which referred to Judge Aujla's findings that he did not find the Claimant's account of problems with her stepson, including physical and verbal abuse, to be credible. UTJ Kopieczek 's determination also referred to a bundle of documents that were before the FT Judge Herlihy and which included evidence that was not before the Tribunal in 2010 including written witness statements which gave an account of the abuse suffered by the Claimant from her stepson. An error of law was found in the determination of FTJ Herlihy for failure to consider the further new evidence, and whose findings of credibility were found not to be sustainable.

13. It was argued that the FTT was clearly aware of the determination of UTJ Kopieczek which was specifically referred to at [3] of her decision. Reference was made to **Devaseelan** at [15] and to the fact that it was necessary to consider the findings of fact made in 2010. The FTT further stated that whilst findings of fact made at a previous hearing were authoritative, consideration must be given to additional evidence which can displace those findings. It was therefore open to the FTT to accept the Claimant's evidence on this issue, which had not been before the First-tier Tribunal in 2010 and which was corroborated by the oral evidence of her daughters and witness statements from three independent witnesses [10].

14. As to the second ground of appeal under Article 8 it was argued that the FTT made careful findings based on the evidence with reference to Section 55 and the interests of the Claimant's grandchildren. The findings of fact were not challenged by the Secretary of State, the FTT had regard to Section 117B as to public interest factors, giving little weight to private life established when status is precarious. The FTT's findings at [26] were based on a careful analysis of evidence, jurisprudence and the finding of family life was not challenged by the Secretary of State. There was no error in the assessment of proportionality.

Error of Law Hearing

15. At the hearing submissions were made by Ms Holmes who relied on the grounds of application and particularly emphasised the FTT's failure to set out the findings made by the Tribunal in 2010.

16. As to the second ground she submitted that the FTT failed to take into account the fact that the Claimant did not have to live with her family in Nigeria and need not return to the former home.

17. Ms Chapman relied on the detailed Rule 24 response and acknowledged that whilst the FTT had not specifically set out the findings of the Tribunal in 2010, the FTT considered the findings and **Devaseelan** was properly applied. As to the concerns raised about the Article 8 assessment, Ms Chapman argued that this was effectively an unsubstantiated assertion. Family life cannot be treated as precarious under Section 117, this issue related only to private life. The FTT found clear and sustainable findings of fact with regard to family life as between the Claimant, her children and grandchildren.

Discussion and Decision

18. I am entirely satisfied that the FTT was fully aware of the findings of fact made by the previous Tribunal in 2010. These findings of fact were not specifically set out in that determination but that does not amount to an error of law. The FTT fully engaged with the relevant evidence and issues under appeal and in particular was cognisant of the Upper Tribunal decision that the second Tribunal had erred in law in making a credibility assessment by failing to take into account additional evidence that was

not before the 2010 Tribunal. Further, I find no justifiable criticism can be raised of the FTT's consideration and application of the guidance and approach in **Devaseelan**. I accept that the FTT did not specifically identify the findings as its starting point but this was inferred and that process followed. I find no error of law there. The FTT found and concluded that the additional evidence, not before the Tribunal in 2010, was capable of resulting in different conclusions and findings of fact. It found that the new evidence fell within the category of evidence that could have been given as at the date of the previous Tribunal 2010 but was not. The guidance in **Devaseelan** was clearly applied. Accepting that the FTT did not engage in any detail with the reasons why that evidence was not put before the Tribunal in 2010, I am satisfied that this does not amount to a material error of law. The FTT found the additional evidence was strong and consisted of not only the Claimant's evidence but also that of her three adult daughters and three independent witnesses.

19. I find no error of law in the second ground. The FTT clearly had in mind the public interest and those factors in statutory form, which were specifically referred to in the decision.

20. The main substance of the decision was the strong family life as between the Claimant and her adult daughters and her grandchildren as shown in findings [24 to 26], none of which are challenged. The FTT concluded that there existed family life above and beyond the normal family ties and also having regard to the best interests of the grandchildren. This ground amounts to a disagreement with the decision made by the FTT. I find that no material error of law is disclosed.

Notice of Decision

21. I find no material error of law in the decision and reasons. The decision and reasons is upheld. The Secretary of State's appeal is dismissed.

22. No anonymity order is made.

Signed Date 23.7.2015
Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

I make an order for repayment of the cost in full.

Signed Date 23.7.2015
Deputy Upper Tribunal Judge G A Black