Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39126/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 10th June 2015	**On 26th June 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

STELLA MORDI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Salmon of Bradford Law Centre
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Hillis made following a decision at Bradford on 6th January 2014.

Background

2. The appellant is a citizen of Nigeria (wrongly stated to be Egypt in the determination) born on 8th May 1971. She has a son born on 21st September 2005 who is her dependant.

3. The appellant arrived in the UK with her son on 14th March 2007 with a six month family visit visa and overstayed. She subsequently made an application for an EEA residence card which was refused and she became appeal rights exhausted on 28th June 2011. She submitted a human rights application on 23rd March 2012 which was refused with no right of appeal, since she had no leave to remain at the time of the application, but on 15th September 2014 the respondent agreed to issue an appealable decision.

4. The appellant did not meet the requirements for leave to remain as a parent under the Immigration Rules because, as at the date of application, her son had not been living in the UK for seven years and she therefore failed to meet the eligibility requirements of E-LTRPT.2.2(c). She was also refused under paragraph 276ADE, with respect to private life and with respect to Article 8 outside the Rules.

5. The judge said that he had taken into account the guidance set out in ZH (Tanzania) v SSHD [2010] UKSC 4 and had regard to the child's best interests as a primary consideration. He took into account the fact that he had made good progress at school and that he had now spent over seven years in the UK. However he was not a British citizen and had no lawful right to be here. There was no persuasive evidence that he had particularly strong relationships with his uncle or with anyone at school which went beyond those normally associated with a child of nine years in full-time education in the UK.

6. So far as proportionality was concerned he said that the appellant was wholly dependent on public funds for accommodation, maintenance, educational and medical care which was a significant drain on the finite resources of the UK. The significant financial burden on the public purse had to be weighted against the best interests of the child.

7. He wrote:

> "The UK Government has done no more than apply its valid Immigration Rules and Law to the Appellant's application and in my judgment correctly conclude that it is not compatible with the economic wellbeing of the UK, its citizens and lawful residents for the Appellant and her son to be given leave to remain in the UK and that it was in the best interests of D to accompany his mother with whom he has lived his whole life, to Nigeria. There is no submission before me that the Appellant's son will not be able to receive education commensurate with local standards on removal to Nigeria with his mother.
>
> The Appellant on her own account is educated to degree level and had two jobs in Nigeria before setting up her own computer business.

> She lost both jobs due to the economic climate in Nigeria prior to 2007. She lost her business due to an accidental fire that destroyed her stock. I find the Appellant is an educated and resourceful woman with employment and business experience who is likely to be able to be financially independent in Nigeria within a reasonable timescale."

8. On that basis he dismissed the appeal.

9. The appellant sought permission to appeal on the grounds that the judge had misrepresented the law in respect of the best interests of the child. Where the best interests clearly favoured a certain course, that course should be followed unless countervailing reasons of considerable force displaced them (ZH (Tanzania)). Had the judge directed himself properly he would have come to a different conclusion.

10. It was accepted that the Rules provided, under EX.1 of Appendix FM, that an applicant with a subsisting parental relationship with a child, who had lived in the UK continuously for at least seven years immediately preceding the application, should be given leave if it would not be reasonable to expect the child to leave the UK. However the judge accepted that the matter should be considered as at the time of hearing rather than at the date of application. The Rule was an attempt to formulate a response to ZH and there was at least an implication that normally, if a child has been in the UK for seven years, the parent should be allowed to stay, subject to there being no countervailing factors of weight. The judge did not consider the considerable hardship to the child if returned to Nigeria and was unfair to hold it against them their recourse to public funds. The alternative would have been for the appellant to work illegally.

11. Permission to appeal was granted by Judge Hollingworth on 11th March 2015.

12. On 23rd March 2015 the respondent served a reply defending the determination.

Submissions

13. Mr Salmon expanded on his grounds and whilst he accepted that the appellant could not meet the requirements of the Rules, since the child did not have seven years' leave at the time of application, he had been in the UK for over seven years as at the date of hearing and therefore, for the purposes of Section 177B should have been regarded as a qualifying child. Although the appellant's immigration history was poor there was no criminality and great hardship to the child by the disruption of his education if he were to be removed

14. Mrs Pettersen submitted that this was a sustainable decision. The judge had considered the best interests of the child in the round and it was open to him to place weight upon the fact that there was presently a financial

burden on the state. The judge was entitled to find that the child could accompany his mother to Nigeria and it would be reasonable to expect him to do so.

Findings and Conclusions

15. There is no reference to Section 117B in this determination. Judges are duty bound to have regard to the specific considerations set out in Sections 117A to 117D although it is not an error of law to fail to refer to those sections if the judge has applied the test he was supposed to apply according to its terms. What matters is substance, not form (Dube (Sections 117A – 117D) [2015] UKUT 00093). It is clear that in fact the judge did have regard to those considerations albeit that he did not cite them.

16. Section 117B states as follows:

> "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 wellbeing 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 wellbeing 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."

17. So far as the ability to speak English is concerned, this was not addressed. However, in AM (Section 117B – Malawi) [2015] UKUT 0260 the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either Sections 117B or 2 or 3 whatever the degree of his fluency in English or the strength of his financial resources. The failure to mention the appellant's ability to speak English is therefore immaterial.

18. So far as the judge's consideration of the drain on the public purse is concerned, that was plainly a matter which he was bound to take into account by virtue of Section 117(iii).

19. The appellant has been in the UK unlawfully since she overstayed her visa in 2007. Little weight should therefore be given to her private life.

20. The real issue here is Section 117(vi) and the position of the child, and in this respect the judge clearly asked himself the right question.

21. He cited the Court of Appeal's decision in EV (Philippines) and Others v SSHD [2014] EWCA Civ 874, which considered the treatment of the best interests of the child.

22. At paragraph 32 Christopher Clarke LJ said:

> "There is a danger in this field of moving from looseness of terms to semantics. At the same time there could be said to be a tension between (a) treating the best interests of the child as a primary consideration which could be outweighed by others provided that no other consideration was treated as inherently more significant; and (b) treating the child's best interests as a consideration which must rank higher than any other which could nevertheless be outweighed by others. It is material, however, to note that Lord Kerr, as he made clear, was dealing with a case of children who were British citizens and where there were very powerful other factors – see [41] below - in favour of not removing them (the best interests of the child clearly favour a certain course - the outcome of cases such as the present). He also agreed with the judgment of Lady Hale. In those circumstance

> we should, in my judgment, be guided by the formulation which she adopted."

23. And at paragraph 35:

> "A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens."

24. Lewison L J said at paragraph 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?"

25. He concluded:

> "In our case none of the family is a British citizen. None has the right to remain in the UK. 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."

26. The judge made a clear finding that it was reasonable to expect the child to return to Nigeria, the country of his nationality, and gave proper reasons for doing so. He would be able to receive education commensurate with the local standards on removal and his mother would be able to support him both on the basis of her previous work experience and because she is educated to degree level.

27. The child has been in the UK for almost all of his life and appears to have few ties with his country of nationality. He has spent five years in education here, but, on the other hand his education has not yet reached

a critical stage, and no medical grounds have been put forward to suggest that there would be difficulties for him in relocating to Nigeria – mention is made of asthma but it is controlled by inhalers which are available there. The appellant has a brother in Nigeria and although she says that he is poor and unable to assist financially, on the judge's unchallenged findings, she would be able to provide for herself.

28. No mention is made of the child's father. It has to be assumed that he is in Nigeria. The most important fact here is that the child is a Nigerian national. There would be no deprivation of citizenship rights in the UK since he is not entitled to them.

29. The judge's conclusion is entirely consistent with the reasoning in EV, and the grounds disclose no error of law.

Notice of Decision

30. The original judge did not err in law. His decision stands.

31. No anonymity direction is made.

Signed Date

Upper Tribunal Judge Taylor