



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/41113/2013

THE IMMIGRATION ACTS

Heard at Field House, London
On 7 January 2015

Determination Promulgated
On 26 January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

ENDURANCE OMON AMILEGBE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Khalid, instructed directly by the appellant

For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of Nigeria, appealed to the First-tier Tribunal against the decision of the Secretary of State to refuse her application for leave to remain on the basis of his private and family life in the UK outside the Immigration Rules. First-tier Tribunal Judge Buckwell dismissed the appeal and the appellant now appeals with permission to this Tribunal.

Background

2. The appellant entered the UK on 30 September 2006 with entry clearance as the dependant of a work permit holder. Her leave was valid until 20 August 2007 and she was subsequently granted discretionary leave to remain valid from 10 December 2009 until 10 December 2012. The claims that she married a Nigerian national on 11 June

2012 in the UK. Her husband, also a Nigerian national, entered the UK on 23 September 2004 with leave to enter as a student until 14 December 2005 and was subsequently granted extensions of stay as a student until 31 May 2010 and a further extension of stay as a Tier 1 Post-study Migrant from 24 June 2010 until 24 June 2012.

3. On 6 December 2012 the appellant applied for leave to remain in the UK. Her husband was named on the application form as her dependant. The Secretary of State considered the application under Appendix FM and paragraph 276ADE of the Immigration Rules. The Secretary of State refused the application on 7 August 2013 on the basis that the appellant did not meet the requirements of Appendix FM as she did not meet the requirements of the Immigration Rules in terms of her relationship and she did not have a parental relationship with a qualifying child. She did not meet the requirements of paragraph 276ADE as she had not been resident in the UK for 20 years and had spent 16 years in her home country before coming to the UK. Further, it was not accepted that she had lost all ties to Nigeria.
4. It is claimed that the appellant's husband obtained a law degree and is working with a firm of solicitors. The couple claim to have a son who was born in the UK on 14 October 2013. The appellant's case is that whilst her grandparents, uncles, aunts and cousins live in Nigeria her parents live in the UK and she sees them frequently. She also has five siblings, including her twin sister, and a cousin-brother living in the UK. It is her case that it would be difficult for her to find work in Nigeria and she did not want to return there.
5. The appellant gave evidence at the hearing but the First-tier Tribunal Judge took into account the fact that her husband neither submitted a witness statement nor attended the hearing and, despite submitting an unsigned and undated statement, her sister did not attend the hearing. The Judge did not accept as credible the claimed relationship between the appellant and her husband but accepted the relationship between the appellant and the child. The Judge concluded that the appellant fails to meet the requirements of the Immigration Rules and that the public interest outweighs the factors favouring the appellant and her family.

Error of Law

6. The grounds of appeal to the Upper Tribunal contend that the Judge erred in considering the appellant to be an overstayer [25] whereas she had limited leave to remain when she made the current application. It appears from the immigration history set out in the respondent's bundle and by the First-tier Tribunal Judge at paragraph 2 that, when she made the application the subject of this appeal on 6 December 2012, the appellant had Discretionary leave to remain until 10 December 2012. Mr Avery submitted that the appellant was an overstayer in the past but accepted that she was not an overstayer at the date of the hearing.
7. The First-tier Tribunal Judge did therefore make a mistake of fact in saying that the appellant is an overstayer. Mr Khalid submitted that this was a material error as it would have been the starting point for the Judge and had an effect on the Judge's eventual decision. Mr Avery submitted that the error was not material as there is nothing to indicate that this was a factor in the decision, also there was very little

evidence before the Judge to support the Article 8 claim so the Judge's conclusions are therefore sustainable.

8. I find that the Judge accurately set out the appellant's immigration history in paragraph 25 where he made the mistake as to her current status. He clearly appreciated that the appellant was previously granted three years Discretionary leave to remain having had immigration leave for a temporary period before that. It is clear from reading the whole of paragraph 25 and the proportionality exercise set out at paragraph 27 that the Judge did not attach weight to the appellant's immigration status and that the mistake was not therefore a material one.
9. The grounds of appeal further contend that the First-tier Tribunal Judge did not give adequate consideration to the best interests of the child in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009. Mr Avery submitted that there was very little evidence before the Judge as to the child. He submitted that the child was very young and there was no question of him being integrated into the UK on his own account. He submitted that there was no evidence as to his father's circumstances and that, in the absence of any other evidence, the Judge could not have reached any conclusion other than that it is in the child's best interests to be with his mother. Mr Khalid submitted that the consequence of this decision is that the family will be separated as the appellant's husband has a separate application.
10. There was no evidence before the Judge as to the appellant's husband's status apart from her assertion in oral evidence that he has his own appeal pending [10]. It is not clear to me why the First-tier Tribunal Judge said that the respondent has a duty to consider the best interests of the child [26][31] without referring specifically to his own. However I find that the Judge had insufficient evidence before him to reach a conclusion other than that which he did, that it is in the child's best interests to be with his mother. There was no evidence as to the nature of the husband's claimed application or appeal or as to its progress or indeed as to whether the appellant or her son are his dependants for the purposes of that appeal. In the absence of such evidence the Judge could not have concluded that the family would be separated as claimed by Mr Khalid.
11. The grounds of appeal further contend that the First-tier Tribunal Judge erred in concluding that the decision to remove the appellant is proportionate. Mr Khalid submitted that the Judge's finding that he doubted the credibility of the relationship with her husband was harsh. He submitted that the appellant's witness statement said that the child was the product of that relationship. However the only evidence before the Judge as to the relationship was the appellant's statement and oral evidence. There was no evidence from the appellant's husband. There was no birth certificate for the child. I find that in light of the scant evidence before him it was open to the First-tier Tribunal Judge to doubt the credibility of this relationship.
12. Mr Khalid submitted that the Judge failed to consider the appellant's private and family life. However there was no evidence before the Judge from the appellant's parents. There was only an unsigned statement purporting to be from her sister and there was nothing from her husband. The main evidence before the Judge was therefore

the appellant's statement and oral evidence. It is clear that the Judge took account of this evidence in reaching his conclusions.

13. At the hearing Mr Khalid submitted that the Judge erred in failing to consider whether the appellant could meet the requirements of paragraph 276ADE, in particular whether she could establish that she had no ties in Nigeria. He relied on the decision in Ogundimu (Article 8 - new rules) Nigeria [2013] UKUT 00060 (IAC). Mr Avery submitted that this alleged error was not in the grounds of appeal. Mr Khalid pointed out that the appellant was not legally represented before the First-tier Tribunal or in drafting the grounds of appeal. However Mr Khalid accepted on the basis of the appellant's instructions that the grounds of appeal had been drafted by a 'legal friend' of the appellant. I do not therefore accept that she did not have legal advice in drafting the grounds of appeal or that this ground could not have reasonably been raised then.
14. In any event, even had the Judge considered paragraph 276ADE, it is clear that the evidence before the Judge was that the appellant was in Nigeria before she came to the UK in September 2006 [2] [16] and that she has grandparents, uncles, aunts and cousins in Nigeria [11]. She claims to be married to a Nigerian man who appears to have no status in the UK. The appellant's oral evidence to the Judge was that it would be difficult for her to have similar employment in Nigeria to that she had in the UK. The Judge noted that the appellant emphasised in her oral evidence the lack of opportunity she would have in Nigeria [24]. Further, there was no evidence as to the appellant's husband's family in Nigeria. Overall I find that there was insufficient evidence before the Judge to reach a finding that the appellant had no ties in Nigeria.
15. I have considered the First-tier Tribunal Judge's decision as a whole and I find that the decision to dismiss the appeal was one which was open to him on the basis of the evidence before him.

Conclusion:

The making of the decision of the First-tier Tribunal did not involve the making of a material error on point of law.

Signed

Date: 26 January 2015

A Grimes
Deputy Judge of the Upper Tribunal