Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA051982015

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 27th May 2016	**On 8th June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

A.M.O.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Alban of Sultan Lloyd Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against the decision of Judge O'Hagan of the First-tier Tribunal (the FTT) promulgated on 30th July 2015.

2. The Appellant is a female Nigerian citizen born in June 1983 who arrived in the United Kingdom as a visitor on 5th December 2012, with a visa valid until 21st December 2013.

3. The Appellant overstayed and made an asylum claim on 28th February 2014. The claim was refused on 18th March 2015, and a decision made to remove the Appellant from the United Kingdom. The Appellant has twins, born in the United Kingdom on 12th July 2013.

4. The appeal was heard by the FTT on 24th June 2015 and dismissed on asylum, humanitarian protection, and human rights grounds, and under the Immigration rules.

5. The Appellant applied for permission to appeal, and permission was granted by Upper Tribunal Judge Lindsley who found it arguable that the FTT had erred in considering Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention). Judge Lindsley found it arguable that the FTT had erred in concluding that the Appellant's twin children are not British citizens, even though they were born in the United Kingdom to a British father. Judge Lindsley described this finding as being clearly incorrect.

Error of Law

6. At a hearing on 3rd February 2016 I heard submissions from both parties regarding error of law. It was conceded on behalf of the Respondent that the FTT had erred in law by finding that the children had been born in the United Kingdom, to a British father, but had then concluded that the children were not British without giving any adequate reasons for that finding. Set out below are my conclusions and reasons for finding an error of law and setting aside the decision of the FTT in relation to Article 8 of the 1950 Convention;

> "15. I announced at the hearing that the FTT had erred in law in considering the Appellant's children. The Appellant has twins born in the United Kingdom on 12th July 2013. The error was in not explaining the conclusion reached by the FTT, that the children are not British.
>
> 16. Mrs Petersen was correct not to rely upon the rule 24 response, as it is clear that this issue was raised before the FTT, both in the grounds of appeal and in the Appellant's evidence (paragraph 19).
>
> 17. The FTT found in paragraphs 39 and 40 that the children were born in the United Kingdom to a British father, but then concluded that the children are not British citizens, without explaining that finding. It would appear that the children are British as pointed out by Judge Lindsley in paragraph 6 of the grant of permission.
>
> 18. Had this error not been made the FTT would have considered Appendix FM in relation to leave to remain as a parent, in a different manner, by considering the British citizenship of the children. The FTT would also have considered Article 8

outside the Immigration rules in a different way, taking into account that the Appellant has 'qualifying' children and therefore section 117B(6) of the Nationality, Immigration and Asylum Act 2002 needed to be considered on that basis.

19. I therefore set aside the decision of the FTT. As there was no error disclosed in the findings made by the FTT that the Appellant was not entitled to asylum or humanitarian protection, and that her removal from this country would not breach Articles 2 or 3 of the 1950 Convention, the findings made by the FTT on those issues are preserved. The findings are summarised in paragraph 38 of the FTT decision, and the conclusion that the Appellant has fabricated her claim is preserved."

7. The hearing was then adjourned following a request on behalf of the Appellant, that up-to-date medical evidence was required in relation to the Appellant's daughter. Full details of the application for permission to appeal, the grant of permission, and the submissions made by both parties are contained in my error of law decision promulgated on 18th February 2016.

Re-making the Decision - Upper Tribunal Hearing 27th May 2016

Preliminary Issues

8. I ascertained that I had all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed.

9. I had the Respondent's bundle that had been before the FTT, with Annexes A-C and the reasons for refusal dated 18th March 2015. I also had the Notice of Appeal, and the Appellant's skeleton argument and attached documents comprising 61 pages which had been submitted on 3rd February 2016. Miss Alban had submitted a further bundle of documents comprising 60 pages. Inexplicably, this bundle had not been provided in advance of the hearing, but as Mr Mills indicated that the late submission caused him no difficulties, the bundle was admitted into evidence.

10. The hearing was put back briefly as Miss Alban had not seen the Appellant's witness statement dated 24th June 2015. When the hearing resumed both representatives indicated that they were ready to proceed and there was no application for an adjournment.

Oral Evidence

11. The Appellant gave oral evidence in English. There was no need for an interpreter. I have recorded all questions and answers in my Record of Proceedings and it is not necessary to reiterate them in full.

12. In brief summary the Appellant confirmed that her twins are British. They now have British passports. The twins live with the Appellant.

13. The Appellant is no longer in a relationship with the father of the twins, who is a British citizen. In her witness statement she stated that the relationship ended three months after the twins were born and she had had no further contact with him.

14. In her oral evidence she said that she did not know where he lived, but that she had some telephone contact with him. However he had another partner and he did not play any part in the twin's upbringing.

15. The twins' father did not financially support them, he had only seen them once in 2016, which was in February. Prior to that the last time the Appellant saw him was in September 2015 when she was out shopping and saw him by coincidence.

16. The Appellant stated that she had sole responsibility for the twins and received no assistance from their father whatsoever.

The Respondent's Submissions

17. Mr Mills accepted that the twins are British citizens. It was accepted that the Appellant satisfied E-LTRPT.2.2, 2.3, 2.4, and 3.1. Therefore the issue was whether the requirements of EX.1(a) are satisfied. It was not disputed that the Appellant has a genuine and subsisting parental relationship with her children, that they are under 18 years of age and they are in the UK and are British citizens. The issue was whether it would be reasonable to expect the children to leave the United Kingdom. Mr Mills submitted that this involved a balancing exercise and that the public interest in maintaining effective immigration control must be taken into account.

18. Mr Mills pointed out that the Appellant had left three children in Nigeria, who were being cared for, and on balance it would be reasonable to expect the British twins to return to Nigeria with the Appellant.

19. Mr Mills submitted that the same test applied if Article 8 was considered outside the Immigration rules, pursuant to section 117B(6). When Article 8 was considered outside the Immigration rules, the fact that the Appellant lacked financial independence must be taken into account, as must the fact that she had remained in the United Kingdom unlawfully following the expiry of her visit visa.

20. With reference to the point made in the skeleton argument submitted on behalf of the Appellant, that Appellant was also entitled to succeed with reference to regulation 15A of The Immigration (European Economic Area) Regulations 2006 and obtain a derivative right of residence, Mr Mills accepted that the Appellant is the primary carer of two British citizens but did not accept that the British citizens would be unable to reside in the United Kingdom if the Appellant had to leave, as they could live with their father, as the Appellant's evidence could not be relied upon to prove that he would not accept responsibility for his children.

The Appellant's Submissions

21. Miss Alban relied upon her skeleton argument. She argued that the issue to be decided in this appeal related to whether or not it was reasonable for the children to leave the United Kingdom. I was asked to find that it would not be reasonable as they British citizens.

22. Miss Alban submitted that the Appellant's evidence was that she had no suitable accommodation in Nigeria. I was asked to consider the best interests of the children as a primary consideration and to find that their best interests would be served by remaining in the United Kingdom with their mother. Reliance was placed in particular upon paragraphs 29-33 of ZH (Tanzania) [2011] UKSC 4.

23. At the conclusions of oral submissions I reserved my decision.

My Conclusions and Reasons

24. Findings made by the FTT in relation to the Appellant's claim to be at risk if returned to Nigeria have been preserved and are summarised in paragraph 38 which I set out below.

> "38. Having considered all of these matters, I was not satisfied therefore that the Appellant has discharged the burden of proving that she faces a substantial risk of serious harm or persecution from those she claims to fear in her home country. I find she has fabricated her claim. Since I do not accept the Appellant's claims, the issues of sufficiency of protection and internal relocation do not arise. I find the Appellant does not discharge the burden of proof of showing entitlement to protection of the Refugee Convention or Articles 2 and 3 of the Human Rights Convention. Any claim to humanitarian protection would stand or fall for identical reasons".

25. The main issue raised by the Appellant relates to Appendix FM, and her claim to be entitled to leave to remain as a parent. I remind myself that when considering the Immigration rules the burden of proof is on the Appellant and the standard of proof is a balance of probability.

26. It has rightly been conceded by the Respondent that the Appellant has two British citizen children, those being her twins born on 12th July 2013.

27. I accept that the Appellant's relationship with the father of the twins ended shortly after their birth. I also accept that the father has played no role in the upbringing of the twins. I am satisfied, having considered the Appellant's evidence carefully, that the Appellant does not know his current address, and genuinely believes that he is in a relationship with another woman.

28. I am satisfied that the father of the twins has not contributed financially to them, save on one occasion, in February 2016 giving the Appellant £5. I accept the Appellant's evidence that the father of the twins has only seen them once in 2016, that being one visit to the Appellant's shared accommodation in February.

29. The requirements for limited leave to remain as a parent are set out in section R-LTRPT of Appendix FM.

30. The applicant for leave to remain and the children must be in the United Kingdom and the applicant must not fall for refusal under section S-LTR which contains the suitability requirements.

31. It has been conceded, and rightly so, that the Appellant meets the requirements of paragraphs E-LTRPT2.2-2.4 and 3.1. This is because the Appellant is in the United Kingdom as are the twins, and they are British citizens. The twins live with the Appellant, not their other parent. I am satisfied that the Appellant has sole responsibility for the children, and that she is taking and intends to continue to take an active role in their upbringing. This was not disputed on behalf of the Respondent.

32. Turning then to EX.1.(a) it is accepted that the Appellant has a genuine and subsisting parental relationship with her children, who are in the United Kingdom and are British citizens. The issue therefore to be decided is whether it would not be reasonable to expect the children to leave the United Kingdom.

33. As explained in ZH (Tanzania) [2011] UKSC 4, a consideration of the best interests of a child will involve asking whether it is reasonable to expect the child to live in another country. The best interests of a child must be considered as a primary consideration, but this is not the only consideration, and this may be outweighed by other considerations.

34. Guidance on considering the best interests of a child was given in EV (Philippines) [2014] EWCA Civ 874 and I set out below paragraph 35;

> "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."

35. In considering the factors set out above, I take into account that the children are not quite 3 years of age and have not started their education. They have never been to Nigeria, but because of their young age they would in my view be able to adapt to life in that country with their mother. Neither child has any significant medical issues. I do not find that they would have linguistic difficulties in Nigeria, and their removal from the United Kingdom would not interfere with their family life, as they would be removed together with their mother. I do not find that their father has any meaningful contact with them. The issue that has to be decided is how their removal would affect their rights as British citizens.

36. I find that it is clear that the best interests of the children would be to remain with their mother, and a decision must be taken as to whether their best interests would be to remain with their mother in the United Kingdom, or travel to Nigeria with her.

37. It was made clear in paragraph 30 of ZH (Tanzania) that nationality is not a "trump card". However nationality was described as being of particular importance in assessing the best interests of a child.

38. In paragraph 32 Lady Hale stated;

> "32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults."

39. Lord Hope at paragraph 41 of ZH (Tanzania) stated;

> "41. But there is much more to British citizenship than the status it gives to the children in immigration law. It carries with it a host of other benefits and advantages, all of which Lady Hale has drawn attention to and carefully analysed. They ought never to be left out of account, but they were nowhere considered in the Court of Appeal's judgment. The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood."

40. I take into account when considering whether it is reasonable to expect the British children to leave the United Kingdom, the fact that the Appellant deliberately overstayed following the expiry of her visit visa, and fabricated an asylum claim. However, I also take into account that in ZH (Tanzania) the Appellant was described as having an appalling immigration history yet her appeal, based upon the British citizenship of her children, was allowed. It was emphasised that children should not be blamed for the conduct of a parent. The Appellant in this case does not have such an appalling history as the Appellant in ZH (Tanzania) who made three unsuccessful claims for asylum, one in her own identity and two in false identities.

41. I do take into account that the Appellant has not proved that she is financially dependent, and there is a strong public interest in maintaining effective immigration control.

42. However I attach very significant weight to the fact that the twin children are British citizens, and if they left the United Kingdom, they would not be able to exercise their rights as British citizens and I therefore conclude that their best interests would be served by remaining in the United Kingdom, with their mother who I accept is their primary carer, and I therefore conclude that it would not be reasonable to expect them to leave the United Kingdom.

43. Therefore the Appellant's appeal succeeds under Appendix FM of the Immigration rules. It is not necessary to go on and consider alternative submissions made on the Appellant's behalf, to the effect that the appeal should be allowed under Article 8 outside the Immigration rules, and that the removal from the United Kingdom would be unlawful under the Zambrano principle.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

I dismiss the appeal on asylum grounds.

The Appellant is not entitled to humanitarian protection.

I dismiss the appeal on human rights grounds in relation to Articles 2 and 3 of the 1950 Convention.

I allow the appeal under Appendix FM of the Immigration rules

Direction Regarding Anonymity – rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made because the Tribunal has considered the best interests of two minor children.

Signed Date 2nd June 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

No fee has been paid or is payable. There is no fee award.

Signed Date 2nd June 2016

Deputy Upper Tribunal Judge M A Hall