Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05498/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th November, 2017	**On 21st December, 2017**
signed and sent	
to Promulgation	
on 20th December, 2017	

Before

Upper Tribunal Judge Chalkley

Between

O.F.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: *Mr E Ikwuazom, a solicitor*
For the Respondent: *Mr Walker, Home Office Presenting Officer*

DECISION AND REASONS

1. The appellant was born on 7th July, 1984 and is a national of Nigeria. She appeals against the decision of the respondent, taken on 5th February 2016, to refuse to grant her, her husband and her three sons further leave to remain in the United Kingdom on the basis that the appellant had a qualifying child over

the age of 7, pursuant to Appendix FM of the Immigration Rules and Article 8 of the European Convention on Human Rights.

2. The appellant entered the United Kingdom on 22nd August 2007, with a visit visa. On 7th July 2012, she applied for leave to remain outside the Immigration Rules which was refused on 13th August 2013, with no right of appeal. She made further application for leave to remain on the basis of her family and private life in the United Kingdom.

3. The appellant's appeal was heard by First-tier Tribunal Judge Chana at Hatton Cross on 17th August 2017. At paragraph 25 of the judge's decision she said this:-

> "I accept that one of the appellant's sons has lived in this country for over seven years. He is now eight years old. However, the appellant must demonstrate that there would be very significant obstacles in accordance with EX2 of Appendix FM for the eight-year-old to go to Nigeria with his parents and siblings, if required to leave the United Kingdom. The appellant's children are not British and therefore do not meet the requirements of paragraph EX1(a) of Appendix FM. The appellant also has to demonstrate that they (sic) [there] will be serious hardship for the appellant and his (sic) husband and children to return to Nigeria."

She went on to find that there were no significant obstacles to the family's removal.

4. The appellant appealed citing paragraph 276ADE(1)(iv) of the Immigration Rules and pointing out that the material part of the two provisions set out in that Rule is in fact the same, the test being whether it would be reasonable to expect the applicant to leave the United Kingdom.

5. The applicant spent some 32 years of her life in Nigeria before coming to the United Kingdom and both she and her spouse are Nigerian nationals. The third appellant was 8 years of age at the time of the hearing before the judge on 14th February this year. The judge records the fourth appellant as being nearly 5½ years old and the fifth appellant as being nearly 4 years old. All the children were born in the United Kingdom. In fact, the appellant's second child was at the time of the hearing almost 6½ years old and is now I am told over 7 years of age.

6. Before me Mr Walker accepted that the decision of First-tier Tribunal Judge Chana did contain a material error of law. The judge simply applied the wrong test. Paragraph 276ADE(1)(iv) says:-

> "*(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK*".

7. At the hearing before me, Mr Ikwuazom told me that there were now two qualifying children, because the appellant's second child was now over the age of 7 years. He told me that he relied on paragraph 95 of *MA Pakistan*. He explained that in that case the child had autism which resulted in him being identified as a child with special educational needs. In particular, he had significant problems with language, social interaction and communication and displayed stereotyped behaviour and mannerisms. Very active steps had been taken to deal with his problems through regular therapy and specialist teaching. In this appeal, however, the appellant's second qualifying child has a deformity of the hand and this, he told me, had required specialist surgery in the United Kingdom. He confirmed that there was no evidence that treatment for this condition was not available in Nigeria. The issue he suggested was whether it was reasonable to expect these two children to leave the United Kingdom. He submitted that in all the circumstances it was not reasonable. It was not reasonable because the second child had a rare condition which had required surgery and the first child, in any event, will next year be entitled, as a right, to apply for British citizenship. He submitted that now the parties had conjoined family claims. He accepted that since Mr Walker had accepted that there was an error of law, I could now remake the decision myself. He invited me to allow the appellant's appeal.

8. For the Secretary of State, Mr Walker accepted that the judge had applied the wrong test, but pointed out that at paragraph 31 of the decision, the First-tier Tribunal Judge had referred to the fact that the appellant has not demonstrated that medical facilities are not available in Nigeria to meet the medical needs of the appellant's child who was due then to have reconstruction on his hand because of his extra thumb. The child has already undergone some operations in the United Kingdom. The issue for the judge was to decide whether or not it would be reasonable to expect the child the leave the United Kingdom. The judge should have identified the public interest engaged, measured its strength and determined whether the private and family life factors advanced on behalf of the respondent outweighed the public interest to the extent that the decision was disproportionate Mr Walker pointed out that there was no evidence today to suggest that any treatment the appellant's children may require is not available to them in Nigeria. I reserved my decision.

9. At paragraphs 22 onwards in her determination, the judge makes her findings of fact. The appellant and her husband had lived in Nigeria until their 30s. At the time of the hearing only one of the appellant's children was a qualifying child. Now there are two children who qualify. The evidence before the judge was that the appellant's oldest child was doing very well and had made good academic progress at school. No objective evidence was placed before her that Nigeria did not have a functioning education system where the appellant's 8 year old son and other children would be able to enter and continue to do well in their studies in Nigeria. She accepted that returning to Nigeria as a family

unit and continuing life may involve a degree of disruption to their lives, but she did not believe that that was unreasonable in the circumstances of the family.

10. I have read the appellant's bundles. I was asked to consider page A8 of the appellants' bundle, but so that there is no doubt I confirm that I have also read pages A6 and page A9. I have read the medical evidence at pages C1 to C27. The decision does not give the dates of birth of the children, but these are set out in the letter of 28th October 2005, addressed to the Home Office with the appellant's application for leave. The appellant's oldest child was born on 30th May, 2008. The appellant's second child was born on 27th September 2010. There is a third child who was born on 9th May 2012.

11. It is clear from the school reports that all three children are making good progress at their schools. The appellant's oldest child is described as being a bright, well-mannered and hardworking boy who shows a very positive attitude to his learning since he joined the school. Academically he is particularly strong in mathematics. His younger brother is described as being "lovely, very able, bright child who applies himself to his learning at all times. He is very popular and is well-liked by his peers. He is particularly more able in mathematics and enjoys learning it". The youngest child is described as being "friendly, inquisitive and an adorable child who enjoys learning new things about the world around him".

12. The longer a child has resided in the United Kingdom the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the United Kingdom. It was necessary for the judge to consider whether, considering all the evidence in the round, it would be unreasonable to expect the appellant's oldest child to leave the United Kingdom with his parents. In fact, the appellant's second son is now 7 years of age., however, looking at all the evidence in the round, I have concluded that it would not be unreasonable to expect either of the appellant's children to leave the United Kingdom. They will not be at any disadvantage in Nigeria where they will be brought up learning about their own heritage in their own culture, have access to education services and to any further health services that they may require.

13. While, for the reason set out above, I accept that the First Tier Tribunal Judge made an error of law, it was not a material error and her decision shall stand.

Notice of Decision

The appeal is dismissed

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.

Richard Chalkley

Upper Tribunal Judge Chalkley

I have dismissed the appeal and therefore there can be no fee award.

Richard Chalkley

Upper Tribunal Judge Chalkley