



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01562/2015

THE IMMIGRATION ACTS

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

ENIOLA ABOSEDE ADEMOLA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DIRECTIONS

1. At paragraph 24 of my Decision and Reasons in this case, I invited the representatives to make submissions as to the proper forum for the reconsideration of the Article 8 claim, an error of law in the First-tier Tribunal's decision having been found.
2. The Respondent in an email of 6 April 2017 is essentially neutral on the point. The Appellant has made submissions on the substantive issues, having apparently misunderstood paragraph 24.
3. I have concluded that the appropriate forum for addressing the Article 8 claim, in the context of the Appellant and her daughter living in Ireland, is for that issue to be considered by Judge Callow, who heard the appeal in the First-tier, at Taylor House, bearing in mind in particular paragraph 23 of my Decision and Reasons.

Signed:

Upper Tribunal Judge Allen

Dated: 27/4/2017



IAC-FH-LW-V3

**Upper Tribunal
(Immigration and Asylum Chamber)**

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**Heard at Field House
On 15 February 2017**

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ENIOLA ABOSEDE ADEMOLA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Ms G Peterson, instructed by DF Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Judge who allowed on human rights grounds the appeal of Ms Ademola against the Secretary of State's decision to make a deportation order against her and refusing her human rights claim. Hereafter I shall refer to Ms Ademola as the appellant and the Secretary of State as the respondent, as they were before the judge.

2. The appellant is a Nigerian national. She travelled to Ireland in 2001 to join her then husband, an Irish national. Her daughter T was born in Ireland on 15 August 2002 and thereafter received an Irish passport. The appellant's relationship with her husband subsequently broke down and she came to the United Kingdom with T in March 2003 and has stayed ever since. She applied unsuccessfully for the issue of an EEA registration card, founded on her relationship with her daughter. However, her daughter's appeal against the decision to refuse her with a registration certificate was allowed on human rights grounds and she was given discretionary leave to remain in the United Kingdom until 15 September 2014.
3. The appellant entered into a relationship in the United Kingdom with a man who ill-treated her. She was a victim of domestic violence and sexual and physical abuse by this man and her daughter was made the subject of a child protection plan under the category of physical, emotional and sexual abuse, with effect from 15 October 2012.
4. On 29 March 2013 the appellant pleaded guilty to a count of theft which took place in circumstances where she stole money from an elderly lady whose carer she was. She had a previous conviction from May 2008 for possession or control of a false or improperly obtained identification document or apparatus for making identification cards. On conviction for the theft offence she was sentenced to 30 months' imprisonment.
5. The judge concluded that the appellant was a "foreign criminal" for the purposes of section 32(1) of the UK Borders Act 2007. The judge went on to consider whether an Article 8 claim was made out. He set out the relevant provisions of the 2002 Act and the Immigration Rules and also considered in some detail the relevant case law. He found the appellant's evidence generally to be credible. He also bore in mind that the appellant has a genuine and subsisting parental relationship with T who is under the age of 18 and has lived in the United Kingdom continuously for at least seven years. He addressed the issue of "undue hardship", the relevant criterion under paragraph 399(a)(ii)(a) and (b). He also noted the appellant had been assessed as being at low risk of reoffending. In assessing whether or not it would be unduly harsh for T to live in Nigeria with the appellant or to remain in the United Kingdom without the appellant, the judge considered her best interests, again referring to the relevant authorities. He concluded that it was in her best interests to remain with the appellant. They have a genuine and subsisting relationship and T has no contact with her father. The judge considered that while T might well have rights to dual citizenship, Nigeria was to all intents and purposes a foreign country to her. She had never visited Nigeria and had no links with the country and her cultural norms had been established in the United Kingdom.
6. The judge also considered that it would be unduly harsh to expect T to remain in the United Kingdom without the appellant. By remaining she would continue with her education but the judge commented that in the appellant's absence it was problematical what progress she would make. He noted that the evidence of among others Ms Dixon who cared for T when her mother was in prison, that the absence of her mother had a detrimental impact on T's emotional and educational wellbeing.

The judge had also noted and taken into account the fact that the appellant had been convicted of a particularly serious offence and had abused the degree of trust invested in her in caring for an elderly vulnerable person. The judge took guidance from what had been decided by the Upper Tribunal in KMO [2015] UKUT 543 (IAC) where it was regarded as right to take into account the offences committed by the foreign criminal and the public interest considerations that come into play in assessing whether the impact on the child of the foreign criminal being deported was inordinately or excessively harsh.

7. The judge then went on to consider the situation under Community law. He noted this was not fully addressed at the hearing, but in light of Counsel's brief submissions it was necessary to address the issue. He examined relevant Regulations and case law and concluded that a person who would ordinarily have a derivative right of residence pursuant to the decision in Zambrano would be denied that right where deportation would be "conducive to the public good". This arose from Regulation 20A of the EEA Regulations. The judge noted that the case of CS was being referred to the CJEU to be heard at the same time as a reference from the Spanish Administrative Tribunal in Rendon Marin. The judge concluded that in light of the referral to the CJEU and the questions posed by the Upper Tribunal in CS, the respondent's decision that the appellant should be denied a derivative right of residence because her deportation from the United Kingdom was conducive to the public good was not in accordance with the law. He concluded that the appeal fell to be allowed under exception 3 at section 33(4) of the UK Borders Act 2007 that deportation would breach the appellant's rights as a foreign criminal under community treaties. The appeal was allowed to the extent that it awaited the lawful decision of the respondent.
8. The Secretary of State sought and was granted permission to appeal on the basis first that the judge had failed to resolve a conflict of fact or opinion and that he was required to decide the case in accordance with the law as it stood under EU law rather than by reference to cases yet to be decided; that there was a procedural error in dealing with the issue when he had not been fully addressed on it and only heard brief submissions by the appellant's representative; that he had erred in finding that it would be unduly harsh for the appellant's daughter to accompany her to Nigeria, arguing that it was wrong to say that T had no links with Nigeria since she would be accompanied by her mother who was born and bred there, and no negative findings had been made as to the prospects of the appellant integrating back into Nigerian society; and finally, that the credibility finding was flawed in that the judge had failed to take into consideration the evidence of witnesses at the hearing and apparent discrepancies as recorded by the Presenting Officer between their evidence regarding the alleged death of the appellant's mother and the apparent emigration of the appellant's two sons. It was also argued that it was an error for the judge to say that the appellant had, with the assistance of her church, generally been financially independent in considering section 117B, bearing in mind the fundamental basis of her deportation was the theft of nearly £6,000 from a vulnerable lady aged 78.

9. Directions were made by Judge Jordan at a hearing on 21 December 2016 requiring the Secretary of State to file and serve submissions setting out her case within 28 days in relation to the impact and effect on the child who as an Irish citizen and a Union citizen and having accrued rights under Article 8 having lived in the United Kingdom since March 2003, and also as to the impact and effect on the appellant as sole carer of T as an Irish citizen, as a Union citizen and as the mother of a child with accrued Article 8 rights.
10. The Secretary of State did not comply with these directions. This clearly caused difficulty for the appellant who had to try and respond to what the answer might have been by the Secretary of State. The Secretary of State sought and was refused an adjournment and the hearing proceeded.
11. Mr Tufan argued that though the decision of CS was now available, it had no bearing on this case. He argued that the case needed to be considered via established case law. The decision of the Upper Tribunal in Badewa [2015] UKUT 329 (IAC) set out the proper approach in a case where sections 117A to D of the 2002 Act were to be considered in the context of an EEA removal decision. The judge had not followed that approach, which required an assessment initially of the position under the Regulations and thereafter Article 8 but had considered Article 8 first. The decision had to be read via the Directive and Articles 20 and 21 of the TFEU, this being the Zambrano issue. The decision in CS was concerned with whether or not a child who was a national of the country he was living in, i.e. the United Kingdom in this case, would be compelled to leave the European Union and that did not apply to this case. As regards the Rendon Marin decision, it was a question of whether the child would be compelled to leave the EU, and the child in this case was of Irish nationality and it was a question of whether her mother had the right to live in Ireland under Zambrano principles.
12. The judge had therefore quite clearly erred in failing to look at the ability of the child and the appellant to reside in Ireland. The judge could and should have considered whether the appellant is subjectively or objectively compelled to go to Ireland and that was a matter that needed to be explored. He founded this argument on what had been said in Harrison [2012] EWCA Civ 1736. There was nothing to compel the child to leave the European Union. Ireland was essentially similar to the United Kingdom and if the question was asked the answer would be that there was no compulsion for either of them to leave the EU and that was an essential point that should have been considered and had not been.
13. Mr Tufan argued that the section 117B factors needed to be considered in full, including the paragraph 117C factors. The crime that had been committed was a very serious one. The judge had to consider the appellant's precarious status and the fact that it had always been the case. The judge seemed to treat speaking English as being a positive factor, whereas it was clear from cases such as AM (Malawi) and Ruppiah that it was at most a neutral factor.

14. The judge was clearly wrong in what he said about financial independence and where he had concluded that when at liberty and with the assistance of her church the appellant had generally been financially independent. The fact that the church might assist could not possibly mean she was independent. This was a negative factor and had to be treated as such. The MAB and KMO debate have been settled in MM (Uganda) and it was clear that all factors had to be looked at. In both MAB and KMO it had been concluded that undue harshness set a very high test. Ms Peterson would argue that the child had no links with Ireland and could not go there, but she was a citizen of that country and there could not be a greater link than that. The judge's consideration of the EEA matters was brief. It was clear, for example, from paragraph 6 in NA (Pakistan) [2015] EWCA Civ 140 that if the appellant and her daughter were to move to Ireland the appellant, who is the parent with sole care, would have a derived right of residence in Ireland applying Zambrano principles. There was a requirement of independent means under Article 7 and that was not the case here, and certainly no comprehensive sickness insurance, so the requirements of the Article were not satisfied. There was no EEA right for the child in the United Kingdom.
15. Ms Peterson addressed the grounds upon which permission had been granted. With regard to ground 1, the judge dealt with the seriousness of the offence including referring to the sentencing remarks. He had also referred to the low risk of offending as assessed in the OASyS evaluation. That report dealt with all the relevant circumstances. The matter had been analysed by the judge outside the EU Regulations and these matters had been set out before him in the skeleton and submissions. If there were an error of law in respect of CS as regards an undetermined issue before the CJEU then it was immaterial to the judge's findings.
16. With regard to the procedural unfairness argument in ground 2, the Presenting Officer had had the skeleton argument before him and could have made any submissions he wished to.
17. Ground 3 was more central and was concerned with the best interests of the child. The findings in this regard were adequate. It was always a very delicate balancing exercise and the judge had made clear findings on the point given all the history and the suffering of both the appellant and her daughter, both of whom had been abused by the appellant's former partner. They had experienced a very painful separation and had been reunited and the child's circumstances now were stable. The judge had taken full account of the evidence and of the skeleton argument.
18. As regards ground 4, the discrepancies had been alluded to in the grounds but had not been produced and were not specified as to the effect they had on the issues. As regards the financial independence point that Mr Tufan had referred to, the appellant had not relied on her criminal activity and nor had the judge. There had been paid work and the judge had heard evidence as to the likelihood of that.
19. It was unclear why the daughter had only been given discretionary leave in accordance with Zambrano. Her self-sufficiency was irrelevant and her parents'

status as a supporter of her. The argument about section 117B should be treated with caution as regards precariousness when the appellant was a Zambrano carer. She did not have settled leave but had an EU citizen child and removal of support for the child should be looked at in light of that. The judge's findings as to whether or not Nigeria was in focus was not in the child's best interests. Mr Tufan had argued that with respect to Marin and CS he could not transpose the best interests findings to Ireland. If the Tribunal were to find an error of law in the judge's failure to consider Ireland, then it was urged to find that on all the evidence which had been before the judge, given the history and the fact that the child was now thriving in secondary school, that they had no connection beyond the child's nationality to Ireland, but a significant connection to the United Kingdom with community support, including the fact that people had attended hearings including today's hearing. After an appalling lengthy history of ill-treatment under which both had been abused, they were removed to a place of safety and the OASyS Report was very lengthy and positive. It considered the bad influence of the appellant's former partner on her and on the child. It would not be in the child's best interests to further destabilise her by removing her to Ireland and the further submissions Ms Peterson had made were relevant to that. The best interests findings could equally be applied to Ireland in all the circumstances. The child's best interests were to live in the United Kingdom where she was socially integrated and she was at a critical point in her education, having begun her GCSE studies, and she was thriving. She had a good relationship with her mother and that sustained her stability here. Her best interests had been properly considered with regards to going to Nigeria. Article 8 had been fully argued before the judge. With regard to the EU matters it was clear that the appellant did not represent a present, genuine and sufficiently serious threat to the fundamental interests of society. All the circumstances were required to be taken into account.

20. By way of reply Mr Tufan argued that the authority in NA (Pakistan) was the most recent delineation of the proper approach. The finding of the child's best interests did not mean that removal would be unreasonable or unduly harsh. Also the child had lived with the family from when the appellant was in prison. The issue of any threat posed by the appellant was not relevant as it was not a question of the appellant being compelled to leave the United Kingdom. There had to be a compulsion as set out in Harrison.
21. I reserved my decision.
22. It is clear from the decision of the Upper Tribunal in Badewa that the correct approach in a case such as this is first to decide if the person will satisfy the requirements of the Immigration (European Economic Area) Regulations 2006, in which context section 117A to D has no application; and secondly, where a person has raised Article 8 as a ground of appeal, section 117A to D applies. However, I see no materiality in the judge's failure to follow this approach. The essential issue is that of the substance of the judge's reasoning on the relevant issues and whether those show an error of law in his decision. As regards the specific grounds, ground 2 can be disposed of fairly briefly in that, as Ms Peterson argued, the Secretary of

State's representative heard her submissions at the hearing and could have addressed the point she made and did not do so. I do not consider there was any procedural or other irregularity affecting the fairness of the proceedings. Nor do I consider ground 4 to be made out. As Ms Peterson argued, the minute of the Presenting Officer has not been produced and it has not been specified what the impact of this matter was on the issues. On the essential points in issue credibility is not a matter of materiality. Nor do I consider that the judge can be said to have erred in finding that the appellant was financially independent with the assistance of her church. As Ms Peterson argued, the appellant has worked in the past, and the judge in no sense can be said to have based his findings on the appellant supporting herself by the proceeds of her theft from the elderly lady.

23. The essential difficulty I think with the judge's decision is the failure to address the fact of the Irish nationality of the appellant's child and the ability of the two to move to Ireland and for the appellant to act as her daughter's carer there. It is, I think, clear that, bearing in mind T's Irish nationality, since the appellant is her mother with sole care she will have a derived right of residence in Ireland, applying Zambrano principles. This has clear relevance to the Article 8 issue in this case. The judge's evaluation of Article 8 is in many ways a very careful and thorough one. But I do not think that those findings can in essence be transposed, as Ms Peterson argued, to the situation of removal to Ireland. The parent/child relationship would of course be continued there, and although they would be away from the support that they have in the United Kingdom and would have to make a fresh start, there is no question of them being required to go to Nigeria, and in that regard I can see faults in the judge's conclusions as to the best interests of the child in the context of the relevant legal tests. But the Article 8 issue in this case, in my judgement, has to be evaluated in the context of the appellant and her daughter living in Ireland, and to that extent the decision of the judge in failing to deal with that point is an error of law. As a consequence the Article 8 issue will have to be reconsidered with an evaluation of this matter factored into it.
24. I invite the parties' representations as to the proper forum for this. It may well be that the best outcome is for the matter to go back to the same judge who decided the case earlier for him to factor into his reasoning the Ireland issue as one might call it. I will decide that point after giving the parties fourteen days from the date on which the decision is sent out to make representations on the matter.
25. No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Allen