



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04136/2016
HU/04141/2016

THE IMMIGRATION ACTS

Heard at Field House
On 6th April 2018 and 7th September 2018

Determination Promulgated
On 17th October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

[S H]

[A E]

(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms J Heybroek and Ms B Jones (counsel)
For the Respondent: Mr S Walker (Home Office Senior Presenting Officer)

DECISION AND REASONS

1. These are the appeals of [SH], a citizen of Nigeria born 25 December 1987, and her son [AE] (born 25 June 2012), against the decision of the First-tier Tribunal of 24 November 2017, dismissing their appeals against the decision of the Secretary of State to refuse their human rights claims. I shall refer to the First Appellant as “the Appellant” for convenience.

2. Central to the entitlement of the First Appellant to remain in the UK are the connections and status of her two children, [AE] (the Second Appellant) and [KD] (born 4 May 2014), her two sons from different fathers. [AE] was the son of [SI] and was a Nigerian citizen; [KD] has consistently been said to be the son of [NA], a British citizen (and thus British himself), though until the continuation hearing before me this critical aspect of the family's case was disputed.

Error of law hearing

3. The immigration history supplied by the Respondent notes that there was no corroborative evidence to support [SH]'s asserted arrival date; she first came to light in February 2009 when she made an application as the partner of an EEA national, though this was subsequently withdrawn due to a change in her circumstances. She applied for leave on long residence grounds in May 2010, an application which was refused on 2 September 2010 and again on 22 March 2011 following a reconsideration.
4. She applied for leave on human rights grounds on 6 May 2011, an application she pursued on 21 August 2012, before it was refused on 25 September 2012. None of the refusals so far bore a right of appeal. Various Pre Action Protocol letters from May 2013 to November 2014 sought a reconsideration of the September 2012 refusal. On 25 November 2014 the Secretary of State sought an update of her circumstances. She made a further application on human rights grounds on 5 December 2014 on behalf of herself and the children. Further Pre Action Protocol letters pursued this application's progress.
5. The Secretary of State enquired as to whether she wished to claim asylum or to be referred to the National Referral Mechanism, but she declined. Having learned of the claimed British citizenship of [KD], she was invited to supply evidence of his parentage via DNA evidence, but she informed the Respondent that he had been uncooperative.
6. [KD] had been issued with a British passport by the Passport Office on 24 July 2014. The application had provided certified copies of this document, but the original was ultimately sent to the Presenting Officers' Unit prior to the original 17 May 2017 hearing, but then not produced thereafter; it transpired that the passport had been lost, as was eventually admitted by the Respondent at the adjourned hearing on 9 November 2017.
7. The First-tier Tribunal summarised the First Appellant's human rights claim thus. [SH] had been brought to the UK in 1998, aged eleven, by a woman from her home village, described as the "village aunt", on the pretext that she was going to meet her sick grandmother. However once she arrived here she was used as a childminder for the woman's own children. She was abandoned when the family moved out and forced to seek the local church's support, who placed her in the care of a Nigerian couple, the [O]s, with whom she lived until reaching adulthood. She had nothing to return to in Nigeria having left the country some 18 years earlier and that all her ties were in the UK.
8. Their applications were eventually refused on 4 February 2016 because

- (a) It was not accepted that [KD] was a British citizen: accordingly both children fell to be considered as relatively young Nigerian nationals with limited ties to the UK given their tender age, and there was no reason to think that adequate educational facilities would not be available to them;
 - (b) There was no evidence proving [SH]'s UK residence prior to 2002, when she was issued with a NHS Medical Card;
 - (c) Any private life [SH] had established in the UK was on a precarious footing given her lack of immigration status;
 - (d) There was no evidence to confirm that the [O]s had raised her as a daughter.
9. The First-tier Tribunal heard oral evidence and made findings of fact upon it, concluding that it was difficult to place much weight on the First Appellant's word alone. Particular emphasis was placed on these factors:
 - (a) There was a significant discrepancy in the evidence as to the circumstances of [KD]'s birth as to when [NA] was contacted: Mr [O] stated this was before they left for the hospital, whilst the First Appellant had said she rang the father in the morning.
 - (b) Whilst [KD] held a British passport, it appeared to have been lost having been sent to the Home Office, and given the doubts raised as to his paternity by the Respondent, it was necessary to make a finding as to his nationality based on the balance of probabilities: there were discrepancies between the birth certificate (stating he was a bus driver) and Mr [O]'s evidence as to his occupation (saying he was a security officer), and the circumstances of his disappearance were surprising, given his original willingness to have his details on the birth certificate; no further steps had been taken to trace him, for example by seeking maintenance from him. In these circumstances the mere fact that the Passport Office had accepted [KD] as British was insufficient. Whilst it was *possible* that [NA] was his father, this was not established to the standard of the balance of probabilities.
10. There were some matters as to which the First-tier Tribunal considered it impossible to make findings of fact:
 - (a) There was no independent evidence of the circumstances in which [SH] was brought to the UK: no finding was possible as to whether false pretences were used, no asylum or trafficking claim having been brought;
 - (b) The date of her arrival here could not be placed beyond 2002, when the Secretary of State accepted that she might well have been present, and as was consistent with the evidence that she had attended school in Walthamstow at that time; the inconsistency mentioned regarding the circumstances of [KD]'s birth was again troubling.
11. Determining the appeal based on these findings, the First-tier Tribunal concluded that the children were well cared for by their mother. There was no information regarding [AE]'s well-being, but there was no reason to believe he was not thriving in the care and devotion of his mother and surrogate grandparents, and no evidence

that either child was developing other than normally. Having regard to the *EV Philippines* factors, the children were healthy and without independent roots in the community that might be expected during teenage years, and Nigeria was the country of their heritage with which the [O]s retained strong links and where their mother was born and raised; they had been brought up within the Nigerian diaspora. In the circumstances it was not unreasonable for the children to return to Nigeria.

12. Even if [KD] was a British citizen, he had no contact with his father and it was reasonable to expect that he be raised by his Nigerian mother with his half-sibling.
13. Grounds of appeal contended that
 - (a) It was not open to the Secretary of State to go behind the issue of a British passport to [KD], particularly given her responsibility for its subsequent disappearance;
 - (b) The discrepancy on which so much weight was placed as to the timing of the notification of [KD]'s birth to the father was predicated on an error of fact: Mr [O] had in fact said he had not been sure whether the father had been present in the labour suite as he had left the hospital at times during the night: this was a highly material error given it was central to the adjudication of the Appellants' case on paternity and thus nationality;
 - (c) The First-tier Tribunal had found that there was an inconsistency in the evidence of [KD]'s father involvement in his son's life, i.e. between what the Judge perceived as his original anxiety to get his name on the birth certificate and to obtain a British passport for his son, as contrasted with his subsequent disappearance. However this failed to take account of the evidence that father and son had an extant relationship for a brief period following his birth and that the father only subsequently became disinterested once financial support was sought, and it was perverse to fail to consider that parental responsibility may fluctuate over time – furthermore, the possibility that he might have been traced via the assistance of the child support agency pursuant to an application for child maintenance against him had not been raised at the hearing.
14. Permission to appeal was granted by the First-tier Tribunal on 11 January 2018 on the basis that it was arguable that the issue of a passport by the relevant domestic authority had established [KD]'s citizenship.

Error of law hearing - Findings and reasons

15. At the start of the “error of law” hearing I indicated that to my mind, without having heard submissions but expressing a preliminary view, the grounds of appeal were made out. If the Passport Office has issued a person with a passport, that recognises that they have a viable claim to British citizenship. Whilst that does not necessarily prevent the matter being re-visited in the future, it seemed to me that the Secretary of State must establish some relevant change of circumstances based on cogent objective evidence before so doing.
16. Mr Walker accepted that the First-tier Tribunal had been wrong to treat the Appellants as bearing the burden of proof in establishing [KD]'s nationality. He

pointed out that the decision was also confusing in that there was no clear-cut concluded finding on the question of nationality, which at one point was said to be incapable of determination. Ms Breybroek agreed.

17. I concluded that the First-tier Tribunal decision could not stand, being fatally flawed by virtue of these material errors of law.
18. Firstly, it was an error of law to place the burden of proof on the Appellants to establish [KD]'s nationality notwithstanding the prior issue of a British passport to him. Where the relevant authorities have already taken a decision recognising a particular entitlement, cogent reasons are required before a related government department comes to a different conclusion, see for example
 - (a) Burnett J in *Ali* [2012] EWHC 3379 (Admin) §23:

“... having once been satisfied that an individual was entitled to a passport, the Secretary of State would need to advance cogent reasons that stood up to scrutiny why, on a later application, she was taking a different view.”
 - (b) Edis J in *Rahman* [2015] EWHC 1146 (Admin) §31:

“... for obviously sensible reasons, it requires cogent reasons to justify the refusal to renew a passport on the application of the person to whom the original passport was issued after an investigation.”
19. Secondly, the First-tier Tribunal failed to make a clear finding on the central issue of [KD]'s nationality in any event.
20. Thirdly, as noted above, the Judge below declined to make a concluded finding on the length of [SH]'s residence, essentially because of its perception that she lacked the right kind of documents to reliably corroborate her stay in the UK. However, this approach is inconsistent with relevant authority, for as stated by Beatson LJ in *Khan* [2016] EWCA Civ 416 §61 in an analogous context:

“First, as Mr Lewis accepted, there is no authority for such a restriction in legislation or the Immigration Rules. Secondly, as recognised, for example in *ZH (Bangladesh) v Secretary of State for the Home Department* [2009] EWCA Civ 8 at [3], the 14 year rule set out in Rule 276B(i)(b) is specifically directed to people who have managed to stay in the United Kingdom for 14 years or more without lawful authority, and is in effect an amnesty clause. It is likely that those in the United Kingdom without leave, and therefore without status, will have no official documentation, particularly in the early period of their residence. Thirdly, although most of the documents listed by the Secretary of State can be classified as "official" in the sense that they are from institutions and not individuals, a tenancy agreement and a letter from a landlord, which are listed, are difficult to classify as 'official'.”
21. Finally, in determining the appeal on the alternative basis that [KD] *was* a British citizen, the First-tier Tribunal failed to take account of its own findings that he had lived with (and must therefore be presumed to have a significant relationship with) the [O]s, whom the First-tier Tribunal styled as his “surrogate grandparents”, which was clearly relevant when determining his best interests and whether there were powerful reasons to justify thinking his departure reasonable.

22. As my “error of law” decision made clear, whilst the appeal had become relatively complex in law, the fact-finding required to complete its determination was foreseeably limited. Thus it was appropriate to retain the appeal for a continuation hearing in the Upper Tribunal.

Continuation hearing

23. Re-determining the appeal, it is appropriate to have regard to rather more of the evidence that was available than was necessary hitherto.
24. In her witness statement the Appellant set out the circumstances of her arrival in the UK. Her parents passed away when she was young and she was raised by her grandmother. She was brought here by a village “aunty” and she did not know what visa was obtained for her. Following her arrival in the UK she was required to stay with that “aunty”, her husband and their three children. The children were then aged five and seven, and one was a young baby. She was forced to look after the children and deprived of social interaction and made to do household chores, like laundry, cooking, and ironing, and was treated like a maid. She missed school and the chance of making friends. Her “aunty” maintained a story that her grandmother was very sick and unable to talk to her; eventually she was told that her grandmother had passed away. Some time afterwards she was told that the family was moving and that she could not accompany them. They promised to return for her subsequently. They left some food and coins for her support. However, they never returned. After a month the means of support they had left her ran out. She asked a neighbour for help, and was quickly forced to beg on the street.
25. Senior Apostle [D], Minister in charge of the St Mary in Hackney church, wrote a letter stating that he first met the Appellant in 1998 at the church. Some time later, a family that was part of the congregation told him of her difficult circumstances, having arrived in the UK and been forced to flee from her guardian here. The church had put in place temporary care arrangements pending her introduction to the [O]s.
26. Mr [O] wrote a letter on behalf of himself and his wife setting out that they first met the Appellant at St Mary Church in Hackney in Autumn 2001. They learned of her troubling past from the Minister there who explained that he was unable to care for her. They had been moved by her story and decided to take her in, not least because they were impressed by the enquiry that the church was conducting via community leaders in her home area. They arranged for her to start school at [~]. She left home suddenly in 2003; they subsequently learned from the Minister that did not wish to return to their home.
27. The Appellant's friend [SC] wrote a letter setting out that she came to know the [S] (who I understand to be the “aunty” and her husband), who then lived at [~] North London, from 1997. She knew [SH] from around that time. Some time later [SH] got in touch, devastated to have been abandoned by her guardian who had travelled on her own, and hoping that [SC] would look after her. [SC] had been unable to do so, having three boys to care for at the time, but eventually introduced her to Pastor [D] at the St Mary in Hackney church.

28. At the outset of the continuation hearing, the relevant issues were agreed by the parties. The Appellant potentially had three avenues to success under the Immigration Rules: the 20-year long unlawful residence route, the reasonableness of her British citizen child's relocation to Nigeria, and the very significant obstacles to integration that she would face there given the length of her absence abroad.
29. Further evidence was adduced as follows:
 - (a) From the Appellant, a short proforma record of an assessment of [AE]'s well-being as at February 2018 from the Social and Communication Clinic at the local NHS Trust, which recorded the family's concerns about [AE], noting that the family had reported him as scratching himself; he had been diagnosed as being on the Autistic Spectrum Disorder, and that he had anger issues;
 - (b) Mr Walker provided a disclosure response from HM Passport Office. He confirmed that in the light of the acceptance therein of the British citizen father's relationship with his son, the Secretary of State accepted that the Appellant was a British citizen, having been born in the UK to a British citizen father.
30. The Appellant gave evidence. Social services were presently assisting her and had consistently found her accommodation. [AE]'s school had helped to access the Social and Communication Clinic regarding his behaviour concerns. She only had faint memories of life when she arrived in the UK as it was so long ago. She remembered her age when she came, she was around eleven. She remembered the excitement of her arrival at a new place to live with her relatives. She had been living in the UK for very many years.
31. Cross examined she said that she remembered being put into school at [~] in Walthamstow some time after her arrival in the UK: her guardian had come to realise that it was unlawful for her not to attend school. This was about four years after her arrival. Before then, she had been required to look after the children constantly. She had not had any contact with [KD]'s father since the boy was aged around one, and she knew nothing of his present circumstances.
32. Mr Walker relied on the refusal letter. He confirmed that in the light of the further information from the Passport Office there was no reason to question [KD]'s entitlement to British citizenship. He accepted there was now corroborative evidence of residence in the UK for a longer period than the Secretary of State had accepted. It was undeniable that the Appellant had very strong ties in this country given she had lived for much of her life here.
33. Ms Jones provided a skeleton argument in which she usefully set out the relevant legal framework and pointed to the salient evidence supporting the Appellants' claims. Orally she submitted that the Appellant's evidence was generally credible, detailed and plausible, and the lack of detail she could provide about her early years in the UK when she was forced to care for her extended family's young children. Given the ties that she had inevitably established here over the last twenty years, and those of the two children including a British citizen child, the family's relocation

would be unreasonable. In any event she would clearly face very significant obstacles to integration back in Nigeria.

Continuation hearing - Findings and reasons

34. I was impressed by [SH]'s oral evidence. She gave the impression of seeking to answer the questions put to her as honestly as possible. Her answers were consistent with the documentary evidence and plausible in the general context of her narrative. Her account's veracity was not challenged by Mr Walker in cross examination or submissions, understandably given its general cogency. I accordingly accept that the history she advances is a credible one.
35. In the light of my general impression of her evidence, I accept her assertion to have first arrived in the UK in 1998 and to have subsequently resided here for 20 years. It is corroborated by the letters from a Minister, who states he has known her from around 1998, as well as by the evidence of [SC]. Her evidence is also generally supported by that from Mr and Mrs [O].
36. It is also clear that she has sole parental responsibility for [KD], who is now established as a British citizen child. [KD]'s birth certificate records his full name as [KD], that his father was [NA] and his mother was [SH]. The Appellant has no contact with his father, and has had no contact with the father since [KD]'s first year.
37. I also accept that [AE] is a somewhat troubled child, given the evidence from the Social and Communication Clinic. This is unsurprising given the difficult conditions in which the Appellant and her two young children have lived.
38. I proceed to remind myself of the relevant legal framework. The Immigration Rules provide:

“Requirements to be met by an applicant for leave to remain on the grounds of private life

276ADE. The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant: ...

(vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK”

39. Sales LJ in *Kamara* [2016] EWCA Civ 813 explained that the concept of integration

“... is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a

variety of human relationships to give substance to the individual's private or family life."

40. It is first appropriate to assess the Appellant's by reference to those Rules. It seems to me that this is a case where she would face very significant obstacles to integration back in Nigeria. She has not lived there for over 20 years. It is inconceivable that she could have any useful memory of her life there to draw upon now, and I place particular weight on the fact that the church conducted enquiries into her original circumstances abroad before making arrangements for her care in the UK. This to my mind corroborates her story to have been effectively abandoned to her fate in the UK by any family members who were then responsible for her. If that was their attitude two decades ago, it is unlikely to have changed subsequently.
41. It may well be true that the Appellant has lived within the Nigerian diaspora to a significant degree thereafter. Certainly she has been supported by a church where it seems reasonable to assume that the congregation has strong connections there. But those are the very connections which were unable to locate family to look after her when she was a vulnerable child. I do not consider that she would have any meaningful social capital to draw upon, and she would be responsible for the welfare of two young children, for whom she would face a difficult choice between finding childcare without social or family support whilst she worked, or having no living by which to support them. It seems to me that she would accordingly face very significant obstacles to integration in the *Kamara* sense.
42. Accordingly her appeal succeeds under the Immigration Rules. Self-evidently the same thinking applies to young [AE], who would certainly not be better off than his mother when it comes to integration abroad.
43. For completeness, I also address private and family life outside the Rules. The Nationality Immigration and Asylum Act 2002 provides that certain considerations must be considered in immigration appeals where private and family life is in play.

"PART 5A

Article 8 of the ECHR: public interest considerations ...

117B 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 well-being 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 well-being 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.”

44. As was stated in *Agyarko* [2017] UKSC 11:

“Cases are not ... to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as the Master of the Rolls made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very compelling ... is required to outweigh the public interest", applying a proportionality test.”

45. When assessing reasonableness in the context of section 117B(6), Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 explained that that wider public interest considerations had to be taken into account when assessing the reasonableness of a child’s relocation, beyond its best interests. The fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise as was shown by the Secretary of State’s published guidance from August 2015 in which it is expressly stated that once the seven years’ residence requirement is satisfied, there need to be “strong reasons” for refusing leave, because after such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. Nevertheless, it may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling.

46. The Secretary of State has published a policy document, *Every Child Matters - Change for Children*, as statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children, which refers to the definition of this task found in section 11 of the Children Act 2004 and in the policy guidance *Working Together to Safeguard Children*, as “ensuring that children are growing up in circumstances consistent with the provision of safe and effective care;

and undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully.”

47. I accept that the children would face real hardship if they relocated abroad with their mother for the self-evident reasons already identified above. In any event, the departure of [KD] would be unreasonable, and contrary to the statutory guidance to promote his optimum life chances. Nothing could do so less than sending him to a country where he has never lived and where the advantages of British citizenship would be largely lost to him, dependent as he would be on a mother whose scarce social capital would make daily life very difficult. There is also the matter of [AE]’s UK connections, and his vulnerability as shown by the intervention by the Social and Communication Clinic cited above.
48. Furthermore, there is the question of the mother’s long residence here. Whilst she had not accumulated 20 years of residence in the UK before making the application (meaning she does not satisfy Rule 276ADE(iii)), she has nevertheless done so by the date of hearing before me. The fact that the Immigration Rules have identified two decades of UK residence as a significant milestone is relevant when determining the strength of her own private life here. The reality is that she knows nothing of life in Nigeria, and has lived for most of that part of her life which she can reasonably be expected to remember in the UK - from around the age of eleven until her early thirties. All her connections and friendships are here.
49. I accordingly find that the family’s departure to Nigeria would be a disproportionate interference with their private and family life rights, both within and outside the Immigration Rules.

Decision:

The appeals are allowed on Human Rights Convention grounds.

Signed:

Date: 11th October 2018



Deputy Upper Tribunal Judge Symes