



**Upper Tribunal
(Immigration and Asylum Chamber)
OA/06754/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at: Manchester
On: 6th December 2017**

**Decision Promulgated
On: 3rd January 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**AIO
(ANONYMITY DIRECTION MADE)**

Appellant

And

ENTRY CLEARANCE OFFICER, SHEFFIELD HUB

Respondent

Representation:

For the Appellant: Miss Akalezi (friend)
For the Respondent: Mrs Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria, born in 1994. She appeals with permission¹ the decision of the First-tier Tribunal (Judge Lever) to dismiss her entry clearance appeal on human rights grounds.

Anonymity

¹ Permission was granted on the 15th September 2017 by First-tier Tribunal Judge MJ Gillespie

2. This case turns on the presence in the United Kingdom of four children who are the subject of care orders by the Family Courts. I am concerned that the identification of the Appellant could lead to the identification of those children. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Background and Matters in Issue

3. This is a matter with a complex background, set out with admirable clarity by the First-tier Tribunal Judge. In short, the case history can be summarised as follows. The Appellant came to the United Kingdom in 2006 and lived here until 2013. During that period she was living with her partner, and the father of her four children, who were born in 2002, 2006, 2007 and 2009. She was subjected to domestic violence by her partner, including rape, physical assault and coercive and controlling behaviour. In 2013 the Appellant travelled to Nigeria, accompanied by the three children who had been living with her in the United Kingdom. At some point thereafter her former partner brought all four children back here, without her consent, leaving her in Nigeria. She has not seen them since.
4. Within a few months of the children's arrival in the UK the eldest daughter reported her father to social services for physical abuse. Care proceedings were instituted and the children were removed from his care. Final care orders were made in respect of the children by HHJ Jenkins in July 2014, Judge Jenkins being satisfied that the children's allegations of regular physical abuse and neglect by their father were true. They are now in long-term foster care provided by Leeds City Council (adoption has been ruled out). Their father was sent to prison upon conviction for child cruelty. He was released from his sentence in mid-2015. He remains in the UK and has repeatedly sought, without success, to have the care orders rescinded or amended.
5. The Appellant has remained in Nigeria. She has however not given up on her children. Since 2014 she has sought various orders from the family court. She has asked for the children to be returned to her in Nigeria and when that failed has sought to gain entry clearance so

that she may be with them here. She has sought to increase the Skype contact that she currently enjoys with them. As Judge Lever notes her progress in these legal endeavours has been severely hampered by the fact that she has not instructed specialist lawyers, either in the family proceedings or in respect of her immigration appeals. She has been repeatedly refused entry clearance for lack of evidence. The application that led to the present appeal is a good illustration of the perils of proceeding without such legal advice. Made in 2015 the Appellant sought entry as a 'family member' within the meaning of Regulation 7 of the Immigration (European Economic Area) Regulations 2006, asserting that she should be given entry clearance to enable her EEA sponsors (the children) to exercise their treaty rights. As I think the Appellant now understands, that was an application doomed to failure since her children are not, for the purpose of the Regulations, EEA nationals exercising treaty rights. They are British and have never lived anywhere else in Europe. There was however another limb to her application: an assertion that it would be a disproportionate and therefore unlawful interference with the Article 8 family life of both her and the children if the ECO continued to exclude her from this country. It is that element of the decision that is the subject of the appeal before me.

The Decision of the First-tier Tribunal

6. The First-tier Tribunal accepted that there was a family life between the Appellant and all four children, arising from their past and present relationship and the fact that she is their biological mother. There had in the past been some doubt about that matter, since for a period at least the Appellant had participated in a concerted attempt to deceive the family court by agreeing that only two of the children were hers. The children's father had insisted (she says by threat) that she do so, he hoping that the two other children would be released from the custody of the local authority into the care of his then girlfriend, whom he falsely claimed to be their natural mother. That fiction came to an end with the production of DNA test results in November 2014.
7. The Tribunal further accepted that the continuing refusal to grant entry clearance amounted to an interference with – or lack of respect for – that family life. The question remained: was the refusal of entry clearance disproportionate?
8. In answering that question the First-tier Tribunal conducted a review of the material before it and the procedural history of the matter. It noted that the father of the children has proved to be a vexatious litigant who has dominated the proceedings in the family court, and that this had perhaps led to something of a neglect of the mother's position. This has been exacerbated by social services and the family courts apparently failing to understand the difficulties that she faces in terms of her immigration status (or rather lack of it). The Tribunal

found however that the Appellant has been her own worst enemy. She has made multiple applications to the family courts and without legal advice has repeatedly failed to understand the true position, namely that her prospects of having any kind of direct contact with the children are nil unless she cooperates with an assessment conducted by social services. Such an assessment could be conducted by Skype/telephone but so far attempts to do so have been unsuccessful. The Tribunal's conclusion is set out at paragraph 44 of its determination:

"I find when looking at matters carefully that refusal is not disproportionate in this case. The Appellant currently enjoys indirect contact with her children via Skype and potentially other means, such as telephone, emails, letters etc. I have referred to paragraph 34 of the judgement where the judge upon hearing the mother recorded that she sought unlimited and unsupervised indirect contact. It appears that she has largely got presently what she requires, namely the indirect contact and therefore refusal of entry does not breach any specific desire or wish that she raised before the judge. If such indirect contact is spasmodic because of the failings identified by the guardian then that can be rectified through correspondence.

I accept that she may also desire direct contact and indeed such may be beneficial to the children. However it is abundantly clear such can only follow an assessment by the local authority or suitability and circumstances. That has been the position throughout these proceedings and appears understandable. An assessment of the mother with a view to increasing contact is something that has been supported by the guardian and also referred to in the judgement. Indeed the judge made himself reference to the desirability of an increased involvement of the mother but the need for an assessment. It is clear therefore that the mechanics of an assessment and the timetabling of such needs to be put in place as the first priority. There may be the need to make an application to the court in view of the Section 94(1) ruling to begin such an assessment and further to be clear what is proposed by the mother to be the end product of an assessment if it should be successful. All of those essential matters can be put in motion by the Appellant from Nigeria. Again I would stress that she should seek legal aid assistance if available to get experienced legal advisors to assist in that matter. If she is able to get an agreement from the local authority for an assessment to be done and a timetable for such an assessment then that would be cogent evidence to support an application to come to the UK for the purposes of such; she would also have that written evidence to place before an Entry Clearance Officer in making such an application. Not only are those matters

that can be put in motion by legal representatives in the UK but the Appellant herself has already demonstrated an ability to communicate from Nigeria with both the court and local authorities and no doubt would have a similar ability to communicate with lawyers. She was represented before me by [MacKenzie Friend] Miss Akalezi and therefore a refusal of entry clearance does not restrict her rights and ability in this matter”.

9. For the benefit of the Appellant I can summarise that part of the First-tier Tribunal’s determination as follows:

- i) The Appellant already has what she last sought from the family courts, namely indirect contact by Skype etc;
- ii) That contact cannot increase – even if she were present in the UK – without further Order by the family court;
- iii) The family court will not alter the present arrangements unless there is an assessment of the Appellant;
- iv) Everyone agrees that this would be a good thing;
- v) An assessment could take place over Skype and telephone. That this is so is demonstrated by the fact that the Appellant has managed to maintain contact with the children, speak to Ms Akalezi, the courts and social services via such means;
- vi) In order to obtain entry clearance with a view to having direct contact with her children the Appellant should participate in a Skype assessment. If the assessment is positive she would then be able to use written evidence of this to make a new, Article 8 based, application for entry clearance.

The Appeal

10. As I have noted the Appellant does not have legal representatives in the UK. She does have the benefit of assistance from Ms Akalezi, a woman who has sought over a number of years to help the Appellant, notwithstanding the fact that she has never actually met her. Ms Akalezi was, ironically, introduced to the case by the Appellant’s ex-partner, who asked her to ‘speak to the Appellant’, ie to participate in his plan to pressurize her. Once Ms Akalezi heard the Appellant’s version of events she immediately switched sides and has been assisting her ever since. Although she is a qualified lawyer she has no expertise in either family or immigration law and is not practising. It was Ms Akalezi who drafted the grounds of appeal. I intend no

disrespect to her if I do not deal with each point made individually. As she agreed during the course of the hearing before me the strongest ground is this: in its assessment of proportionality the First-tier Tribunal failed to make clear findings on the best interests of the children, contrary to s.55 of the Borders, Citizenship and Immigration Act 2009.

Discussion and Findings

11. Given the history of this matter it is perhaps unsurprising that the First-tier Tribunal focused on the proceedings thus far in the family court. It was working with limited information and was rightly concerned that it did not have all of the available information to hand. Reading the determination as a whole it appears to me that the Tribunal conducted a reasonableness review of the ECO's decision. It was clearly not unsympathetic to the position of the Appellant, or her children, and in the passage I cite above the Tribunal offers some clear recommendations to the Appellant on how she might proceed. What it did not do was to make findings on whether it would be in the best interests of these children to allow their mother into this country. For the reasons I set out below the answer to that question, on the evidence before the Tribunal, was clearly affirmative; I am further satisfied that in the circumstances of this case, that should have been a finding determinative of the question of proportionality.

A Primary Consideration

12. Article 8 of the European Convention on Human Rights provides:
 - "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
13. In Beoku-Betts [2008] UKHL 39 the House of Lords held that in decisions affecting the family life of migrants, decision-makers had to consider the Article 8 rights of all family members involved. Thus a decision directly impacting upon a mother would also have to take into account the indirect impact upon her children.
14. The relevant parts of section 55 of the Borders, Citizenship and Immigration Act 2009 read:

“(1) The Secretary of State must make arrangements for ensuring that –

a) the functions mentioned in sub-section (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom

(2) The functions referred to in sub-section (1) are –

a) any function of the Secretary of State in relation to immigration, asylum or nationality;
b) any function conferred by or by virtue of the Immigration Acts on an Immigration Officer ...

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of sub-section (1).

15. The duty imposed by this section was to be applied in this case within the context of Article 8. The best interests of the child was to rank as a *primary* consideration in the proportionality balancing exercise. This required the Tribunal to consider that matter first, to consider all information relevant to the question, and to place significant weight on its own conclusions in the balancing exercise: ZH (Tanzania) [2011] UKSC 4, AJ (India) [2011] EWCA Civ 1191, E-A (Article 8 –best interests of child) Nigeria [2011] UKUT 00315 (IAC), MK (best interests of child) India [2011] UKUT 00475 (IAC), JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC).

The First-tier Tribunal’s Approach

16. The First-tier Tribunal did not ignore the position of the children. It had close regard to the various materials before it relating to the family court proceedings. The determination refers *inter alia* to the evidence of the Children’s Guardian Catherine Hanlon, to the CAFCASS review notes and to the judgement of David Salter, a Judge sitting in the Family Court at Leeds. It makes reference to direct contact with their mother being potentially beneficial to the children, to her increased involvement in their lives being supported by the Guardian, and to the fact that the Judge in the family court regarded that outcome as desirable. The determination also refers, repeatedly, to the importance of the Appellant instructing specialist solicitors who can assist her. In its final analysis of proportionality, however, the determination contains no global assessment, or clear finding, on whether it would be in the best interests of the children to

admit their mother now. Instead the conclusion is reached that because it is *possible* for her to pursue her case - and contact with her children - from Nigeria, the decision cannot be said to be disproportionate. Instead of placing the evaluation of what would be *best* for the children at the centre of its reasoning, the Tribunal focused on the adequacy of the status quo. I am satisfied that that was an error in approach. In omitting to conduct a discrete 'best interests' assessment the Tribunal overlooked the primary consideration in the proportionality balancing exercise: was it *better* for the children if their mother were to be granted entry clearance?

Best Interests

17. The Tribunal is not being asked to decide whether it would be in the children's best interests to be returned to their mother. That is a question that can only be answered by the family court. Instead the Tribunal is asked, as a preliminary matter, to decide a much narrower question. Would it be in their best interests if she were given leave to enter the UK?
18. If the Appellant were to be given leave to enter the UK, for a limited period defined by the Entry Clearance Officer, it would enable her to do three things.
19. First and foremost it would enable her to meaningfully engage with the assessment process rightly identified by the First-tier Tribunal as being the largest obstacle to family reunification. This was a point repeatedly emphasised by Ms Akalezi. The assessment process was something which was *possible* using 'modern means of communication' but would obviously be far easier, and preferable, to perform in person. The children's guardian Catherine Hanlon had already recorded the difficulties that social workers had encountered in trying to conduct their assessment 'on-line'. The connection was difficult and the Appellant had apparently become frustrated and afraid that she was being misunderstood. In observing the interaction between mother and children in Skype contact it was apparent that the younger children were easily distracted and that they found it difficult to sit and talk using this medium. If the Appellant were physically present that would dramatically change the nature of the contact, and social workers would - importantly - have the opportunity to see the children interacting with their mother naturally. If the assessment could be conducted in person it would have the twin benefits of being more practical, and more valuable.
20. Second, although this is a more marginal consideration, it would make it far easier for the Appellant to instruct solicitors. It is apparent from the Judgement of Judge Salter that the Family Court would have been greatly assisted by the Appellant having specialist representation. It is in that context that this factor plays some role in the assessment of the children's welfare. It is plainly in their best

interests that the Family Court have the benefit of clear evidence, and instructions, from their Mother.

21. Third, it would mean that it would be possible for direct contact to resume. The First-tier Tribunal rightly identified that there was at present a barring order in place by the family court to the effect that neither parent can make an application to alter the terms of the care orders without the consent of the court (the 's91 (14) ruling', a reference to s91 of the Children Act 1989). It would appear from Judge Salter's judgement that this has been put in place to prevent any further vexatious litigation from father, and misguided applications by mother (for which see above). It is however clear that the children themselves would like to see their mother, and on the evidence before the Tribunal it is very difficult to see that this would be opposed by either the Local Authority or the family court. The Children's Guardian Catherine Hanlon supports their wishes; indeed she wrote to the ECO to that effect. As the First-tier Tribunal determination notes such direct contact was regarded as desirable by Judge Salter. I note the guidance given by Lady Hale in ZH (Tanzania) [2011] UKSC 4 at paras 34-38: where children are old enough to express their views, these are an important indicator of where their best interests lie.
22. Conversely it is difficult to see the downsides for the children of her being granted entry. The only potential difficulty I can foresee is that they might be confused, and thereby distressed, by the contact, but that would be a matter for children's services. Any contact with their mother will remain regulated by the local authority, whose careful management of their cases will continue under the supervision of the family court. It may be that in the final analysis the children are not returned to her care, but surely it must be in the best interests of the children that they are given a realistic opportunity to reunite their family.

Proportionality

23. In my assessment of proportionality I must start with the Immigration Rules, in particular Appendix FM and the provisions for 'family life as a parent'. It is common ground that the Appellant cannot meet the requirements therein, primarily because of paragraph E-ECPT.2.4 (a) which requires her to either have sole parental responsibility or direct access agreed by the full-time carer or the family court. I start with those Rules because they are an expression of where the Secretary of State, and parliament, considers that the balance should be struck. It is in the public interest that persons who cannot meet the requirements of those rules should be refused entry.
24. Applying the other public interest factors set out at s117B of the Nationality, Immigration and Asylum Act 2002, I find that the

Appellant can speak English, a factor that would better aid her integration (I have no formal confirmation of her ability to speak English but note that communication with Ms Akalezi, the children and social workers has all taken place in English). I am told that she has very little money. She would therefore be entirely reliant on the support of others (or the state) should she be come to the UK and that is a matter that weighs against her in the balancing exercise, since she is plainly not financially independent.

25. In her submissions Mrs Aboni asked me to consider that the Appellant may have ulterior motives in seeking entry clearance: she may not be interested in seeing her children at all, and could simply be using them as a vehicle to gain entry to the UK. There was absolutely nothing in the evidence before me to support such a contention. The Appellant has, since 2014, made multiple and continual efforts to maintain contact with her children. She spent at least one year trying to persuade the family courts to return the children to her *in Nigeria*. Her admission would be entirely discretionary and obviously it would be open to the Secretary of State to refuse to extend her stay, and to remove her from the United Kingdom, in the event that her parental relationship with the children should cease.

26. It is trite immigration and human rights law that a 'best interests' finding will not necessarily demonstrate an action to be disproportionate or otherwise. In this case however I am satisfied that it assumes such significance that it outweighs the public interest as summarised above. This is a paradigm case in which the UK's Article 8 obligations can only be fulfilled 'outside of the rules'. These British children have been through what must have been an extremely difficult time. They have witnessed domestic violence against their mother, endured forced separation from her, had direct violence visited upon them by their father, and have been taken into foster care and separated (in twos) from each other. The Appellant herself was the victim of a prolonged campaign of domestic abuse. She was, it is now not in issue, under the coercive control of her former partner who deliberately returned the family to Nigeria with the express intention of separating the Appellant from her children. It is possible for the Appellant to pursue her case from Nigeria, but I have found that it would be preferable, that is to say in the *best interests* of the children for her to be granted entry clearance in order that she can be assessed in person by social services, and better participate in the family proceedings with a view to resuming direct contact. I am satisfied, having given due weight to the public interest in maintaining immigration control and protecting the economy, that in the exceptional circumstances of this case it would be appropriate to allow the Appellant's human rights appeal. To refuse her entry would be to show a disproportionate lack of respect for the family life that she shares with her British children.

Decision

14 The making of the First-tier Tribunal decision involved an error in approach such that the decision is set aside.

15 The decision is remade as follows: “the appeal is allowed on human rights grounds”.

16 There is an order for anonymity.

Upper Tribunal Judge Bruce
29th December 2017