



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11451/2016

THE IMMIGRATION ACTS

Heard at Liverpool
On 23 July 2018

Decision & Reasons Promulgated
On 24 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

FUNMILAYO [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Osobowale, Counsel instructed by AB James Solicitors

For the Respondent: Mr S. Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Nigeria whose date of birth is 20 March 1983, has been granted permission to appeal on Article 8 ECHR grounds only from the decision of the First-tier Tribunal dismissing her appeal against the decision of the respondent made on 2 October 2016 to refuse her protection and human rights claims, which she had pursued primarily on the ground that she had a well-founded fear of her family forcibly inflicting tribal facial markings on her three children in the event of her and her Nigerian partner returning to Nigeria with their children, who are also Nigerian nationals.

2. The First-tier Tribunal discharged an anonymity direction previously made in favour of the appellant and the dependants on her asylum claim (her partner and their three children), and I was not asked to restore an anonymity direction for these proceedings in the Upper Tribunal. As it is not necessary for me to identify the children and their father by name, I do not consider that an anonymity direction is required to protect the children from harmful publicity.

The Reasons for the Grant of Permission to Appeal on Article 8 Grounds Only

3. On 27 February 2018 First-tier Tribunal Judge Hodgkinson gave his reasons for refusing the appellant permission to appeal against the protection claim brought on behalf of the three children, but for granting permission to appeal on the Article 8 elements of the grounds:

“Many of the contentions raised, on their face, amount to no more than a disagreement with the Judge’s decision. As to the balance of the grounds in relation to protection issues, the Judge’s analysis on available evidence, and conclusions thereon, is entirely sustainable. However, it is arguable that the Judge’s assessment of the best interests of the children, with particular reference to the sole qualifying child, is inadequate, thereby disclosing an arguable error of law.”

Relevant Background

4. The appellant entered the UK on 24 September 2007 on a student visa. She extended her leave on two occasions until July 2010, when an application for further leave to remain as a student was refused.
5. The appellant and her family applied for leave to remain in May 2012 and the application was refused in December 2013. The appellant appealed against the refusal, and her appeal was dismissed by the First-tier Tribunal on 29 May 2014. It was conceded by her representative that the appellant had breached the Rules by using a previously used CAS number. It was found that she had no cause for complaint in relation to earlier proceedings, and that there was no merit in the complaint that she had been prevented from making valid applications for further leave to remain as a student by the late return of documents. She and her husband were found to be neither plausible nor truthful with regard to their evidence that they no longer had effective ties to Nigeria.
6. In further representations made on her behalf to the Removals Case-work Department of the Home Office on 24 December 2014, the appellant’s previous representatives raised for the first time the threat of the children being forced to undergo tribal marking in Nigeria. The appellant did not however claim asylum on this ground until 20 April 2016, when she was given a screening interview.
7. On 2 October 2016 the respondent gave her reasons for refusing the appellant’s protection and human rights claims. On the topic of the children’s best interests, the respondent relied on the general principle that the children should grow up with their family in their own cultural identity wherever possible. She considered that the

children's best interests were to be kept with their parents. While they might not be of the same standard that might be enjoyed in the UK, education and medical facilities were available in Nigeria, and no medical conditions or welfare issues had been raised or identified with respect to the children. Accordingly, the best interests of the children were to return to Nigeria with the appellant and her husband.

8. The appellant appealed against the refusal of her protection and human rights claim, and each of her dependents also appealed. The three children bear the surname of their father, who was the second appellant in the consolidated appeals heard in the First-tier Tribunal by Judge Hudson. The oldest child, Oreoluwa, was born in the UK on 3 July 2005. The middle child, Samuel, was born in the UK on 20 April 2012, and the youngest child, Josephine, was born in the UK on 18 February 2015. They were respectively the third to fifth appellants in the appeals heard in the First-tier Tribunal by Judge Hudson.

The Hearing Before, and the Decision of, the First-tier Tribunal

9. The appeals of the appellant and her dependants came before Judge Hudson sitting in the First-tier Tribunal at Manchester on 8 February 2018. Both parties were legally represented. The Judge received oral evidence from the appellant.
10. In her subsequent decision, the Judge gave detailed reasons at paragraphs [12]-[23] as to why she did not accept that the appellant or her dependents were at risk of persecution upon return to Nigeria. At paragraphs [24]-[29], the Judge addressed the human rights claims of the appellants, beginning with a consideration of whether either parent qualified for leave to remain under the Rules. Having answered this question in the negative, the Judge turned to consider an Article 8 claim outside the Rules.
11. At paragraph [26], she said that he had been told that the appellant's partner had his own ministry and both of them were committed to charitable and religious endeavours in the UK. Given what she considered to be dishonest evidence, she was unwilling to accept this on mere assertion. Although she had seen some photographs, documentary support was absent when it could easily have been submitted. But she accepted that the two older children had friends and were engaged in education. Accordingly Article 8 was engaged and potentially interfered with.
12. At paragraph [27], she observed that the oldest child, Oreoluwa, was now 8 years old. Accordingly, she accepted that to that extent she met the criteria of Rule 276ADE(1)(iv). The only remaining issue was whether it would be reasonable to expect her to leave the UK. In making a proportionality assessment under Article 8, she said that the best interests of the child must be a primary consideration. It was clearly in the best interest of the child to enjoy the care and support of his or her parents and to grow up within their cultural identity. It was reasonable to expect that the children should reside with their parents in Nigeria, and there was no evidence that the family had established a private life in the UK such as to make it unreasonable for them to be relocated back to Nigeria. The children were well cared for by their parents in the UK, and they would continue to be well cared for in Nigeria. They spoke Yoruba, having

learned this language from their parents in the UK. Although the children were born in the UK, and the eldest child was now at school, she was only eight and her life was still very much tied up with her family and within the home. This also applied to the middle child, who was aged five. The Judge continued: *"I further accept that she and her younger brother are popular members of their class and would be missed in removed. Whilst I accept that the elder child's education would be disrupted by removal to Nigeria, the maintenance of immigration control and the public interest in removing over stayers weighs against that disruption. The youngest child is nearly three and although she attends nursery, her attachments will be largely within the family unit. In my view, these factors provide good reason to conclude that any interference with the family's article 8 rights [is] in accordance with the law, in pursuance of the legitimate aim and proportionate to that aim."*

The Hearing in the Upper Tribunal

13. At the hearing before me to determine whether an error of law was made out, Mr Osobowale submitted that the Judge had erred in her approach as she had failed to remind herself that section 117B(6) applied, and that Oreoluwa was a qualifying child. Following **MT & ET Nigeria [2018] UKUT 00088 (IAC)**, there would need to be powerful reasons as to why it was reasonable to expect a qualifying child to leave the country, and the Judge had failed to identify such powerful reasons.
14. On behalf of the respondent, Mr Bates submitted that it was self-evident that the Judge had accepted that the eldest child had accrued over seven years' residence and was a qualifying child. Oreoluwa did not have a strong private life claim, as at the date of the hearing she was still 18 months short of being eligible to apply for naturalisation as a British citizen by virtue of having accrued 10 years' residence in the UK. **MT & ET** was readily distinguishable, as the private life claim of the child was much stronger in that case. In this case, the adverse immigration history of the mother clearly constituted a sufficiently powerful reason as to why it was reasonable for the qualifying child to leave the country.

Discussion

15. The main issue in the appeal was whether the children's wellbeing and welfare would be significantly imperilled by the return of the family unit to Nigeria. The Judge gave fully sustainable reasons for attaching no credibility whatsoever to the protection claim brought on their behalf, and it will be noted that she made a finding of dishonesty against the parents.
16. I consider that the Judge's assessment of the best interests of the eldest and qualifying child was adequate in the circumstances. Although the Judge referenced Rule 276ADE(1)(iv) rather than s117B(6), the question arising under both is the same, and it only needs to be answered once. The Judge recognised that there were best interest considerations militating in favour of the eldest child remaining in the UK. She accepted that Oreoluwa enjoyed her education and had been given significant responsibility at school. She accepted that she was a popular member of class, who would be missed by her fellow pupils; and she accepted that her education would be

disrupted by relocation to Nigeria. The Judge did not focus exclusively on the advantages of Oreoluwa returning with her parents and younger siblings to Nigeria.

17. The longer that a child has resided in the UK past the seven-year watershed, the more powerful must be the reasons for holding that it is nonetheless reasonable for the child to leave the UK, even if what is contemplated is the departure of the entire family unit. But, the converse is also true. The shorter the period of residence beyond the watershed period of seven years, the less powerful the reasons need to be (albeit not so as to fall below the bare minimum requirement of being “strong” or “powerful”), particularly where there has not been seven years’ residence from the age of four. The Judge characterised the factors discussed in paragraph [27] as providing a good reason to conclude that any interference with the family’s Article 8 rights was proportionate, and hence as providing a good reason as to why it was reasonable to expect Oreoluwa to leave the UK, which she identified as the key issue at the beginning of [27]. Nothing material turns on the fact that the reason was characterised as good, as opposed to being characterised as powerful. The Judge identified sufficiently powerful reasons as to why it was reasonable to expect Oreoluwa - then aged eight and a half - to leave the UK, which were the adverse immigration histories of both her parents.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed

Date 28 July 2018

Judge Monson
Deputy Upper Tribunal Judge