



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

Appeal Number: IA/11200/2013

THE IMMIGRATION ACTS

Heard at Field House

On 11 July 2014

Determination

Promulgated

On 14 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

**EUNICE ABIKE ADENIGBAGBE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Chipperfield, Counsel

For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION ON ERROR OF LAW

1. The appellant is a citizen of Nigeria born on 15 February 1952. She has appealed with the permission of the First-tier Tribunal against a decision of First-tier Tribunal Judge Bart-Stewart dismissing her appeal against the decision of the respondent, made on 21 March 2013, to remove her to Nigeria as an overstayer, having refused her application for leave on article 8 grounds.
2. At the heart of the appellant's case was that her adult son, Adewale Adeyemi Adeninbagbe, born on 5 July 1975, has serious mental health problems and the appellant's presence is necessary to care for him.

There was a previous appeal on human rights grounds brought by her son, determined by Judge Taylor, in which he found there was no family life between the appellant and her son. At paragraph 12 of his determination he wrote:

“According to the medical report, the appellant lived in accommodation for people with no access to benefits, although his mother gave the same address in evidence, it is not clear that she would have been eligible to live in the same accommodation as a visitor. I am not satisfied that the appellant has established family life in the UK with his mother.”

3. Judge Taylor found that removing the appellant's son would not cause a breach of either article 3 or article 8 of the Human Rights Convention.
4. The appellant's son has since claimed asylum and awaits a decision. Judge Bart-Stewart refused the appellant's application for an adjournment to await the outcome of the appellant's son's application. She treated the findings of Judge Taylor as her starting-point and found there was nothing before her to lead her to depart from those findings. In paragraph 20 she stated that she had set out the evidence in the appeal of the appellant's son in some detail and, *“there appears to be little that has changed since then. The facts are the same ... Nothing has been put before me to show a change of circumstances or reason to depart from [Judge Taylor's] findings.”* She noted there was more recent medical evidence in the form of a letter from Dr Benito and there was a fear of relapse if the appellant's son returned to Nigeria. However, there was no prospect of him being removed at present. Even if he were removed, the cost of treatment could reasonably be met by the appellant's other son, who is a medical doctor living in the USA. In any event, the appellant's son was not dependent on her and her continued presence in the UK was not necessary.
5. The appellant sought permission to appeal on the ground the judge had overlooked the fact Judge Taylor's finding that there was no family life was mainly based on his doubts about whether the appellant was living with her son. There was evidence before Judge Bart-Stewart confirming they lived at the same address, which she had overlooked. She had also overlooked evidence that the appellant's presence was important in assisting her son to recover. Permission to appeal was granted by Judge P M J Hollingworth because it was arguable the judge had not recognised the change in the factual matrix as between the dates of the two appeals.
6. The respondent filed a rule 24 response opposing the appeal. The grounds seeking permission to appeal are simple disagreement with the judge's cogent findings. The case concerns the question of whether the judge correctly applied the principles set out in *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* [2002] UKIAT 00702 Starred. The principles set out in that case include the following:

d. Our guidelines on procedure in second appeals

37... The first Adjudicator's determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the Appellant was then making, at the time of that determination. It is not binding on the second Adjudicator; but, on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second Adjudicator's role to consider arguments intended to undermine the first Adjudicator's determination.

38. The second Adjudicator must, however be careful to recognise that the issue before him is not the issue that was before the first Adjudicator. In particular, time has passed; and the situation at the time of the second Adjudicator's determination may be shown to be different from that which obtained previously. Appellants may want to ask the second Adjudicator to consider arguments on issues that were not - or could not be - raised before the first Adjudicator; or evidence that was not - or could not have been - presented to the first Adjudicator.

The Tribunal then set out examples of exceptions to the above in paragraphs 39 and 40. In particular:

Facts happening since the first Adjudicator's determination can *always* be taken into account by the second Adjudicator. If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.

However,

Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should *not usually* lead to any reconsideration of the conclusions reached by the first Adjudicator.

7. I heard submissions on the issue of whether the judge had made a material error of law which vitiated her decision. Mr Chipperfield pointed out that nearly four years had passed between the two hearings and he argued that there was important, material evidence before the second

judge which was capable of showing that she ought to have considered the issue of family life for herself rather than find the decision of the first judge should not be disturbed. In particular, he relied on three medical documents. A letter from Dr Benito to the appellant's son's GP, dated 8 April 2013, referred to the appellant's son's address as Flat 40 Arica House, which was the same address given for her in a report by her GP, dated 19 July 2013, and also shown on her medical notes. Mr Chipperfield argued these were sufficient to show there had been a change of circumstances since Judge Taylor's decision.

8. Mr Chipperfield also argued that the judge erred in paragraph 24 of her determination in finding the appellant's son was not dependent on her. He said there was a great deal of evidence before the judge showing there was an unusual degree of dependency. For example, the letter from Anneke Grindley, Community Mental Health Nurse, to the Home Office, dated 6 March 2013, which stated the appellant was her son's "*main carer and support person*". She went on to say the appellant provided "*intensive support*" for her son and she played an important role in his recovery. She needed to live in close proximity to her son to ensure he remained well. I note she gave the appellant's son's address as 47 Hurstbourne Road. A similar thread ran through letters going back to 2009. None of this evidence had been addressed in the determination. Mr Chipperfield argued the judge's finding was unsound.
9. Mr Avery argued the fact the appellant relied on reports going back to 2009 showed there had been no material change of circumstances since the first determination and therefore the judge had not erred. There was, in his view, no firm evidence showing the appellant lived with her son, as it might be reasonable to expect.
10. I reserved my determination on the question of whether the judge made a material error of law. Having carefully considered the arguments, I have concluded that she did not and that her determination shall stand. My reasons are as follows.
11. I consider the judge correctly applied the *Devaseelan* principles, as she directed herself to do. This is clear from paragraph 20 of her determination. The same paragraph also shows she was familiar with Dr Benito's letter and there is no basis for saying she was not fully aware of that letter's contents, including the reference to the appellant's son's address. In any case, as Mr Avery said, this is a clinical letter updating his GP. Whilst it can generally be assumed the address shown would reflect what was in the hospital records, without more, I do not think the judge can be faulted for not basing a factual finding on it. It is far from clear that the judge's attention was ever drawn to cogent evidence regarding the question of whether the appellant and her son lived together. As noted, the letter from Ms Grindley, dated a month earlier, throws doubt on the claim in any event. Looking through the evidence which would have been available to the judge, most of it records the appellant's son

as living elsewhere, at 211 Springbank Road and then 47 Hurstbourne Road. I do not find any error in the judge's assessment of the evidence and even the documents which I am now asked to consider as crucial would not necessarily have led a judge to decide differently to Judge Bart-Stewart on the point about accommodation.

12. On the dependency point, the challenge is a broader one to the effect that the judge ought to have concluded differently on the strength of all the evidence before her, particularly the letter from Ms Grindley. However, the judge gave adequate reasons for her finding that the appellant's son was not unusually dependent on her. Paragraph 18 contains her summary of the evidence regarding the appellant's son's state of health. She returns to the letter from Dr Benito in paragraph 20, explaining she found no change since findings were made by Judge Taylor. Her sentence beginning, "*[n]othing has been put before me to show a change of circumstances ...*" is unparticularised in terms of what evidence she had been shown. However, as Mr Avery pointed out, if this went back to 2009 then the judge was well-placed to take a view whether there had been a significant change of circumstances. I find the judge was entitled to reach the conclusion she reached and she gave adequate reasons for her decision on the point.

DECISION

The Judge of the First-tier Tribunal did not make a material error on a point of law and her decision dismissing the appellant's appeal shall stand.

Signed

Date 11 July 2014

**Neil Froom, sitting as a Deputy Judge of
the Upper Tribunal**