



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03953/2016

THE IMMIGRATION ACTS

Heard at Field House
On 13 October 2017

Decision & Reasons Promulgated
On 27 October 2017

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMUDALAT ABOLORE LAPIDO

Respondent

Representation:

For the Appellant:

Mr. T. Wilding, Home Office Presenting Officer

For the Respondent:

Ms J. Elliott-Kelly of counsel, instructed by Lupins
Solicitors

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent, who was born on 12 February 1980, is a national of Nigeria. She was granted a multi-entry visit visa on 16 December 2004 and visited the United Kingdom between 23 December and 26 December 2004 and 3 and 7 February 2005. She then returned

on 6 March 2005 but was refused leave to enter as she had another passport in the name of Shakirat Abelore Lapido in her bag. She was removed to Nigeria and her subsequent appeal was dismissed on the basis that she had said that her intention when visiting the United Kingdom had been to obtain employment.

2. The Respondent made a further application for entry clearance as a visitor in a false name in 2006, which was refused but a further application was granted and she arrived here on 10 August 2006, using the name of Panebi Mina. Her son, E, who had been born in Nigeria on 22 July 1999, accompanied her.
3. The Respondent's second son, D, was born in the United Kingdom, on 6 December 2006 and on 18 January 2007, the Respondent applied for indefinite leave to remain. In this application she asserted that she had first entered the United Kingdom as a child in 1991. This application was refused on 4 November 2008 on the basis that most of the documentary evidence relied upon was false.
4. On 13 February 2010, the Respondent married an EEA national and on 4 June 2010 she applied for a residence card as his spouse. Her application was refused on 6 December 2010 on the basis that no banns for her marriage had been published for her marriage at All Saints Church.
5. Meanwhile, she had been encountered outside this same church on 31 July 2010 in possession of an envelope containing a number of wedding rings and photocopies of passports. She was arrested and on 22 March 2012 she was convicted of conspiracy to breach UK immigration laws and knowingly possessing false identity documents with intent. The sentencing judge noted that her part in the conspiracy had been that of a marriage fixer and that she had acted as "middle management" in the conspiracy. She was sentenced to three years' imprisonment. She was released on licence on 10 October 2012 and her son, J, was born on 9 November 2012.
6. Meanwhile, interim care orders in relation to E and D had been made in favour of the London Borough of Lambeth on 23 May 2012 and full care orders on 26 September 2012 on the basis of neglect. The Respondent applied for leave to remain on human rights grounds on 12 July 2013 but her application was refused on 28 August 2013.

7. A decision to deport the Respondent was made on 1 April 2015 and the Respondent replied relying on Article 8 grounds on 15 April 2015. A deportation order was then signed on 26 January 2016. The Respondent appealed and her appeal was allowed by First-tier Tribunal Judge Clarke in a decision promulgated on 11 April 2017. The Appellant appealed against this decision on 21 April 2017 and First-tier Tribunal Judge Boyes granted permission to appeal on 26 July 2017 on the basis that First-tier Tribunal Judge Clarke had erred in consideration of the public law interest aspects of the deportation order and had misdirected herself in doing so.

ERROR OF LAW HEARING

8. Both the Home Office Presenting Officer and counsel for the Respondent made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

DECISION

9. The Respondent was liable to automatic deportation under section 32 of the UK Borders Act 2007 and her and her children's article 8 rights had to be considered in the light of Section 117C of the Nationality, Immigration and Asylum Act 2002 and paragraphs 398 to 399A of the Immigration Rules.
10. In paragraphs 17 and 18 of her decision, she made passing references to paragraph 398(c), 399 and 399A of the Immigration Rules and sections 117A – D of the Nationality, Immigration and Asylum Act 2002. But she did not explicitly remind herself that, for the purposes of section 117C(1) of the Nationality, Immigration and Asylum Act 2002, the deportation of a foreign criminal is in the public interest.
11. The First-tier Tribunal Judge purported to consider the contents of section 117C(5) of the Act and paragraph 399(a)(ii) of the Immigration Rules in paragraphs 19 to 26 of her decision. The former provides an exception to deportation where the criminal has a genuine and subsisting relationship with a qualifying child and deportation would be unduly harsh for any child. (Section 117D defines a qualifying child as one who is a British citizen or who has lived in

the United Kingdom for a continuous period of seven years or more). The latter provides an exception when a person has a genuine and subsisting parental relationship with a child under the age of 18 who is in the United Kingdom and it would be unduly harsh for him or her to live in the country to which the parent is to be deported or it would be unduly harsh for him or her to remain in the United Kingdom without that parent.

12. In particular, she noted that the Appellant accepted that the Respondent had a parental relationship with J and R with whom she currently lived and also E and D with whom she had contact. But in paragraph 16 of her decision she found that the children could not be expected to live with the Respondent to Nigeria as they were British citizens. However, it was only J and R who are British citizens and she did not provide any reasons for finding that it would be unduly harsh for R to accompany her mother to Nigeria. Neither did she consider whether it would be unduly harsh for J and R to go there if their father was providing financial support and their grandmother was there to provide emotional support.
13. I was informed by counsel for the Respondent that the local authority was taking steps to regularise the immigration status of E and D but had not yet done so. But in any event, as they were in the full-time care of the London Borough of Lambeth at the time of the appeal hearing, it was not suggested by the Appellant that they could accompany the Respondent to Nigeria so it was not necessary to consider whether it would be unduly harsh for them to accompany the Respondent to Nigeria.
14. In relation to whether it would be unduly harsh for them to remain here, I noted that in a letter, dated 29 September 2015, the London Borough of Lambeth stated that due to safeguarding concerns contact with E and D was supervised and that both boys were scared of the anger she displayed during contact sessions. The letter also stated that the local authority did not support E being returned to her care and that D did not want to return to her care and that he was settled in long-term foster care. At the time of the hearing there was no evidence from any on-going Family Court proceedings which indicated that they may be returned to the Respondent's care during their minority.
15. Furthermore, when considering whether it would be unduly harsh for J and R to accompany the Respondent to Nigeria or remain here with their father but without their mother, the First-tier Tribunal Judge failed to take into account the test established in *KMO* (section 117 –

unduly harsh) *Nigeria* [2015] UKUT 00543 (IAC) which was reaffirmed by the Court of Appeal in *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 450. It held that when deciding whether the deportation of a parent would be unduly harsh for a child it was necessary to take into account all the circumstances in the case including the parent's criminal and immigration history. In paragraph 29 of her decision, the First-tier Tribunal Judge noted that the Respondent took an active and important role in the conspiracy for which she was convicted but singularly failed to take into account her immigration history which itself involved applications which relied upon using false names and documents.

16. In my view, it was not sufficient for counsel for the Respondent to rely upon the fact that the First-tier Tribunal Judge had outlined the Respondent's immigration history in paragraphs 3 to 12 of her decision. This was because later in the decision she did analyse the Respondent's criminal history when weighing up whether it had been shown that any breach of Article 8 would be proportionate. It was at this point that her poor immigration history should also have been considered.
17. In addition, in *KMO* the Upper Tribunal adopted the definition of "unduly harsh" in *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 (IAC), which stated that "whether the consequences of deportation will be "unduly harsh" for an individual involves for more than "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging" consequences and imposes a considerably more elevated or higher threshold". It went on to state that "the consequences for an individual will be "harsh" if they are "severe" or "bleak" and they will be "unduly" so if they are "inordinately" or "excessively" harsh taking into account all of the circumstances of the individual".
18. In contrast, all that the First-tier Tribunal Judge said in paragraph 31 of her decision was that "there are four children with their own individual difficulties, some greater than others, but the composite effect of child E and J is more than any 'normal' impact which deportation may have".
19. As a consequence, I find that First-tier Tribunal Judge Clarke did make material errors of law in her decision and reasons.

DECISION

- (1) The Appellant's appeal is allowed.
- (2) The appeal is remitted to a First-tier Tribunal Judge other than First-tier Tribunal Judge Clarke.

Nadine Finch

Signed

Date 13 October 2017

Upper Tribunal Judge Finch