



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04492/2015

THE IMMIGRATION ACTS

Heard at Field House
On 19th April 2017

Decisions & Reasons Promulgated
On 9th May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

JOSEPHINE NWANYIEZE KEMAKOLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Frans Khan (Counsel)
For the Respondent: Mr Keith Norton (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Twydell, promulgated on 12th September 2016, following a hearing at Taylor House on 18th August 2016. In the determination, the judge dismissed the appeal of the Appellant, who subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Nigeria, who was born on 23rd December 1973, and is a female. She appealed against the decision of the Respondent dated 10th August 2015, refusing her application to remain in the UK outside of the Immigration Rules under

Article 8 of the ECHR. She has four children. They were born on 30th May 2013, on 19th March 2005, on 18th November 2009, and on 30th June 2011. Of these, the first two were born in Nigeria and the remaining two were born in the UK. All are citizens of Nigeria. A feature of this appeal is that the Appellant's immigration status has always been precarious since 29th September 2008 when she became an overstayer on her visitor's visa. Her claim is that she should be allowed to remain in the UK primarily on the basis of her oldest two children who have lived with her in this country for at least seven years at the date of the application, and she has a genuine and subsisting relationship with all her children, such that there would be very significant obstacles to her integration into Nigeria, were they forced to return back to that country.

The Judge's Findings

3. The judge set out, first the Appellant's claim, and then the Respondent's case against that claim, before making her own findings of fact. She was clear in that the Appellant was currently residing in the UK with her children as a result of overstaying her visitor's visa granted on 24th April 2008 until 28th September 2008. She had originally come to the UK with her husband, Ray Ihe Kemakolam, and her two oldest children. These two children were at the time aged 5 years and 3 years. Two further children were then born in the UK, and after that her husband "without trace of his whereabouts" left the Appellant, and "the Appellant has not sought to find her husband or to formalise her separation by way of divorce or other appropriate judicial separation" (paragraph 15). If there is a hint here of the unexplained separation being without a proper explanation then this is understandable, although no issue was taken in relation to this at the hearing before me.
4. The judge having set out the background facts, went on to conclude that, "when considering the Rules, I come to the conclusion it would be reasonable to expect the Appellant and her children to leave the UK and integrate into Nigeria" (paragraph 24). She then went on to consider Article 8 separately outside the Rules and applied the well-known case of **Razgar [2004] UKHL 27**, noting that the Appellant plainly had a family life in the UK, that Article 8 was engaged, and what this eventually came down to was the issue of proportionality, and in relation to the children's best interests, she applied the law correctly (see paragraph 25). The judge eventually concluded that given that the Appellant was "resourceful" and the children would be looked after by a "caring and protective mother" their return to Nigeria was not disproportionate to their interests and was not something that could be impugned on the basis that it was not reasonable.
5. The appeal was dismissed.

Grounds of Application

6. The grounds of application stated that the judge failed to make findings on material matters and gave proper no reasons for finding that there would be no interference with the Appellant's private and family life and the judge had not considered the best interests of the children.

7. In a decision dated 11th January 2017, the First-tier Tribunal rejected the application for permission on the basis that the judge had at paragraph 13 “explicitly addressed Section 55 and gave a series of reasons for the findings made, none has been addressed in the grounds” (paragraph 4).
8. However, the Upper Tribunal in a decision dated 23rd February 2017 granted permission to appeal on the grounds that the Section 55 duty had not been properly carried out, in that the judge may not have conducted an evaluative assessment of the ties the children might have established in the UK after seven years. Second, that it would appear that the judge focused on whether it was practicable for the children to return to Nigeria, rather than whether it would be “reasonable” to do so.

The Hearing

9. At the hearing before me on 19th April 2017, Mr Khan, appearing on behalf of the Appellant submitted that the main issues were as follows. First, there was the question of the best interests of the children because they had grown up in this country, and the first two had already been living in this country for seven years, at the date of the application and they were well integrated into their studies at school and had never been to Nigeria. Second, paragraph 276ADE would have applied in these circumstances given that the children had been in the UK for seven years. Indeed, it was accepted by the Home Office that all three children are integrated into British society and are doing well at school. Third, the children had no experience of living in Nigeria. Fourth, they were supported by a Jewish charity in this country and had no recourse to any other funding or sustenance because the Appellant’s husband had left her destitute. Fifth, it was not reasonable in these circumstances to expect them to leave the UK and return to Nigeria. Fifth, the case of **PD (Sri Lanka) [2016] UKUT 00108**, was put before the judge, and what this states (at paragraph 12) is that the ministerial statement in relation to children was clear that, “the key test for a non-British citizen child remaining on a permanent basis is the length of residence in the UK of the child, which the Immigration Rules set at at least the last seven years, subject to countervailing factors”. The judge, argued Mr Khan, had not adequately engaged with this. Sixth, the Section 55 duty is clear from the case of **JO (Nigeria) [2014] UKUT 00517** where it is stated (at paragraph 12) that, “children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made”. Mr Khan reasoned that the children were of sufficient age to express an opinion.
10. For his part, Mr Norton relied upon his Rule 24 response. He submitted that the First-tier Tribunal Judge had refused permission for a very good reason. It used to be the case under the Home Office policy DP5/96 that a child who had remained in the UK for seven years could stay here permanently but this policy was revoked in 2008. The essential issues here were the best interests of the children, the impact on them on their return to Nigeria, and whether it was reasonable to expect them to go, and all these matters had been adequately addressed by the judge in her determination. Permission had been granted on the basis that the judge appears to have concentrated on whether it was practicable for the family to return but this is not so given that at paragraph 24 the judge expressly states that it would be

reasonable to expect the Appellant and her children to return to Nigeria. Indeed, from paragraph 25 onwards the judge gives detailed consideration to the merits of the Appellant's claim. Finally, we now had the decision in **Treebhavon [2017] UKUT 13**, and this makes it quite clear that where the case of a foreign national, who is not an offender does not satisfy the requirements of Article 8, "the test to be applied is that of compelling circumstances". There were simply no "compelling circumstances" in this case.

11. In reply, Mr Khan submitted that the judge had accepted that there was limited family in Nigeria, and this consisted of an aged grandmother who was ill and ill-equipped to look after the Appellant and her children.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.
13. Whereas it is plainly the case that the judge here has engaged in a detailed and comprehensive determination of the issues, and has applied the law correctly and diligently, the judge does not ventilate fully the integration of the Appellant's children into UK society and the ties that they have formed here. The case of **IO (Nigeria) [2014] UKUT 00517** makes it clear that these matters are relevant.
14. Thus, a letter from [], dated 7th June 2016, refers to three of the children at this church school, and it records the fact that the children's "attendance is excellent with the children achieving 100% so far this year" (see document F in the Appellant's bundle). Another letter from the [] refers to the first child, who was born on 30th May 2013, who had her birth in Nigeria, and this states that this child "is an amazing young lady of exceptional character. She has a very good relationship with staff in school and is highly spoken of." It goes on to say that she "will be choosing her options in preparation for her major exams in year ten and eleven any interruptions in her education due to extenuating circumstances would be detrimental to her academic progress" (see F1 in the bundle).
15. These are matters that go to the proportionality exercise and should have been taken into account. Another letter for the child born on 19th March 2005, who was also born in Nigeria, refers to her as "a conscientious pupil who wants to do well. He is a determined character who brings an energetic approach to all aspects of his learning. He has made good progress since joining the school in the spring". It states that he "has been a pleasure to teach. He is courteous and dependable and a popular member of the class" (see F4 in the bundle). A similar report also exists for the first child, already referred to, born on 30th May 2003 (see bundle F6 to F7), and this states that she "has made great progress in the time she has been at the school. She seems to enjoy all subjects and takes great pride in her presentation." It goes on to say that she "has lots of friends in the class and always tries to cheer up anyone who is sad. She is very reliable and has been a classroom monitor on a number of occasions".

16. Although these matters have not been taken into account, the fault for that cannot be laid entirely at the door of the judge because remarkably there are no witness statements from the children, which one would expect at least from the older two, and had there been such witness statements, these matters could have been further set out for consideration by the judge. The case of **IO (Nigeria) [2014] UKUT 00517** states that the opinions of the children should be sought where their interests are affected. It does not, however, mean that the children are not required to put forward their position for consideration by the decision maker. That this has been the case is regrettable and the shortcoming doubtless lies at the door of those representing the Appellant.
17. Second, and regardless of these matters, the fact here is that the eldest two children had both been in the UK for seven years at the date of the application. The oldest of these children is now 17 years of age and the one after her is 12 years of age. They are considerably removed from their infant years. They are likely to have developed ties and private life rights of their own and these matters should properly be put before the decision maker for consideration. In the circumstances, the matter needs to be remitted back to the First-tier Tribunal for reconsideration of evidence which really needs to be properly put for a correct decision.

Notice of Decision

18. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Twydell, under practice statement 7.2(b) in that the nature or extent of any judicial fact finding which is necessary in order for the decision and the appeal to be remade is such that having regard to the overriding objective it is appropriate to remit the case to the First-tier Tribunal.
19. No anonymity direction is made. This appeal is allowed.

Signed

Date

Deputy Upper Tribunal Judge Juss

8th May 2017