



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

Appeal Numbers: HU/04978/2015
HU/05867/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 7 December 2017**

**Decision & Reasons
Promulgated
On 18 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**(1) OA (NIGERIA)
(2) YA (NIGERIA)
(ANONYMITY DIRECTION MADE)**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms P Yong, Counsel instructed by Springfield Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, who are irregular migrants, appeal from the decision of the First-tier Tribunal (Judge Brewer sitting at Taylor House on 23 June 2017), dismissing their appeals against the decision of the Secretary of State to refuse to grant them and their children leave to remain in the UK on family or private life grounds. The First-tier Tribunal did not make an anonymity direction, but as the central issue in their appeals is the potential impact

on their young children of being required to relocate to their home country, I consider that it is appropriate that the appellants and their children should enjoy anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The appellants and their children are nationals of Nigeria. The first appellant, "OA", claims to have arrived in the UK in November 2004, but Home Office records show that he was refused entry clearance from Nigeria on 30 August 2006. The second appellant, YA, was refused entry clearance on 31 March 2004, but nonetheless claims to have arrived in the UK in 2005.
3. On [] 2008, YA gave birth in the UK to a son, "EA". In early 2010, the appellants made separate applications for leave to remain on compassionate grounds. The applications were refused with no right of appeal.
4. On 4 April 2011, the appellants made a joint request through their then legal representatives for reconsideration of the refusals. While this reconsideration request was pending, the second appellant gave birth to a daughter, "TA", on [] 2014.
5. On 7 July 2015, all four members of the family were served with individual RED0001 notices as overstayers.
6. On 20 August 2015, the respondent gave her reasons for refusing the appellants' human rights applications for leave to remain on the basis of family and private life, which were deemed to have been made on 14 July 2015.
7. The appellants did not qualify for leave to remain under either the Partner or Parent routes specified in Appendix FM. Both EA and TA had been present in the UK for less than seven years. Nonetheless, consideration had still been given to EX.1 as it was accepted that the appellants had a genuine and subsisting relationship with their children. It was not accepted that it would be unreasonable to expect the children to leave UK with their parents. They were not at a critical stage of their education, and they would be able adapt to life in Nigeria with the help of their parents who were familiar with the culture and customs of their home country, having spent the majority of their lives there.
8. On the topic of exceptional circumstances, OA had previously raised the fact that his son EA suffered from acute bronchitis. However, the appellants had not raised any ongoing concerns about EA's health in the most recent representations of 14 July 2015. It was considered that EA's health had improved since 2011. The evidence submitted in support of the application indicated that the parents and their children had been living within a Nigerian community whilst in the UK: they were therefore "*somewhat familiar*" with the customs, culture, language and social norms

of Nigeria, and thus they would be able to adapt more easily to life in Nigeria.

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

9. Both parties were legally represented before Judge Brewer. The appellants were represented by Ms Miszkiel of Counsel. As noted by Judge Brewer at paragraph [36] of his subsequent decision, the evidence before him included *“a number of other documents provided by the appellant in 3 paginated bundles.”*
10. One of the bundles ran to over 300 pages. Most of it was devoted to medical evidence relating to EA. In an additional witness statement at page 276-277, which she signed on 9 December 2016, YA said that she had lost her mother and a child in this country. They regularly visited the graves of both. If they were removed, they would not be able to visit and lay flowers. Her father was alone and she cared for him. If her son, EA, was sent to Nigeria, he would not be able to get the medical facilities like here. The medicines were fake and there were no good transport facilities to take a child during the emergency period. No amount of financial support that would be sent to them in Nigeria by her family here could save EA’s life.
11. In a report dated 8 December 2016, at pages 278 to 310 of the same bundle, Charles Musendo, Independent Social Worker, said that he had been asked to undertake an independent social work assessment on the family, commenting in particular on the following areas:
 - Would it be reasonable to expect EA to leave the UK and settle in Nigeria in the light that he has spent most of his formative years in the UK?
 - In his expert opinion, how would the second appellant’s removal impact on her son and the family unit as a whole?
 - Whether it would be in the best interests of EA to be removed from the UK with his parents.
 - Where the best interests of the children lay in these circumstances.
12. In order to carry out this task, he had spent three hours with the family at their home in Grove Park, London SE12, and he had also *“relied”* on various documents which had been given to him by the appellants’ legal representatives, which he went on to list.
13. Mr Musendo established from speaking to YA that she had given birth to a son, [J], on [] 2012, who had died within a few hours of being born. She also *“emotionally”* explained to him that she had lost her mother in January 2013, when she had passed away in Manchester due to ovarian cancer. YA said that [J]’s grave was five minutes from their home, and they visited the grave *“yearly”* (paragraph 22).

14. At paragraphs 24 to 30 of his report, Mr Musendo gave a detailed account of his conversations with EA and TA. They presented as happy and thriving. He deliberately did not ask them how they felt about going to Nigeria. He also did not ask them about [J], or about their deceased maternal grandmother.
15. Nonetheless, as part of conclusions given at paragraph 63 onwards, Mr Musendo said at paragraph 67:

I am further concerned that both [EA] and [TA] have already experienced a significant loss in their life. The loss of their sibling is a huge blow to them and if they are to experience loss of their family friends, it is likely to lead to psychological problems such as sleeping difficulties, anxiety, mental health issues, poor concentration, behaviour problems to name a few...It would be contrary to the best interests of [EA] and [TA] to be separated from deceased brother and family friends.
16. In his subsequent decision, the Judge said at paragraph [32] that the appeal at the hearing "*rested entirely on the ill health of the children*", principally EA and, to a lesser degree, TA.
17. At paragraph [37], the Judge said that he had heard oral evidence from the appellants, and from YA's father.
18. At paragraph [45], the Judge found that the appellants, as well as EA and TA, had "*a good relationship*" with YA's father. He lived in Manchester. He was not in the best of health - suffering from diabetes and hypertension: "*The family visit him about once a month*".
19. After making extensive reference to domestic authorities on the topic of the best interests of the child, including **Azimi-Moayed & Others (Decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**, the Judge began his discussion at paragraph [56]. The question which he said he had to address was, if the appellants and their children were removed to Nigeria, given both children's allergies and the issues of food labelling and counterfeit drugs in Nigeria, would that amount to either (a) a significant obstacle to integration into Nigeria, or (b) exceptional circumstances for the grant of leave to remain outside the Rules, bearing in mind the duty of the respondent to have regard to the need to safeguard and promote the welfare of children who are in the United Kingdom?
20. The Judge went on to find that YA took responsibility for food preparation and she would not doubt continue to do so in Nigeria, and accordingly there was no reason why the same level of care and scrutiny could not work in Nigeria if it worked in the UK. With regard to the problem of counterfeit drugs, the Judge found that Nigeria was endeavouring to tackle the issue, and that the prevalence of counterfeit drugs had fallen from about 54% in 1990 to 16% or 17% in 2016. The Judge also observed that much of the problem with counterfeit drugs in Nigeria related to counterfeit Malaria medication (as distinct from the type of medication

required by EA).

21. The Judge went on to conclude that the removal of the appellant would not infringe the best interests of either EA or TA, and there would not be significant obstacles to reintegration into Nigeria for the appellants as individuals or taking into account the best interests of their children.
22. At paragraph [65], the Judge set out his conclusions on an Article 8 claim outside the Rules.

The Application for Permission to Appeal

23. The application for permission to appeal was settled by the appellant's solicitors. Ground 1 was that the First-tier Tribunal had erred in its consideration of exceptional circumstances (proportionality) by unreasonably failing to consider the report of the independent social worker. Ground 2 was that the First-tier Tribunal erred in its consideration of exceptional circumstances (proportionality) by unreasonably failing to consider the evidence of the second appellant and her father on the topic of their relationship. The First-tier Tribunal Judge had failed to "*properly*" consider the evidence contained in passages from the witness statements of the second appellant and the second appellant's father.

The Reasons for the Eventual Grant of Permission to Appeal

24. Permission to appeal was refused by the First-tier Tribunal as the grounds were considered to have no merit: they were just an attempt to re-argue the exercise of discretion by the Judge. In a renewed application for permission to appeal to the Upper Tribunal, the appellant's solicitors submitted that the Tribunal had failed to consider relevant evidence when exercising discretion. On 29 September 2017, Upper Tribunal Judge Blum granted the appellants permission to appeal on all grounds for the following reasons:

There was a report by an independent social worker before the Ftj but there is little in the decision to indicate that this report was considered by him. Although the Upper Tribunal will need to consider whether the report could have made any material difference to the Ftj's ultimate conclusions, it is, at this stage, arguable that the Ftj erred in law by failing to engage with relevant evidence.

The Hearing in the Upper Tribunal

25. At the hearing before me to determine whether an error of law was made out, Ms Yong sought to extend the grounds of appeal into other areas. She indicated that she wished to challenge the Judge's findings on the medical issues, and also his methodology in resolving the issue of the children's best interests. There had been no formal application to seek permission to vary the grounds of appeal, and in any event I considered it was far too late to seek to introduce new grounds. Therefore, I refused Ms Yong permission to argue the appeal outside the scope of the two pleaded

grounds for which permission to appeal had been granted.

26. On behalf of the respondent, Mr Kotas adopted the Rule 24 response opposing the appeal which had been settled by a colleague. He submitted that the Independent Social Worker report added very little to the appellants' case, and it was fundamentally flawed. It did not contain an expert's declaration, and Mr Musendo had been discharging the function of an advocate, not the function of an independent expert.

Discussion

27. In **South Bucks District Council v Porter (2) [2004] UKHL 33** Lord Brown said at [26]:

The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need only refer to the main issues in the dispute, not to every material consideration.

28. Ms Miszkiel does not appear to have had a hand in the drafting of the application for permission to appeal to the Upper Tribunal, and it also does not appear that she was asked to produce her record of the proceedings before Judge Brewer. This is significant, as the consequence is that there is no evidence before me which contradicts the Judge's declaration at paragraph [32] of his decision that at the hearing the sole issue in controversy was whether the appeals should succeed on account of the ill health of the children.
29. In her skeleton argument for the hearing, Ms Miszkiel relied primarily on medical issues, in particular the availability of safe and appropriate medication and treatment for the children in Nigeria. I accept that additionally she relied on extracts from the Independent Social Worker's report and upon the proposition (at paragraph 30) that because (a) the appellants had lost their second child and (b) the second appellant's mother had died of ovarian cancer shortly thereafter, the emotional ties between the appellants and the second appellant's father were "*above and beyond normal emotional ties*" - as the second appellant cooked for her father and the whole family visited him. Ms Miszkiel further submitted, in paragraph 31, that matters relating to death and burial were sufficient to engage Article 8.
30. However, as Mr Kotas submits, it does not follow that the hearing proceeded on the same lines as that foreshadowed in her skeleton

argument. There is no factual challenge in the grounds of appeal to the Judge's declaration at paragraph [32]; and there is no specific evidence which shows that, after hearing the evidence and the oral submissions of the representatives, the Judge ought to have treated the additional matters ventilated in the skeleton argument as "*principal important controversial issues*" upon which he needed to reach a distinct and discreet conclusion when undertaking a proportionality assessment outside the Rules.

31. While the Judge did not engage with the Independent Social Worker's report as a 'report', he engaged with its subject matter. There is no material error in the Judge not giving weight to Mr Musendo's opinions expressed in the report. Not only was the report flawed in lacking a declaration by Mr Musendo of his duty of independence, but in substance the exercise which Mr Musendo was asked to undertake - and which he did undertake - was primarily that of an advocate, rather than that of an independent expert bringing to bear his expertise on matters which were within his competence.
32. Mr Musendo's assumption of the role of an advocate is typified by the passage from paragraph 39 of his report which is cited in Ground 1:

Not only would the children have to then cope with the trauma and emotional distress of losing their sibling on whom they and their mother depend on, but they will also have to deal simultaneously with the loss of their home, school, friends, way of life and the stability and the security that they are currently smothered in...

33. As is apparent from the other passages in his report to which I have made reference earlier in this decision, there was no evidential basis whatsoever for the proposition that the children were currently having to cope with the trauma and emotional distress of losing [J]. As I explored with Ms Yong at the hearing, TA had not even been born when she "*lost*" her sibling.
34. Mr Musendo ascertained that the family visited [J]'s grave only once a year. At the same time, he did not ascertain how the children felt about their dead sibling. Accordingly, Mr Musendo's opinion on this topic was not relevant evidence of which the Judge needed to take express account in his proportionality assessment.
35. As for Ground 2, the Judge made a finding of fact at paragraph [45] about the status of the relationship between the appellants and YA's father in Manchester. He found that they had "*a good relationship*". He did not find that there was a dependency relationship between YA and her father which meant beyond normal emotional ties. Although the witness statement evidence of YA was that the family visited him once a fortnight, the Judge found that the family visited him about once a month. There is no challenge by way of appeal to this finding of fact, which the Judge will have arrived at after hearing oral evidence from the appellants and YA's father. Given that her father was living independently in Manchester, whereas the appellants lived in London, and given that he was receiving

visits from the family at a rate of about once a month, no reasonable Tribunal properly directed could have found that YA enjoyed family life with her father for the purposes of Article 8.

36. Indeed, it is not suggested in Ground 2 that the Judge ought to have held that the relationship between YA and her father satisfied the **Kugathas** criteria. The error of law challenge is that the Judge failed “*properly*” to consider the witness statement evidence about the closeness of the relationship between them in the assessment of proportionality. Hence, the error of law challenge takes no account of the oral evidence which the Judge received on this topic. Moreover, there is no reason to suppose that the Judge did not take into account his earlier findings of fact when assessing proportionality. In the light of his unchallenged finding of fact at paragraph [45], it was clearly open to the Judge not to treat the relationship between YA and her father as a matter which was capable of tipping the scales in the appellants’ favour when assessing proportionality.

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.

Direction Regarding Anonymity - rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 14 December 2017

Judge Monson
Deputy Upper Tribunal Judge