



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

Appeal Number: HU/08107/2018

THE IMMIGRATION ACTS

Heard at Field House

On 14th February 2019

**Decision & Reasons
Promulgated**

On 19th February 2019

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**AO
(ANONYMITY DIRECTION MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ojo, Legal Representative, Law Eagles

For the Respondent: Mr S Whitwell, Senior Home Office Presenting officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Andrew promulgated on 14 September 2018, in which the Appellant's appeal against the decision to refuse her human rights claim dated 15 March 2018 was dismissed.

2. The Appellant is a national of Nigeria born in the United Kingdom in 2010, who has since birth resided with her mother, also a Nigerian national, in the United Kingdom. The Appellant has never had any leave to remain in the United Kingdom.
3. The Respondent refused the application the basis that the Appellant did not meet any of the requirements for leave to remain set out in Appendix FM of the Immigration Rules, nor did she meet the requirements in paragraph 276ADE(1)(iv) of the Immigration Rules on the basis that it would be reasonable to expect her to leave the United Kingdom to return to Nigeria with her mother. The Respondent did not consider that there were any exceptional circumstances to warrant a grant of leave to remain in the United Kingdom, in particular, there was education available to her in Nigeria, a country with which she would have some familiarity through her mother and no claim had been made on protection grounds in relation to the claimed threat of FGM.
4. Judge Andrew dismissed the appeal in a decision promulgated on 14 September 2018 on human rights grounds. In summary, the First-tier Tribunal found that it was in the Appellant's best interests to be with her mother and to be in Nigeria, where she had extended family members, where English is widely spoken, where education and medical care was available to her and where her mother would be able to seek employment and house them. Further, that it would be reasonable to expect the Appellant to leave the United Kingdom, returning to Nigeria with her Nigerian mother.

The appeal

5. The Appellant's grounds of appeal are lengthy and difficult to follow. They are divided into two grounds, the first, broadly, that the First-tier Tribunal erred in law in its consideration of section 55 of the Borders, Citizenship and Immigration Act 2009; in its assessment of section 117B(6) of the Nationality, Immigration and Asylum act 2002 and in the proportionality exercise under Article 8 of the European Convention on Human Rights. This appears to be on the basis that the Appellant and her mother should not be separated (albeit there has never been a suggestion that they would be, neither have leave to remain and would be returned to Nigeria together as a family unit) and on the basis of the Appellant's length of residence and deep ties to the United Kingdom, where she has lived all of her life and where she is in education. The grounds of appeal claim that the decision of the First-tier Tribunal is full of contradictions which are arguable and appealable, but none are specifically identified.
6. The second ground of appeal is headed 'irrationality' and sets out grounds of challenge which are more appropriate to an application for Judicial Review than identifying any error of law in a statutory appeal context. Further, within this ground serious allegations are made against the First-tier Judge, including that the decision was 'irrational and defies all logic' and claims that the Judge 'should have exercised discretion to ensure that

his decision was not biased and prejudicial by taking into account all relevant immigration rules regarding qualifying children in the United Kingdom'. Further, that the Judge 'ignored the laid-down rule and cited irrelevant facts to circumvent the rules and justify his irrational decision on the basis of the Appellants being able to simply relocate and start life again in Nigeria.' and that the 'Judge brazenly disregarded the Appellant's legitimate claim preventing him from conducting a fair, unbiased assessment of the facts as he did not give credence to the statutory duty imposed on him to thoroughly consider the Appellant's' best interests. However, no specific examples are given as to these claimed errors and instead what surrounds these passages are essentially submissions as to why the appeal should have been allowed on the facts. The allegations made against the Judge are wholly un-particularised and unfounded. This ground was rightly not pursued orally before me.

7. Permission to appeal was granted by Judge McClure on 19 October 2018 on the basis that it was arguable in light of MT & ET (Child's best interests: extempore pilot) [2018] UKUT 115 (IAC) that the First-tier Tribunal had failed to consider whether there were strong reasons for removing the Appellant from the United Kingdom, considering relocation of the family unit rather than the Appellant herself. This decision post-dated the decision of the First-tier Tribunal under appeal and also the application for permission to appeal and was at least for that reason not previously relied upon by the Appellant.
8. Given the imprecise nature of the grounds of appeal and grant of permission on a specific, but different basis, I sought clarification from Mr Ojo as to the grounds of appeal being pursued by the Appellant, particularly in light of the decision of the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53. Mr Ojo was unable to do so with any greater clarity, relying broadly on issues under paragraph 276ADE of the Immigration Rules, the best interests of a child pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009, section 117B of the Nationality, immigration and Asylum Act 2002 and finally Article 8 of the European Convention on Human Rights. When pressed, he stated that the error of law relied upon was that the First-tier Tribunal had failed to take into account the range of evidence about the Appellant as a qualifying child, specifically that she had been in the United Kingdom since birth, was in education here, had never been to Nigeria, had expressed a fear on return to Nigeria and claimed family life with friends and members of her church. No proper assessment was said to have been undertaken as to her best interests in accordance with EV (Philippines) v Secretary of State Stayed for the Home Department [2014] EWCA Civ 874 and the Appellant's own evidence as to whether she wanted to go to Nigeria was not given sufficient weight.
9. In essence, Mr Ojo's submissions were directed more towards why an appeal should be allowed at first instance rather than identifying any error of law in the decision made by the First-tier Tribunal.

10. Mr Ojo did not expressly seek to rely on the second ground of appeal on the basis of irrationality as set out in the application for permission to appeal. He did however try to raise challenges on the basis of procedural fairness (that contrary to paragraph 6 of the decision of the First-tier Tribunal, the Appellant was not permitted to raise or rely on issues of FGM and domestic violence) and as to whether the correct burden of proof had been applied; however, he accepted that none of these points had been raised in the application for permission to appeal and no grant of permission on any such grounds had been given.
11. In response, Mr Whitwell submitted that the Appellant had not identified any error of law in the decision of the First-tier Tribunal and referred to the relevant paragraphs in the decision which dealt with all of the points that Mr Ojo had said had not been considered by the Judge; showing that they had in fact expressly been taken into account in reaching the decision. These were all relevant factors to be considered in accordance with the Supreme Court's decision in KO (Nigeria). The Appellant's claim was said to be made on the basis that simply being resident in the United Kingdom for seven years would be sufficient, but this is not a trump card and overall, the grounds of appeal amounted only to disagreement with the decision reached rather than identifying any error of law.

Findings and reasons

12. The grounds of appeal to challenge the decision of the First-tier Tribunal are entirely lacking in merit and this is not a case in which permission to appeal should have been granted. The Appellant has been unable to identify any even arguable errors of law in the approach of the First-tier Tribunal and did not even expressly rely on the reasons given for the grant of permission as to the arguable need for 'strong reasons' to be identified for the removal of a qualifying child. To the contrary, the submissions on behalf of the Appellant primarily sought to reargue the claim before the First-tier Tribunal and at best expressed only disagreement with the outcome of the appeal.
13. The First-tier Tribunal expressly recognised in paragraphs 11 and 12 of the decision that the Appellant was born in the United Kingdom, had lived here ever since and had never been to Nigeria. An assessment of her best interests is set out in paragraphs 21 to 27 of the decision and includes consideration of the Appellant's age, her education (including her progress at school, that she is not at a critical stage of her education, for example about to take GCSEs or A-levels and that education facilities are available in Nigeria), friends in the United Kingdom, the Appellant's language ability (and no difficulties likely to be faced given that English is widely spoken in Nigeria), that the Appellant is in good health and medical facilities are available in Nigeria, the possibility of extended family relationships in Nigeria and that the Appellant would be supported and accommodated by her mother in Nigeria. It was not accepted that the Appellant had established family life with friends or members of her church as claimed.

14. It is clear and express on the face of the First-tier Tribunal's decision that all of the relevant factors for the assessment of best interests set out by the Court of Appeal in EV (Philippines) as recently endorsed by the Supreme Court in KO (Nigeria), were taken into account. The conclusion on the basis of that evidence is unassailable.
15. It is further clear from paragraph 6 of the decision of the First-tier Tribunal that the Appellant did not pursue her claim on the basis of any fear on return to Nigeria because of FGM or domestic violence (against the Appellant or her mother) and reference was made to the rejection of the Appellant's mother's asylum claim (including on appeal) on this basis. There is nothing to support the suggestion made orally at the hearing that the Appellant was prevented from raising these issues, to the contrary, the unchallenged record set out in paragraph 6 of the decision was that these matters were not pursued.
16. Although the First-tier Tribunal did not have the benefit of the Supreme Court's decision in KO which had not been handed down when this appeal was initially heard, I find that the approach of the Judge in this case as to the question of whether it is reasonable to expect the Appellant to leave the United Kingdom, is entirely in accordance with that decision. The key findings in KO are as follows:

"16. It is natural to begin with the first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DB 5/96 it contains no requirement to consider the criminality or misconduct of a parent of the balancing factor. It is impossible in my view to read it as importing such a requirement by implication.

17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I refer that it was intended have the same effect. The question again is what is "reasonable" for the child. As Eliza LJ said in MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705, [2016] one WLR 5093, Para 36, there is nothing in this subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. List of relevant factors set out in the IDI guidance (para 10 above) seems to be wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).

18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it

leads to there ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well expressed by Lord Boyd in SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT 1245:

“22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, ‘Why would the child be expected to leave the United Kingdom?’ In a case such as this second only be one answer: ‘because the parents have no right to remain in the UK’. To approach the question any other way strips away the context in which the assessment of reasonableness is being made ...”

19. He noted (para 21) that Lewison LJ had made a similar point in considering the “best interests” of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 854*, para 58:

“58. In my judgement, therefore, the assessment of the best interests of the children must be made on the basis of the facts as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow parent with no right to remain to the country of origin?”

To the extent that Elias LJ may have suggested otherwise in MA (Pakistan) para 40, I would respectfully disagree. There is nothing in the section to suggest that “reasonableness” is to be considered otherwise than in the real world in which the children find themselves.”

17. As above, the First-tier Tribunal assessed very carefully the real world situation of the Appellant and expressly considered the factors required for the best interests assessment as set out in (EV) Philippines. The Appellant and her mother are both nationals of Nigeria and others expected to leave the United Kingdom as a family unit as neither have any lawful leave to remain, which is the correct background to the assessment and against which the question of reasonableness must be considered. The approach of the First-tier Tribunal discloses no error of law, the findings and conclusions being entirely sustainable on the evidence before it and in accordance with the approach confirmed by the Supreme Court in KO.

18. There is no separate or additional requirement for the First-tier Tribunal to identify strong and powerful reasons for the finding that it would be reasonable for a child who resided in the United Kingdom for a period of at least seven years to be expected to leave, even where those seven years occur after the age of four. Sufficiently strong and powerful reasons are in any event given by the First-tier Tribunal on the facts of this case, recognising the real world situation of the Appellant.
19. The Appellant has not identified any other error of law in the decision of the First-tier Tribunal, despite the wide and varying submissions made in writing and orally, these were not grounds on which permission to appeal was sought or obtained and in any event were wholly unarguable. This appeal amounts only to disagreement with the decision taken by the First-tier Tribunal.
20. For all of these reasons I find no error of law in the First-tier Tribunal's decision on any of the grounds put forward by the Appellant's, those originally set out in writing those made orally at the hearing before me and the decision to dismiss the appeal therefore stands.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed
2019



Date 14th February

Upper Tribunal Judge Jackson