Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: IA/27990/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 11 November 2015	**On 21 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MS BNN
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr E. Waheed, counsel instructed by Gracelands solicitors
For the Respondent: Ms Fijiwala, Home Office Presenting Officer

Anonymity Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was requested by Mr Waheed and I find that it is appropriate to make an order because the case involves consideration of the welfare of four young children. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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.

DECISION & REASONS

1. The Appellant is a national of Nigeria, born on 5 October 1970. On 10 August 2005, she was issued with a visit visa and arrived in the United Kingdom with her husband and two children. They subsequently overstayed and on 13 November 2011, the Appellant applied for leave to remain outside the Immigration Rules with her husband and children as her dependants. This application was refused without the right of appeal but following further submissions on 3 March 2012, 30 April 2012, 11 March 2013, 29 April 2014 and 16 June 2014, the Respondent issued a further refusal decision on 27 June 2014, with the right of appeal.

2. The Appellant duly appealed against this decision and her appeal came before First Tier Tribunal Judge Housego for hearing on 23 February 2015. The Judge noted that the appeal was based primarily on the health of the eldest child: CBN (DOB 22.7.02) who has been diagnosed with Aspergers Syndrome, with reference to Articles 3 and 8 and section 55 of the Borders, Immigration & Asylum Act 2009. In addition to C, there are three further children: ACN (DOB 1.8.04) who was born in Nigeria and DNN (DOB 10.12.06) and GCN (DOB 28.11.12) who were both born in the United Kingdom.

3. In a decision promulgated on 16 March 2015, the Judge dismissed the appeal, essentially on the basis that the Appellant did not meet the requirements of the Immigration Rules and there were no compassionate or compelling factors that would make it appropriate to warrant the exercise of discretion outside the Rules.

4. An application for permission to appeal was made on 28 May 2015. The grounds in support of the application asserted that the Judge had erred materially in law: (i) in failing to adequately take into account the best interests of the Appellant's children and failed to adequately consider evidence that autism is taboo in Nigeria; (ii) in failing to consider whether it would be reasonable for the children to return to Nigeria in accordance with paragraph 276ADE(iv) of the Rules; (iii) section 117B of the NIAA 2002 is inconsistent with paragraph 276ADE of the Rules; (iv) the Judge failed to take into account material factors under section 117B of the NIAA 2002 *viz* that there are 3 qualifying children under paragraph 276ADE(iv) of the Rules and the Appellant and her family speak English and are no burden on tax payers.

5. Permission to appeal was granted by First Tier Tribunal Judge Hollingworth on the basis that an arguable error of law had arisen in relation to the extent of consideration by the Judge of evidence adduced in relation to the approach taken to autism in Nigeria and it was arguable that the Judge has not set out the thrust of the evidence adduced at the hearing in this context in relation to findings appertaining to Article 3, Article 8 and the application of section 55.

Hearing

6. At the hearing before me, Mr Waheed submitted a skeleton argument. He also requested that an anonymity order be made, given that there were 4 children and the case essentially turned on the condition of the eldest child and an assessment of the evidence in respect of the eldest child and the Judge's

finding at [36] that: "*on the balance of probabilities I do not find that there is any significant difficulty for receiving medical treatment for autism in Nigeria. The only evidence of that is the absence of reference to such treatment in country guidance issued by the Home Office and one article from 2006, subsequently repeated in 2010.*" This finding failed to take into account the contents of the article that drew attention to the stigma and lack of recognition of the condition in Nigeria and the problems faced by those suffering from it and their parents. The only other evidence referred to is the absence of evidence – when one reads the refusal letter no mention is made of treatment of autism and Aspergers and it is not in any of the Home Office information. The Judge correctly noted at [7] that the burden of justifying interference with an established private and family life rests with the Respondent and thus where the Respondent puts forward no evidence that burden is not met. It was not open to the Judge to find in the absence of evidence that that burden had been met by the Respondent. Mr Waheed asked me to find that the Judge had made a material error of law.

7. Mr Waheed further submitted that the Judge had erred in his consideration of paragraph 276ADE(iv) at [38] where consideration was limited to the Appellant only but he should have considered her dependants as well. In respect of section 117 of the NIAA 2002, he submitted that Article 8 on the facts of this case constitutes both private life and family life and the Appellant's private life encompassed her as a mother watching her child suffer on return to Nigeria. At [58] the Judge dealt with that by finding that the family would be returned to together, but that is not the only issue here as his siblings and his parents would be impacted by having to watch C suffer. He submitted that GS (India) [2015] EWCA Civ 40 was a standalone case about illness and the ECHR but this particular case concerns the welfare of children and section 55 and the Judge erred in relying on it. He submitted that if I was minded to find a material error of law there was no need for a further hearing as there was no need for further oral evidence; the Appellant's fears as to her child were said to be corroborated by background evidence and it was open to the Upper Tribunal to analyse the background evidence. Mr Waheed submitted that the credibility findings did not go to the core of the claim, which was now based on the children.

8. Ms Fijiwala submitted that there were no errors in the determination; that the Judge had fully considered the issue of autism and that the decision in GS (India) was relevant and did not stand alone in relation to medical issues as it considers Articles 3 and 8 of ECHR. Although it was asserted that certain documentation had not been considered, the article that had been provided was noted by the Judge at [8] and [36]. In relation to [36] when the Judge considered the lack of evidence this was not in relation to medical issues in Nigeria but to a lack of reference to autism in the evidence available. It is clear from the refusal letter that the eldest child was considered at [36]-[48] and consideration was given to the medical facilities. It was up to the Appellant to establish a lack of facilities in Nigeria and not for the Respondent to prove that such facilities are in place. In respect of the contents of the article referred to it is clear that there is some awareness in the medical community about autism but the article refers more to misdiagnosis, however, it is clear that the

Appellant's eldest son has already been diagnosed and the family would be returning with this in mind. It is also clear that the parents are taking care of the children and there is no reason why would not continue to do so in Nigeria. According to page 2 of the article, there are various organizations involved and NGOs are aware of autism and would be able to assist this family. Ms Fijiwala further submitted that the article is 5 years old and conditions would have improved. She submitted that at page 3 of the article implementation would have been put in place in terms of further awareness of autism. The Appellant's case is that autism is regarded as taboo but this is considered by the Judge at [46] in an article 3 context where he finds the threshold is not met, which is consistent with N and D and [101] of GS (India).

9. In respect of Article 8, Ms Fijiwala relied upon [111] of GS (India) [2015] EWCA Civ 40. She submitted that it was clear that the Judge found family life existed between the Appellant and her dependants but the family would be returning together as a unit and family life could continue together. In respect of section 117B of the NIAA 2002, little weight should be given to all their private lives and the eldest child cannot rely on medical treatment as treatment is available in Nigeria. She submitted that it was clear that the Judge has considered section 55 and best interests. The Judge has also taken into account relevant case law: Azimi Moayed [2013] UKUT 000397 (IAC); Razgar [2004] UKHL 27 and EV (Philippines) [2014] EWCA Civ 874 and it was in the best interests of the child to remain with his parents. In respect of the reasonableness of relocation, the eldest child is bilingual. In respect of paragraph 276ADE of the Rules, having found the children could return and given that treatment is available in Nigeria it was reasonable to expect children to return and so the fact that the children were not directly considered would have made no material difference. She submitted that, in relation to grounds 3 & 4 which refer to section 117B and 276ADE, there was no inconsistency between the Rules and the Act and it was the same test in relation to a "qualified child." The Judge accepted that 3 of the children qualified but it was reasonable to expect them to leave the United Kingdom. In light of the decision in AM (Malawi) [2015] UKUT 0260 (IAC) this is a question that only needs to be answered once. When the Judge was considering whether it was reasonable for the children to leave the United Kingdom it was incumbent on the Judge to consider the public interest factors and whole situation in the round, not just a childcentric evaluation. In respect of section 117B(3) and the family speaking English, it is clear from AM (Malawi) [2015] UKUT 0260 (IAC) that the public interest factors do not on their own give rise to right to remain in the UK. Further, the Judge properly considered credibility. The Appellant and her dependants came as visitors and made no application for 6 years and thus the maintenance of immigration control weighed heavily against them. It would be reasonable and proportionate to return them as a family unit.

Decision

10. I find that First Tier Tribunal Judge Housego erred materially in law for the following reasons:

10.1. whilst at [41] the Judge directed himself in respect of the best interests of the Appellant's children, I consider that in so doing he failed to give any specific consideration to the impact on the eldest child, C, and whether it would be in his best interests to be returned to Nigeria given that he has been diagnosed with Aspergers Syndrome. There is no analysis of the evidence in the form of reports submitted [56-81 of the Appellant's bundle] which make clear that he has difficulties in all of the three areas that comprise the triad of autism – difficulties with his social interaction and social communication, which is having a significant impact on his ability to form reciprocal peer relationships and his socialization and that he also has a history of rigidity of thought and behaviour [65].

10.2. I further consider that the Judge erred in his finding at [36] [cited at [6] above] in that Aspergers syndrome is not a condition that requires medical treatment as such but rather, because it is concerned with speech and language and thus learning difficulties and social communication, it is a disability which requires care and support. The first Appellant's evidence before the Judge, which he records at [12] is that he would suffer in Nigeria because autism is regarded as a taboo, is heavily stigmatized and there would be inadequate support for her son there. The Judge failed to make any findings on this evidence.

10.3 in failing to consider whether it would be reasonable for the children to return to Nigeria in accordance with paragraph 276ADE(iv) of the Rules. I note that at [26]-[29] of the refusal decision the Respondent expressly considered this aspect of the case. The Judge's finding is at [38] and provides:

> "The two elder of the children have lived in the UK at least 7 years preceding the application and are in the UK, but for the reasons set out in the rest of this section of this decision I find that it would be reasonable for the children to leave the UK. The same point deals with para ADE276(iv). Para 276ADE(vi) applies where there would be very significant obstacles to the applicant's integration into the country to which she would have to go. The appellant faces no such difficulty. The assertion is that her elder son does. I have found this not to be do."

I consider that the Judge materially erred in his consideration of the application of paragraph 276ADE(iv) for the following reasons:

(i) he made a factual error in that the three eldest children had resided continuously in the United Kingdom for longer than 7 years at the date of decision. I consider this error to be material in any assessment of reasonableness given that consideration must be given to this question in respect of three children rather than two;

(ii) the decision lacks adequate reasoning. The only reason put forward by the Judge for finding that it would be reasonable for the family as a whole to return is that he has already found that there would not be very significant obstacles to the integration of the first Appellant's eldest son, but this is not in fact the case as there is no finding to this effect elsewhere in the decision.

(iii) Even if there were such a finding it would be erroneous in that the three children who *prima facie* fall for consideration under paragraph 276ADE(iv) are not required to show that there would be very significant obstacles to their integration but only that it would not be reasonable to expect them to return to Nigeria. The Judge appears to have merged the two separate tests under paragraph 276ADE (iv) and (vi) and in so doing erred materially in law.

11. I do not find that the Judge erred for the reasons asserted in Ground (iii) or (iv) of the grounds of appeal, because AM (Malawi) [2015] UKUT 0260 (IAC) makes clear that the section 117B considerations represent Parliament's view of the public interest that must be taken into account when assessing proportionality and expressly states at [18] that:

> "18. The mere fact that the evidence in a particular case establishes fluency or financial independence to some degree, does not prevent the Respondent from relying upon these matters as public interest factors weighing against the claimant. The Respondent would only be prevented from doing so if a claimant could demonstrate fluency, or financial independence, to the level of the requirements set out in the Immigration Rules. There was therefore no error of law in the Judge's approach to the issues of fluency and financial independence in the context of her consideration of s117B. The Appellant could obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources."

12. However, for the reasons given in [10] above, I find that the decision of First Tier Tribunal Housego contains a material error of law in respect of the first two grounds of appeal. Given that those errors go to the heart of the appeal I remit the appeal for a hearing *de novo* before a Judge of the First-tier Tribunal other than Judge Housego.

Deputy Upper Tribunal Judge Chapman

14 December 2015