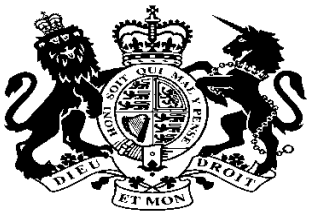

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/27415/2016**

THE IMMIGRATION ACTS

Heard at Field House
On 12 October 2018

Decision Promulgated
On 30 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

ABIBAT [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Absent (Daniel Aramide, solicitors)
For the Respondent: Ms V Kiss, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Hussain promulgated on 16 May 2018, which dismissed the Appellant's appeal.

Background

3. The Appellant, born on [~] 1978, is a Nigerian national who entered the UK as a visitor on March 2003. On 19 May 2016 the appellant made an application for leave to remain in the UK. The respondent refused that application on 1 December 2016.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge M B Hussain ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 15 August 2018 Judge Grimmet granted permission to appeal stating inter alia

> It is arguable that the Judge erred in failing to fully consider the position of the child born to the appellant in the UK over seven years ago even though he was not party to the appeal.

The Hearing

5. The appellant did not appear and she was not represented. Tribunal staff telephoned the appellant's solicitor who said that he continues to represent the appellant but has no instructions from the appellant to move the appeal. The appellant's solicitor declined to withdraw from acting but said that he will not come to this Upper Tribunal hearing. As a result, nobody moved the grounds of appeal.

6. (a) Ms Kiss, for the respondent told me that the decision does not contain a material error of law. She took me to [20] and [21] of the decision and reminded me that the appellant's oldest child is not a party to this appeal. She told me that the Judge was correct to note that the appellant's child chose not to appeal to the First-tier Tribunal against the respondent's decision to refuse his application.

(b) Ms Kiss told me that the Judge's findings of fact are a reflection of the paucity of evidence placed before the First-tier Tribunal. The appellant lodged a 31 page bundle, which includes her 10 paragraph witness statement. Ms Kiss told me that the appellant's oral evidence is summarised between [9] and [14] of the decision, and that the appellant did not offer evidence concerning the welfare of any of her children, nor was it argued that the respondent's decision runs counter to the best interests of the children. It was not argued that it is not reasonable for any of the appellant's children to return to Nigeria.

(c) Ms Kiss asked me to dismiss the appeal and allow the decision to stand.

Analysis.

7. At [20] the Judge correctly records that the appellant's original application was accompanied by an application from the appellant's son, and the appellant's son did not appeal the respondent's decision in his case. At [20] the Judge discusses the

importance of considering paragraph 276ADE of the rules when a child has been in the UK for more than seven years, then, at [21], the Judge says

> In this case, I am unable to take that approach because the appellants minor child, born in October 2008, is not an appellant. Since he is not an appellant, I am not in a position to assess whether or not he will meet the requirements of paragraph 276 ADE(iv). I therefore assess the appellant's claim under that paragraph.

8. The Judge has taken too narrow a view. The wording of paragraph 276ADE(1) of the rules sets out test that an "applicant" must satisfy. The appellant's child is not an appellant and the decision in the appellant's child's application is not now under scrutiny, but it is clear from the Judge's decision that he was well aware that the appellant's oldest child was born in October 2008 in the UK and has only ever lived in the UK. Section 55 of the Borders, Citizenship and Immigration Act 2009 obliges the Judge to consider the best interests of the appellant's children. Section 117B(6) of the Nationality, Immigration & Asylum Act 2002 requires the Judge to consider whether or not it is unreasonable for a qualifying child to return to his parents' country of origin.

9. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) the Tribunal held that duties to have regard as a primary consideration to the best interests of a child are so well established that a judge should take the point for him or herself as an obvious point to be considered, where the issue arises on the evidence, irrespective of whether the appellants or the advocates have done so.

10. The decision contains a material error of law. I set it aside. There is no good reason why I should not substitute my own decision.

The Immigration Rules

11. The appellant's witness statement does not address the interests of the children at all. The appellant produces her children's birth certificates and a school report. The appellant does not suggest in her witness statement that it is in her children's best interests that they stay in the UK. The Judge's record of proceedings indicates that the appellant gave no oral evidence at all about the children.

12. In submissions to the First-tier Tribunal, counsel for the appellant specifically relied on the oral and written evidence, and stated that the appellant's oldest child was nine years old at the date of hearing and was not familiar with life in Nigeria. Counsel for the appellant said that the appellant should not be separated from her children, and that both of the appellant's children were born in the UK. Those submissions have no evidential foundation.

13. The application for permission to appeal and the grant of permission to appeal focused entirely on consideration of the appellant's oldest child's interests. There is no criticism of the Judge's findings in relation to the appellant herself.

The Immigration Rules

14. The appellant's application was made under the 10-year parent route. To succeed the appellant would have to meet the requirements of E-LTRPT2.2 of the rules. On the appellant's own evidence, she does not have sole responsibility for her children, because she lives with her partner who shares parental responsibility with her. As a result, the appellant does not meet the eligibility requirements, and paragraph EX.1 of the rules cannot be considered.

15. Because of her age and the length of time that the appellant has been in the UK the appellant cannot meet the requirements of paragraph 276 ADE(1)(i) to (v) of the immigration rules. There is a dearth of evidence of significant obstacles to integration.

16. In SSHD v Kamara [2016] EWCA Civ 813 it was held that the concept of integration into a country was a broad one. It was not confined to the mere ability to find a job or sustain life whilst living in the other country. It would usually be sufficient for a court or tribunal to direct itself in the terms Parliament had chosen to use. The idea of "integration" called for a broad evaluative judgment to be made as to whether the individual would be enough of an insider in terms of understanding how life in the society in that other country was carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private and family life.

17. In Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 13 (IAC) it was held that mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are unlikely to satisfy the test of "very significant obstacles" in paragraph 276 ADE of the Immigration Rules. In Parveen v SSHD [2018] EWCA Civ 932 Underhill LJ commented on that observation "*I have to say that I do not find that a very useful gloss on the words of the rule. It is fair enough to observe that the words "very significant" connote an "elevated" threshold, and I have no difficulty with the observation that the test will not be met by "mere inconvenience or upheaval". But I am not sure that saying that "mere" hardship or difficulty or hurdles, even if multiplied, will not "generally" suffice adds anything of substance. The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as "very significant"*".

18. The appellant's evidence, at its highest, is that removal will bring about upheaval and inconvenience. On that evidence, the appellant cannot meet the requirements of paragraph 276ADE(1)(vi) of the rules. The appellant fails to discharge the burden of proving that she meets the requirements of the immigration rules.

19. I am mindful of Section 55 of the Borders, Citizenship and Immigration Act 2009, and the case of ZH (Tanzania) v SSHD [2011] UKSC 4**.** I remind myself of the cases

of Azimi-Moayed and others (decisions affecting children; onward appeals), [2013] UKUT 00197 and PW [2015] CSIH 36. It is well settled that it is in the interests of young children to stay with their parents.

20. Paragraph 276ADE (1)(iv) of the Immigration Rules says

> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> > (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
> >
> > (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
> >
> > (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
> >
> > (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
> >
> > (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
> >
> > (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

21. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 the child's best interest were to remain in UK, but that was not sufficient for the appellant in that case to succeed. In this case there is no reliable evidence of where the interests of the appellants children lie. Azimi-Moayed and others (decisions affecting children; onward appeals), [2013] UKUT 00197 and PW [2015] CSIH 36 tell me that it is in the interests of the children to remain with their parents. Both the appellant and her partner are Nigerian nationals. The respondent has no intention of separating this family. My starting position is that it is in the best interests of the appellant's children to remain with the appellant and her partner. There is no evidence to suggest that the children's best interests lie anywhere else.

22. The test for considering the appellant's children's interest both under paragraph 276ADE of the immigration rules and as part of the proportionality exercise influenced by section 117B of the 2002 Act is a test of reasonableness. The

determinative question in this appeal is whether it is unreasonable to expect the appellant's oldest child (a qualifying child) to leave the UK and return to Nigeria.

23. There is no evidence produced for the appellant either to the First-tier Tribunal or to the Upper Tribunal to indicate that it is unreasonable for the appellant's oldest child to accompany the appellant to Nigeria. All that is advanced is that the appellant's oldest child has lived in the UK for (now) 10 years. That evidence, standing entirely alone, is not sufficient to demonstrate that it is unreasonable to expect the qualifying child to return to Nigeria.

24. In the simplest of terms, the appellant cannot succeed because it is not argued that it is in the best interests of her children to remain in the UK and it is not argued that it is unreasonable to expect either of her children to accompany her to Nigeria. It cannot be presumed, simply because one of the appellant's children is a qualifying child, that it is unreasonable for the child to return to Nigeria. The test of reasonableness was not addressed by the appellant. The appellant does not discharge the burden of proving that paragraph 276ADE(1)(iv) is met.

25. On the facts as I find them to be the appellant cannot meet the requirements of either appendix FM or paragraph 276 ADE of the immigration rules.

Article 8 ECHR

26. I consider article 8 ECHR grounds of appeal outside the immigration rules. The respondent's decision cannot be a breach of the right to respect for family life because it is the respondent's intention to keep all of this family together. The respondent's decision is that the appellant, her partner and their two children can return to Nigeria. The respondent's decision does not force separation on the appellant's family, so it is not a breach of article 8 family life.

27. S.117B(6) of the 2002 Act is in two parts which are conjunctive. Section 117B(6)(a) weighs in favour of the Appellant because it is not disputed that she has a genuine and subsisting paternal relationship with a qualifying child. It is Section 117B(6)(b) which is determinative of this case.

28. The test of reasonableness was not addressed by the appellant. The appellant cannot therefore benefit from section 117B(6) of the 2002Act. There is no reliable evidence which could support a finding that it is not reasonable for either of the appellant's children to accompany her to Nigeria.

29. When I consider all of the evidence presented in this case I still know little about the appellant's home, her habits and activities of daily living, her significant friendships, any integration into UK society, or any contribution to her local community. There is no reliable evidence of the component parts of private life within the meaning of article 8 of the 1950 convention before me. The appellant fails to establish that she has created article 8 private life within the UK.

30. Even if I am wrong, and the appellant has established article 8 private life in the UK, I can only give little weight to that private live because it was established when the appellant was in the UK unlawfully and throughout the time when the appellant's immigration status is precarious. The appellant has not lead evidence to address the test of reasonableness in s.117B(6) of the 2002 Act, even though her oldest child is a qualifying child, so that the maintenance of effective immigration controls is in the public interest. The public interests outweighs any article 8 private life the appellant may have because of the operation of s.117B of the 2002 Act.

Decision

The First-tier Tribunal decision promulgated on 16 May 2018 is tainted by a material error of law. I set it aside.

I substitute my own decision.

The appellant's appeal is dismissed on article 8 ECHR grounds.

Signed  Date 19 October 2018

Deputy Upper Tribunal Judge Doyle