IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00337/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 3 July 2014 and 16 October 2014	**On 18 November 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MRS SERAH ELIGADEL EJEKU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Okoro, Solicitor (3/7/2014)
Mr Holt, Counsel, instructed by Arndale solicitors (16/10/14)
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge D Birrell promulgated on 7 March 2014, dismissing her appeal against the decision of the respondent which was made on 7 January 2014 to remove her from the United Kingdom pursuant to a decision to refuse to grant her asylum.

The Appellant's Case

2. The appellant married her first husband in 2003 and on 15 November 2004 they had a daughter. She suffered serious abuse from him. She left him in November 2006 leaving her daughter with a friend in Abuja whilst she returned to her mother's house in Lagos and continued to work. She travelled abroad regularly buying goods to sell in Nigeria last entering the United Kingdom in March and April 2009. She obtained a false Portuguese passport and began to work in that identity but this was discovered and she was sentenced to four months' imprisonment.

3. In August 2011 she became pregnant with her son who was subsequently born on 31 May 2012. It is her case that the child's father is Mustafa Otuyo, who is a married man and a British citizen.

4. The appellant believes that if returned to Nigeria she would be sacrificed by her former husband in accordance with Nigerian custom. It is also her case that her son is a British citizen and as such cannot be removed from the United Kingdom; and that therefore she should be allowed leave to remain here to care for him.

The Respondent's Case

5. The respondent's case is set out in the refusal letter dated 31 December 2013. She did not accept the appellant's account of fearing her ex-husband given the inconsistencies in her account and with her previous visa applications [15] and noted that the appellant appeared to have no problems with her husband since 2006 and had left Nigeria in 2009 during which time she was able to travel abroad, support herself and her daughter and to continue her education, indicating that her husband was not a threat [17]; she was unable to give any information about her husband's family or even his job. The respondent drew inferences adverse to the appellant for her failure to claim asylum until after she was arrested in 2011 and faced with removal choosing instead of her claiming asylum to live and work illegally.

6. The respondent considered that even if the appellant's account were true, her fear on return was speculative, did not engage the Convention and that there was in place in Nigeria a sufficiency of protection for her or that in the alternative it would be unduly harsh to expect her to relocate to an area where she would not be at risk from her husband.

7. The respondent noted that the appellant had when interviewed named two men as the possible fathers of her child, neither of which was the father named on the birth certificate and absent any other evidence was not satisfied that the child's father is a British citizen; and, believing the child to be a Nigerian national considered that the appellant did not meet the requirements of Appendix FM EX. 1. She considered also that the

appellant did not meet the current paragraph 276ADE and the child's best interests were to go to Nigeria with her given his age and the fact that the appellant had extended family there including her mother, grandmother and daughter. She noted that there was no evidence that the child had any contact with the biological father or other family in the United Kingdom and thus his best interests would be served by him going to Nigeria.

The Hearing

8. When the matter came before Judge Birrell on 28 February 2014 the appellant was unrepresented. Judge Birrell heard evidence from the appellant as well as Mr Otuyo. The judge found the appellant to be a vague, evasive an unconvincing witness by key features of her case [40] noting numerous discrepancies in her account. She also considered that Mr Otuyo was not a persuasive or credible witness [52] noting that he had difficulty even in identifying how many children he has and being unable to explain why if he had registered the birth, his name appeared differently in two places on the birth certificate. Judge Birrell found;

   (i) that the appellant had had no contact from her husband since separation in 2006 and that there is nothing to suggest that he had the means and motivation to look for her if she returned [43] and her claim to be a risk from him was pure speculation;

   (ii) that she did not accept that the appellant had lost touch with her child in Nigeria; that the timing of her application for asylum was a cynical ploy to extend her stay [45D] that she had not met the evidential burden to establish that Mr Otuyo was the father of the child [49] given the significant number of discrepancies noting that when interviewed she had named two men as potential fathers neither of whom was Mr Otuyo [50] that her explanation for this was not logical [51] and inconsistent

   (iii) the appellant's interest was only in identifying the British citizen's father of the child [53];

   (iv) as she had rejected the child's link with Mr Otuyo, he could not benefit from EX.1[54];

   (v) that the appellant did not meet the requirements of Appendix FM or paragraph 276ADE [55]; and that it would be in the child's best interests to return to Nigeria with his mother where she could be reunited with her daughter there being nothing to suggest a Nigerian upbringing would be contrary to the child's best interests [58].

9. The appellant sought permission to appeal on the grounds that:-

   (i) the judge's conclusion that the appellant's child is not a British citizen was perverse given that he had been genuinely

issued with a British passport which is not in dispute and the conclusion to the contrary was only a suspicion that the claimed father might not be the biological father, both parents having confirmed the child's parentage;

(ii) accordingly the judge had failed properly to apply paragraph EX.1 of Appendix FM;

(iii) that it was the respondent, who had alleged that the child was not a British citizen, to prove this and had failed to do so, the judge's conclusion to the contrary being incorrect;

(iv) that in light of the Immigration Directive Instructions with respect to EX.1 that it would not be reasonable to expect the appellant a parent of a British child to leave the United Kingdom.

10. On 20 March 2014 Upper Tribunal Judge Martin granted permission stating:-

> "3. I do not accept that the judge can be criticised for the numerous adverse credibility findings on the basis of the evidence before her, which was clearly woefully vague and contradictory I am persuaded that the judge might have erred in failing to assess the appellant's case on the basis that her child has a British passport. It may well be that in this case possession of the passport is not an indication of nationality given the other difficulties but it is a matter which findings need to be made."

Did the determination of the First-tier Tribunal involve the making of an error of law?

11. Judge Birrell approached the issue of the child's citizenship on the basis that it was for the appellant to prove that the father of the child was Mr Otuyo [43] and that he was a British Citizen.

12. It is not in doubt that the appellant's child has been issued with a valid British passport, nor is it disputed that a copy of that passport was in the material before Judge Birrell. She did not, however, make any reference to it.

13. A British Passport can only have been issued because the Secretary of State was satisfied that the appellant is the child of a British citizen and been born in the United Kingdom, and it follows from this that the child's birth certificate had been accepted by the proper authorities as being correct. They would also have to have been satisfied as to the father's nationality.

14. While a British Passport is not conclusive evidence of citizenship, it is strongly persuasive – see **R v SSHD ex part Obi** [1997] 1 WLR 1498. Here, no issue was taken with the assertion that the appellant's child is

the person to whom the passport was issued, and Judge Birrell did not consider the passport in reaching her decision. That was a failure to consider relevant evidence.

15. In reality, the respondent's case before Judeg Birrell would have to have been that the child's British Passport has been obtained by fraud, either in relation to information supplied to the Registrar of Births, or to the Passport Agency, or both. The burden was thus on the respondent to show that the child is not a British Citizen. Judge Birrell, however, approached this issue on the basis that it was for the appellant to prove that her child is a British Citizen, thus reversing the correct burden of proof. In doing so, she also failed to take into account the fact that a British Passport had been issued to the child.

16. There appears to have been no positive evidence put forward by the respondent in support of the assertion that the passport had been fraudulently obtained. Accordingly, I am satisfied that the judge erred in concluding that the appellant's son was not a British citizen.

17. I am satisfied that this error was material because although she went on to consider pursuant to Appendix FM-EX.1 whether it would be reasonable to expect the child to relocate to Nigeria, that analysis was undertaken on the basis that the child was not a British citizen which is a relevant and material issue.

18. Accordingly, I am satisfied that the determination of Judge Birrell did involve the making of an error of law and I set it aside insofar as it relates to the findings regarding the child's nationality and the applicability of Appendix FM EX.1.

Remaking the decision

19. When the appeal reconvened on 16 October 2014, I raised the issue of both parties to address me on the fact that it appears that this is a case which, following the decision of the European Court of Justice in **Zambrano** [2011] EUECJ C-34/09 it may well be difficult for the respondent to argue that it would not be reasonable to expect the child to go to live in Nigeria with his mother. Mr Holt did not seek to persuade me that the grounds of appeal should be amended to include the submission that the appellant is entitled to a derivative right of residence pursuant to Regulation 15A (4A) of the Immigration (European Economic Area) Regulations 2006 but both parties acknowledged that the decision in **Zambrano** must be taken into account in remaking the decision.

20. It was common ground that the sole issue in this case is whether the appellant falls within the provisions of EX.1; it is not in dispute that the other provisions of the immigration rules are met.

21. Mr Harrison accepted that he was not in a position to provide any evidence to show that although Mrs Ejeku's child had been issued a British passport,

this had been obtained by fraud nor is there any indication that any investigations had been undertaken. He accepted he was not therefore in a position to submit that the child was not a British citizen, as is confirmed by his passport.

22. It is apparent from Judge Birrell's findings which were sustained that the appellant is the mother of the child. It is not in doubt that the child lives with her, or that she cares for the child on a day to day basis. There is little contact between the child and the father who has his own family and Mr Harrison made no submission nor did he point to any evidence indicative of the fact that the appellant is not the child's primary carer. I am satisfied that the father would not take care of the child, and that if the appellant were to be removed to Nigeria, he would have to go with her. The issue under the immigration rules is, therefore, as both parties accepted, whether that would be reasonable.

23. The current guidance issued by the respondent in respect of Appendix FM provides:

> "Where a decision to refuse the application would require a parent or family carer to return to a country outside the EU, the case must always be assessed on the basis it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer. In such cases it will usually be appropriate to grant leave to the parent or primary carer to enable them to remain in the UK with the child provided there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent and family care gives rise to considerations as such were it is to justify separation, the child could otherwise stay with another parent or alternative primary care in the UK or the EU."

24. The child is a British citizen. It is not submitted by either party that he has relatives in the United Kingdom who could care for him other than his mother who, it is accepted is his primary carer. I am not satisfied in this case that there is any alternative to the appellant's child being looked after by her and accordingly, I am not satisfied in the circumstances nor was it submitted by Mr Harrison that there was any basis on which the appellant does not fall within the terms of EX.1 and, it appears, she falls within the relevant policy guidance.

25. Accordingly, for the reasons set out above I allow the appeal under the Immigration Rules.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside in part. The decision that the appellant's removal would not be in breach of the Refugee Convention, is not entitled to

Humanitarian Protection and that her removal would not be contrary to article 3 of the Human Rights Convention is preserved.

2. I remake the decision that the appellant does not meet the requirements of Appendix FM of the Immigration Rules and I allow the appeal under the Immigration Rules.

Signed Date: 17 November 2014

Upper Tribunal Judge Rintoul