Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07196/2016
HU/07200/2016

THE IMMIGRATION ACTS

Heard at Field House

On 16th October 2018

Decision & Reasons Promulgated
On 6th November 2018

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

OCI
OEI
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Nathan (instructed by Quality Solicitors Orion)
For the Respondent: Mr T Lindsay (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Appellants, with permission, in relation to a Decision and Reasons of Judge Lodge of the First-tier Tribunal, promulgated on 11th December 2017, following a hearing on 1st December 2017.

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2. The Appellants are a mother and her eldest daughter. However, the appeal before the First-tier Tribunal and before me rests on the situation of the Appellants two minor children who are dependents in the appeal.

3. Permission was granted by a Judge of the First-tier Tribunal who felt it was arguable that the Judge failed to analyse adequately the situation concerning the child who was undertaking GCSEs in June 2018 (child 1). He did not believe there was force in the criticism of the Judge's analysis of the situation of the child with autism (child 2). He also believed the adverse credibility findings concerning the inability of the Appellants to describe their husband/father's true position in Nigeria to be unimpeachable.

4. Before me Mr Nathan relied upon all of the grounds.

5. The first ground argued that while the Judge noted with respect to child 2 that he was not at a critical stage in his education, he made no reference to child 1's education when in fact he was due to take his GCSEs in June 2018. The grounds, and Mr Nathan, argued that both children, being in years 10 and 11, were at a critical stage in their education.

6. The second ground argued the Judge erred in his finding that there were adequate educational facilities in Nigeria for child 2 who has learning disabilities, now diagnosed as autism, for which he attends a special school in the UK.

7. The third ground is more generic criticising the Judges comment at paragraph 26 that it is "somewhat bizarre" for the first Appellant to have only one surviving close relative. The Judge is also criticised for failing to accept the destruction of the family home by the state government, when had that been raised, evidence could have been provided. The Judge's finding about the sources of the loan for her daughter's tuition fees is also criticised as is the comment that the family have been a burden on public funds because, prior to the Secretary of State's refusal to grant her further leave, the family was supported by the first Appellant's earnings as a law lecturer at Leicester University.

8. The background to this case is that the Appellants are nationals of Nigeria who made an application for leave to remain on Article 8 grounds. The second Appellant was born in September 1997, child 1 in December 2001 and child 2 in June 2003.

9. The first Appellant was granted entry clearance as a student and entered the UK on 22 November 2011 with leave until July 2014 (subsequently extended until 2015).

10. The children entered the United Kingdom to join her as dependents in 2012.

11. Prior to the expiry of her leave the Appellants sought leave to remain outside the Immigration Rules. It is that decision which was the subject of this appeal.

12. Child 1 has attended school in the UK. Child 2 has been attending a special school in the UK. He was initially diagnosed with impaired communication and learning difficulties and at the date of the hearing before the First-tier Tribunal there were indications that he had signs of autism. He has since been diagnosed as autistic.

13. Mr Nathan’s submissions were that the Judge ought to have factored in that both children were at a critical stage in their education, whereas he disregarded child 1’s situation. Further, the Judge should have attached greater weight to the 2015 report from child 2’s headteacher indicating that he had made outstanding progress since he had been at the school and that a move would be detrimental. The 2017 report indicated that he had moved into key stage IV, which are the GCSE years, and if moved he would not continue to make progress and a failure to be able to access the specialist training and education that he is currently receiving would be detrimental to his future life chances.

14. He argued that while schools in Nigeria may be good schools there are no good special schools and to send child 2 back he “would be damned”.

15. On the Secretary of State’s behalf Mr Lindsay argued that there was no evidence of any private life in the UK save for education and the Judge had found that they would have access to the best there is in Nigeria because they had available funds. That finding was not challenged. He also referred to the significant negative credibility findings regarding the first Appellant and that there was a significant public interest in not permitting those who have sought to deceive to remain.

16. Turning to the Decision and Reasons of Judge Lodge; he set out the basis of the claim and noted that it was accepted that the Appellants could not meet the Immigration Rules and so the only issue was whether removal would be disproportionate having regard to Article 8 of the ECHR particularly with regard to the best interests of the children.

17. Whilst the case before me and the grounds argue that inadequate consideration was given to the situation of child 1 it is quite clear from paragraph 19 of the First-tier Tribunal’s decision that counsel who represented the Appellants before the First-tier Tribunal relied only on the best interests of child 2 and his claimed “unique position”. He said: -

> “Mr O’Callaghan added that 276 ADE (1) (vi) was an issue with regard to the first Appellant but only in the context of their being very significant obstacles to the family returning because of child 2’s unique position. That is to say if child 2 succeeds (outside the Rules) the family can rely on 276 ADE (1) (6). He did not add, but it must

follow, that if it is reasonable for child 2 to return the appeals of the Appellants must fail.

18. If the position of child 2 was all that was relied upon before the First-tier Tribunal then the Judge cannot be criticised for addressing the only issue put to him. Counsel clearly believed, correctly, that child 2 was the only issue that could possibly succeed in the appeal.

19. The Judge said at paragraph 21 that the first Appellant came to the UK to complete a PhD that she had started in Nigeria in 2008. The Secretary of State submitted to the First-tier Tribunal that the first Appellant's primary intention in coming to the UK was to take advantage of the education available for her children and particularly the son with special educational needs. There was a document in the Respondent's bundle indicating that child 2 should be been enrolled in a special school in Nigeria where his problems could be adequately addressed. That same document indicated that an alternative would be to take him to the UK or USA where there are several special schools.

20. There was another document recommending that child 2 go to the UK to access medical and educational opportunities. The Judge did not find that accessing education for child 2 was the only purpose in coming to the UK but he did find that it was one of the drivers. In particular, he noted that the Appellant had started her PhD by distance learning and he was therefore unable to understand why she could not complete it that way, particularly as the cost of coming to the UK must have been considerable in terms of university fees.

21. The first Appellant is married and her husband came to the UK in 2012 but then returned, presumably because of his employment in Nigeria. There was vague reference by the first Appellant to some problem with her husband but she did say they were still married. The second Appellant, the eldest daughter, said in her evidence that she was in regular contact with her father and the Judge found that the first Appellant and her husband remained in a subsisting relationship.

22. The first Appellant had given evidence that their home, in the grounds of the University, where she and her husband had lived had been demolished by the government. However, she was unable to give any real detail about this and the Judge found that she had been less than truthful in this evidence. In any event he said that that house had been rented property and her husband had another house so that if the family were removed he was satisfied there was a home that they could return to.

23. The Judge did find it odd that the Appellant only had her mother in Nigeria and that neither she nor her husband had any other relatives. Although this finding may attract some criticism it is in no way determinative of the appeal.

24. Both Appellants gave vague evidence about the first Appellant's husband's employment at the University. The Judge simply did not accept that neither the first Appellant nor her eldest daughter knew what his position was. The Judge did note that the husband had been provided with accommodation and that he supported his family in the UK for five years and had paid large sums of money for tuition fees. He found himself satisfied that the husband was in a well remunerated position at the University of Benin and there would be no financial difficulties if the family were to return.

25. He rejected the first Appellant's claim that she had had to borrow money to pay for her daughter's tuition and accommodation and found himself satisfied that the husband had financially supported the family and paid for the eldest child's education.

26. The Judge then specifically turned to the situation of child 2 and found that, although he was clearly progressing well in his current environment and school, he was not prepared to accept that leaving that school would severely impact his educational attainment or mental health. He noted that his mother had had no hesitation in leaving him in Nigeria in 2011 for a period of nearly a year and he noted that the change from living in Nigeria to the UK had no detrimental impact upon him. The Judge found that common sense indicated that he was safe and happy in the bosom of his family and that must be the main anchor in his life. With regard to his educational attainment the Judge found that would depend on whether he could access comparable help in Nigeria.

27. The Judge then looked at the availability of such education in Nigeria and noted that prior to arriving in the UK child 2 was receiving specialist care in Nigeria and noted a recommendation that he attend a special school in Nigeria which was properly equipped to treat children with his difficulties.

28. Additionally, the Judge noted information provided by the Home Office confirming the availability of special education in Nigeria.

29. The Judge noted that, given the comfortable financial situation of this family, child 2 would be able to access the best education there is in Nigeria.

30. In the wider context the Judge noted that child 2 will be returning as part of the family unit to be reunited with his father and grandmother in Nigeria. He would be returning to a country of which he is a citizen with all the rights of that citizenship and would have his family to help them to adjust to life there. There would be no financial problems for the family and he could access any and every facility both private and public.

31. Overall the Judge found that it had not been established that it was in child 2's best interests that he remain in the UK.

32. It also clearly factored into the Judge's reasoning that although wealthy, the family in accessing special education in the UK for child 2 in particular, had been a burden on public funds. Even if the first Appellant's husband paid for his eldest daughter's university education and for his wife's, quite clearly the younger children were being educated at public expense.

33. At the time the First-tier Tribunal heard this appeal, given the landscape of case law at that time, another Judge hearing the case may have decided it differently. That is not to say that this Judge made an error of law. His findings are all fully reasoned and based on the evidence. It is true that the Judge made reasoned findings that this is a wealthy family, the adult Appellants had not been truthful as to their situation in Nigeria as to their accommodation or the relationship between the first Appellant and her husband or to the reason for the children coming to the UK. The Judge made reasoned findings based on the evidence as to the availability of education in Nigeria and I cannot fault those reasons.

34. In any event, the landscape has changed somewhat following the decision of the Supreme Court in KO (Nigeria) [2018] UKSC 53. That case made clear that when considering whether it is reasonable to expect a child to leave the UK relevant to paragraph 276 ADE the reasonableness test is entirely child focused and any adverse behaviour by a parent cannot be taken into account. However, that case also made clear that in an assessment of the best interests of children and what is reasonable must take place in the real world. If neither parent has a right to remain in the UK than that is the background against which the assessment is conducted and the ultimate question is whether it is reasonable to expect the child to follow the parent with no right remain to the country of origin. Adding the Supreme Court's reasoning into the reasoning of the Judge the First-tier Tribunal, I find there can be no question of a finding that it would not be reasonable for either of the two minor children to return to Nigeria with their mother who must leave as she has no right remain to be reunited with their father and grandmother.

35. Furthermore, it is not unimportant that neither child was a qualifying child for the purposes of s.117B and that their private life such as it is has been built up while their status was precarious.

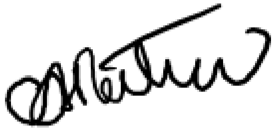
Notice of Decision

The First-tier Tribunal's decision is not tainted by material error of law. Accordingly, the 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 Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his 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 Date 5th November 2018

Upper Tribunal Judge Martin