Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13300/2017

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 18 February 2020	**On 09 March 2020**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: None
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This decision refers to the circumstances of the appellant's three young children and for that reason I have maintained the anonymity order.

2. In this decision, I remake the substantive decision on whether the appeal brought by the appellant against a decision dated 17 October 2017, refusing her human rights application should be allowed or dismissed on human rights grounds.

3. In a decision promulgated on 3 December 2019, Upper Tribunal ('UT') Judge Rintoul gave reasons for setting aside a decision of the First-tier Tribunal ('FTT') sent on 12 March 2019, dismissing the appellant's appeal on human rights grounds.

Parties

4. The appellant is citizen of Nigeria who entered the United Kingdom ('UK') in June 2013 as a dependent of her husband. He held leave to remain as a Tier 4 Migrant from 2009, which was then changed to leave as a Tier 1 Migrant and then to leave as a Tier 2 Migrant (expiring on 4 August 2016).

5. The appellant arrived in the UK with her son, A, who was born in September 2007. A is therefore 12, having arrived in the UK in June 2013, when he was 5. The couple had two more children born in the UK, B in December 2014 and C in March 2018.

6. The appellant and her husband ('the father')'s in-time human rights application to remain in the UK was refused by the respondent in a decision dated 17 October 2017. They both appealed against this decision to the FTT, which dismissed their appeals.

7. I have been informed that the father was granted indefinite leave to remain ('ILR') in the UK following the promulgation of the FTT's decision, and as noted by Judge Rintoul in his 'error of law' decision, this meant that his appeal was deemed to have been withdrawn. He has played no further part in the appeal proceedings. This appeal therefore solely relates to this appellant and her three children. The father has had no contact with the appellant and the children for many months now, and for reasons set out below, the relevant Local Authority ('LA') is not supportive of direct contact.

Issues to be determined

8. The FTT judge focussed upon Article 8 of the ECHR and did not address Article 3. Although this was briefly criticised in the grounds of appeal, it is clear from Judge Rintoul's decision that he was most concerned with the FTT's failure to address the best interests of the children, in the context of Article 8.

9. The appellant is no longer represented but confirmed before me that she was content for the decision to be remade under Article 8 only and that the focus of my decision should be upon the impact of removal on her children, albeit that it would be relevant in determining this to note her submission that the children will be

adversely impacted by the deterioration in her mental health in Nigeria.

LA involvement with the family

10. The LA first became involved with the family in March 2014, when the appellant was sectioned under the Mental Health Acts. The family were supported whilst the appellant remained hospitalised but the referral was closed in September 2017. A further referral was made to the LA in December 2017 and since this time the LA has remained closely involved with the family.

11. This information is set out in a detailed chronology and summary of current involvement dated 13 January 2020, as prepared by Ms O'Brien, a social worker employed by the LA, and submitted pursuant to an order made by Judge Rintoul at the error of law hearing. In summary, the children became subject to a 'child protection plan' in April 2018 and investigations began regarding the impact upon the children of *inter alia*, the appellant's mental health issues and domestic abuse allegations against the father. By May 2019 this was downgraded to a 'child in need' plan but upgraded again to a 'child protection plan' in July 2019, following further domestic abuse allegations against the father.

12. In December 2019 the appellant and A were video interviewed regarding the domestic abuse allegations. This investigation remains ongoing.

Hearing

13. At the beginning of the hearing before me the appellant provided me with a copy of the chronology prepared by the LA I have referred to above. The appellant was unrepresented and there was no interpreter available. She was content to proceed without an interpreter. I was satisfied that she fully understood the proceedings and was able to give her evidence in a clear manner. It was not disputed that the appellant was a vulnerable witness, and particular care was taken to ensure she understood the proceedings and was able to give evidence comfortably. The appellant clarified the family's current position and was briefly cross-examined by Mr Bates.

14. Mr Bates accepted that the appellant's evidence was entirely truthful and credible and made it clear on behalf of the respondent that there was no challenge to the factual matrix articulated by the appellant, which was consistent with the evidence from the LA. Mr Bates accepted that the children's best interests firmly supported remaining in the UK given the following: the role that the LA had played and continued to play; the appellant's mental health concerns, and; the specific concerns disclosed by A. Mr Bates quite properly reminded me that the case does not involve any 'qualifying' children and a high

threshold is necessary to allow the appeal on Article 8 grounds. Mr Bates however invited me to note that the only powerful public interest in this case was the maintenance of immigration control, which had been diminishing with time given A's proximity to residence in the UK for a seven year period (in June 2020). Mr Bates noted that the father had been granted ILR but was unable to provide me with any detail on why the respondent considered it appropriate to do so or to not grant his family members (to whom he is now estranged) ILR. Mr Bates candidly indicated that he was unable to 'concede' the appeal, but the relevant material factors 'probably' outweighed the public interest and supported the appeal being exceptionally allowed on Article 8 grounds.

15. After hearing from Mr Bates, I told the appellant that her appeal was allowed on Article 8 grounds, for reasons I now give.

Legal framework

16. The appellant's application to remain in the UK fell to be determined under the Immigration Rules set out in Appendix FM and Appendix FM-SE.

17. The respondent was also under an obligation to consider whether the refusal of the appellant's application would result in unjustifiably harsh consequences, necessitating an examination of Article 8 factors, outside the rules. GEN.3.1.-GEN.3.3 of the Rules, which were amended from 10 August 2017 for all decisions made on or after that date by HC290 poses the following question: are there exceptional circumstances which would render refusal of leave to remain, a breach of Article 8 of the ECHR, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application. In accordance with GEN.3.3.(1) the decision-maker must take into account, as a primary consideration, the best interests of any relevant child. This reflects the relevant statutory framework that primary consideration must be given to the best interests of any relevant child in line with section 55 of the Borders, Citizenship and Immigration Act 2009.

18. When determining this appeal I bear in mind the demanding test set out above and have taken into consideration sections 117A-D of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). Section 117B(6) provides enhanced protection for persons in a genuine and subsisting relationship with a 'qualifying child' who is defined in s. 117D(1) to mean a British citizen child or a child who has lived in the UK for a continuous period of seven years or more. From this it is clear that none of the three children are 'qualifying', albeit A would become a 'qualifying child' in June 2020.

19. I have also borne in mind the relevant domestic and Strasbourg jurisprudence on Article 8, but given the position adopted by Mr Bates, I do not consider it necessary to set this out in any detail.

Discussion

20. Dealing firstly with the appellant's situation under the Immigration Rules, I turn first to 276ADE. None of the children are qualifying children either at the date of the decision or hearing and cannot meet 276ADE(1)(iv). I must also consider whether there are 'very significant obstacles' to the appellant's integration to Nigeria for the purposes of 276ADE(1)(vi). In so doing I must undertake a broad evaluative judgment - see SSHD v Kamara [2016] EWCA 813, [2016] 4 WLR 152 and SA (Afghanistan) v SSHD [2019] EWCA Civ 53. I must assess whether any obstacles to integration reach the high threshold required by 'very significant' – see Parveen v SSHD [208] EWCA Civ 932.

21. The appellant told me and I accept that her mental health deteriorated significantly in March 2014 (when she was pregnant with her second child, B) and this led to her hospitalisation due to a psychotic episode, for many months. Although the appellant has remained stable since her release and has been compliant regarding her anti-psychotic medication, I accept her evidence that this would be very difficult to maintain in Nigeria without the extensive support network she has in the UK. Importantly, this includes quarterly visits to her treating Consultant Psychiatrist Dr Vovnik and weekly visits to her home by a community mental health nurse, Ms Rotheram. Ms Rotheram has emphasised in correspondence that the appellant is on the 'Care Programme Approach' and suffers with paranoid schizophrenia, a severe and enduring mental illness. In addition, the appellant receives extensive support in parenting her children from the LA and members of her Church.

22. By contrast, I accept the appellant's evidence that she has no family or community to support her in Nigeria. When she last lived there in 2013 her contacts were inextricably linked with the father. Mr Bates pressed this point in cross-examination and entirely accepted during the course of his submissions, that the appellant would have no meaningful support from her family, the father's family or otherwise in Nigeria and would have to fend for herself there. I note that the respondent adopted a different position at the FTT hearing (see [26] and [43] of the FTT decision). At that time the father was still a part of the family unit, and the evidence no longer supports the appellant or the three children having any access to family support in Nigeria.

23. I acknowledge that the appellant has tried her best to provide for her family in difficult circumstances in the UK. She has tried her best to work when able to and indicated that if allowed to do so after her hospitalisation and after her leave to remain expired, she would have

liked to have worked to support her children in the UK. She worked briefly as a 'voluntary' toilet bar attendant in 2018 but has not returned when the LA explained that she did not have permission to work from the respondent. She will be able to work in Nigeria and is likely to endeavour to do so. However, I note that the appellant's serious mental health deterioration in 2014 occurred at a time when she was working very long hours to provide for her family, which at the time only included one child. In Nigeria she will be a single mother with three children, including a baby. I have no doubt that she will try her best to obtain employment but without any meaningful support in Nigeria, this will cause her great stress and anxiety, and given her particular circumstances and current mental health, this is likely to lead to a significant deterioration in her mental health within weeks or months of the family's arrival in Nigeria, such that she is likely to return to the position in 2014, when she was unable to care for family or participate in society, and was sectioned for a lengthy period. In my view, a broad evaluative judgment of all the relevant factors but in particular this appellant's mental health history and current presentation, are such that within a short period of time once in Nigeria she will face serious hardship in caring for herself and her children with the consequence that the obstacles to her integration with the wider Nigerian society will be 'very significant'.

24. I reach that conclusion even assuming that before her removal, she will be provided with the necessary medication to last her for the first months in Nigeria and after that time medication will be available to her in Nigeria. I also fully bear in mind the points made by the respondent in the decision under appeal that this appellant resided for the majority of her life in Nigeria and will have considerable knowledge and resilience to assist her to reintegrate.

25. That is not, however, the end of the examination of the appellant's position under the Rules. Even if I am wrong in relation to 276ADE, the appellant is still entitled to succeed under the Rules if able to show, pursuant to GEN.3.1-GEN.3.3., that there are exceptional circumstances which would render the decision to remove a breach of Article 8 because such refusal: "*would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.*"

26. I am satisfied from the information before me that the appellant and her three children would be so affected, and I now turn to whether the effect was such as to result in unjustifiably harsh consequences. In so doing I have taken into account the relevant public interest and public interest considerations. When considering whether the consequences for the children will be unjustifiably harsh it is important to conduct a holistic assessment that addresses both sides of the Article 8 balancing exercise.

27. Turning first to consider the public interest considerations applicable in this case, it is clear that there is a public interest in the maintenance of immigration control which has the legitimate aim of furthering the economic well-being of the UK. I have proceeded on the basis that the appellant and her children have no legal entitlement to remain under the substantive Immigration Rules. A is close to being but is not yet a qualifying child. The appellant can speak English and with the correct support in place may be able to work in the UK. Little weight must be given to the family life of the family members given their immigration history. None of these are trump cards or come anywhere near to determining the balancing exercise. However, as acknowledged by Mr Bates this unusual case raises two particular compelling and compassionate concerns, which I address in turn.

28. First, I have already determined that the appellant's mental health is likely to significantly deteriorate on return to Nigeria with adverse consequences for her and her children. Even if I am wrong in concluding that this meets the necessary threshold for 276ADE(1)(vi) to be met, my underlying factual assessment remains relevant at this stage.

29. Second, the children are currently subject to a child protection plan to address identified safeguarding issues. The LA initially considered there to be a period of stability in the home, but escalated their involvement in July 2019. Related to this, I accept the appellant's evidence that she has been provided with comprehensive support from mental health professionals and social workers at the LA to help her to care for her children. This is consistent with material from the LA demonstrating either weekly or fortnightly home or statutory visits to the family home from 2018 onwards. There are particular concerns regarding A, who has made some very worrying significant disclosures. He is emotionally very vulnerable and seems to be being very closely monitored by the LA and his school. This includes 1:1 regular weekly sessions with the school monitor to provide him with ongoing support regarding his emotional well-being.

30. It is well-established that the best interests of the children assessment requires a balanced approach. I do not need to dwell on this in any detail because Mr Bates conceded that this is a case in which the children's best interests overwhelmingly support remaining in the UK, where both they and their mother can continue to access the comprehensive support they have been assessed to need by the LA.

31. Weighing up the above considerations on a cumulative basis and balancing these against the public interest as identified by Mr Bates and the public interest considerations in section 117B(6) of the 2002 Act, I am satisfied that for the appellant to currently live in Nigeria with her children would within a short period of time, result in

unjustifiably harsh consequences. The children have no one else to turn to in Nigeria for support. They are young and vulnerable. Given the likelihood that the appellant's mental health condition is likely to deteriorate significantly, they are likely to be entirely isolated and without a viable and dependable carer in Nigeria.

32. In so finding I have reminded myself that this is a very high test to meet. This is not a 'pure health case' for the purposes of either GEN 3.1 or Article 8. My assessment is based not just on the appellant's mental health but the particular circumstances relevant to these children and how the family as a whole and individually are likely to be adversely impacted by removal to Nigeria. Nonetheless, in my judgment this is one of the 'very few rare cases' where article 8 might be engaged – in this case there is a separate or further element (impact on vulnerable children assessed to be in need) going beyond the appellant's mental health - see GS (India) v SSHD [2015] EWCA Civ 40 at [111].

Conclusion

33. For the reasons set out above, I find that the appellant has displaced the burden of establishing a breach of 276ADE(1)(vi) if returned to Nigeria. If I am wrong about this, the appellant's removal would result in unjustifiably harsh consequences for her children such that this is one of those exceptional cases that notwithstanding the public interest in the family's removal, it would be a breach of Article 8 to remove them.

Notice of decision

34. The appeal is allowed on human rights grounds (Article 8 of the ECHR).

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: *UTJ Plimmer* Dated:
Upper Tribunal Judge Plimmer 2 March 2020