Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15773/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 2nd December 2014	**On 5th December 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ANGEL AJOKE ADERONKE EYIWUNMI DAIRO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Miss N Weir, of Latta & Co Solicitors
For the Respondent: Mr A Mullen, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria, born on 19th July 1983. Her older son, known as Richard, was born in the UK on 18th July 2007.

2. On 30th May 2013 the appellant made a "fresh claim" to remain in the UK. The respondent refused it by letter dated 18th March 2014, finding it reasonable that the appellant should return with her son to Nigeria. The respondent did not accept that the appellant was in a genuine and

subsisting relationship with a UK citizen, Mr Paul Connor, there being little evidence to substantiate that.

3. The facts as established at the hearing of the appeal on 23rd May 2014 in the First-tier Tribunal before Judge Bradshaw were different. In his determination, promulgated on 11th June 2014, the judge found that the appellant is in a genuine and subsisting relationship with Mr Connor (and that is no longer disputed). They have a daughter, Omolola, born on 21st April 2014.

4. The judge at paragraphs 68 and 69 found that Mr Connor reasonably took the position that he would not go to Nigeria and nor would his daughter. The judge found at paragraph 76 that some communication could be maintained; at paragraph 77 that the appellant might apply to return to the UK; at paragraph 81 that the interests of Omolola would be best served by being brought up by her mother and father, which would not happen if the appellant were removed to Nigeria; but concluded at paragraph 82 that removal would be a proportionate outcome.

5. The grounds of appeal to the Upper Tribunal are:

   (1) no reasoning for the finding that Richard would not be adversely affected by separation from his sister;

   (2) no reasoning for the finding that Richard would not be affected by loss of a father figure;

   (3) failing to consider the impact of the limited communication available from Nigeria on the relationship between the appellant and her infant daughter;

   (4) error in finding that the appellant could apply from Nigeria, that being an outcome which should have been excluded by reference to *Chikwamba*; and

   (5) removal of the appellant and her son would deprive her daughter from being brought up by her father and mother; the appellant's immigration history should not count against the children; failure to evaluate the best interests of the children; all leading to a disproportionate outcome.

6. Grounds 1 and 2 might be of lesser importance, but 3, 4 and 5 all go to material matters. The judge did not make it clear why he thought the appellant might succeed on an application from abroad. At paragraph 77 he appears to contemplate that she would. However, the income disclosed would not be sufficient for that purpose, and the appellant had put her case on the basis that the terms of the Immigration Rules could not be met. It is not clear whether the decision is based on the assumption of a short term or of a long term separation of mother and child – two very different matters, although even a separation of a few months might be quite undesirable. Separation of mother and an infant

child is a drastic step, requiring considerable justification. Departure only to comply with formalities would not seem to be a good enough reason, even where there has been a poor immigration history.

7. For the reasons identified in the grounds and for lack of clarity in the reasoning underpinning the final outcome, I was satisfied that the determination falls to be set aside.

8. Mr Mullen made a somewhat ingenious submission that the acknowledgment of not meeting the Rules involved an acceptance that it would be reasonable to expect the child to leave the UK and that there were no insurmountable obstacles to family life with the appellant's partner continuing outside the UK, and so the appeal could not succeed outside the Rules either. I think that submission reads much more into the acknowledgment of failure to meet the Rules than was intended. The appellant surely meant that she and her partner could not satisfy the financial requirements, and no more. On the basis of such a far reaching concession, there would have been no appeal to pursue.

9. In remaking the decision part 5A of the 2002 Act, as inserted by section 19 of the 2014 Act, is to be taken into account (although these provisions do not appear to have been intended to alter the pre-existing law). Section 117B(6) provides thus:

> In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

10. The appellant is not liable to deportation. The genuine and subsisting nature of her parental relationship with Omolola is not in doubt. Omolola is a qualifying child, being a British citizen.

11. Richard was born in the UK and has passed the age of 7. Miss Weir acknowledged that there is some doubt as to the length of time he may have spent outside the UK, but she submitted that even if he was absent from the UK for a period not long after birth he has now been here for a continuous period of seven years or more. That point need not be explored further, because I think the position of Omolola on its own decides the case. Although the position in relation to Richard is relevant, it is not as strong as that aspect.

12. The question is whether it would be reasonable to expect Omolola to leave the UK. Judge Bradshaw found that it would not. Mr Mullen submitted that it would be reasonable to expect the child to leave, taking into account the appellant's poor immigration history. Her parents do not think it would be reasonable; opinions to be taken into account, although not determinative. She is a UK citizen, with the advantages which that confers. It would not

be impossible for Mr Connor to make a life in Nigeria, but it would be much less advantageous for his daughter than if he carries on making his living and supporting his family here. I had no difficulty in concluding that it would not be reasonable to expect Omolola to leave. It follows that the public interest does not require the appellant's removal.

13. It is also plain that the interests of the child are far better served by her being brought up here by both parents than by her being separated from her mother, especially at such a tender age.

14. I indicated at the hearing that the appeal would be allowed under Article 8, outside the Rules. Representatives did not suggest that on the above finding about whether it was reasonable to expect the child to leave the UK, the case succeeded within the Rules. That was not considered at the time of the refusal decision, when the facts were very different. It has occurred to me since the hearing that the present facts might satisfy Appendix FM, paragraphs E-LTRP.3.1.(c) and section EX.1 (a) of the Rules; but there may other aspects to this complex scheme. I have not called for further submissions, because whether under section EX.1 (a) of the Rules or the similar wording of section 117B(6) of the 2002 Act, the outcome is the same.

15. The determination of the First-tier Tribunal is **set aside**. The following decision is substituted: the appeal, as originally brought to the First-tier Tribunal, is **allowed**.

16. No order for anonymity has been requested or made.

4 December 2014
Upper Tribunal Judge Macleman