Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11848/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th August 2015	**On 8th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BISOLA VICTORIA IBINOLA

Claimant

Representation:
For the Appellant: Ms E Savage, Senior Presenting Officer
For the Claimant: Mr M Al-Rashid, Counsel instructed by David A Grand (OISC)

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge J.R.W.D. Jones QC allowing the Claimant's appeal on human rights grounds with reference to Appendix FM.

2. In a Refusal Letter dated 26 February 2014, dated 3 March 2014, the Secretary of State refused the Claimant's human rights application in relation to her right to private and family life and issued removal directions dated 3 March 2014 (IS151B) set for the Claimant's country of origin, Nigeria. The First-tier Tribunal promulgated its decision allowing the Claimant's appeal against that decision on 12 March 2015.

3. The Appellant appealed against that decision. The grounds may be summarised as follows:

   (i) The judge erred in considering the question of whether the children could be expected to move to Nigeria by asking himself the wrong question. The judge wrongly focussed on whether the family life between the Claimant and her husband could be replicated in Nigeria. The judge considered whether the children could live in Nigeria but failed to consider whether the Appellant's husband could visit his children in the UK periodically or whether his children could visit him in Nigeria if they wished to, which is in keeping with the family's situation as there is often some distance between the family but their relationships are maintained. The partner's choice not to move to Nigeria with the Claimant does not of itself satisfy Appendix EX.1.(b). In short, the difficulties faced could be overcome by the children being left in the UK and their father moving with the Claimant to Nigeria which is a choice reasonably expected of all of them in the circumstances;

   (ii) The judge has erred by failing to consider the 'precarious' relationship as the Claimant has been in the UK without leave since 31 December 2010.

4. The Appellant was granted permission to appeal by First-tier Tribunal Judge Osborne.

5. I was not provided with a Rule 24 response from the Claimant but was addressed in oral submissions by her counsel.

No Error of Law

6. At the close of submissions, I indicated that I would reserve my decision, which I shall now give. I do not find that there was an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.

7. In relation to the first ground, I find that the Secretary of State's appeal must fail in relation to the judge having allegedly omitted consideration of whether it was an insurmountable obstacle to separate the husband from his British children from a previous relationship. With respect to both advocates, they appear to my mind to have missed the point entirely.

8. The Secretary of State cannot require a British citizen to relocate abroad or quit the UK. This is because citizens possess an inalienable right of abode and are not subject to immigration control pursuant to section 1(1) of the Immigration Act 1971. For ease of reference, section 1(1) states as follows:

> 'All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their

right to be established or as may be otherwise lawfully imposed on any person'

9. Therefore, as the Secretary of State cannot require the Claimant's British husband nor his British children to move to Nigeria, if the British husband refuses to go to Nigeria, it is unclear to what extent a judge could consider the hypothetical scenario of such a person quitting their country of residence, particularly where that individual has already expressed that they do not wish to or will not go. In the light of that stance, it is of little application or use that a judge consider what would happen if they did go, given that the individual has made their stance abundantly clear. To this extent, nothing may be expected of a British citizen as they are not subject to immigration control and one cannot 'expect' them to go as Ms Savage contends.

10. Furthermore, I do not accept Ms Savage's submission that the consideration of visits by British children to a British parent abroad is a mandatory requirement to be considered under Appendix FM EX.1.(b). Despite a request from me to point to any relevant wording in a rule or any relevant guidance, Ms Savage was unable to refer me to any specific rule or guidance which could support her contention. Further still and notwithstanding the above, she was unable to demonstrate that this point was taken by the Secretary of State in her refusal decision (see paragraphs 10-24 of the Refusal), or that it was pursued at the First-tier Tribunal below. Consequently, it is an entirely new point that has been raised for the first time by the Secretary of State's Specialist Appeals Team when bringing this appeal to the Upper Tribunal and has no place in these proceedings which seek to demonstrate an error of law in the way the judge addressed the Secretary of State's bases for refusal.

11. I further reject Ms Savage's contention that the choice of the parties to relocate is unimportant compared to whether separation of the father and children is within the range of what can reasonably be expected of them. The practicality of removal and the *status quo* is of great importance in an Article 8 assessment, particularly where a party chooses not to go (as Ms Savage accepts they may do) and where any further discussion on whether they leave the UK is therefore laid to rest (for further discussion on this concept, see [42] of Lord Justice Sedley's judgment in *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5). In my view, it would be unhelpful for judges to be expected to speculate on potential scenarios, especially where such assessment is rendered unnecessary by a British citizen making clear that they will not leave their country of abode, which the Secretary of State must respect and observe given the British citizen's right is inalienable and given that the Secretary of State's powers of control do not apply to individuals mentioned in section 1(1) of the 1971 Act.

12. In any event, even if it were required of a judge to consider the hypothesis of a British parent relocating abroad with their foreign spouse and whether the British children from a previous relationship should be deprived of

their regular parental contact and whether they should now maintain contact via international visits, I have serious doubts as to the lawfulness or usefulness of any such application for the reasons given above, and particularly given that such a hypothesis does not allow for the best interests of a child to form the primary consideration in that analysis, as it appears to be presumed that the British parent must go and the child's involvement is therefore reduced to merely whether it is an insurmountable obstacle to curtail the child's contact to international visits. That presumption and starting point implicitly places the public interest as the primary consideration as opposed to the child's (see [10] of *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74).

13. The judge at paragraph 57 rightly considers whether there are insurmountable obstacles to the relationship continuing abroad and considers the children an important part of that assessment. I find that the judge was unarguably entitled to consider the relationship and contact between the husband and the children in the manner that he did, which clearly held the best interests of the children in mind (as stated at paragraph 59). Furthermore, as highlighted by Mr Al-Rashid, it is trite but correct that it is in the best interests of a child to be raised by both parents (see *Azimi-Moayed and others (decisions affecting children; onward appeals)* [2013] UKUT 00197, for example).

14. Further still, and notwithstanding my findings above, I reject ground 1 as there is little utility in considering whether the contact between the British husband and children can be maintained via international visits because the British husband is financially responsible for his children. The husband's business is in the UK and if he were to quit the UK that would also clearly interfere with his ability to financially support his three British children. His departure would therefore affect the rights that those children enjoy as citizens of the European Union pursuant to the decision in *Sanade and others (British children-Zambrano-Dereci)* [2012] UKUT 48 which is a matter that makes the Secretary of State's contention further tenuous to say the least.

15. Turning to ground two, the weight to be given to the public interest is given statutory voice in the form of section 117B(1) for all Article 8 matters arising before the Tribunal. The judge considered the relevant factors before him and his decision is compliant with the observation in *Dube (ss.117A-117D)* [2015] UKUT 90 (IAC) that not every subsection of section 117B need be examined explicitly in turn, as what matters is substance not form.

16. However, notwithstanding that observation, this ground is immaterial as pursuant to the second headnote and [45] of *Bossade (ss.117A-D-interrelationship with Rules)* [2015] UKUT 415 (IAC), there is no requirement for judges to consider the public interest when considering the Immigration Rules as it is distilled into the Rules as laid before Parliament. The consideration given at paragraph 61 was therefore immaterial to the appeal under the rules and appears to be a nominal

mention at best. For the avoidance of doubt, I find that the judge has not erred in his brief reference to the public interest considerations under section 117A-D, which go in favour of both parties at respective sub-paragraphs anyhow.

17. The grounds do not reveal an error of law such that the decision should be set aside.

Decision

18. The appeal to the Upper Tribunal is dismissed.

19. The decision of the First-tier Tribunal is affirmed.

Signed Date

Deputy Upper Tribunal Judge Saini