IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28589/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th August 2015	**On 18th August 2015**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MRS VIVIAN AIMIEDE ITOYA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In Person
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal R Sullivan promulgated on 24th March 2015 in which he dismissed the appellant's appeal against a decision of the respondent to refuse her human rights application and to remove her from the United Kingdom.

Background

2. The appellant is a citizen of Nigeria, date of birth 7th January 1979. She and her husband, who was dependent on her application to the Respondent, as were her two children, entered the United Kingdom in 2005 and overstayed their grant of entry clearance as visitors. The oldest child was

born on 27th March 2006 in the UK and the younger child was born on 20th December 2010. Both are nationals of Nigeria. On 3rd April 2013 a human rights application was submitted by the appellant. This was accompanied by a letter from David A Grand, a non-practising barrister, dated 28th March 2013. That covering letter indicated that the application was being made by the appellant and her dependent family. I am grateful to Mr Duffy, who represents the Secretary of State today, for providing me with a copy of the application form. It is clear from that document that the appellant was the principal applicant but her family members were regarded as being dependent on her claim. By reasons of impecuniosity, the appellant represents herself today.

3. On 7th May 2013 the application was refused with no right of appeal. Following a pre-action Protocol letter and a threat of judicial review proceedings a further decision was made on 18th January 2014 maintaining the initial refusal. On 14th February 2014 forms IS.151A and One-Stop Notices were served on the appellant, her husband and their two children. The introduction to the respondent's bundle indicated that they were all served as overstayers but it was clear from discussions at the appeal hearing before the First-tier Tribunal that the two children had never overstayed.

4. On 20th May 2014 the appellant was served with an IS.151B 'notice of immigration decision' which was a decision to remove her from the UK, and a reasons for refusal letter. The IS.151B indicated that the appellant had made a human rights claim and it afforded her an in country right of appeal. On the same day the appellant's spouse and two children were served with IS.151A Part 2 documents, which were also immigration decisions to remove them from the United Kingdom. The only difference between the two decisions, apart from the title of the immigration decision documents, was that the decisions served on the family members other than the appellant made no reference to them having made human rights claims and they were not accorded, according to the respondent, in country rights of appeal. The appellant exercised her right of appeal and a hearing before the First-tier Judge occurred on 13th March 2015.

The First-tier Tribunal's decision

5. In his determination the judge identified the history of the matter and the issues under appeal. The judge accurately outlined the relevant law, identified the basis of both the appellant's case and that of the respondent, made a note of the appellant's submissions and then assessed the evidence before him. The judge considered the appeal under the Immigration Rules giving expression to Article 8 and then considered the appeal outside of the Immigration Rules giving specific consideration to the position of the appellant's oldest child, whom I will refer to as GI. The judge found that the removal of the appellant would not constitute a breach either of the Immigration Rules or of Article 8 and the appeal was dismissed.

The Grounds of Appeal

6. The grounds of appeal indicate that the appellant's spouse and her children ought to have been granted in country rights of appeal. The grounds contend that the failure to do so gave rise to material inconsistency and there was no rational explanation for the distinction between the appellant's application and the dependence on that same application of her family members. The grounds note that IS.151Bs were not issued against the spouse and the children. The grounds claim that the respondent failed to consider the position of GI under the Rules. This was said to be core to the claim and the grounds contend that the judge was wrong to consider the position of GI as he was not an appellant.

7. Leave to appeal was granted on the basis that it appeared there was confusion arising as to the actual nature of the decision taken by the respondent in respect of her husband and children's rights of appeal. It was said to be arguable that the judge was wrong in his approach to the application of the Immigration Rules and the proportionality of the removal of the appellant.

The appeal before the Upper Tribunal

8. As indicated, the appellant was not represented at the Upper Tribunal hearing. A letter from David A Grand, dated 28th July 2015, indicated that, due to the appellant's inability to afford representation, there would be no-one to represent her at the hearing. The letter went on to support and reinforce the grounds of appeal. The letter states:

> "In the context of the appellant's dismissed appeal before the First-tier Immigration and Asylum Tribunal the Immigration Judge asserts that it would be reasonable to expect the family to return together as a single family unit. However such a finding does not invest upon the respondent lawful authority to indeed remove the family as a single unit. The dismissed appeal is only relevant to the appellant since the Tribunal has no jurisdiction to determine the lawfulness of the removal of other family members."

9. At paragraph 4 of the letter it states:

> "The fact remains that the appellant's partner is adamant that he and his children will not voluntarily leave the United Kingdom. In those circumstances – regardless of whether the Tribunal considers it reasonable to expect the family to leave together – it is an outcome which the legal architecture will not secure on the basis that the respondent failed to issue an in country appealable immigration decision for the appellant's other family members to which they are entitled."

10. Reference is made further in the letter to the Immigration Act 2014 and a copy is provided of a policy document issued by the Secretary of State entitled "Requests for reconsiderations of human rights or protection based claims refused without right of appeal before 6th April 2015". I pause at this point to note that the other family members were accorded a right of appeal, albeit one that was purportedly out of country. The policy document is therefore of limited utility in this appeal.

11. The letter concludes by inviting the Upper Tribunal to allow the appeal on human rights grounds.

12. In the appellant's submissions before me she concentrated on the position of her children. She indicated to me that her children were all born here, this is the country that they know and they can speak no other languages other than English, they have made friends in this country and are well-settled and there was no-one else back at home.

13. In response Mr Duffy invited me to find that the determination was properly made. The remedy if the appellant's family members were not satisfied with the issuance of the IS.151A Part 2 decisions was by way of judicial review. Mr Duffy indicated that it was commonplace in his experience for principal human rights applicants to be granted an in-country right of appeal but for any dependants to be issued with a decision purportedly giving them only an out-of-country right of appeal.

14. Mr Duffy indicated that the judge was fully entitled to consider the impact on GI and made reference to the well-known authority of **Beoku-Betts**. Mr Duffy concluded by reference to the fact that the grounds of appeal took no issue with the substantive consideration by the judge of the position of GI and that any further in-country right of appeal granted to the appellant's other family members would in effect be academic given what he claimed to be unassailable findings of fact by the First-tier Judge.

Discussion

15. The decision made against the appellant is one that she appealed to the First-tier Tribunal. There was a valid appeal before the First-tier Tribunal. The judge was obliged to consider that appeal. The Upper Tribunal's jurisdiction to consider a right of appeal on any point of law arises from the First-tier Tribunal's decision. This is clear from the Tribunals, Courts and Enforcement Act 2007, Section 11(1). I can only interfere with the First-tier Tribunal's decision if the First-tier Tribunal made an error on a point of law (Section 12 of the TCEA 2007). I am therefore restricted to a consideration of the single appeal that was validly brought before the First-tier Tribunal.

16. There is no jurisdiction for me to consider whether rights of appeal were unlawfully denied to individuals who have not sought to appeal adverse decisions. If the appellant's spouse and children were aggrieved by the failure to grant them in-country rights of appeal they could, in any event, have sought to appeal those decisions to the First-tier Tribunal, asserting that the First-tier Tribunal had jurisdiction to entertain the appeals regardless of the view of the respondent. Alternatively, they could have judicially reviewed the respondent's decisions on the basis that they were unlawful in purporting to give only out-of-country rights of appeal.

17. With respect to the issuance of the IS.151As Part 2 decisions to the rest of the appellant's family, it is clear that these decisions were to remove them from the United Kingdom. Contrary to paragraph 5 of the grounds of

appeal, the respondent had decided to remove the whole family, albeit by slightly different removal decisions. There was therefore no likelihood of the family unit being broken up as there was nothing to indicate that the appellant and her family would not all be removed together. This is especially so given that the removal decisions were all made at the same time and in respect of all the family members.

18. The judge was fully entitled to consider the position of GI, in fact it would have been a grievous error had he not done so. The judge had to consider whether there would be a breach of Article 8 in respect of the removal of the appellant. This would clearly impact on the child but there was no suggestion that the family unit would be broken up. The judge was also obliged to consider Section 55 of the Borders, Citizenship and Immigration Act 2009 with reference to **ZH (Tanzania)**. The judge did so. The judge's substantive consideration cannot be faulted. The judge considered and identified the best interests of the child as being a primary consideration (paragraph 10).

19. The judge's findings at paragraphs 40 and 41, with reference to the appellant, again cannot be faulted. The judge considered the length of time the appellant had resided in the United Kingdom. The judge noticed that there was evidence that the appellant's father and at least one of her siblings were still in Nigeria and that she had telephone contact with her father and one sister there. She and her sister speak English to one another and the appellant was educated in Nigeria in the English language. Before coming to the United Kingdom the judge noted that the appellant had worked in Nigeria as a petty trader. The judge noted that the appellant was in good health. The judge further noted that the appellant's husband, before coming to the United Kingdom, had worked as a contractor in the petrochemical industry.

20. The judge noted with particular reference to GI that he had spent almost nine years in the United Kingdom. The judge noted that the child was a Nigerian citizen and that nationality was one indication of where the child's future lay. The judge made reference to school reports provided by GI's school charting his progress and noted that GI was regarded as a valued and well-liked member of the school with many friends. The judge recorded the appellant's oral evidence that her oldest child was healthy and had many friends.

21. The judge then went on to consider the position of the appellant and her family members outside of the Immigration Rules. The judge accepted that all four family members had established elements of private life in the United Kingdom. The judge made reference to the factors contained in Section 117B of the 2002 Act. The judge concluded that the decision did interfere with rights to respect for family and private life. The judge nevertheless went on to find that the appellant had not been candid about her sources of income in the United Kingdom and found that she was not financially independent and that she had not shown that she would not be a burden on taxpayers.

22. The judge then went on to consider the issue of proportionality and the interests of the two children, which he took as a primary consideration. The judge noted that the children were not responsible for poor decisions taken by their parents.

23. With respect to GI the judge, at paragraph 58, noted again that he was in good health, that he had been in primary education in the UK since September 2009, that he had completed five full academic years and had made many friends/ The judge accepted that GI and his friends would be upset if he had to leave the school and return to Nigeria. The judge accepted that it was not in GI's best interests to disrupt his education. The judge concluded, however, that there was available in Nigeria an educational system which would fulfil his needs. The judge recognised that children continue to make friends throughout their education and that after a period of disruption and upsets GI might well find himself settled in a new school with new friends. The judge concluded that it was in GI's best interests to remain with his parents and younger brother and, given all the evidence concerning him and his parents, and their backgrounds and links with Nigeria, the judge concluded that it would be reasonable to expect GI to leave the United Kingdom with his parents and sibling.

24. This was a decision the judge was fully entitled to make. The substance of the judge's analysis was not, in any event, challenged in the grounds of appeal.

Notice of Decision

For the reasons I have given I find there to be no merit in the grounds of appeal and I dismiss the appeal.

No anonymity direction is made.

Signed

10 August 2015
Date

Upper Tribunal Judge Blum