Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/32237/2014
IA/32241/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 December 2015	**On 22 January 2016**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

TRACEY NYONMA CHIDI-UBANI
E N

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Richard Singer, Counsel, instructed by Adam Bernard Sols.
For the Respondent: Ms N Willcocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellants appeal against the decision of the First-tier Tribunal (Judge Oliver) dismissing the appellants' appeal against a decision taken on 26 July 2014 to refuse to grant leave to remain in the UK and to remove the appellants from the UK.

Introduction

3. The first appellant is a citizen of Nigeria born in 1985. The second appellant is her infant son, born in 2014. The first appellant entered the UK in 1999 on a visit visa with her father at the age of 14. An application for an extension was refused on 3 March 2000 and further applications were refused on 9 February 2001, 15 February 2012 and 20 May 2013. On 30 June 2014 the respondent replied to a request for reconsideration by issuing a section 120 notice and serving a notice of liability to removal. Her solicitors made further submissions on 11 July 2014 arguing that there were insurmountable obstacles to her continuing her life in Nigeria and there were exceptional circumstances.

4. The Secretary of State accepted the appellant's identity and length of stay in the UK but concluded that requirements of the Immigration Rules were not met and there were no exceptional circumstances so as to justify a grant of leave outside the Rules.

The Appeal

5. The appellants appealed to the First-tier Tribunal and the first appellant attended an oral hearing at Richmond on 18 May 2015. She was represented by Mr Singer. The First-tier Tribunal found that the first appellant did not meet the requirements of paragraph 276ADE of the Rules which at the time of decision required that she had no ties with the country to which she would have to go if required to leave. She spent her first 14 years in Nigeria and had lived close to many of Nigerian origin through her aunt and the church which plays an important part in her life. She had not lost all her ties.

6. The judge went on to consider whether there were exceptional circumstances which required the judge to permit or consider the appeals more widely under the Razgar tests. The judge accepted that the first appellant could not be blamed for the initial period of overstaying because she was only a child at the time and accepted her evidence that she was unaware of the early attempts to regularise her stay. However, by 2003 she was an adult and must have become aware of her status well before 2010-2011 when it was the particular reason that she was refused enrolment at college. The judge found that the 2013 Immigration Act was relevant to the first appellant's case in terms of her immigration history and the weight that should be attached to her private life in the UK. The 14 year long residence rule never assisted the first appellant because her period of residence was broken at various stages and it was clear that the first appellant could not prove continuous residence.

7. The judge briefly considered the best interests of the second appellant and found that he was just over one year old, his mother was his whole world

and his paramount interest was to be with her, he had a family cultural heritage to which he would be returning and he would have the benefit that his mother had the educational advantage of further studies which would hold her in good stead in the employment market on return.

The Appeal to the Upper Tribunal

8. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law. The judge had applied the wrong test under paragraph 276ADE of the Rules (the correct test was whether there were very significant obstacles to reintegration into Nigeria as a single mother with a child born out of wedlock, the judge incorrectly applied an exceptional circumstances test, the judge failed to consider the best interests of the second appellant as a primary consideration and the judge failed to consider delay on the part of the respondent as part of any balancing exercise under Article 8.

9. Permission to appeal was granted by First-tier Tribunal Judge Frankish on 28 September 2015 on the basis that it was arguable that the judge had applied the pre-28 July 2014 276ADE test.

10. In a rule 24 response dated 2 October 2015 the respondent submitted that the first appellant could not meet either version of the Rules and the grounds amounted to no more than a litany of forensic criticism whilst ignoring the basic legal test required.

11. Thus, the appeal came before me

Discussion

12. Mr Singer submitted that the latest application was refused on 26 July 2014 and HC532 was laid before Parliament on 12 July 2014, coming into force on 28 July 2014. The judge heard the appeal on 18 May 2015 which means that the new version of paragraph 276ADE was in force. The stigma of having a child out of wedlock is capable of amounting to a very serious obstacle. There is no prior test of exceptionality before considering Article 8; it is normal to look at Article 8 outside the Rules in cases involving a child and there was sufficient here to justify consideration outside the Rules. There was no element of primacy given to the best interests of the child; as shown by the use of the word “finally” in paragraph 16 of the decision. There was a wealth of evidence that should have been considered by the judge. There has been a significant delay. The first appellant turned 18 in August 2003 and could have been removed. There was no reasoned decision from the respondent which granted a right of appeal until July 2014. That was a 10 year delay and should have been a factor in the balancing exercise.

13. Ms Willcocks-Briscoe submitted that “no ties” was a stricter test for the respondent than the current 276ADE test. There is no background evidence to show that there would be very significant obstacles and the first appellant’s educational achievements could be used to obtain work in Nigeria. Religious activity could continue in Nigeria and there is nothing to show detriment to the appellants. The judge did consider the

circumstances. The judge did go on to assess the appellants' claim outside the Rules; if the judge had thought that there were no exceptional circumstances that would not have happened. The best interests starting point is the parents and then the children should be considered. The judge did consider the mother and the best interests of the child. There was no background evidence regarding lack of facilities in Nigeria. The judge could not make findings about evidence that was not there. The appellants' position should have been supported by evidence that was easily available. There was nothing to show that the first appellant was adversely affected by delay. Applicants are expected to return when they have no further right to remain in the UK. The decision should stand – any errors are not material.

14. I find that the judge intended to refer to the Immigration Act 2014 in paragraph 15 of the decision rather than "2013" (presumably referring to section 117B of the 2002 Act). I am satisfied that the judge incorrectly applied a test of exceptionality in paragraph 15 before application of the Razgar tests. The judge made no mention of the correct test, i.e. whether there were compelling circumstances such as to justify a grant of leave to remain outside the Rules (SS Congo [2015] EWCA Civ 387). That error clearly influenced the somewhat brief assessment of Article 8 factors including the best interests of the child. I find that the judge materially erred in law when assessing Article 8.

15. In addition, I am satisfied that the judge applied the wrong version of paragraph 276ADE of the Rules because the new version was fully in force by the date of the oral hearing. The judge did not consider the "very significant obstacles" test from paragraph 276ADE(1)(vi) of the Rules. The first appellant would return to Nigeria as a single mother with a child born out of wedlock, having lived in the UK since she was 14 years old. I reject the submission that the first appellant could not possibly meet either version of the Rules. Again, the correct test has simply not been considered and that is a further material error of law.

16. Thus, the First-tier Tribunal's decision to dismiss the appellants' appeals involved the making of an error of law and its decision cannot stand.

Decision

17. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be *de novo* with all issues to be considered again by the First-tier Tribunal.

18. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined *de novo* by a judge other than the previous First-tier judge.

Signed  Date 20 January 2016

Judge Archer
Deputy Judge of the Upper Tribunal