Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13044/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd November 2017	**On 10th November 2017**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS MARIAM OMOKARO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant : Mr P Nath (Senior Home Office Presenting Officer)
For the Respondent: Miss S Pascoe (instructed by Bespoke, Solicitors)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Secretary of State, with permission, in relation to a Decision and Reasons of the First-tier Tribunal (Judge Dineen) promulgated on 27th January 2017 by which he allowed the appeal against a decision to remove the Appellant and her two children to Nigeria on Human Rights grounds.

2. For the sake of continuity and clarity I shall continue to refer to the Secretary of State as the Respondent and to Miss Omokaro as the Appellant in this Judgment.

3. It is appropriate at this stage to say that before the First-tier Tribunal there were three Appellants, the current Appellant, born on 15th March 1974 and her two children born [ ] 2010 and [ ] 2013. The second and third Appellants before the First-tier Tribunal were born in the UK. However, the Secretary of State had lodged decisions in relation to all three and therefore there were three appeals before the First-tier Tribunal.

4. The Secretary of State's application for permission to appeal refers only to the first Appellant and there are no applications in relation to the second and third. On that basis given that the two children's successful appeals are unchallenged it is difficult to see how it can be said that their mother's appeal could be dismissed and she removed to Nigeria.

5. Nevertheless I shall consider the grounds.

6. The application for permission to appeal asserts that the Judge made a material misdirection in law in treating the child's best interests as a trump card. He had, it is claimed, elevated the consideration of the child's best interests from being a primary consideration to the primary consideration above that of the public interest.

7. The grounds go on to refer to the fact that the proportionality exercise must include a balancing exercise, taking all matters into account, not just the child's best interests.

8. A Judge of the First-tier Tribunal granted permission to appeal on that basis.

9. The facts of the case before the First-tier Tribunal were that the first Appellant entered the UK with a visit visa valid from December 2008 to June 2009. She did not leave at the expiry of her visa and on 8th October 2010 gave birth to the second Appellant. She then applied, on 15th August 2011, for leave to remain outside the Rules which was refused. Then on 16th August 2012 the Secretary of State agreed to reconsider her application. On 30 June 2013 the Appellant gave birth to the third Appellant.

10. On 20th March 2015 the Secretary of State served notices of decisions to remove all three Appellants from the UK. It was the Appellants' appeals against those decisions which came before the First-tier Tribunal.

11. At the hearing before Judge Dineen it was accepted by the Appellants that they could not succeed under paragraph 276 ADE or Appendix FM of the Immigration Rules and the appeal therefore proceeded purely on the basis of Article 8 under the ECHR.

12. The evidence was that all three Appellant s were living at the home of a cousin and her two children in the UK. They were members of the congregation of a church which had been confirmed by the Pastor of that church. Financially the family was supported by the church and by their friends.

13. The first Appellant was separated from her husband and did not know his whereabouts. In Nigeria she had been a teacher and also worked as the treasurer for a pharmaceutical company. She has no close family in Nigeria and is not close to her extended family. She receives no financial support from her husband.

14. It is fair to stay that none of those facts were determinative in the Appellants favour and did not feature as the Judge's reasoning for allowing the appeal.

15. What did it tip the balance the Appellant s favour in this case was the situation of the second Appellant. He suffers from sickle-cell disease. He is receiving treatment from the NHS. The Judge had a report from the Department of Haematology at Queens Hospital, Romford in which it was stated that he has Haemoglobin S Lepore. He apparently inherited the Haemoglobin S from his father and the Haemoglobin Lepore from his mother. That was described as a sickly disorder but one of the milder forms. It was said that he was at increased risk of painful crises that require analgesia and occasionally hospital admission. He is reviewed regularly in the Haemoglobinopathy clinic to look for any complications. His current medication is penicillin and folic acid and he has completed vaccinations for Hepatitis B and Influenza and is awaiting vaccination for Pneumothorax and Meningitis B.

16. Additionally there was a care planning document before the Judge from Child Health Services at the NHS Foundation Trust which deals, among other things, with procedures for ensuring child safety at school. That document stated that sickle-cell crises can often occur for no apparent reason, although it may be triggered by changes in weather, excessive exposure to sun, or the body suddenly becoming short of oxygen as a result of physical exertion or stress. In the event of his suffering pain in the head, an ambulance must be called as a stroke can occur. If he suffers high temperature, severe pain during a sickle-cell crisis, breathing difficulties, severe abdominal pain, severe headache, stiff neck or dizziness, or changes in mental state, his mother must be telephoned, and if that is not possible 999 must be called and an ambulance requested. Ambulance, medical and nursing staff must be told that he suffers from sickle-cell disease so that they are aware of the potentially serious nature of his condition.

17. There is no cure for sickle-cell disease.

18. The Judge then considered documents referring to the situation in Nigeria which indicated that the care available for the disease is suboptimal.

19. The Judge then noted that the gov.UK document reported that Nigeria has the largest population of people with sickle-cell disease in the world with around 150,000 babies born with the condition each year. A Consultant at Guy's and St Thomas's NHS Foundation Trust in London has been working with the NHS screening programme to support and assist such a project in Katsina State, Nigeria. He reported that:-

> "It is estimated that only 50% of children with sickle-cell disease live past the age of 10 in Nigeria, compared to over 96% surviving to adulthood in the UK and the US".

20. The Judge then noted that the Secretary of State accepted that sickle-cell disease is a life-threatening condition.

21. It was that child's situation which was determinative of this appeal and at paragraph 51 the Judge stated that it was necessary to establish whether there were compelling circumstances which contraindicated the removal of that child. In so doing he took into account that there is no cure for sickle cell disease which is life-threatening. He took into account that the World Health Organisation states the disease has major social and economic implications for an affected child and also that only 50% of such children survive past the age of 10 in Nigeria. He said at paragraph 55 that there is what can be described as a real risk that in Nigeria the second Appellant's life would be cut short before he attains adult hood.

22. The Judge then went on to consider the criteria set out in section 117B of the Immigration and Asylum Act 2002 and at paragraph 60 took into account the fact that the child's best interests are a primary consideration but not the only or paramount consideration.

23. The Judge took into account the Secretary of State's guidance to immigration officers which set out the relevant considerations when considering whether it would be unreasonable to expect a non-British child to leave the UK which include situations where there is evidence that the child is undergoing a course of treatment for a life-threatening or serious illness and the treatment would not be available in the country of return. The Judge noted that while treatment would be available in the country of return, it would not be available in the same form as in the UK in this case or with the same likely outcome.

24. The Judge also referred himself to paragraph 11.3 of the same guidance which states that exceptional circumstances mean those in which refusal would result in unjustifiably harsh consequences for the applicant or the applicant's family. Clearly what weighed heavily in the Judge's mind was the reduction in life expectancy beyond the age of 10 years for the second Appellant and on that basis he found his removal would be a disproportionate interference with his private life and that the removal of his mother and brother to that country without him would be a disproportionate interference with the family life of all three Appellants.

25. On the particular facts of this case, given the gravity of the situation of the second Appellant I am unable to find that the First-tier Tribunal made an error of law allowing the appeal and in finding removal of the child disproportionate. Although the best interests of the child are not a paramount consideration as they are in family proceedings, they are nevertheless a primary consideration. There must be good reasons for coming to a conclusion which is not in the child's best interests. This is not a finely balanced case of a child who is settled in the UK but is otherwise fit and healthy. This is a case where the child will have extremely serious medical consequences if removed; in this case that he is unlikely to live beyond the age of 10. He is already 7.

26. Additionally, even were I to find that the Judge had misdirected himself and his consideration of proportionality flawed and set aside the determination, in redeciding it different factors come into play. The child has now been in the UK seven years and the case would need to be considered under paragraph 276 ADE. In its present form consideration would need to be given to whether it would be reasonable to expect that child to leave the UK. Given the medical evidence and his situation and the evidence as to the consequences of his removal to Nigeria it is not conceivable that any Judge would find it reasonable to remove this child. Nor can I conceive of any situation where a Judge would find it reasonable or proportionate for the said child to remain in this country without his mother and siblings.

27. For all of the above reasons I find the First-tier Tribunal did not make an error of law in its Decision and Reasons.

Decision

The Secretary of State's appeal to the Upper Tribunal is dismissed

There having been no application for anonymity in this case and none made by the first-tier Tribunal I see no justification for making one now.

Signed Date 8th November 2017

Upper Tribunal Judge Martin