Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA149722015

THE IMMIGRATION ACTS

Heard at: Field House	**Decision Promulgated**
On: 26 April 2017	**On: 5 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between
MS SYLVIA NGOSI EZEH
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Radford of Counsel
For the Respondent: Mr P Singh, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 5 November 1975. She appealed against the decision of the respondent dated 27 March 2015 for leave to remain in the United Kingdom pursuant to Article 8 of the European Convention on Human Rights.

2. First-tier Tribunal Judge Cassel in a decision dated 25 April 2016 dismissed the appellant's appeal. Permission to appeal was initially refused by First--tier Tribunal Judge Ransley on 11 January 2017 but was subsequently granted by upper Tribunal Judge McWilliam on 7 March 2017 stating that it is arguable that the Judge did not make a finding in respect of the child's best interests which is arguably material in an assessment of reasonableness and proportionality.

First-tier Tribunal's findings

3. The First-tier Tribunal Judge made the following findings in the determination which I summarise. There is no dispute that the appellant's son, Yuki is under the age of 18 and has lived continuously in the United Kingdom for at least seven years. The issue is whether it would be reasonable to expect her to leave the United Kingdom. It is common ground that the appeal of the appellant under the Immigration Rules will succeed if it is unreasonable to expect Yuki to leave the country and will fail if it is not unreasonable.

4. The Judge said aside any misdemeanours of the appellant in the consideration of reasonableness. Pausing there, the appellant was not found to be a credible witness which includes her immigration history and her veracity. There is evidence of an extensive family network in Nigeria. Yuki has a grandmother, uncles, aunts and cousins. He is in contact with his grandmother by telephone roughly as regularly as he is with his father in the United Kingdom. He has no other family members here.

5. Although the Judge accepts that Yuki has never been to Nigeria, he does speak English which is the predominant language in Nigeria and it is clear from correspondence and documentation provided by the appellant that she has not lost contact with the Nigerian community in England and it is reasonable therefore to assume that Yuki has acquired some knowledge of the culture through his mother's contact with Nigerian culture. He has done well in his education in England. The United States Embassy at page 4 makes it clear in an article, that there is a functional education system in Nigeria to which Yuki would have access. There are no serious health issues for him and no evidence that change of his accommodation can be considered exceptional circumstances.

6. There is no single factor which is determinative but balancing and taking full account of all the various factors referred to in the decision, the Judge was not satisfied that the appellant has established on the balance of probabilities that it would not be reasonable to expect them to leave the United Kingdom together as a family unit of mother and son. Therefore, the appellant's appeal fails under the Immigration Rules.

Grounds of appeal

7. The amended application for permission to appeal states the following which I summarise. The reasoning of the First--tier Tribunal Judge on the issue of the best interests of the appellant's child is in paragraphs 36 to 44 of her decision but there is no reference to the child's best interests in those paragraphs.

8. The first-tier Tribunal Judge failed to actually decide what the best interests of the child were in this case. It was not an issue that the child would remain with his mother. The issue to be decided was whether it was in the best interests of the child to remain in the United Kingdom or return to Nigeria with his mother. Without deciding this issue, the Judge could not possibly have taken account of the child's best interest as a primary consideration either in assessing the reasonableness of the proportionality of requiring the child to leave the United Kingdom

9. In light of the case of ***EV Philippines [2014] E WCA 7874***, the Judge was meant to ask and answer the material question which is – is it in the best interests of the child to remain in this country.

10. Therefore, the consideration of the best interests of the child and the reasonableness of requiring the child to leave the United Kingdom is flawed. The Judge failed to consider the case law including ***Azmi-Moyed and others [2013] UKUT*** and it was required that the Judge to find whether it would be reasonable for a child who has lived in the United Kingdom for seven years to leave the country.

11. The Judge failed to apply the applicable law to the facts of her case. The Judge failed to take material matters into account and failed to resolve factual disputes.

Rule 24 response by the respondent

12. The respondent in her rule 24 response stated that the Judge of the First--tier Tribunal directed himself appropriately. At paragraph 8 of the decision, the Judge records the central issues as stated by the appellant's representative, namely the appellant's child. At paragraph 36 the Judge acknowledges that the question to be asked is whether it would be reasonable for the child to leave the United Kingdom. It is submitted that the Judge made sufficient findings on the evidence that was provided. It is not a material error of law to refer to the substance of case law without naming it.

The hearing

13. At the hearing, I heard submissions as to whether there is an error of law in the First-tier Tribunal Judge's decision. Mr Radford on behalf of the appellant submitted that the Judge did not assess the best interests of the child. At paragraph 34 of the decision there is a statement as to the best interests of the child but in no other paragraphs of the decision does it appear. When the Judge states that it is in the best interests of the appellant to live with his mother, the Judge did not specify whether it was in the United Kingdom or in Nigeria. The Judge merely concentrated on why removal to Nigeria would not be too bad for the appellant. The Judge failed to consider the test of

reasonableness and no assessment of the difficulties for the child in respect of his education in Nigeria. The Judge does not resolve the difficulties in the decision other than to say that the appellant has family in Nigeria but gave no reasons. I was referred to the report of Amnesty International.

14. The Judge did not follow the guidance at ***MA Pakistan*** at paragraph 116 in respect of the child seven-year residence. The Judge did not identify what the best interests of the child requires. The Judge did not consider the background information on Nigeria, where it states that there is violence in Nigeria when considering the reasonableness of the child returning to that country. I have also been asked to consider that Nigeria has 1 ½ million people displaced due to violence in that country. The Judge did not take into account that the appellant would be a single mother without any support in Nigeria or whether she can receive support from her family.

15. Mr Singh on behalf of the respondent submitted that the decision should be read by starting with paragraph 34 where the consideration of the best interests of the child begins. At paragraph 35 the Judge refers to the case of ***Azmi Moyed*** where the best interests of the child lie in going with his mother to Nigeria. The Judge was clearly aware of the seven-year residence principle and gave proper consideration to this in his assessment of the child's best interests. At paragraph 37 of the decision the Judge made sure that the appellant's lack of credibility did not affect his evaluation of the best interests of the child.

16. The Judge found that there is extensive family life in Nigeria and at paragraph 39 found that Nigeria is an English-speaking country and the appellant's mother is very familiar with Nigerian culture. He referred to the case of ***MA Pakistan*** paragraph 117B (vi) and considered all the factors in evaluating the appellant's child is best interests. The Judge found that there was a functioning education system in Nigeria and there were no health issues in this case. Therefore, there was nothing exceptional for the Judge to take into account. He referred to the case of ***ZH Tanzania*** made adequate findings that the appellant had family network in Nigeria.

17. In reply Mr Radford said that the Judge made no findings of any family support that the appellant may receive on his return to Nigeria. The appellant's father is in the United Kingdom and there was no clear conclusion where the appellant's best interests lie.

Findings on whether there is an error of law

18. Having carefully considered the decision of the First-tier Tribunal, I find that there is no material error of law in the first-tier Tribunal's decision. On reading of the entirety of the decision it is evident that the Judge had in mind the correct test to be applied in respect of the appellant's child best interests.

At paragraph 25 the Judge records in her decision that "the issue for the Tribunal is what is in the child's best interests". At paragraph 34 the Judge states that the starting point when considering the best interests of a young child would be that it was in the best interests of a child to live with and be brought up with his or her parents. This is an entirely satisfactory direction the Judge gave to herself. The Judge found that the appellant's best interests is to be with his mother and live with her wherever his mother lives and given that the child's mother was going to be removed to Nigeria, it is obvious that the Judge found that the child's best interests lie in living with his mother in Nigeria. Therefore, I do not find any merit in the argument that the Judge having said that it is in the best interests of the appellant to live with his mother, the Judge did not specify whether it was in the United Kingdom or in Nigeria.

19. The Judge considered the case of the ***Azmi-Moyed and others [2013] UKUT 00197*** and referred me to paragraph 13 of the decision, which states "as a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggested so should the dependent children who form part of the household unless there are reasons to the contrary". Therefore, the Judge did decide that the best interests of the child is to live with his mother in Nigeria as her dependent child and there is no material error in this conclusion which the Judge reached on the evidence.

20. In this regard, the Judge found that the appellant and her child have and extensive family network in Nigeria. It is implicit in that finding that the child will have family support in Nigeria until appellant and her child settle down in that country. There was no evidence upon which the Judge could have concluded that the appellant and her child would not get family support on their return.

21. The evidence, before the Judge was that the appellant He is in contact with his grandmother by telephone roughly as regularly as he is with his father in the United Kingdom. On this evidence, the Judge was entitled to find that the child is close to his grandmother and will have her support on return and therefore the child's welfare was adequately considered.

22. The Judge accepted that the appellant has never been to Nigeria but she correctly pointed out that the child does speak English which is the predominant language in Nigeria. The Judge also found that it is clear from the correspondence and documentation provided by the appellant that the appellant has not lost contact with the Nigerian community in the United Kingdom and found that it would be reasonable to assume that the appellant had acquired some knowledge of the culture through his mother's contact with the Nigerian culture in this country. This finding demonstrates that the Judge considered that the child who will be returning with his mother will,

with the help of his mother, adjust to Nigerian culture. There is no perversity in this finding.

23. The Judge further noted that there is a duty on the Secretary of State regarding the welfare of children under section 55 of the Boarders, Citizenship and Immigration Act 2009. The duty imposed by section 55 of the Borders Citizenship and Immigration Act 2009 requires the decision-maker to be properly informed of the position of a child affected by the respondent's decision. The Judge must conduct a careful examination of all relevant information and factors. Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations. The question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one to be done on the evidence before the Tribunal. The Judge stated at paragraph 37 of the decision that it is trite law that the issue of reasonableness is an intensely fact finding exercise.

24. The Judge considered the child's education and noted that there is an education system in Nigeria which the appellant's child will have access to. The Judge found that given that the child has done very well in school in this country, there should be no reason why he would not do well in a school in Nigeria. Even if it is acknowledged, that the education system might be better in the United Kingdom, this does not mean that it would be unreasonable for the child to adjust to a system of education in Nigeria.

25. The Judge also considered the observations in ***Zoumbas [2013] UK C70*** that the best interests of the child must be a primary consideration but considered that it does not have the status of paramount consideration. The Judge also considered the case of ***EV Philippines and others v SSHD [2014] EWCA civ 874*** that the balancing exercise that is central and the consideration for the need to maintain immigration control.

26. The best interests of the child must be based on a careful consideration of the likely circumstances of the appellant and her child if returned as a unit to Nigeria. The Judge took into account all the factors relevant to the appellant's well-being if returned to Nigeria. There was an objective evaluation made on the question of whether the appellant would have family support to help to settle the appellant and her child into the country. The Judge found that the appellant had a network of family in Nigeria and this equates to support and protection on her return.

27. Having found that the appellant does not have any health issues and will be returning as a normal child to continue with his life in that country found that it not be unreasonable to expect the appellant and her child to leave the United Kingdom together as a family unit of mother and son. I find that this is

a properly made finding on the evidence and that the Judge has made a careful examination of all relevant information and factors in this appeal and come to a sustainable conclusion.

28. It has been argued that the First-tier Tribunal Judge did not actually decide on exactly what the best interests of the child were and if the Judge had considered them, it would have inevitably found that the child's best interests lie in continue to live in this country. The Judge has clearly made findings that the best interests of the appellant's child and his welfare is to live with his mother wherever she lives and in this case, it is in Nigeria.

29. What really is being argued, is that it is a given that a child would have a better quality of life in this country and that must inevitably mean that the child's best interests lie in remaining in this country and that any other conclusion is perverse. I do not understand the jurisprudence on children to say that given the better quality of life and education in this country, that a child's best interests will always and inevitably lie in remaining in this country. Section 55 refers to the "*welfare*" of children and the Judge considered that the welfare of the child is adequately addressed by him returning to his country of nationality with his mother. Therefore, the Judge identified the child's best interests and balanced them with other material considerations as was required such as the respondent's interests in a fair and orderly immigration control.

30. In the case of ***MEA Pakistan [2016] EWCA Civ 705***, it was stated that the fact that there is a qualified child is a relevant consideration and one that might be said to point to it being in his interest to remain in the United Kingdom, but it is equally clear that the assessment of reasonableness must take account of the conduct of the claimant. The Judge considered the appellant's immigration history and found it to be wanting although the Judge clearly did not hold this against the evaluation of the appellant's best interests but is clearly of relevance.

31. The Judge considered the case of ***Azmi-Moyed and others [2013] UKUT 00197*** which states that seven years from the age of four is likely to be more significant to a child then the first seven years of the child's life. The Judge found that the appellant's son was young enough to adapt to life and education in Nigeria. I do not find this is a perverse finding because the child with his mother would be returned to Nigeria together. The child is not a British citizen and therefore requiring him to leave with his mother to a country of his nationality where the rest of his family lives, is more than reasonable in all the circumstances. No material error of law has been demonstrated in the decision.

32. I find that there is no material error of law in the decision and a differently constituted Tribunal would not come to any other decision considering the

facts. The appellant and her child are not British citizen and therefore it is reasonable for them to be returned to their country of nationality. The appellant's immigration status has always been precarious in the United Kingdom although I accept that cannot be held against her child but it is a matter which merits consideration.

Decision

Appeal dismissed

Signed by

Deputy Judge of the Upper Tribunal
Mrs S Chana This 2nd day of May 2017