Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/25611/2015**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reason Promulgated**
On 24 August 2017	**On 29 August 2017**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

E I O

Respondent

Representation:

For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Miss N Weir, of Thorntons Law LLP, Solicitors

DETERMINATION AND REASONS

1. The parties are as above, but the rest of this determination refers to them as they were in the FtT.

2. The SSHD appeals against a decision by First-tier Tribunal Judge J C Grant-Hutchison, promulgated on 17 May 2016, allowing the appellant's appeal under article 8 of the ECHR.

3. The SSHD's grounds recognise this as a sensitive and sympathetic case, and then run essentially as follows. The Judge improperly approached the case as if it were a review of the decision of FtT Judge Blair, promulgated on 10 July 2015, IA/07639/2015, allowing an appeal by the appellant's husband. That decision was

no more than a starting point. The appellant provided no new evidence, which was significant. The absence of medical evidence for her showed there had been some change. Four years had gone by since she was bereaved of her infant child. The FtT made no finding on the public interest in maintaining immigration control.

4. The appellant filed a response to the grant of permission. Its main points are these. The Judge took the previous decision as a starting point, as parties agreed she should do, and went on to consider the case on its current merits, having heard evidence. She did not say there was "no new evidence", as suggested in the grounds, but that there was "no new evidence which disturbed the earlier findings". The public interest was acknowledged at ¶13 - 14 and at ¶28 where the Judge made a balanced assessment of proportionality.

Submissions for SSHD.

5. The appellant was granted leave outwith the rules to cover a period of bereavement and grieving, which the judge erroneously extended into a period which had no end date. Tragic though the circumstances were, the period for which leave was justified was finite.

6. The judge in effect proceeded as if she were reviewing the previous decision, rather than undertaking a fresh fact-finding exercise. That decision was about her husband remaining with her while she had leave on an exceptional basis. It was not directly on her circumstances. The judge failed to come to conclusions based on the up-to-date position. The decision effectively made the two cases into a perpetual loop, by which the leave of one spouse expired, and leave was then obtained, based on still current leave of the other.

7. The decision was driven entirely by sympathy. It did not take account of the evident recovery process. The appellant was able to engage in employment and study. She needed no medical intervention.

8. The judge did not engage with whether this was a case of private or of family life. The burial of a child in the UK was not a basis on which a right to remain based on family life, outside the rules, could be constructed. The judge did not engage with the fact that a private life claim based on precarious status was highly unlikely to succeed outside the rules. The appellant and her husband had suffered a devastating bereavement, but there was no evidence that there would be any disproportionate impact on them if they were required to leave the UK to carry on their private and family life in Nigeria.

9. The judge did not take account of the public interest. The statement at paragraph 20 that exhumation could not possibly be in the public interest was a misconception of how that concept applied to the case.

10. The decision should be set aside.

11. The appellant had tendered additional evidence, for consideration if the decision required to be remade. Mrs O'Brien submitted that the further evidence was in

keeping with a couple who had recovered as far as possible and as might be expected from their loss, and were getting on with their lives. Discretionary leave having been granted on the basis that it would cover the treatment of the child and the recovery of the parent, there was nothing to show that there was any further right to leave outside the rules.

12. The outcome should be reversed.

Submissions for Mrs E I O

13. Judge Grant-Hutchison had not taken the decision of Judge Blair as any more than starting point. She had not thought her task was to review that decision. She received evidence from the appellant and from husband, and based her decision on that.

14. It was accepted that the appellant's claim to leave to remain was entirely based on the burial of her son in the UK, and had always fallen outside the immigration rules. There was a deep emotional connection to the country where her son had been born and been buried.

15. The sequence of events was that the appellant was lawfully here as a student. She was granted leave based on her infant son's medical condition, but unfortunately the grant did not arrive until after he had passed away. Her husband sought a visit visa over that period, which was initially refused, but then granted on a further application. He arrived only after the child died. He was refused further leave outside the rules, but his appeal was allowed by Judge Blair so that he might remain with his wife. The family had never sought to circumvent the rules. At present, the appellant has leave continuing under section 3C, and her husband has leave granted in pursuance of his successful appeal.

16. The grounds were misleading in saying that the decision was based on there being no new evidence; it was based on all the evidence up-to-date, which led the judge to a similar conclusion.

17. Current evidence showed that the appellant and her husband had the ability to cope, but that was strongly linked with being where their son lived, and being able to visit his place of burial. Residence in the UK in the long term had not been their plan, but became so by force of circumstances beyond their control. Any further leave which would be granted in pursuance of the favourable decision would normally be for the period of 2 ½ years, and the circumstances would require to be revisited thereafter.

18. The judge had not quoted at length but had referred to part 5A of the 2002 Act (paragraphs 26 – 27), and it was plain that the appellant and her husband were self-sufficient, both in employment, and both able to speak English. They had not sought public funds even in the form of legal aid in respect of their immigration proceedings.

19. There was no significance in whether this was a private and family life case. There was a connection to the UK of an exceptional and compelling nature, such that

removal would be disproportionate. No public interest could be discerned in enforcing her removal.

20. If the decision were to be remade, the up-to-date circumstances were these. The appellant is expecting another child. She has an offer of a place on a nursing course, but cannot take it up unless granted further leave by the respondent; her 3C leave is not accepted for those purposes. She and her husband could not visit the child's grave regularly, if at all, if they had to return to Nigeria.

21. There was no error of law requiring the decision to be set aside. Alternatively, if the decision were to be remade then based on all the circumstances to which reference had been made, the outcome should be in favour of the appellant.

Reply for SSHD.

22. It was evident from the submissions that the appellant and her husband now assert a right to remain indefinitely in the UK, based on loss of their child. The circumstances of the case were highly sympathetic, as had been acknowledged, but did not disclose anything which exceptionally gave them such a right, outside the rules. The circumstances did not come close to the requirements of the rules for entitlement to be placed on a route to settlement.

23. It was not correct that leave following upon the decision under appeal would automatically be for 2 ½ years, its term was a matter for the Secretary of State.

24. It was difficult to see how the case could be analysed as one involving family life, and if it were one involving private life, then the judge plainly failed to take account of the section 117B, particularly the legally precarious nature of the appellant's immigration status.

Further response for Mrs E I O

25. I permitted Miss Weir to reply to the above. She accepted that the length of any period of leave would be for the respondent. At the end of that, it would be for the appellant to make a further application. That was for the future. This was not a matter which disclosed error in the decision currently under consideration.

Discussion and conclusions

26. The judge said in her concluding paragraph that the appellant was "still going through the healing process which can only be individual to her in how she can come to terms with her son's death and the time it may take. To take that away from her now would not in my view be proportionate".

27. That was the judge's assessment at the date of the hearing before her. The grounds and submissions do not show that she fell into the errors of treating Judge Blair's' decision as determinative, or as the subject of a review rather than the starting point in a distinct case, or of failing to consider current circumstances.

28. The first sentence of paragraph 20 of the judge's decision reads a little oddly, as if the respondent had to show that exhumation and reinternment would be in the public interest. There was no such onus on the respondent, and no reason to think that such a procedure might ever be in the public interest. The matter arises by reference to another case, the report of which was produced for the appellant, but neither party appears to have suggested that the possibility of exhumation and reinternment was relevant in this case. That matter does not appear in the respondent's decision, which says that it would be reasonable for the appellant and her husband to return to Nigeria "and you can then apply for entry clearance should you wish to return to the UK to attend the service every year". (A service of remembrance is arranged annually by the hospital where the child was cared for and by a church.) No relevant submission by either party at the hearing is recorded in the decision.

29. That part of the decision may be disregarded, without making any difference to the outcome.

30. Apart from that, the respondent has not shown that the judge was not aware that the maintenance of effective immigration controls is in the public interest - s.117B(1) of the 2002 Act. The point is fundamental to all article 8 cases, and she is a highly experienced judge.

31. It often does not matter, as Miss Weir submitted, whether a case is analysed as disclosing family or private life; but it does matter where s. 117B (5) applies – "Little weight is to be given to a private life established by a person at a time when the person's immigration status is precarious". The appellant's status was always lawful but it was precarious, applying the case law on that term. That was perhaps the strongest point made in the respondent's submissions; but it does not appear to have been made to the FtT, and is scarcely foreshadowed in the grounds.

32. The grounds are not established. The rest of the submissions for the SSHD in my view were relevant to a fresh decision on the merits, rather than to error by the FtT on the case then before it.

33. The decision of the First-tier Tribunal shall stand.

34. The anonymity direction made by the FtT is preserved. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

25 August 2017
Upper Tribunal Judge Macleman