Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32192/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th August 2017	**On 20th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

OLWAFEMI [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Akindele (Solicitor)
For the Respondent: Mr S Kotas (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Callow, promulgated on 12th December 2016, following a hearing at Taylor House on 18th November 2016. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, and was born on 8th March 1982. He appealed against a decision of the Respondent dated 16th September 2015, refusing his application for leave to remain in the UK under Appendix FM and paragraph 276ADE(1) of the Immigration Rules.

The Appellant's Claim

3. The Appellant, who arrived in the UK on 13th November 2004, on a visit visa, had subsequently overstayed, following which in December 2007, he applied for a residence card as an extended family member of a Mr Longe, which was refused. He did not leave the UK. On 20th April 2011, he made a human rights application which was also refused on 3rd June 2011. Subsequently he married his wife, [TA], on 19th February 2014 and a son was born to them on [ ] 2015, enabling him to make a human rights application for leave to remain, although he did not include his son as his dependant in the application. The Appellant's wife in the meantime, succeeded in getting indefinite leave to remain on the basis of ten years' lawful residence under paragraph 276B of the Immigration Rules. She had been in the UK as a student since 2004. A feature of this appeal before the judge below was that the Appellant's son had been diagnosed as suffering from sickle cell anaemia.

The Judge's Findings

4. At the hearing before Judge Callow, the Appellant submitted that, in relation to his son, whilst treatment may be available in Nigeria, reports showed that sickle cell anaemia was more fatal than HIV and Aids in Nigeria and that only about 5% of children with sickle cell anaemia lived up to the age of 10 (see paragraph 6).

5. The judge had regard to the background information, as well as the fact that the Appellant's visit visa expired in 2005, which was now over eleven years ago, and that the Appellant had been in the UK appearing all this time as an overstayer. The judge also considered the fact that the Appellant's son, who was now 2 years of age, suffered from sickle cell anaemia and had speech and hearing difficulties (paragraph 10). Furthermore, consideration was given to the fact that although the Appellant did not cite his son as his dependant, the judge addressed the son's situation "as a matter of possibly unwarranted concern" (paragraph 13).

6. This was in addition to the matter having been addressed by a previous judge, namely, by IJ Raymond, and bearing in mind that the "**Devaseelan** principles" applied (see paragraph 13). The judge addressed the question as to whether it was reasonable to expect the child to be removed with his parents to Nigeria or whether their best interests are in favour of remaining in the UK (paragraph 18).

7. The contention by the judge was that, "no evidence of any weight beyond disruption to the treatment of the son has been given that it would be unduly harsh to return to Nigeria or that there are any exceptional circumstances" (paragraph 31).

8. The appeal was dismissed.

9. On 3rd July 2017, permission to appeal was granted by the Tribunal on the basis that there was little or no consideration of the medical reports in the appeal bundle, or of the background evidence concerning the treatment of sickle cell anaemia in Nigeria, in the reasonableness assessment of the judge.

The Hearing

10. At the hearing before me on 10th August 2017, Mr Akindele appearing on behalf of the Appellant submitted that the judge had to consider the "best interests of the child", and in doing so, had to give regard to the medical evidence that had been provided, and this showed at page 38, that 100,000 children die in Nigeria on account of sickle cell anaemia. There was accordingly, a risk to the Appellant's child, such that if the Appellant was removed, the child could not be expected to go with him, and this would lead to the family being separated, and the right to family life being impaired.

11. For his part, Mr Kotas submitted that this was a case where permission should not have been granted. The reason is that the child was not a "qualifying child". The son was only 2 years of age. The Appellant's position was considered in 2014 by a previous judge, by IJ Raymond (see paragraph 13). The "**Devaseelan**" principles applied and that being so, unless there was compelling evidence to the contrary, that decision had to be the starting point, and the judge followed that particular line of argument. Second, the appeal fails quite simply because the evidence that has been relied upon, and on the basis of which permission to appeal has been granted, is very generic evidence. This consists of a letter from Vivian-Queentz Fumbon, the specialist health visitor, which is dated 6th May 2016, but which is written only in general terms, as if it applied to any patient suffering from sickle cell anaemia. It is not particularised with respect to the Appellant's child. For example, there is a statement that, "we tend to advise all times that they should maintain their temperatures and avoid a cold environment. He also encouraged them to avoid stressful environments ...". At page 23, the same expert provides another letter of support dated 12th June 2015 where she states in the first paragraphs the position in very general terms once again. The third paragraph is in terms that, "we advise them to carry their pain medication and water with them at all times". There is nothing specific to the Appellant's child as such.

12. In reply, Mr Akindele submitted that it was not necessary to attribute a particular risk to the Appellant's child. At paragraph 16 the judge had

relied upon the case of **EV (Philippines)**, but the judge did not set out what the "best interests" of the child in this case would entail.

No Error of Law

13. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

14. First, this is a case where there was a prior determination by IJ Raymond in 2015 and the "**Devaseelan** principles" applied. The judge was careful to proceed on this basis (see paragraph 13). The judge observed with respect to the Appellant that, "his situation and status has already been addressed and there are no new facts warranting reconsideration". This was in a situation where the Appellant did not cite his son as his dependant. Nevertheless, the judge did observe that, "I nonetheless address the son's situation again as a matter of possibly unwarranted concern" (paragraph 13).

15. Second, the judge applied the correct test by considering the son's best interests", and in doing so stated that, "I have borne in mind the evidence of potential diminished medical treatment in Nigeria" (paragraph 18).

16. Third, and most importantly, there is the evidence of the expert, which it is alleged the judge did not properly take into account. There is nothing to suggest that the judge actually ignored the evidence of the expert. This is because what the judge states is that, "no evidence of any weight beyond disruption to the treatment of the son has been given that it would be unduly harsh to return to Nigeria or that there are any exceptional circumstances" (paragraph 31).

17. If one now looks at the letters written by the expert, Vivian-Queentz Fumbon, the specialist health visitor, dated 6th May 2016 and 12th June 2015, it is blamed that they are written in a very general sense, and certainly do not show any basis for the judge concluding that there are "exceptional circumstances" in relation to this Appellant. It is not the case that treatment from sickle cell anaemia is not available in Nigeria. If, as the judge pointed out, the position in Nigeria is that of "potential diminished medical treatment" (paragraph 18), it is for the Appellant to demonstrate, on the basis of clear medical evidence, what the "exceptional circumstances" are in relation to the Appellant's son, that would point to it being "unduly harsh" to expect the Appellant to return.

18. The Appellant has a poor immigration history. He has overstayed in the United Kingdom by eleven years. The child is only 2 years of age and is not a "qualifying child", and in these circumstances it has been well-established since **Zoumbas [2013] UKSC 74**, that ordinarily the "best interests" of a young child are served by keeping the family unit in tact, and if the principal Appellant is to be removed then it is not unreasonable to expect the child to return with the removed parent.

19. Accordingly, there is nothing in the suggestion that the Appellant's application fell to succeed on account of his 2 year old son's sickle cell anaemia condition. I come to this conclusion notwithstanding Mr Akindele's commendable efforts to persuade me otherwise.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 19th September 2017