Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14552/2016
HU/14558/2016
HU/14561/2016
HU/14565/2016

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 7 December 2017	**On 4 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

OR
EGA
EOA
ERA
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Singh, Greater Manchester Immigration Aid Unit
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1 This is an appeal against the decision of Judge of the first-tier Tribunal NMK Lawrence dated 9 February 2017, dismissing the Appellant's appeal against the decision of the Respondent dated 10 May 2016 refusing her human rights claim.

2 The Appellant is a national of Nigeria, and entered the United Kingdom in January 2005, with entry clearance as a visitor valid until 20 March 2005. She does not appear to have had leave to remain since that date. She has three dependent children, born in 2008, 2009, and 2011. The Appellant made her application for leave to remain as long ago as 10 July 2012. The Appellant argued that her removal from the United Kingdom would be a disproportionate interference with the private and family lives of the Appellant and her children.

3 It is necessary in this appeal to consider what matters were considered by the Respondent in the decision letter, and what issues were raised by the Appellant in her subsequent notice of appeal to the First-tier Tribunal dated 24 May 2016

4 There is a reference in the Respondent's decision of 10 May 2016 to a decision dated 23 April 2013, although the refusal letter of 10 May 2016 does not explain clearly the Appellant's immigration history from 2013 onwards, or what happened to result in the present decision. However, in the grounds of appeal accompanying the Appellant's notice of appeal against the Respondent's decision, t he Appellant gives a history of attempting to challenge the decision of 2013 by way of judicial review. The refusal letter of 10 May 2016 also refers to the Appellant's application being 'reconsidered' by the Respondent. It seems that the present decision is therefore one arising from the application on 10 July 2012.

5 The Respondent was of the view that the Appellants did not meet any of the requirements for leave to remain under the immigration rules, whether under Appendix FM or paragraph 276ADE (1), and found that there were no exceptional circumstances to warrant leave to remain outside the rules.

6 At page 10 of 14 of the decision, the Respondent also states as follows:

> "It is noted that subsequent to this submission of your FLR(o) application you raised further information with regard to your circumstances. Our records show that this claim has been considered separately by the relevant department. This reconsideration deals with your application on the basis of your family and private life."

7 It is also to be noted what the Appellant states in her grounds of appeal dated 24 May 2016: (drafted in the third person):

> "Although her application was refused by the SOS on 23.04.2013, and later on she was detained, however, she submitted pre-action protocol with the intention to submit her application for leave to move for judicial review. The SOS, under the rules, was required to respond within 14 working days but her pre-action protocol remain pending for over a year, then there was no option for her except to submit a complaint on 29.10.2014 to The Home Office Complaints Allocation Hub, Croydon. Then, while responding on 26th of November 2014, the SOS accepted the seriousness of her claim being a potential trafficking victim and sought more information on a questionnaire. The

> Appellant sent the completed NRM form along with her statement duly signed by her on 09.12.2014. Later on she was interviewed on 13.07.2015 in relation to her trafficking claim. Her application for discretionary leave under human rights has now finally been refused by the SOS with a right of appeal. However the conclusive decision of the competent authority on the matter of her trafficking is still awaited."

8 The decision letter also gives the Appellant notice under s.120 NIAA 2002 that she should state any further grounds on which she sought to remain in the United Kingdom.

9 In her grounds of appeal, which, even if not served directly on the Respondent, are clearly in the possession of the Respondent, the Appellant sets out that she was trafficked to the United Kingdom. She states that she was orphaned in Nigeria at the age of 12, and forced into prostitution at the age of 14. She states the after some years, she met a man who brought her to the United Kingdom (arriving in January 2005, the Appellant would have been 26). In the United Kingdom, the Appellant states that she was again obliged to work as a prostitute. At least two of her three children are said to have arisen from pregnancies from clients.

10 On appeal, the Appellant was represented by Mr Mohammad of International Immigration Advisory Services. At paragraph 7, the Judge notes that Mr Mohammad wished to raise the issue of the Appellant being trafficked into the UK within the appeal proceedings. The Judge held:

> "Mr Mohammad wishes to pursue this point at appeal. However, he accepts that this was a matter which was *(sic)* part of her application made on 10 July 2012. Mr Mohammed was unable to demonstrate that a s.120 Notice had been served on the Respondent. Therefore, the point about being trafficked is a 'new matter' put, for the first time, to the Tribunal. However, since it is a 'new matter' not put before the Secretary of State either as part of the application or a s.120 Notice, I am unable to consider it (see: S 85(5)(6) Nationality Immigration and Asylum Act 2002) I could only consider should Mr Townsend give his consent. Mr Townsend did not. Therefore, the issue of trafficking is not before this Tribunal. It is entirely correct that Mr Townsend did not give his consent since there are special procedures put in place, by the Respondent, to consider trafficking cases. The Appellant should avail herself of these."

11 The Judge considered the Appellant's position under the immigration rules at [10], and the second third and fourth Appellants' position under 276ADE(1) at paragraph [12], noting that at the date of the application, none of the children had been in United Kingdom for seven years. From paragraph [13] onwards, the Judge gives a lengthy direction in law as to the consideration of best interests of children; considered certain matters relevant to the assessment of the best interests of children, and the proportionality of the removal, as set out in *EV (Philippines)* [2014] EWCA Civ 874. Amongst those findings, the Judge held at paragraph [18] that the children had not lost touch with their own culture since their parents *(sic)* still are involved 'in their cultural associations'.

12 The Judge also made the following findings:

> "I have considered the evidence relied upon by the Appellant. I do not find that the best interests of the minor Appellants is likely to be adversely affected by returning them to Nigeria." [20]
>
> "Appellant is an adult. She remained in the UK, without leave, since 2005. She maintained herself and her children. If she could do this in a foreign country there is no reason to find she is not able to do the same in her home country, where she lived from birth to 2005." [24]

and

> "However, she has been able to maintain herself and her children in the UK, a foreign country to her, without any relatives or family support. There is no reason why she could not do the same in her home country. It is not going to be difficult with three children *(sic)*. However, none of the Appellants is infirmed, mentally or physically." [25]

13 The appeal was dismissed.

14 The Appellant was not represented at the time that she made her application for permission to appeal to the Upper Tribunal on 9 February 2017. Her grounds argue that even if her children were not seven years old at the date of application, the Judge should have considered her case under Article 8 at the time of the decision. She now had two children who were over the age of seven and had been born in the United Kingdom. She referred to a four-year unreasonable delay by the Home Office in considering an application.

15 In granting permission to appeal on 23 August 2017, Judge of the First-tier Tribunal Pullig was of the view the Judge should have considered the potential application of Appendix FM Ex1 in relation to the Appellant, and it was arguable that the Judge should not have treated the Appellant's trafficking account as amounting to a new matter, but rather, as being relevant to her human rights claim.

16 Before me, I heard submissions from the parties. It is safe to say that after discussion, Mr Harrison did not strongly contend that the decision was sustainable

Discussion.

17 I find that there are material errors of law in the Judge's decision for the following reasons.

18 I anticipate that there is a word missing from the third line of paragraph 7 of the Judge's decision, and that the Judge intended to state that Mr Mohammad accepted that the trafficking issue was *not* a matter which was part of the Appellant's application made on 10th of July 2012. It is difficult to make sense of the paragraph otherwise. However, even if Mr Mohammad purported to accept that the Appellant's trafficking claim, including the factual assertions of her circumstances in Nigeria

before departure, and her circumstances in United Kingdom after arrival, did not form part of the application dated 10th of July 2012, it is clear that he was wrong to do so; in the Appellant's notice of appeal, the Appellant explains in some detail how those matters had been put before the Secretary of State whilst reconsidering that application, which resulted in the present decision of 10 May 2016. Simply because the Secretary of State is considering, as Competent Authority, whether a person is a victim of human trafficking, and whether that person is owed any duty under the Council of European Convention on Action against Trafficking in Human Beings, this does not obviate the duty on the Respondent to consider evidence which has been given to her in the context of a human rights application. It would appear that the Appellant had set out to the Respondent, as per para 7 above, her circumstances in Nigeria and after arrival in the UK.

19 It would therefore appear that the Appellant's account of being trafficked, and her circumstances in Nigeria prior to departure, were not, contrary to the Judge's suggestion at [7], raised in the grounds of appeal for the first time; they had been raised long before that.

20 Further, the Judge misdirects himself in law as to the application of s.85(5) and (6) NIAA 2002. The jurisdiction to consider matters relied upon by the Appellant is not determined by whether the Appellant had served a statement of additional grounds in response to a the s.120 Notice given in the decision letter (and in any event, arguably she had, in the form of the grounds of appeal, which has been served on the Respondent); the issue is whether or not any matter that the Appellant seeks to rely open represents a 'new matter', ie one which:

(a) constitutes a ground of appeal of a kind listed in section 84, and

(b) the Secretary of State has not previously considered the matter in the context of

(i) the decision mentioned in section 82(1), or

(ii) a statement made by the Appellant under section 120.

21 The Judge failed to ask himself these questions. The Appellant was seeking to rely on the matters relating to her previous circumstances in Nigeria; being an orphan, and being forced into prostitution, and later also being forced into prostitution in the UK. Quite aside from whether any duty may arise to her under Council of European Convention on Action against Trafficking in Human Beings, these considerations were manifestly relevant to the assessment of the circumstances likely to exist upon return to Nigeria, and therefore relevant to the assessment of the best interests of the children.

22 Having incorrectly held that the Appellant had not raised these matters prior to her notice of appeal, the Judge also failed to consider whether the factual matrix set out in the grounds of appeal was distinct from the matters raised by the Appellant prior to the decision, and further, what matters the Respondent had actually 'considered'.

23 The consideration of these matters is set out at page 10 of the refusal letter, as para 6 above. It can be seen that the Respondent declined to set out the detail of what 'further information with regard to *(the Appellant's)* circumstances' was actually before the Respondent. Further, the Respondent erroneously, I find, failed to apply that further information to her human rights claim – stating that the information had been considered separately by the 'relevant department'.

24 Having failed to acknowledge that the Appellant had set out the matters in her grounds of appeal prior to the decision of 10 May 2016, and having misdirected himself in law as to the application of s.85(5)and (6) NIAA 2002 as above, I find that the Judge's decision, seemingly to leave out of account all matters relating to the Appellant's claim to have come to the UK following a life of forced prostitution in Nigeria, was unsustainable.

25 Further, and in any event, the Judge erred in law in his assessment of the children's likely future position in Nigeria, in purporting to find at paragraph 18 that the children had not lost touch with their own culture, since their parents were still involved in their 'cultural associations'. It is difficult to know what this means, and it is difficult to know why the Judge here refers to parents in the pleural, as the Appellant's evidence was that she had no contact with the fathers of her children, who were amongst her clients whilst forced to be a prostitute in the United Kingdom.

26 At paragraph 24 and 25, the Judge refers to the Appellant having been able to sustain herself in the United Kingdom, which was relevant to her likely ability to support herself in Nigeria. However, this fails to take into account evidence which was filed with the Appellant's notice of appeal; that in fact, the Appellants were financially supported in the United Kingdom by Manchester City Council Social Services, no doubt by Children's Services, under section 17 Children Act 1989 to prevent the children becoming destitute. She had, of course also previously supported herself by being forced into prostitution. Having failed to take those matters into account, the Judge's finding about the Appellant's ability to support herself in Nigeria is unsustainable.

27 The Judge's finding at 20 that the children's best interests is not likely to be adversely affected by returning to Nigeria, is inadequately reasoned, and fails to set out any findings of fact as to what their circumstances are likely to be in Nigeria.

28 Further, the Judge has not taken into account the consideration at s.117B(6) NIAA 2002 that in the case of a person who is not liable to deportation, the public interest does not require the person's removal where—(a)the person has a genuine and subsisting parental relationship with a qualifying child, and (b)it would not be reasonable to expect the child to leave the United Kingdom. This consideration arises at date of hearing (and is not limited to the circumstances at date of application), at

which point, two of the Appellant's children had resided in the UK for 7 years and were qualifying children.

29 Further, associated with that point, given that two of her children had been in the United Kingdom for more than seven years, the Judge fails to direct himself in law that powerful reasons would need to be identified by way of public interest considerations, to outweigh the interests of the children in remaining in the United Kingdom; *MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor* [2016] EWCA Civ 705 (07 July 2016), para 49.

30 Insofar as any of these issues is not raised in either the Appellant's grounds of appeal, or in the grant of permission to appeal, I find they are Robinson obvious errors.

31 The Judge's decision is therefore unsustainable and will be remitted.

32 I have held above that the Judge's decision making in relation to whether the matters contained within the Appellant's grounds of appeal regarding her circumstances in Nigeria prior to departure had been considered by the Respondent in the decision of 10 May 2016, or whether they represented a new matter, was flawed. I do not attempt to make a decision of my own as to whether or not those matters were or were not considered by the Sec date, or were or were not new matters, requiring the consent of the Respondent for the First-tier Tribunal to consider them. I leave those matters for the First-tier Tribunal to consider, when remaking the decision in the present appeal.

33 However, I make the following direction for the remitted appeal:

> "(1) By 4.00 pm, 14 days prior to the listing of the appeal before the First-tier Tribunal, the Respondent is directed to file and serve:
>
> (i) a bundle containing all relevant documentation relating to the Appellant's human rights claim and trafficking claim, including copies of representations, complaints and interviews described at paragraph 3 of the Appellant's notice of appeal dated 24 May 2016, and including any decisions made on her trafficking claim, whether on reasonable grounds, or conclusive grounds; and
>
> (ii) a letter setting out the Respondent's view as to whether, in the decision letter dated 10 May 2016, the Respondent did consider the further information provided by the Appellant with regard to her circumstances in Nigeria, as set out in the Appellant's grounds of appeal dated 24 May 2016, or should be treated as having done so; further, if expressing the view that the Respondent did not consider that material, informing the Appellant and the Tribunal as to whether the Respondent intends to consider that material prior to hearing, and if not, why not; and if not, whether the Respondent consents to the matters set out in the grounds of

appeal of 24 May 2016 being considered by the Tribunal, and if declining to give such consent, giving her full reasons for adopting that position."

Decision

34 I set the decision aside.

35 Due to the extent of the findings of fact that are required for the remaking of this decision, I find that it is appropriate that the matter be remitted to the First-tier Tribunal, with the above direction.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity in order to preserve the anonymity of the minor appellants. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: Date: 29.3.18

Deputy Upper Tribunal Judge O'Ryan