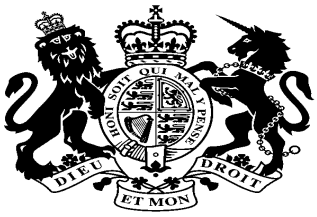

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/26848/2016
HU/26850/2016
HU/26853/2016
HU/26854/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 19 December 2018	**On 08 February 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

R O & Others
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity should have been granted at an earlier stage of the proceedings because the case involves child welfare issues. I find that it is appropriate to make an order. 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.

Representation:
For the appellant: Ms A. Olujinmi of Quintessence Solicitors
For the respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant is the mother of three dependent children. She appealed the respondent's decision dated 22 November 2016 to refuse a human rights claim.

2. First-tier Tribunal Judge Geraint-Jones ("the judge") dismissed the appeal in a decision promulgated on 15 March 2018. For the purpose of the appeal before the Upper Tribunal it is not necessary to set out the judge's findings or the grounds of appeal because Ms Everett accepted that the First-tier Tribunal Judge erred in failing to conduct an evaluative assessment of the best interests of the children with reference to relevant evidence. The decision is set aside and will be remade by the Upper Tribunal.

Decision and reasons

Background

3. The appellant is a Nigerian citizen who entered the UK on 21 October 2008 with entry clearance as the dependent spouse of a Tier 4 (General) student. The oldest child, "A", was two and a half years old on arrival in the UK. The middle child, "B", was just over one year old on arrival in the UK. Both children had been continuously resident in the UK for a period of over seven years at the date of the respondent's decision. At the date of the hearing they have been continuously resident for a period of just over 10 years. The evidence indicates that the appellant gave birth to a stillborn child in 2011. The youngest child, "C", was born in the UK in July 2013 and has been continuously resident in the UK for a period of five and a half years.

4. The respondent's summary of the appellant's immigration history does not make clear when the initial grant of leave to enter expired. However, information contained in the form for the most recent application indicates that it was likely to be in or around October 2009. The appellant says that her ex-husband took responsibility for making the applications to extend their leave to remain. The respondent records that an application for further leave to remain was made on 06 July 2012, which was refused with no right of appeal on 23 August 2013.

5. The appellant's account, which is supported by a detailed social work report prepared in support of family proceedings, is that she and the children were subject to violence and abuse by her ex-husband over a long period of time. In such circumstances it is plausible that her husband may have controlled their passports and taken responsibility for their immigration status. It seems that he took no steps to make an application to extend their initial leave to enter when it expired in October 2009. The appellant and the two oldest children became overstayers. It unclear whether the appellant thought that her husband had made an application to extend their leave to remain or was fully aware, at that point, that their leave to

remain had expired but could do little about it if her husband was as controlling and abusive as she says.

6. The appellant made an application for leave to remain on human rights grounds on 27 November 2014. The evidence indicates that this was a period of crisis for the appellant and the children. She left her husband in July 2014. The family was known to social services. A social care assessment was completed in August 2014. The exact nature of the circumstances surrounding the split in 2014 is unclear.

7. On 22 September 2016 the family court gave the appellant permission to disclose a copy of the final order in the family proceedings, the Cafcass report and the report from the school psychology department to the Home Office. The social work report describes "police involvement" relating to the appellant's ex-husband and bail conditions being set to preventing him from having contact with the appellant and the children. On 04 November 2014 the appellant presented herself to social services with the children saying that they were destitute and needed support. The history provided in the social work report indicates, at that point, the appellant was provided with assistance to seek legal advice regarding her immigration status in the UK. This is what seems to have prompted the application for leave to remain on human rights grounds made on 27 November 2014. The application was refused without a right of appeal on 28 January 2015.

8. In a final order made on 29 January 2016 the family court ordered that the children should live with their mother and that there should be no contact between the father and the children. The court was satisfied that the father subjected the appellant and the two oldest children to physical abuse and that he posed a risk of harm to both mother and children. The appellant made the current application for leave to remain on human rights grounds on 23 July 2016. Another order of the family court shows that the marriage was dissolved on 13 January 2017.

Best interests of the children

9. In assessing the best interests of the children, I have considered the principles outlined in *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of children are a primary consideration, but not the only consideration.

10. The respondent must have regard to the need to safeguard the welfare of children who are in the United Kingdom. I take into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55. In the guidance, the respondent acknowledges the importance of international human rights instruments including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its

functions as expressed in UK domestic legislation and policies." The UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.

11. All three children are Nigerian citizens who do not have leave to remain in the UK. A and B have lived in the UK for a continuous period of 10 years. They entered the UK as very young children and are unlikely to have any meaningful memories of life in Nigeria. They have spent an important formative period in the UK. The evidence shows that their early years were marred by domestic violence towards them and their mother. The social work report prepared in 2015 indicates that both children feared their father and did not want to see him again. Certainly, the evidence shows that the appellant was sufficiently frightened of her ex-husband that they moved some distance to another town. In 2016 she felt the need to change the children's names by deed poll. These steps reflect the appellant's fear of her ex-husband.

12. The children's mother also expressed fears about returning to Nigeria because she thought that her ex-husband's family might try to take the children away from her. The claim has not been put on a protection basis and there is little evidence to support such a fear albeit it may well be genuinely held. Her witness statement provides scant information about how she might support herself and the children if she returned to Nigeria. No information is highlighted about the appellant's level of education or past work history.

13. The social work report makes clear that the children were subjected to "significant emotional harm" due to domestic violence and were also subject to a "degree of physical harm". The social worker concluded that all three children required consistency, emotional stability, appropriate home conditions and regular social interaction. The social worker had no concerns about the appellant's ability to care for the children albeit it seems that she receives assistance and support from social services. In an annexed report of a counsellor who was seeing B at the time, the counsellor reported that the child was concerned about "feeling safe". Both A and B expressed fears about seeing their father again.

14. A letter from a social worker in the Children's Assessment Team dated 10 March 2016 supported an application for accommodation and support under the Immigration and Asylum Act 1999. In her opinion it was in the best interests of the children to remain in the same town where they had settled after the appellant left her husband. The children were said to be settled in the area and had made links in the community. The social worker also felt that it was in the family's best interests to be granted leave to remain. Although no reasons were given to explain why, it is

reasonable to infer from what she said that it was in the interests of the children to maintain continuity and stability.

15. The youngest child, C, was born in the UK and has known no other life. It seems that he was spared the worst of the domestic abuse due to his young age. He has lived in the UK for a continuous period of five years and is likely to be starting school. Little other information is provided about his circumstances.

16. Little up to date information is provided about the current circumstances of the children. Given the fact that social services were satisfied that the appellant could provide them with adequate care it is reasonable to infer that they have been able to settle into life in their new home after the trauma and upheavals of the situation they faced when living with their father. The children have enjoyed a period of four years in which they are likely to have established some equilibrium.

17. The only up to date evidence relates to the situation of A, who has now been diagnosed with Autism Spectrum Disorder (ASD). Correspondence from local health care and special needs professionals from November 2018 confirms the diagnosis. The nurse practitioner in the local community paediatric team confirms that A has complex needs that require close monitoring within a Community Medical Team. He has restrictive and repetitive behaviours that affect his day-to-day functioning. This means that he needs to have a consistent and predicable routine and environment to function. He struggles with any new social setting. He required comprehensive support to make the transition to secondary school. Any change in his environment could be detrimental to his physical and mental health.

18. The respondent recognises that a child who has been resident in the UK for a continuous period of seven years will have established strong ties and this factor must be given significant weight: see *MA (Pakistan) v SSHD* [2016] EWCA Civ 705. In this case, A has been resident in the UK for a considerably longer period than seven years. He is a child with special needs who has suffered traumatic events in the past as a result of domestic abuse. The need for continuity and stability is more important for a child with such needs. Any disruption from the settled life he has established in the UK is not likely to be in his best interests. Social work professionals supported this view in the past.

19. I am satisfied that the family history is such that continued stability is of the utmost importance for the three children involved in this case. I am satisfied that any further upheaval from a settled life in the UK to live in a country that they are likely to find alien is not in their best interests. I conclude that it is in the best interests of the children, and quite clearly in the best interests of the eldest child, to remain in the UK in the care of their mother.

Conclusions

20. Section 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way that it incompatible with a Convention right. This duty is placed on the Secretary of State as well as courts and tribunals. The requirements of the immigration rules and the statutory provisions are said to reflect the respondent's position on Article 8 of the European Convention. However, the complicated provisions relating to private and family life bear little resemblance to the approach taken by the European Court of Human Rights when conducting a balancing exercise under Article 8. The Strasbourg court conducts a holistic assessment of all the relevant circumstances of a case weighing the individual's circumstances against the public interest considerations without artificially separating different aspects of a claim. I am bound to assess the appeal with reference to the immigration rules and relevant statutory provisions, but it must always be remembered that those provisions are intended to give effect to, and are said to be compatible with, the underlying principles enshrined in Article 8 of the European Convention.

21. The appellant does not meet the private life requirements of the immigration rules. She falls far short of the 20-year residence requirement contained in paragraph 276ADE(1)(iii) of the immigration rules. It is not arguable that she would face very significant obstacles to integration in Nigeria given that she is a Nigerian citizen and spent over thirty years of her life there before coming to the UK. She does not meet the requirements of paragraph 276ADE(1)(vi). She does not meet the requirements of Appendix FM of the immigration rules for leave to remain as the sole carer for the children because none of the children are British citizens or settled in the UK.

22. At the date of the application for leave to remain A and B had been resident in the UK for a continuous period of seven years. At the date of the hearing they have now been resident for a period of over 10 years. The two oldest children are 'qualifying children' for the purpose of paragraph 276ADE(1)(iv) of the immigration rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002").

23. The test of whether it is 'reasonable' to expect a child who has been continuously resident in the UK for a continuous period of seven years is used in paragraph 276ADE(1)(iv) (in so far as it relates to the children) and section 117B(6) (in so far as it relates to the mother). In *KO (Nigeria) v SSHD* [2018] UKSC 53 the Supreme Court found that the assessment of 'reasonableness' is directed to the position of the child without reference to the misconduct of his or her parents although what is reasonable must be considered in the 'real world' context in which the children find themselves.

24. The appellant and her children are not British citizens and have had no leave to remain since 2009. Weight should be given to the public interest in maintaining an effective system of immigration control. The appellant remained in the UK without leave since 2009 and does not meet the requirements of the immigration rules. Although it seems likely that she knew she was remaining without leave, the evidence indicates that there were mitigating circumstances. The appellant was in an abusive relationship in which her husband controlled all aspects of her life. Her ability to take steps to regularise the status of herself and the children was limited. After she left her husband in July 2014 she sought legal advice and made an application to regularise her status. There is no evidence of immigration offences at the more serious end of the scale e.g. fraud, deception, absconding or criminal offences.

25. Little evidence is produced of the appellant's ties to the UK. Section 117B of the NIAA 2002 makes clear that little weight can be placed on a private life established when a person's status is precarious.

26. The case is focussed on the interests of the children. The appellant is the sole carer of three children who have spent most of their lives in the UK. The oldest two children are not likely to have any meaningful memories or knowledge of life in Nigeria given their young age when they entered the UK. The youngest child was born in the UK and knows no other life. It is not disputed that the appellant has a genuine and subsisting parental relationship with the children or that two of the children are 'qualifying children' for the purpose of section 276ADE(1)(iv) and section 117B(6) NIAA 2002.

27. In *MA (Pakistan)* Lord Justice Elias emphasised that significant weight should be given to the interests of a child, especially with reference to the respondent's published policy guidance: at that time the Immigration Directorate Instructions "Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10 Year Routes" (August 2015). The latest version of the same policy is dated 22 February 2018. It continues to state that 'significant weight' should be given to the fact that a child has been continuously resident in the UK for a period of at least seven years. The respondent recognises that in that time a child is likely to have set down roots and will be integrated into life in the UK.

28. It is trite law that children should not be blamed for the actions of their parents. In this case both parents arrived in the UK with leave to remain but overstayed their leave and continued to expand the family in the knowledge that their immigration status was precarious. The cumulative effect of public interest factors can, in certain circumstances, outweigh the significant weight that should be given to the best interests of the children. However, 'strong reasons' will be needed to remove a family where a child has been resident in the UK for a period of seven years or more. The best interests of a child who is long settled in the UK are a primary consideration that must be given significant weight.

29. On the facts of this case, I conclude that the public interest considerations are not so serious to outweigh the interests of the children. Having balanced the competing factors, I conclude that it would be unreasonable to expect the two oldest children to leave the UK. They meet the requirements of paragraph 276ADE(1)(iv) of the immigration rules, which is said to reflect the respondent's position as to where a fair balance is struck under Article 8. For the same reasons, the appellant meets the requirements of section 117B(6), which states that the public interest does not require the person's removal if it would be unreasonable to expect a 'qualifying child' to leave the UK. As a dependent child the C must also succeed.

30. I conclude that removal of the appellant in consequence of the decision would not strike a fair balance between the weight to be given to the public interest (as expressed in the relevant rules, statute and policy) and the impact on the individuals involved in this case.

31. The removal of the appellant from the UK would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside

The decision is remade and the appeal is ALLOWED on human rights grounds

Signed  Date 07 February 2019
Upper Tribunal Judge Canavan