Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01188/2019

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 3rd September 2019	**On 12th September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS O A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No legal representation
For the Respondent: Mr David Mills (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Lloyd, promulgated on 4th April 2019, following a hearing in Manchester on 28th March 2019. 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.

© CROWN COPYRIGHT 2019

The Appellant

2. The Appellant is a citizen of Nigeria, a female, and was born on 16th December 1983. She appealed against the decision of the Respondent dated 4th January 2019, refusing her leave to remain in the United Kingdom. The Appellant had lived in the UK for eight years. She had originally come on 18th September 2010 on a Tier 4 Student visa. She had later applied to remain on the basis of her family life with her partner, whose student visa expired at the end of March 2019 (and the appeal in this case was heard on 28th March 2019). He had applied for an extension to his visa but had not yet received a decision from the Respondent. He too was a Nigerian national (paragraph 7). The Appellant and her husband have two children, a daughter and a son. The daughter was allergic to certain products, including dairy, eggs and soya. The son was allergic to cow's milk. The Appellant herself had high blood pressure. It was the Appellant's case that she cannot obtain dairy free milk and other foods for her children in Nigeria and her son has prescription formula milk in the UK which she cannot obtain in Nigeria.

The Judge's Findings

3. The judge held that the Appellant could not meet the requirements of paragraph 276ADE(vi). She had returned to Nigeria herself five times since she arrived in the UK in 2010. The judge did not consider that there were significant obstacles to her reintegration into Nigerian society. Nor was it accepted that there was no food available for the daughter to eat in Nigeria. After all, the Appellant had stayed in Nigeria for two months after the food allergy diagnosis. Although medical notes have been produced "none of the hospital letters say this was due to problems related to her eating foods she was allergic to. The latter illnesses were for conditions unrelated to the food allergies" (paragraph 33).

4. The judge went on to consider the best interests of the children and observed that the children were of a very young age, being 5 years and 7 months. It was in their best interests to be with their mother who will be returning to Nigeria with them. Their father could also choose to return with the family when his study was over or when his visa expired at the end of this month, which was March 2019 (paragraph 46).

5. The appeal was dismissed.

Grounds of Application

6. The grounds of application state that the judge erred in law in failing to have due regard to the allergies suffered by the Appellant's children, failed to have proper regard to the fact that her partner had been granted further leave to remain until 1st March 2020 (which was not evident at the time when the appeal was heard on 29th March 2019), and that the best interests of the children had not been adequately considered.

7. On 7th May 2019, permission to appeal was granted on the basis that this was an Appellant who had throughout been unrepresented, and continued to be

unrepresented, and it had now transpired that her partner, had been granted an extension to his student visa from 27th March 2019 until 1st March 2020, and this was a factor which could not be taken into account in undertaking the balancing exercise, when the judge considered where the balance of considerations fell.

8. In the circumstances, given that the appeal was actually determined on 4th April 2019, by which time the Appellant's partner had already been granted leave to remain on 27th March 2019, it was arguable that there had been some procedural unfairness. Secondly, in granting permission, it was stated that there had been extensive medical evidence before the judge relating to the allergies suffered by both children but there were insufficient findings as to the effect of such allergies on the wellbeing of children. In particular, both children had been hospitalised in the previous twelve months prior to the date of the hearing and this had not been recorded by the judge. Moreover Section 55 of the BCIA 2009 had not been adequately considered.

Submissions

9. At the hearing before me on 3rd September 2019, the Appellant relied upon the grounds of application.

10. For his part, Mr Mills submitted that there was no error of law because the judge did not proceed on the basis that the Appellant's husband did not have leave to remain. The appeal was heard on 29th March 2019 and it would appear that the judge had dealt with this on the basis that further leave to remain may be granted, and if this was so then, "their father can also choose to return with the family when his study is over, or when his visa expires this month" (paragraph 46). It was implicit in this statement, submitted Mr Mills, that the judge allowed for the possibility that the Appellant's husband would be granted a further period of leave to remain to complete his studies, following which he could return back to his country to enjoy a family life there. That being so, the judge simply did not proceed on the basis that the Appellant's husband had no leave to remain in this country.

11. Secondly, submitted Mr Mills, given that the Appellant and her partner are now aware of the children's allergies and their condition, and given that they now have a food regime which enables them to maintain adequate good health, the Appellant and her partner can take adequate precautions upon return to Nigeria, so as to ensure that they do not suffer any further detriment in their health.

12. In reply, the Appellant submitted that the fact was that at the time of the hearing the Tribunal did not have any knowledge of the fact that just a day before, on 27th March 2019, her husband had been granted leave to remain in a letter that was dated then, but arrived a few days afterwards to the Appellant's home. The fact remained, she submitted, that given that the judge's determination is dated 4th April 2019, by that stage the Appellant's partner already had extant leave for a week.

13. Second, she submitted that there was documentation from Dr O. F. Adeniyi, of an article entitled "food allergy, two case reports and management challenges in a

resource limited setting", by the department of paediatrics, and she submitted that this had not been considered by the Tribunal. She was entirely wrong about this because Judge Lloyd did expressly take this into account (at paragraph 36).

Error of Law

14. I am satisfied that the making of the decision by the judge involved an error of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, there is the question of the Appellant's partner having been granted further leave to remain at the time of the hearing on 28th March 2019. Plainly he had been granted leave only the day before on 27th March 2019. I do not accept, despite Mr Mills' admirable submissions before me to persuade me otherwise, that the reference to the fact that "their father can also choose to return with the family when his study is over, or when his visa expires this month, implies that the judge has accepted the possibility of further leave to remain being granted to the Appellant's partner. The basis for this is insufficient. The matter had to be considered on the basis of the actual facts on the date of the hearing, which was that only a day before the Appellant's partner had been given further leave to remain. When directly addressing this point before me, the Appellant stated that at the hearing below before Judge Lloyd, she had taken care to inquire of the Home Office Presenting Officer as to when the Appellant's partner's application for further leave to remain would be decided and he had replied that it would be "very very soon". It was not known to him that only a day before the Home Office had actually granted the Appellant's partner further leave to remain. That was the actual state of affairs on the day of the hearing before Judge Lloyd. The matter ought to have been considered on the basis that the Appellant's partner had leave to remain for another year until 1st March 2020. In consequence, I accept that a procedural unfairness had been caused to the Appellant in this regard.

15. Second, there is the question of the Appellant's children's illness. Whereas the judge is entirely correct to conclude that the suggestion that there is no dairy food in Nigeria is absurd so that she rejects it, there is a factual error in terms of the children's continuing ill health. The judge observes that "since the daughter has eliminated certain foods to which she is allergic from her diet, it does not appear she has had further health problems" (paragraph 34). This fails to take into account the fact that both children were hospitalised in the United Kingdom in the last year. The "best interests" of the children under Section 55 of the BCIA, accordingly required a more detailed consideration in the light of the copious medical evidence. It is unfortunate that the Appellant is unrepresented. Proper preparation in an organised fashion of the evidence that the Appellant wishes to rely upon would assist the Tribunal of inquiry a great deal in coming to a decision that was not flawed.

16. I accordingly direct that the Appellant prepare her evidence in future in a systematic and organised fashion so that it is easy to follow, with the chronology, and an index page, and it would be altogether more preferable if she was represented by a legal representative, but that is a matter for her.

Decision

17. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Lloyd pursuant to practice statement 7.2(b) of the Practice Directions.

18. An anonymity direction is made.

19. This appeal is allowed.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their 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.

Signed Dated

Deputy Upper Tribunal Judge Juss 10th September 2019