Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11508/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 20th August 2018	**On 26th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

OPEOLUWA [A]
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Adewusi (LR), instructed by Crown & Law Solicitors
For the Respondent: Mr C Bates (Senior Home Office Presenting Officer)

DECISION AND REASONS

This is an appeal against the determination of First-tier Tribunal Judge Holt, promulgated on 14th March 2018, following a hearing at Manchester on 16th February 2018. 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

The Appellant is a female, a citizen of Nigeria, and was born on 15th February 1982. She appealed against a decision of the Respondent refusing her application for indefinite leave to remain in the UK on the basis of long residence.

The Appellant's Claim

The essence of the Appellant's claim is that she arrived in the UK on a student visa in 2006, following which there were a series of further grants of leave, until she eventually applied on 17th October 2016 for indefinite leave to remain on the basis of long residence. She has three children aged 10, 7 and 2. She claims that the children's father has British citizenship. She also claimed that the eldest of her three children was in the throes of applying for British citizenship (see paragraph 4 of the determination).

A core issue in the appeal arose because the Respondent, Secretary of State, decided that the Appellant had not been honest in her dealings and communication with the Home Office when compared to what she had said to the Inland Revenue tax authorities. She had understated her income to the tax authorities, impliedly as a tax avoidance measure, and had only then corrected this at a much later date, which was not in tandem with the income she had declared to the Home Office.

Accordingly, the application for ILR was refused on the basis that under paragraph 322(5) of the Immigration Rules the provision regarding

> "the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that this represented a threat to national security"

fell to be considered.

The Judge's Findings

The judge found that the Appellant continued to insist at the hearing that she had done nothing wrong. She had simply made a mistake which she had subsequently corrected. The discrepancies between what she had put on the tax forms and represented to the HMRC compared to what she had told to the Respondent, Secretary of State, she simply described as mistakes or errors (paragraph 22). The judge went on to conclude that the Appellant had asserted her children were at school in the United Kingdom and they spoke English at home (paragraph 29).

However, the judge's own conclusions were that there are schools and healthcare services in Nigeria equally as well (paragraph 30). The Appellant herself had been educated in Lagos, had studied chemistry, and even worked as a teacher in Lagos. There was no reason why she would be going back to destitution in that country because she was a graduate with valuable

qualifications in chemistry as well as accountancy and she could find work there (paragraph 31).

Finally, the judge went on to hold that it would not be unreasonable to expect the Appellant and the family to go to Nigeria with their mother if that is what the family decided.

The appeal was dismissed.

The Grounds of Application

The grounds of application state that the judge erred by not recognising that the eldest child was a British citizen applicant and that the Judge had failed to consider the best interests of the children. The judge had failed to apply Section 55 of the BCIA 2009. The Appellant had applied for indefinite leave to remain on the basis of long residence and her family with her two, and now three, children. The judge had noted that the eldest child was aged 10 and whilst all three of them were Nigerian citizens, the position of the eldest child had not been taken into account.

On 5th July 2018, permission to appeal was granted on the basis that the two eldest children had been born in the UK in November 2007 and June 2010 and at the date of the hearing had been resident in this country for more than seven years. There was an omission to consider the mandatory requirements under Section 19 of the Immigration Act 2014 as well as a failure to consider Section 117B(6).

Submissions

At the hearing before me, Mr Adewusi submitted that the fact that two of the children were over 7 years of age had not been considered. They were qualifying children. The issue of "reasonableness" in terms of their return back to Nigeria had to be considered in that context. There was no deportation or criminal damage into this case. Accordingly, the public interest considerations would fall in a very different manner to what would otherwise be the case. Moreover, citizenship had now been granted to the eldest child, who was a British citizen, together with his father, although the principal Appellant and the British citizen father had been separated.

For his part, Mr Bates submitted that the eldest child was not, at the time of the date of the hearing, a British citizen. An application had simply been made. The judge was entitled to treat the matter as it then stood.

Second, any question of not having treated "qualifying" children in the context of the "reasonability" of their return, was misconceived. This is because the judge does at the end of the determination (at paragraph 34) state that, "on the basis of the evidence produced I am satisfied that the Appellant's conduct is such that Regulations 276D, 276B and 322(5) apply and, in the alternative 276ADE is not satisfied in this case" (paragraph 34). Mr Bates submitted that the reference to paragraph 276ADE is a reference to the "reasonableness" of requesting a "qualifying" child to return back to their country.

In any event, the judge did say (at paragraph 32) that, "I do not find that it would be unreasonable to expect them to go to Nigeria with their mother if that is what the family decided" (paragraph 32).

In his reply, Mr Adewusi submitted that there was a claim that the father of the children was a British citizen and the judge had concluded that this was indeed the case (at paragraph 32) when the judge expressed herself in the manner that,

> "given that it was claimed that the Appellant's father was in the United Kingdom as a British citizen, then it seems to me that the Appellant and her partner would have a choice of either the children staying in the United Kingdom to continue their education living with her father or they could return to Nigeria with their mother" (paragraph 32).

Mr Bates intervened to say that there was no express finding by the judge that the father was indeed a British citizen. The judge was simply proceeding, throughout the determination, on the basis that this was what was being claimed on behalf of the father.

Error of Law

I am satisfied that the making of the decision by the judge involved 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.

First, this is a case where two of the children are "qualifying" children. This matter needs to have been expressly recognised by the judge. It appears not to have been the case. The matter needed to be considered on this basis.

Second, insofar as it fell to be considered on this basis, it was important to take into account the Home Office's own policy, "Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes" at paragraph 11.2.4. This states that, "strong reasons will be required in order to refuse a case with continuous UK residence of more than seven years". Furthermore, as held by Elias LJ in **MA (Pakistan) [2016] EWCA Civ 705** (at paragraph 46), where there is such a length of residence children will "have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK".

In fact, His Lordship went on to say (at paragraph 46) that "in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit…". That being so, the observation by the judge that it was open to the children to either remain with the claimed British citizen father, or to return to Nigeria with their mother (paragraph 32) was not adequately reasoned.

To begin with, it was important that the judge did make an express finding that the father was indeed a British citizen. If that finding was made, then the rest

of the question had to be considered in the context of the "very strong expectation" that the best interests of the children will be to remain in the UK.

The essential question at hand is that of proportionality, and how the balance of considerations should fall in this case. This has to be evaluated against the background where it is plain that the Appellant has been less than truthful in her dealings with the Home Office. She has persistently maintained the untenable position that she had only made an innocent mistake. That being so, the matter needs to return back to the First-tier Tribunal, for a rehearing of the question of where proportionality considerations fall.

There has been a delay in sending out this Determination to the parties concerned, because although it was dictated on the day of the Hearing, and typed up shortly thereafter, it appears to have been held up in the system, before promulgation.

Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. 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 Holt, pursuant to Practice Statement 7.2.

No anonymity order is made.

The appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 25th February 2019