IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33995/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 November 2015	**On 14 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

D. O. O.
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms E Savage, Home Office Presenting Officer
For the Respondent: Ms U Miszkiel, Counsel instructed by Kulendran Immigration

DETERMINATION AND REASONS

1. This is an appeal brought by the Secretary of State for the Home Department in relation to a decision of First-tier Tribunal Judge Ian Howard which was promulgated on 28 May 2015.

2. The respondent to the appeal, D. O. O., was born in June 1995 and is a citizen of Nigeria. I shall however refer to her in this decision as the applicant to avoid confusion. She, together with her minor brother, have a long immigration history which I need not go into for these purposes. Suffice it to say that an application for leave to remain was made on 20

February 2009. That was refused and on 12 April 2011 all appeal rights had been exhausted. On 16 August 2011 a reconsideration request was made and between then and June 2014 further material was put forward. The application was considered under Appendix FM paragraph 276ADE of the Immigration Rules and also under Articles 3 and 8 of the European Convention on Human Rights.

3. An appeal was lodged by the appellant on 28 August 2014. It would appear that the appeal related to a single decision letter which embraced both the applicant and her younger brother and certainly when the matter was before the Judge, it was approached with the concurrence of both the Secretary of State and those acting for the applicant on the basis that the determination of the applicant's appeal would be dispositive also of the brother's situation. A point which arose during the course of argument today is that that technically no appeal was lodged by the brother and therefore the determination by Judge Howard and any ruling I make today will be ineffective in relation to the brother. I consider that my approach today is to regard both the applicant and her dependent brother as standing or falling together. Any disposal today of this appeal should inevitably have an impact on the position of the dependent brother.

4. When Judge Howard looked at the matter he was required to go into considerable detail of the history of immigration status and of two earlier decisions by Judge Mailer and Judge Webb in the course of which it would appear that negative findings had been made on credibility issues. In this case Judge Howard had the advantage of a report from a clinical psychologist, Dr Julia Heller, dated 11 November 2014, and I too have had the advantage of reading that document in full. It deals with psychiatric history and it is not necessary for the purposes of this decision for me to rehearse its content. It is also fair to say (and it is accepted) that having regard to the relative youth of the applicant and her brother, the judge was entitled to look afresh at issues of credibility and was not bound by the observations of earlier judges who had looked at evidence given by these individuals when they were not as old as they are now.

5. The judge proceeded to dispose of the matter, adopting the five question approach commended by the House of Lords in the well-known authority of **R v Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27**. In approaching the case as the judge addressed the first question, whether the proposed removal would amount to an interference with the exercise of the private or family life of the applicant and her dependent brother.

6. At paragraph 26, the judge said this:

> "The decision of the respondent is to remove the appellant and her brother from the UK. They live with their aunt and have done so now since 2010. Also living with them is their sister E. Unlike their aunt, E. has no status in the United Kingdom. Their aunt has effectively brought the children up for the last five years. To describe what they have as anything less than a family life would be to fail to understand the opinion of Baroness Hale in

> **Beoku-Betts**. The removal of the appellant and her brother would be an interference with the family life they have established with their aunt."

7. I am told, and the Secretary of State accepts, that the 2010 figure ought properly to read 2008 and that the period during which these children have been with their aunt should be recorded as seven and not five years.

8. This was a case where in effect the aunt was the *de facto* parent of the applicant and her brother. The judge makes an express finding to the effect that the children were brought up by her. To my mind this is a sufficient finding of fact to justify the conclusion that there would be an interference with family life notwithstanding that we are dealing with two adults: aunt and niece. There needs to be more than ordinary love and affection but in my opinion and on a clear reading of the earlier decision the judge came to the view that there was genuine day-to-day parenting by the aunt of both niece and nephew. The criticism made in the grounds of appeal and pursued in oral argument before me that there was insufficient evidence of a family life is, to my mind, based upon a misreading of what was said shortly but clearly by the judge in his determination.

9. The second matter, pursued with skill and economy by Ms Savage on behalf of the Secretary of State relates to an inadequacy, so it is said, on the judge's part in dealing with the question of whether it would be appropriate for the applicant and her brother to be returned to Nigeria. Again, this point seems to be based upon a misreading of what the judge himself said in his evaluation of question 2 of the **Razgar** questions, by reference to Dr Heller's report.

10. The judge at paragraph 26 said the following:

> "The appellant is found by Dr Heller to be suffering from severe clinical depression. This condition would, in the opinion of the doctor, significantly deteriorate if she were removed.
>
> Insofar as M. is concerned the doctor opines that he is suffering from two psychologically diagnosable conditions, childhood-onset fluency disorder and non-rapid eye movement sleep arousal disorder. He is not clinically depressed. She does however conclude that to remove him to Nigeria would prove a severe psychological trauma and would definitely predispose him to further significant mental illness.
>
> Given that both these sets of circumstances are managed within the family environment they both inhabit without the risk of deteriorations of which the doctor speaks there is certainly the potential to engage Article 8." [Emphasis added].

11. It is apparent from this paragraph that the judge gave due consideration to whether it would be appropriate for the applicant and her brother to be returned to Nigeria and that there was a proper basis of medical evidence which indicated that it would be disadvantageous to varying degrees for both the applicant and her brother to be returned.

12. Dealing then with the other issues which are raised by way of criticism of the judge's decision, they seem to me individually and cumulatively to

amount to no more than a complaint as to the weight given to various features and as is well-known issues of weight to be ascribed to different elements of the evidence are matters which are properly within the discretion of the First-tier Tribunal Judge and should not be interfered with by the Upper Tribunal.

13. The more significant suggestion that there may be an error of law relates to the fact that in applying the statutory presumptions under Section 117B of the Immigration Act, the judge in this instance gave no or no sufficient regard to the period when the applicant's immigration status was either unlawful or precarious. It is said that she was an overstayer and therefore could not acquire Article 8 private and family life rights during the period when her residence was indeed precarious.

14. I accept that in a very lengthy paragraph of the decision, namely paragraph 26, the judge's reasoning may not be as explicit as ideally should be the case. The judge deals with matters under subheadings concerning each of the five **Razgar** questions but he also recites in full the statutory tests to be applied under Section 117B. As a counsel of perfection it would have been better had he dealt in terms with the period when the applicant's immigration status was precarious and it is unfortunate that such a sentence is absent from the overall decision.

15. However, I need to look at the totality of the decision and, having regard to the great care which the judge took over a factually complex case with a long immigration history and the fact that he took the trouble to set out the statutory test to be applied, it seems to me that he must have weighed this consideration in coming to the conclusion which he did.

16. If I am wrong on that and it could be said to have been an error of law not to deal with it expressly, looking at all of the evidence, all of the judge's findings and the overall trajectory of his conclusions, I do not consider that the absence of an express sentence dealing with Section 117B had any material effect on the outcome of this particular appeal, and in those circumstances I would similarly reject this criticism.

17. I therefore come to the conclusion that although permission to appeal was granted on a number of limbs, not all of which were advanced by the Secretary of State in the grounds of appeal, those matters, whether singly or collectively do not amount to an error of law. Both the balancing exercise which needs to be conducted under Article 8 and the question of proportionality are inevitably complex but I do not consider that any criticism can legitimately be made, save for the small omission which I do not regard as material.

18. I look to the penultimate section within paragraph 26 and to the judge's conclusion:

> "For all the reasons I have found to be reliable in Dr Heller's reports the family life in the UK is not one that could be replicated with their mother in Nigeria. The anticipated deterioration in both their mental health is only the first of a number of barriers to this and these barriers are significant."

Although the judge does not at that point repeat what those barriers are and how significant they might be it is implicit from the foregoing paragraphs of the decision that he has properly exercised his discretion.

19. The conclusion comes in paragraph 27 and reads as follows:

> "So it is that when I add all the matters relied upon by the appellant and about which I am satisfied against the matters relied upon by the respondent as making these removals (and thereby interferences) necessary I am not satisfied the decisions to remove are proportionate."

To my mind that is a soundly based conclusion. It is adequately explained and there can be no fault with the reasoning.

20. It therefore follows that this appeal must be dismissed. I make one final observation arising out of that last paragraph, namely that the expression 'removals' is put in the plural and 'decisions to remove' are similarly put in the plural. It seems clear to me that the appeal to the First-tier Tribunal and the Secretary of State's appeal to the Upper Tribunal today must clearly relate both to the named applicant and to her younger brother, who is her dependant. It further seems to me that the Secretary of State has acquiesced in this approach throughout the currency of these proceedings both before the First-tier Tribunal and before me. The view I take, and I make it clear now lest there be argument at a later stage, is that the decision made by Judge Howard and affirmed today by me is as relevant to, and dispositive of, the interests of her younger sibling M. as they are in relation to the applicant.

Notice of Decision

The appeal is dismissed.

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 her or any member of her 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 *Mark Hill* Date 11 December 2015

Deputy Upper Tribunal Judge Hill QC

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed *Mark Hill* Date 11 December 2015

Deputy Upper Tribunal Judge Hill QC