Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18845/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 July 2019	**On 24 July 2019**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

LYDIA [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Babarinde of Hatten Wyatt Solicitors
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Nigerian national who was born on 27 April 1990. She appeals against a decision which was issued by First-tier Tribunal Judge Widdup on 27 March 2019, dismissing her appeal against the respondent's refusal of her human rights claim.

Background

2. The appellant entered the UK as a student in 2013 and was subsequently granted further leave to remain until February 2015. She overstayed upon the expiry of that leave and, in October 2017, she made an application for leave to remain on human rights grounds. Her representatives stated in the application that she was the partner of a Nigerian national named [LO] and that they were the parents of two children named [JnO] and [JlO], who were born in the UK on 15 August 2014 and 12 January 2017. Mr [O] was said to be a Nigeria national with a retained right to reside in the United Kingdom following the termination of his marriage to an EEA national. The children were nationals of Nigeria. It was submitted that the first appellant's length of residence and the best interests of the children outweighed the public interest in immigration control and that the appellant should be granted leave to remain on human rights grounds.

3. The respondent refused the application on 15 August 2018. He concluded there was no evidence to show that the appellant and Mr [O] had lived together for the two years preceding the application or to show that their relationship was genuine and subsisting. Nor did Mr [O] have British citizenship or a form of status which enabled him to sponsor an application under Appendix FM of the Immigration Rules. The appellant could not succeed under the Partner Route for those reasons and, in any event, there was no reason to think that the relationships in question could not continue in Nigeria. The appellant had not shown that she had sole responsibility for her children and was unable to show that she should succeed under the Parent Route either. It was not accepted that there would be very significant obstacles to the appellant re-integrating into Nigeria or that there were exceptional circumstances outside the Immigration Rules which justified a decision to grant leave to remain on Article 8 ECHR grounds.

The Decision of the First-tier Tribunal

4. The appellant appealed and her appeal came before Judge Widdup, sitting at Hatton Cross, on 19 March 2019. She was represented at that hearing by Mr Babarinde, as she was before me.

5. The case advanced before Judge Widdup on the appellant's behalf was focused principally on [JnO], who had by that stage been recognised to have Special Education Needs. Evidence was adduced to show that [JnO] had Global Development Delay, social communication difficulties and traits of ASD – Autistic Spectrum Disorder – and had been placed on his primary school's SEN register. It was also submitted that Mr [O] had lived with the appellant since November 2016 and that he would shortly be eligible for Permanent Residence ("PR").

6. The appellant was called to give evidence before Judge Widdup. Mr [O] did not attend, although he had made a witness statement. His absence was attributed to an assertion that only a parent was allowed to collect [JnO] from Primary School as a result of his diagnoses. The Presenting Officer is recorded as having told the judge that Mr [O]'s 'most recent application had been refused' but that submission was wrongly recorded by the judge. As Mr Babarinde confirmed before me, the Presenting Officer had actually stated that consideration was being given to revoking Mr [O]'s EEA Residence Card. The Presenting Officer also handed up – without objection or application on Mr Babarinde's part – a report dated 6 June 2018 about the availability in Nigeria of treatment for children with autism.

7. Having considered the oral and written evidence before him, Judge Widdup concluded that Mr [O] had been issued with a residence card as an individual who had retained a right to reside in the UK following the termination of his marriage: [30]. That card was valid from 28 September 2017 to 28 September 2022.

8. Judge Widdup considered and did not accept the explanation given for Mr [O]'s absence from the hearing: [31]. He considered there to be very little evidence of Mr [O]'s right to reside under the EEA Regulations. There was no evidence about his former marriage to an EEA national or his claim to have resided in the UK for five years in compliance with the EEA Regulations: [32]. There was a lack of evidence of a genuine and subsisting relationship and there was no satisfactory explanation for his absence from the hearing: [33]-[34]. The judge accordingly attached little weight to Mr [O]'s witness statement and concluded that the appellant had not discharged the burden of proving that she enjoyed a genuine and subsisting relationship with him: [35].

9. The judge turned to consider [JnO]'s best interests at [37]. He described that issue as 'the main issue in the appeal'. He noted that the appellant was accepted by Mr Babarinde to have no claim under the Immigration Rules, whether in reliance on her claimed relationship with Mr [O] or with the children. The appeal was argued purely on an Article 8 ECHR basis outside the Immigration Rules: [39]. The judge considered Article 8 ECHR to be engaged and proceeded to consider whether the respondent's decision represented a proportionate interference with those rights. He began that assessment by assessing the best interests of the children, and [JnO] in particular.

10. The judge noted that the children were Nigerian nationals and that it was in their best interests that they continue to be brought up by the appellant and to maintain a relationship with their father. The appellant and the children would be returned to Nigeria together and if, contrary to his primary finding, the

appellant was in a relationship with Mr [O], he might be able to support an application for entry clearance made by all three of them: [43]-[46].

11. Judge Widdup considered the evidence relating to [JnO]'s diagnosis and his particular needs: [47]-[49]. He considered the evidence adduced by the respondent about the care which might be available in Nigeria. He considered, in light of that evidence, that there was some support available but he was unable to make any findings in relation to the ease with which it could be obtained, or whether it was widely available: [51]-[52]. He noted that the respondent's evidence indicated that such children might be stigmatised or thought to be possessed in Nigeria: [52].

12. In all the circumstances, the judge considered that it was in [JnO]'s best interests to continue to receive the support and treatment he received in the UK. He went on to consider, however, whether those best interests were outweighed by the public interest in immigration control, as manifested in s117B of the Nationality, Immigration and Asylum Act 2002. Having undertaken a balancing exercise over the course of [54]-[65], the judge concluded that the public interest outweighed the considerations on the appellant's side of the balance sheet, including [JnO]'s best interests.

The Appeal to the Upper Tribunal

13. The appellant sought permission to appeal on grounds which may be summarised as follows. Firstly, that the judge had erred in not treating the child's best interests as paramount and failing to consider cases such as JO (Nigeria) [2014] UKUT 517 (IAC) and EV (Philippines) [2014] EWCA Civ 874. Secondly, that the judge had erred in relying on an 'unknown publication' when concluding that there was some treatment available in Nigeria for [JnO]. Thirdly, that 'more weight' should have been given to the reasons given for Mr [O]'s attendance. Fourthly, that Mr [O] would be entitled to PR and the judge had been wrong to conclude otherwise. Fifthly, that the judge had failed, in considering the public interest in the appellant's removal, to consider the effect of administrative delay in light of EB (Kosovo) 2008 UKHL 41; [2009] 1 AC 1159.

14. Having been refused permission to appeal by the First-tier Tribunal, the appellant was granted permission on renewal by Upper Tribunal Judge Lindsley.

Submissions

15. Before me, Mr [O] focused his submissions on [JnO]'s position, submitting that the judge had misdirected himself in law in his consideration of the child's best interests and had relied impermissibly on the background material provided by the

respondent. Mr Babarinde did not seek to develop the points made about Mr [O]'s status in the UK to any real extent, since Mr [O]'s residence card had subsequently been revoked by the respondent and an appeal was pending, to be heard in October 2019. He submitted that [JnO]'s best interests had not been properly considered and that the judge had not reasoned his conclusions adequately. He submitted that Mr [O] might have been entitled to PR at the date of hearing because he had been granted a residence card in 2014 and a retained residence card in 2017. Some payslips had been before Judge Widdup showing that he had continued to be economically active thereafter.

16. Ms Everett submitted that Judge Widdup had not erred in law. He had directed himself appropriately on the evidence and had been entitled to conclude that there would be some support for [JnO] in Nigeria. He had accepted that he could not, on the evidence before him, come to any conclusion about the extent of that support and he had also accepted that [JnO] may encounter stigma in Nigeria. Ultimately, however, these matters were all carefully factored into the Article 8 assessment and the judge was entitled to conclude that the public interest outweighed those matters which militated in the appellant's favour, including [JnO]'s best interests. The conclusion the judge had reached about the appellant's relationship with Mr [O] was clearly open to him, and the assertion that he was unable to attend the hearing because he had to collect [JnO] from school was inadequate. The reasoning was sound and the decision should be upheld.

17. Mr Babarinde emphasised in response that the main issue was the impact of removal on [JnO].

18. I indicated at the end of the hearing that I did not consider Judge Widdup's decision to be erroneous in law and that it would stand. I reserved the reasons for that decision, which are as follows.

Discussion

19. I deal firstly with the points upon which Mr Babarinde did not particularly focus. The first concerns the judge's approach to Mr [O]'s non-attendance at the hearing. It was submitted in the grounds that more weight should have been given to the assertion that he could not attend the hearing because he had to collect [JnO] from school. In my judgment, Judge Widdup was perfectly entitled to be concerned about this assertion. The appellant and Mr [O] lived in Ashford at the time of the hearing before the FtT. The hearing was in Hatton Cross, as I have recorded. There was no documentary evidence to show that only a parent could collect [JnO] from school. And there was no application for the case to be heard first in the list so that Mr [O] could return to Ashford from Feltham. The judge was therefore

presented with an appeal in which there was no satisfactory explanation for Mr [O]'s absence. He was entitled to consider that his absence from the hearing militated against the establishment of a genuine and subsisting relationship, particularly when there was a lack of cogent documentary evidence to show that the appellant and this gentleman were in a long-term relationship. It is to be recalled that the Secretary of State had doubted whether the relationship was genuine and subsisting; the absence of further evidence, and the absence of Mr [O] from the hearing, was to be considered against that backdrop.

20. The judge's conclusions about Mr [O]'s status were equally open to him. Although I was shown a copy of a residence card which was issued in 2014, that card was seemingly not shown to Judge Widdup. He was shown a copy of a card which was said to have been granted in 2017, on the basis that Mr [O] had retained a right to reside following the termination of his marriage to an EEA national. As confirmed by SSWP v Dias [2011] 3 CMLR 40, however, such a card is declaratory of the underlying right and the judge was entitled to consider what there was before him to establish that Mr [O] had established a right to reside permanently in the United Kingdom. He was entitled to conclude, for the reasons that he gave, that there was insufficient to establish such a right.

21. There was reference in the grounds of appeal to the principle in EB (Kosovo) that administrative delay might reduce the weight which is otherwise to be attached to the maintenance of proper immigration control. That point was rightly not developed by Mr Babarinde orally. There was no undue delay in this case on the part of the respondent.

22. Judge Lindsley was concerned when granting permission that Judge Widdup had not considered the appellant's private life under paragraph 276ADE(1)(vi) of the Immigration Rules. It is correct that the judge did not consider whether the appellant would experience very significant obstacles to her re-integration to Nigeria. But, as I have recorded above, that was not part of Mr Babarinde's case; he expressly stated before Judge Widdup that he did not rely on the Immigration Rules.

23. Mr Babarinde's main complaint was that Judge Widdup had failed either to undertake a lawful consideration of [JnO]'s best interests or that he had failed to accord proper weight to those interests in balancing the competing considerations under Article 8 ECHR. In my judgment, neither of those grounds is made out.

24. Mr Babarinde criticises Judge Widdup for attaching weight to the background material provided by the Presenting Officer about the treatment for autism in Nigeria. Repeating the submissions he made before the judge, he submitted that the information

(which is contained in a Home Office Response to Country Information Request) may not have reflected the position accurately, not least because the charity described in the document might have had a financial interest in presenting itself in a particular way. I consider that it was open to the judge to attach weight to this report, particularly when there was no other evidence before him about the treatment may be able to access in Nigeria. His approach to the report was demonstrably balanced, and he noted that there was no indication about the extent to which treatment would be available, just as he noted that there was stigma attached to children with ASD in Nigeria.

25. The judge concluded that it would be in [JnO]'s best interests to remain in the UK to continue to receive the specialist support from which he benefits at the moment. Contrary to the submissions made by Mr Babarinde and to the grounds of appeal, that conclusion was not determinative of the appeal. These were not proceedings in the Family Court and [JnO]'s best interests were not the paramount consideration; they were instead a primary consideration, which is a consideration of substantial importance. There is no suggestion in Judge Widdup's decision that he treated [JnO]'s best interests as anything other than that. As a judge in a specialist Tribunal, it is to be assumed that he knew and applied the law correctly unless the contrary is established. Mr Babarinde has not established any such error.

26. Having reached the conclusions he did about the appellant's relationship with Mr [O] and the best interests of the children, Judge Widdup undertook a detailed balancing exercise, taking proper account of the matters which militated against the appellant in the Article 8 'balance sheet'. He was entitled to conclude, for the reasons he gave, that the public interest outweighed those matters on the appellant's side of the balance sheet. Whilst [JnO] would benefit from ongoing support in the UK, the need to maintain immigration control and the appellant's precarious or unlawful status throughout militated against her and her children remaining in the UK. In reaching that conclusion, the judge demonstrably considered and applied relevant authority, including EV (Philippines), and there is no basis for a submission that he misdirected himself on the law. It was for the judge to balance the competing considerations and to reach a decision under Article 8 ECHR. The conclusion that he reached in that respect was adequately reasoned and fully in accordance with the relevant authorities. Neither the grounds of appeal nor the submissions made by Mr Babarinde establish any legal error on Judge Widdup's part.

Notice of Decision

The appeal is dismissed. Judge Widdup's decision stands.

No anonymity direction is made.

MARK BLUNDELL
Judge of the Upper Tribunal

18 July 2019