



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/13946/2014**

APPEAL NUMBER:

THE IMMIGRATION ACTS

Heard at: Field House

**Decision and Reasons
Promulgated**

On: 1 July 2015

On: 13 July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

ENTRY CLEARANCE OFFICER

Appellant

and

**MR AYODEJI HAMEED AWEDA LAWAL
NO ANONYMITY DIRECTION MADE**

Respondent

Representation

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer

**For the Respondent: Mr P Richardson, counsel (instructed by Perera
and Co Solicitors)**

DETERMINATION AND REASONS

- 1.** I shall refer to the appellant as the Secretary of State for the Home Department and to the respondent as "the claimant".
- 2.** The claimant is a national of Nigeria, born on 27 June 1979. He entered the UK illegally in 1999. His partner, Mrs Temipope Enioa Alabi, entered the UK as a visitor in 2004. The claimant commenced a relationship with her.

- 3.** She gave birth to their children, Mosunmola, on 1 March 2006 and Ola on 31 July 2008.
- 4.** The claimant then married a Portuguese national on 15 May 2009. In September 2010 the Secretary of State refused his application for a residence card as the family member of that national. His subsequent appeal in October 2010 was heard and dismissed on 14 January 2011. He became appeal rights exhausted on 26 January 2011.
- 5.** The claimant thereafter reunited with Ms Alabi, his ex partner.
- 6.** On 2 December 2011 he made a human rights application with his family as his dependants.
- 7.** Subsequently, his partner gave birth to Fawas on 6 July 2012.
- 8.** On 15 August 2012, the Secretary of State refused his human rights application with no right of appeal.
- 9.** In March 2013 his solicitors lodged an application on behalf of the claimant and his family pursuant to paragraph 276ADE and EX.1 of Appendix FM of the immigration rules as well as under Article 8 of the Human Rights Convention.
- 10.** On 24 April 2013, the Secretary of State refused the second human rights application with no right of appeal. That was followed by a pre-action protocol letter on behalf of the family, with particular reference to Mosunmola who was born in the UK and was 7 years old at the date of application in 2013.
- 11.** After further information was requested and supplied, his application was refused on 12 March 2014. The Secretary of State refused the application under paragraph 276ADE (vi) and EX.1 of Appendix FM and refused the children under paragraph 276ADE (iv). Regard was had to s.55 of the UK Borders Act 2007 as well as Article 8.
- 12.** The matter came before First-tier Tribunal Judge Easterman on 9 October 2014. He adjourned the matter, being concerned that the claimant had been issued an in country right of appeal whilst the remainder of the family were issued an out of country right of appeal, even though the March 2013 application was made on behalf of all five family members who were the subject of the decisions.
- 13.** Following the pre-action protocol letter requesting an in country right of appeal for all, in the event that the reconsidered decision again refused their application, only the claimant was issued with an in country right of appeal [11].
- 14.** Mr Easterman directed that the Secretary of State should consider whether there has been an error in the current position and whether all

should have had an in country right of appeal “which they appear to have accepted is the correct course in relation to the first appellant...” [11].

- 15.** In her reply dated 6 January 2015, the Secretary of State noted that it was only the claimant who made a human rights application and his wife and children are named as his dependants. They have not made an application for human rights in their own right, but as the dependants of the lead applicant. They are liable for administrative removal on that basis. As they had not submitted an application in their own right as individuals, they are not entitled to their own in country right of appeal but are considered to be dependants in the claimant's case. Accordingly, it was considered that the Secretary of State had served the correct notices on all family members [12].
- 16.** At the hearing before the First tier Tribunal, it was submitted that all the family members were entitled to an in country right of appeal in accordance with s.92(4) of the Nationality, Immigration and Asylum Act 2002 in compliance with s.113(1) of that Act. They had made a claim to the respondent that to remove them would be unlawful. They had made claims on a number of occasions supported by written representations from their solicitors. The representations listed all five family members. All of them should therefore have been given an in country right of appeal. That particularly affected Mosunmola where the case is at its strongest as she would have no right of appeal until she leaves the UK. The family's appeal should be dealt with together, as a whole, failing which this would not be in accordance with the law. There would be 's.55 related issues' [13].
- 17.** The Home Office Presenting Officer submitted that it was not possible to determine the case of all five when only one claimant was before the Tribunal. If the Judge were to find that the decision was not in accordance with the law, that would force the respondent to act [14]. No submission was made to that effect however. Nor has there been any attempt to bring judicial review proceedings against the refusal by the Secretary of State to grant the remaining family members an in country right of appeal.
- 18.** Judge Veloso decided to proceed on the basis that there was a valid in country appeal before her in respect of the five relatives [15]. She records that the Home Office Presenting Officer acknowledged that the Secretary of State's statement of 6 January 2015 was wrong in law, having earlier submitted that it was impossible to determine the case of all five.
- 19.** Judge Veloso was satisfied that the written representations of 6 March 2013 from the solicitors made it clear that all five family members were making an Article 8 claim which was again made clear in the pre-action protocol letter dated 24 May 2013. The application form listed the claimant before her as the main applicant as its format specifically requires.

- 20.** She was thus satisfied that she had jurisdiction to hear all five appeals in accordance with s.92(4) of the 2002 Act. In any event, she stated that even if wrong, she would have to have regard to the decision by the House of Lords of Beoku-Betts [2008] UKHL 39, where she is required to deal with all four relatives “as part of this appeal” [15].
- 21.** The Home Office Presenting Officer before Judge Veloso stated that she relied on the reasons for refusal letter. In previous determinations, the Judge found that the claimant had entered into a sham marriage with an EEA national, which showed a blatant disregard for the immigration rules and that should be the starting point with regard to his credibility [18].
- 22.** It was conceded that Mosunmola had been in the UK for over seven years. However, it was not conceded that it would not be reasonable to expect her to leave the UK. She had not been in the UK for seven years from the age of four, which was stated to be a significant period in the Upper Tribunal's decision in Azimi (Moayed) [2013] UKUT 197. She relied on MK (India) [2011] UKUT 475 where the child in that case was removed despite the fact that she was 12 years old, having been in the UK for seven years.
- 23.** Submissions were also made with regard to Article 8. The whole family had Nigerian nationality. The claimant and his partner had family in Nigeria. None of the children was a British citizen with the right to remain. It was reasonable for them to follow their parents and it was in their best interests to remain with them. With regard to s.117B, the claimant's partner had been on Child Benefit since 2014 and the family had established a family life in the UK when their stay in this country “was illegal” [19].
- 24.** Before the First-tier Tribunal Judge, Mr Richardson, who also appeared on their behalf before the Upper Tribunal, submitted that the issue of the “reasonableness” of expecting Mosunmola to leave the UK was in issue. With regards to Article 8, outside the rules, this was ultimately the same test “via s.117B(6).” She is a qualifying child and her parents have a relationship with her. It is unreasonable to expect her to leave the UK and it is not in the public interest for her parents to return.
- 25.** The starting point, he submitted, is to look at Mosunmola “which fits with s.55” of the 2007 Act. Mosunmola had been in the UK for over seven years. She had been in school for six years. She has received educational and health support. It is advantageous for her to remain in the UK, particularly with regard to her hearing problem. The claimant's immigration history, although not good, fell short of criminality and could not be visited on the children.
- 26.** The Judge directed herself on the basis that “the appeals before me” [22] were presented under paragraph 276ADE for Mosunmola, outside the immigration rules for the claimant, his partner and the two other children.

- 27.** She stated that in considering Article 8, she must follow the two stage approach referred to in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 [24].
- 28.** If the claimant and his family do not succeed under the rules, she must first consider whether their case should be considered outside the rules. If there are grounds warranting such consideration, she must then have regard to the five steps set out in Razgar [2004] UKHL 27, and have regard to Part 5A of the Nationality, Immigration and Asylum Act 2002, namely s.117A to D [24].
- 29.** Judge Veloso found that Mosunmola succeeded under the rules and that the claimant, his partner and the other children succeeded under Article 8 [29].
- 30.** Mosunmola was born in the UK on 1 March 2006 and has been present here for close to nine years at the date of hearing. It was over seven years at the date of application. In addition, the two children, Ola and Fawas had been present for over six and a half and two and half years respectively as at the date of hearing.
- 31.** She found that it was accepted by the Secretary of State that Mosunmola comes within paragraph 276ADE (1) (iv). She then considered the reasonableness of expecting her to leave the UK. In that regard she noted that Mosunmola was not a British citizen and did not have a right to education here. The English language is used in educational institutions in Nigeria and state education is free. She found that Mosunmola would not have linguistic problems if she left the UK to live in Nigeria.
- 32.** On the other hand, Mosunmola was now nine years old. She had been living in the UK for over seven years at the date of application. She had never been to Nigeria and had never experienced its educational system. She had done her entire schooling in the UK. She has done well here. She has made many friends and many have written letters of support.
- 33.** The Judge found from the letters of support that she had established strong bonds with the UK and that her removal would cause a major upheaval in her life and impact on her academically and socially [33].
- 34.** The Judge had regard to the claimant's sham marriage, but noted that this should not be held against Mosunmola, having regard to the "seventh principle" enunciated in Zoumbas [2013] UKSC 74.
- 35.** Judge Veloso found on the balance of probabilities after considering all the evidence in the round, that it would not be reasonable to expect Mosunmola to leave the UK. She therefore succeeded under paragraph 276ADE (1)(iv) of the rules [35].
- 36.** It was conceded that neither the claimant, his partner nor the other children satisfied the requirements of paragraph 276ADE and no other paragraph had been referred to or relied on [36].

- 37.** The Judge then found that there were sufficient grounds to warrant consideration of Article 8 outside the immigration rules on account of the particular circumstances of this case. The very fact of the claimant and his partner being the parents of Mosunmola has not been considered within the immigration rules which impose a requirement of “sole responsibility”.
- 38.** She applied the Razgar steps and found that the claimant, his partner and Mosunmola had established private life during their almost nine years and over six and a half years living here. This was through their work, school, interaction within the local community and friends. Fawas to a much lesser extent in the light of his very young age [38]. The family has lived as a family unit.
- 39.** She considered the public interest element and proportionality and applying s.117A and s117B, she had regard to the length of time the family had been living here although without leave, apart from the initial six months or so in respect of the claimant's partner. The entire family speak English and have integrated into their community over the years.
- 40.** She had regard to s.55 of the 2007 Act and the welfare of the children as a primary consideration. She referred to EV (Philippines) at [34] and [35]. Whilst there is free education in Nigeria in the English language, she found that Ola had never been to Nigeria and had not experienced the education system there. He has been in this country some months short of seven years; he had set down some roots including outside of his immediate family circle. Fawas is not of an age to have yet established a life of any independence from his parents.
- 41.** Mosunmola fell within the rules, which in Article 8 terms amounts to close to nine years and that in the circumstances, it would not be reasonable to expect her to leave the UK. She found that all three children's best interests is to remain with their parents [41].
- 42.** She had regard to the fact that the claimant and his partner had established private life at a time when they knew they had no immigration status. They also took up employment without permission. This however rendered them financially independent.
- 43.** She had regard to the reliance on Child Benefit from 2014. The employment here provided them with skills that they could take back to Nigeria to assist them in finding employment and in their being able to accommodate their family [42]. They also have family in Nigeria to support them. The key element in the balance with regard to their particular case, however, is s.117B(6) to the effect that as claimants are not liable to deportation, the public interest does not require their removal as there is no issue regarding the genuineness and subsistence of their parental relationship with Mosunmola.
- 44.** She found that the whole family returning to Nigeria would disproportionately affect Mosunmola's private life having regard to the

letters of support and correspondence from the school (regardless of the fact that she complies with the immigration rules).

- 45.** Removing the family without her would disproportionately affect her family life with her parents, on whom she remains dependent, and would affect her family life with her siblings. She also gave some weight to the medical evidence in this case which referred to high levels of depression and anxiety in both the claimant and his partner, “around the immigration status.” [42]
- 46.** Accordingly she found that the claimant and his partner's removal would be disproportionate as would Ola and Fawas's removal, as they were entirely dependent on their parents.
- 47.** On 1 June 2015, First-tier Tribunal Judge Chohan granted the Secretary of State permission to appeal. He noted that it seemed from the decision as a whole that the only appeal before the Judge was the one in respect of the claimant, Mr Lawal. His family members were treated by the Secretary of State as dependants in that appeal and not as having separate rights of appeal.
- 48.** He found that it is clear from the determination that the Judge made findings in respect of the claimant's dependants on the basis that they had a right of appeal. However, no separate decisions were made in respect of the claimant's family members. Accordingly, the only person to have had a right of appeal in the UK was Mr Lawal. In the event, the Judge might have erred by creating a jurisdiction by giving the claimant's family members a right of appeal when there was no immigration decision in respect of any of them.
- 49.** He allowed all grounds to be argued.
- 50.** Mr Avery relied on the Secretary's permission grounds. He submitted that judicial review should in the circumstances have taken place as apart from Mr Lawal, the remaining family members only had a right to appeal once they left the UK.
- 51.** The Judge should have acceded to Ms Lush's submission that if she were to find that the decision was not in accordance with the law, this “would force the respondent to act.” However, it was not a route that was taken. The Secretary of State had indicated that the other family members were dependants on Mr Lawal's case.
- 52.** The Judge was not entitled to allow the appeal of Mosunmola under the Immigration Rules on an in country basis. Accordingly, the issue of jurisdiction is important and has affected the outcome of the whole appeal. The Judge focused on a person who was not an appellant before her, wrongly allowing her appeal under the rules. Then she “hanged the remaining claims” under Article 8 on that decision. This could not be done if there was no right of appeal in the first place.

- 53.** He submitted that Mosumola's interests had to be considered in the context of her father's appeal.
- 54.** He further submitted that the Judge, having considered the best interests of the children, should have gone on to consider the issue of reasonableness in the context of the status of the parents, consistently with EV (Philippines), *supra*. Although EV was referred to, it was not properly given effect to or taken into account.
- 55.** He also submitted that the analysis in relation to s.117B was flawed and that the Judge failed to consider the best interests of the child and the issue of reasonableness having regard to s.117B(6). In allowing the appeal under Article 8, the Judge failed to set out Article 8 considerations within the context of the Immigration Rules and to give the appropriate weight. The assessment was one sided and did not mention the parents' conduct in consideration of Article 8.
- 56.** With regard to s.117B(vi), he submitted that the Judge had not engaged with other parts of s.117 or properly looked at the issue of reasonableness. There was a deficiency regarding the public interest considerations.
- 57.** Finally, he submitted that the finding [35] that it would not be reasonable to expect Mosunmola to leave the UK having regard to paragraph 276ADE(1)(iv) of the rules was unsupported by any proper reasoning.
- 58.** He submitted that the Secretary of State's appeal should be allowed and that the decision should be re-made before the First-tier Tribunal because a root and branch approach was required in its re-making.
- 59.** Mr Richardson on behalf of the claimant referred to his Rule 24 response. In his oral submissions, he accepted that Mosunmola did not have a right of appeal in the UK. There should have been a finding that their removal decisions breached the rights of all of them and on that basis should have allowed only the claimant's appeal. Nevertheless, he submitted that the Judge's approach did not result in a material error, having regard to the ultimate findings, because the Secretary of State "invited" the Judge to consider the family members as dependants in the case and did so in writing as set out at paragraph 12 of the determination. That meant that the outcome of their appeals depended on the outcome of the claimant's appeal.
- 60.** Accordingly their human rights had to be assessed at the same time as the claimant's, otherwise the Secretary of State's acceptance that they were to be considered as his dependants would be meaningless.
- 61.** Moreover, the Judge correctly held that she had to look at the human rights considerations with regard to all the family members. The Judge therefore correctly found that the claimant's solicitors had made it clear that all five family members were making an Article 8 claim [15].

62. The removals affected the human rights of all five family members and it was upon that basis that the appeal of the claimant was allowed.
63. He submitted that if the Secretary of State's proposition that the family members should be treated as dependants on the claimant's appeal, the challenge to the Judge's decision "is at best academic." (paragraph 8 of the rule 24 response).
64. The Judge had to have regard to the human rights of all family members, as recognised in Beoku-Betts, *supra*.
65. The Judge was accordingly correct to assess the human rights of a family as a whole whether or not the dependants themselves had a valid right of appeal in country. That was because the decisions had been made on the same date to remove the whole family.
66. Insofar as the contention that the Judge failed properly to assess the reasonableness of the children leaving the UK, and in particular failing to have regard to the immigration history of the parents in any such assessment, the Tribunal had regard in paragraphs 32, 34 and 40 to factors militating against the claimant and his family. She assessed the issue of reasonableness in the context of the immigration history of the parents.
67. Given the findings on reasonableness of relocation for Mosunmola, a qualifying child, under s.117B(6) there was no need to assess the proportionality in the parents' cases as it was not in the public interest to remove them.
68. The Judge at paragraph 37 properly found that there were sufficient grounds warranting consideration of Article 8 outside the rules.
69. In reply, Mr Avery submitted that with regard to s.117B, the Judge was compelled to attach little weight to private life formed in circumstances of this case.
70. Moreover, the Judge should have considered the best interests of the children in the context of the status of their parents. This was not done.

Assessment

71. It was not in dispute before the First-tier Tribunal that it was only the claimant who had an in country right of appeal. It was accepted that none of the other family members had such a right, having been served with administrative removal notices entitling them to have an out of country appeal only. The rest of the family had not made any application for human rights in their own right.
72. Accordingly, there was only one appellant who had a valid in country appeal before the Judge, namely the claimant.

- 73.** The respondent had noted that the other family members had not submitted any applications in their own right as individuals and were accordingly not entitled to an in country right of appeal.
- 74.** The Secretary of State accepted however that they were to be considered as dependants on the claimant's case.
- 75.** No attempt had been made to judicially review the decision of the Secretary of State dated 6 January 2015 set out in her response to the direction of First-tier Tribunal Judge Easterman.
- 76.** I find that the decision of Judge Veloso to proceed with the hearing on the basis that all five relatives had a valid in country appeal before her was incorrect. That was not cured by the Home Office Presenting Officer's acknowledgement that the Secretary of State's statement contained in the response dated 6 January 2015 was wrong in law. No attempt had been made to set aside that supposedly unlawful decision.
- 77.** In the event, as submitted by Mr Richardson, the Judge did acknowledge that if she were wrong about that she would proceed and deal with all five relatives, having regard to the decision of Beoku-Betts.
- 78.** Mosunmola was not an appellant in her own right as there had been no separate immigration decision relating to her, and the fact that she had not appealed against that decision meant she was not entitled to succeed under the immigration rules as an appellant.
- 79.** Submissions had also been made to the Judge by the Home Office Presenting Officer with regard to the Court of Appeal decision in EV, supra. It had been contended [19] that it would be reasonable for them to follow their parents and it was in their best interests to remain with them.
- 80.** The Judge also had regard to Mr Richardson's submissions under s.55 of the 2007 Act. Their best interests would not be served by her removal. Masunmola had been in the UK for over seven years; had been to school for six years; the UK is the only country she knows; this is where she is getting educational and health support. It was thus advantageous for her to remain here particularly with regard to her hearing problem.
- 81.** It was also submitted that removal was unreasonable, not only for her, but it was not in the public interest for the parents and was also unreasonable for the other two children [20].
- 82.** In considering the issue of reasonableness of her departure the Judge took account of the fact that she was not a British citizen and did not have a right of education here. She also noted that English is used in educational institutions in Nigeria and that such education is free.
- 83.** On the other hand she was born here and had lived here for over seven years. She had never been to Nigeria and had not experienced its educational system. She is doing well here and has made friends. The

Judge had regard to the strong letters of support and the bonds she had formed here. She concluded that the removal would cause major upheaval in her life and impact on her academically and socially.

- 84.** On that basis, the Judge concluded that it would not be reasonable to expect her to leave the UK having regard to the provisions of s.276 ADE(1) (iv) of the rules. In considering s.55 of the 2007 Act and noting that the welfare of the children is a primary consideration, the Judge had regard to EV and noted with regard to Ola that she was born in the UK and had never been to Nigeria. She had not experienced education there. She had set down some roots including those outside of the immediate family circle. She found that Fawas was not of an age to have established a life of independence from his parents.
- 85.** Again, having regard to the considerations under s.55, the Judge found that with regard to Mosunmola, it would not be reasonable to expect her to leave the UK. She found that all three children's best interests were to remain with their parents [41].
- 86.** When dealing with s.117B(vi) of the 2002 Act, the Judge did not in terms have regard to s.117B(vi)(b), namely that it would not be reasonable to expect the child to leave the UK.
- 87.** I have had regard to the approach required to be undertaken as set out in EV and in particular to paragraph 35 and 37, as well as the comments of Lord Justice Lewison at paragraph 49, where he stated that in the real world, the appellant is almost always the parent who has no right to remain in the UK. The parent thus relies on the best interests of his or her children in order to "piggyback" on their rights. Lord Justice Lewison noted that in the case before the court of appeal, as no doubt in many others, the Judge made two findings about their best interests:
 - (a) The best interests of the children are obviously to remain with their parents; and
 - (b) It is in their best interests that education in the UK is not to be disrupted.
- 88.** At paragraph 58, Lord Justice Lewison stated that the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, it is the background against which the assessment is conducted.
- 89.** Thus the ultimate question will be, is it reasonable to expect the child to follow the parents with no right to remain in the country of origin?
- 90.** I find that the First-tier Tribunal Judge did not make any proper and reasoned assessment as to reasonableness following the approach

mandated in EV notwithstanding submissions that she had received from the presenting officer set out at paragraph 19.

- 91.** The Judge had regard to that authority at paragraph 41, stating simply that in the circumstances, it would not be reasonable to expect Mosunmola to leave the UK. She found that all three children's best interests would be to remain with their parents.
- 92.** Although the Judge referred to paragraphs 34 and 35 from EV, she did not have regard to or grapple with the significance of paragraph 58 of Lord Justice Lewison's judgment.
- 93.** In this case neither parent had a right to remain. That is the background against which the assessment had to be conducted.
- 94.** The ultimate question that had to be decided was whether it would in those circumstances be reasonable to expect the child to follow parents who had no right to remain here.
- 95.** I have had regard to the guidance of Pill LJ in AJ (India) v SSHD [2011] EWCA Civ 1191 and in AM (s.117B) Malawi [2015] UKUT 0260. The guidance of Pill LJ in AJ is reiterated at paragraph 37. There, LJ Pill when dealing with Baroness Hale's decision in ZH regarding the welfare of children as an integral part of the Article 8 assessment, noted that the primacy of the interests of the child falls to be considered in the context of the particular family circumstances as well as the need to maintain immigration control.
- 96.** There was no evidence before Judge Veloso that any interruption to the education of Mosunmola upon return to Nigeria would be any more significant than that faced by any child forced to move from one country to another. In this respect I have had regard to the approach by the Tribunal in AM, *supra*, at paragraph 39.
- 97.** There was no evidence presented that the remaining children would face any more significant problems than a move from the UK to Nigeria.
- 98.** The Judge has made express findings that the employment of the claimant and the partner provided them with skills that they could take back to Nigeria. That would assist them in finding employment. They would be able to maintain and accommodate the family. They also have family in Nigeria to whom they could turn for support [42].
- 99.** In the circumstances I find that the First-tier Tribunal Judge has not properly assessed the reasonableness of the family's return to Nigeria, having regard to the approach in EV and other authorities.
- 100.** I find that the decision of the First-tier Tribunal Judge involved the making of material errors of law as set out herein. I accordingly set aside the decision. The parties agreed that in that event the decision should be re-made by the First-tier Tribunal at Hatton Cross.

101. Having regard to the fact that the whole of the decision will have to be re-made, following substantial evidence, I accept that this is an appropriate case justifying remission.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and the decision is set aside. The claimant's appeal is remitted to Hatton Cross, where it will be re-made. The time estimate for the appeal is a half day.

No anonymity direction is made.

Signed

Date 12/7/2015

Deputy Upper Tribunal Judge_Mailer