Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/23845/2014
IA/23853/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 2 July 2015	**On 3 July 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Olalekan Olufolahanmi Adebambo
Adetokunbo Gladys Adebambo
[No anonymity direction made]

Claimants

Representation:

For the claimants: Ms E Greenwood, instructed by G Singh Solicitors
For the appellant: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimants, Olalekan Olufolahanmi Adebambo, date of birth 30.9.74, and his wife, Adetokunbo Gladys Adebambo, date of birth 29.5.79, are citizens of Nigeria.

2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Wellesley-Cole promulgated 2.3.15, allowing the claimants' appeals against the decisions of the Secretary of State, dated 19.5.14, to refuse their applications for leave

to remain in the United Kingdom outside the Immigration Rules on the basis of article 8 ECHR private and family life. The Judge heard the appeal on 12.2.15.

3. First-tier Tribunal Judge Reid granted permission to appeal on 30.4.15.

4. Thus the matter came before me on 2.7.15 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out herein I find that there are such errors of law in the making of the decision of the First-tier Tribunal that is should be set aside and remade.

6. An issue arose at the First-tier Tribunal as to whether there were valid appeals in relation to the children, in particular Pauldavid, the subject matter of most of the First-tier Tribunal decision. As in the First-tier Tribunal, the representative of the Secretary of State accepted that as the children are minors, they are dependants of the parent claimants and thus their circumstances had to be considered as part of the appeal.

7. It was common ground that the claimants could not meet the requirements of the Immigration Rules and thus the judge went on to consider article 8 ECHR outside the Rules. Ultimately, the judge reached the conclusion that the claimants' private and family life rights outweighed the legitimate aim of the state so as to find that the removal of the child Pauldavid, and thus also the removal of his parents and baby sister, would be disproportionate.

8. In granting permission to appeal, Judge Reid found it arguable that the judge's reasoning, particularly at §20 of the decision, is lacking in clarity in the article 8 proportionality balancing exercise between the claimants' private and family rights and the public interest in their removal taking into account the public interest considerations of section 117B of the 2002 Act.

9. I find that the grounds of appeal rightly complain that the First-tier Tribunal Judge made material misdirections and erred in law in the application of section 117B of the 2002 Act. In particular, it appears that the judge gave positive credit in the proportionality assessment to factors that do not engender positive credit, such as the ability to speak English and not being a burden on the tax payer. It is submitted in the grounds that the family is not financially independent, as they are heavily reliant on public services to which they are not entitled and have been working illegally in the UK. Further, the wording of section 117B(3) requires the person to be at that time financially independent, not that they might be in the future if allowed to remain.

10. I find that the judge failed to have proper regard for the public interest considerations including those under section 117B of the 2002 Act, a view now reinforced by the recent decision in AM (S 117B) Malawi [2015] UKUT 0260 (IAC). The claimants' continued presence in the UK is unlawful. The first claimant has overstayed for many years. They have no right to remain in the UK and cannot meet any of the Immigration Rules for leave to do so. They have chosen to have children

and effectively attempt to settle in the UK when they should have left the UK. Article 8 is not a shortcut to compliance with Immigration Rules, which provide a route for settlement and is the Secretary of State's proportionate response to article 8 private and family life claims. The immigration status of the claimants in the UK was always precarious, thus little weight should be accorded to any private life developed in the UK. Further, little weight should to be accorded in the proportionality balancing exercise to both any private life or a relationship with a partner developed when they were unlawfully present in the UK. The immigration history of the parents is appalling. They deliberately did not leave the UK when they should have done.

11. A further error is disclosed in §20 by the judge's reliance to the claimant's credit in the proportionality balancing exercise that the claimants are able speak English and will be in the future financially independent. As AM made clear, a claimant's human rights are not improved and cannot accrue 'credit' for such matters: "An appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources." The test in section 117B is of present financial independence, not some speculative future aspiration. No credit ought to have been accorded to the illegal working of the parents and the fact that they may have paid council tax (but did not pay income tax on illegal earnings) cannot be properly said to stand in their favour in the proportionality assessment. I reject Ms Greenwood's submission that the judge only raised these issues so as to eliminate them as negative factors. To the contrary, it is quite clear from the wording of the decision that they were being assessed as factors in the claimants' favour.

12. Neither can the claimants acquire any positive benefit by reason of their immigration history, as held in Nasim & Ors (Article 8) [2014] UKUT 00025 (IAC): "A person's human rights are not enhanced by not committing criminal offences or not relying on public funds. The only significance of such matters in cases concerning proposed or hypothetical removal from the UK is to preclude the Secretary of State from pointing to any public interest justifying removal, over and above the basic importance of maintain a firm and coherent system of immigration control."

13. I also fail to comprehend why the judge considers at §20 that the fact that Pauldavid is "dependent on medical services, as he has been a patient since birth," is a factor to be associated with the fact that the parents speak English in the claimants' favour. I find the wording of this paragraph curious and difficult to follow. Towards the end of this paragraph the judge acknowledges some of the factors relied on the representative of the Secretary of State, but appears to simply dismiss them by stating, "but private life has been established and it was already agreed they have family life, but these are all factors which by virtue of section 117B suggest that refusal is not in the public interest in this case." This sentence makes no sense at all. The reasoning in this crucial paragraph is somewhat muddled and does not justify the conclusion reached. It follows that the proportionality assessment is flawed by reason of inadequate and deficient treatment of section 117B public interest considerations. In the circumstances, the submission that the judge failed to accord

sufficient weight to the public interest in removal of the claimants is also well-founded.

14. I also find that the judge erred in assessing the best interests of the children, particularly Pauldavid, by failing to follow the correct approach set out in the current case law guidance. In Azimi-Moyed the Upper Tribunal in considering the case law in relation to decisions affecting children identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

> "i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
> ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
> iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
> iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
> v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases."

15. In Zoumbas v SSHD, the fact that the children were not British citizens and thus had no right to future education and health care in the UK, together with the assessment of other factors, did not create such a strong case for the children that their interest in remaining in the UK could have outweighed the considerations on which the Home Secretary had relied in striking the balance in the proportionality exercise. There was in that case no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo.

> "No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the UK so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knot family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred in UK society would have been predominantly in the context of the family unit." It was also stated that it was legitimate for the decision-maker to ask herself first whether it

> would have been proportionate to remove the parents if they had no children, and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance."

16. In EV (Philippines) v SSHD [2014] EWCA Civ 974, at §58 the Court of Appeal held 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, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain in the country of origin?"

17. The Court of Appeal gave guidance that:

> "a decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
>
> "In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.
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> "In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

18. The Court of Appeal pointed out at §60 that the facts of the case were a long way from those of ZH (Tanzania):

> "In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the Tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh

> the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

19. At §61, the Court continued,

> "In fact the immigration judge weighed the best interests of the children as a primary consideration, and set against it the economic well-being of the country. As Maurice Kay LJ pointed out in AE (Algeria) v SSHD [2014] EWCA Civ 653, at [9] in conducting that exercise it would have been appropriate to consider the cost to the public purse in providing education to these children. In fact that was not something that the immigration judge explicitly considered. If anything, therefore, the immigration judge adopted an approach too favourable to the appellant."

20. In my view a very similar observation can be made of the First-tier Tribunal Judge in the present case. The best interests of both children are obviously to remain with their parents. None of the family is British and they have no right to reside, be raised, receive medical treatment, or be educated in the UK. The extensive medical services accessed in the UK means that they have already been a considerable burden to the public purse. The approach adopted by the First-tier Tribunal does not take any satisfactory account of these highly relevant factors.

21. All in all, I find that the decision failed to amount to a properly balanced proportionality assessment; it appears to have been heavily weighted in favour of the claimants and somewhat dismissive of the weight of the public interest in removal. Whilst those factors which can properly be regarded as in favour of the claimants should certainly have been taken into account, including the evidence as to the medical needs of Pauldavid, and whether necessary treatment would be available outside the UK. However, the other factors, those in favour of removal, should not have been left out of account, or accorded the scant consideration and weight the way the decision is drafted suggests. Whether it is described as being too favourable to the claimants, or insufficiently cognisant of the factors in favour of removal is no more than two sides of the same coin. The imbalance in the decision is sufficient and significant so as to render the decision flawed and in error of law, requiring it to be set aside and remade.

22. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors in the making of the First-tier Tribunal decision vitiate all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

23. In all the circumstances, at the invitation and request of the claimants to relist this appeal for a fresh hearing in the First-tier Tribunal, notwithstanding the likely delay

that will be occasioned, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the Secretary of State of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

24. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the decision in the appeal to the First-tier Tribunal to be remade afresh.

Signed

Deputy Upper Tribunal Judge Pickup

Deputy Upper Tribunal Judge Pickup

Consequential Directions

25. The appeal is to be relisted at the earliest date available at Taylor House, with an estimate of 2 hours;

26. No interpreter is required;

27. No later than 7 working days before the appeal hearing the claimants must lodge with the Tribunal and serve on the Secretary of State a single, indexed, paginated bundle containing all evidence on which the claimants wish to rely, including further and up to date evidence as to their family circumstances;

28. If it is contended that appropriate or necessary medical treatment for the child Pauldavid is not available in Nigeria, the claimants must produce independent objective evidence on that issue.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

Signed

Deputy Upper Tribunal Judge Pickup