



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26968/2014
IA/26969/2014
IA/26970/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28 July 2015

Decision Promulgated
On 4 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Miss IFEOMA OKWEREOGU
Miss KAOSISOCHUKWU GENEVIEVE OKWEREOGU
Master CHUKWEBUKA JOSHUA OKWEREOGU
(Anonymity Direction Not Made)

Respondents

Representation:

For the Appellant: Ms U Uwaezuoke, Duncan Lewis, solicitors
For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1 I have considered whether any party requires the protection of an anonymity direction. No anonymity direction was made previously in respect of the appellants.

Having considered all of the circumstances and the evidence, I do not consider it necessary to make an anonymity order.

2 For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to the Okwereogu family as the appellants, reflecting their position before the First Tier Tribunal.

3 This is an appeal by the Secretary of State against a decision of First Tier Tribunal Judge Adio ("the judge") promulgated on 24 November 2014 which allowed the appellants' appeals under Paragraph 276ADE, Paragraph EX.1 of Appendix FM and under Article 8.

Background

4 The second and third appellants are the children of the first appellant. They are all Nigerian citizens. On 9 June 2014, the respondent refused the appellants' applications for leave to remain in the UK and decided to remove each of the appellants from the UK. The appellants appealed against that decision.

The Judge's Decision

5 All three appellants appealed to the First Tier Tribunal. The judge allowed the appeal of the first and second appellants under the Immigration Rules, finding that the second appellant is a qualifying child in terms of Paragraph 117B(6) of the Nationality, Immigration and Asylum Act 2002 and that it is not reasonable for the second appellant to leave the UK. The judge therefore found that the first appellant fulfils the requirements of EX.1(a) of Appendix FM to the Immigration Rules. The appellant allowed the third appellant's appeal after considering Article 8 ECHR outwith the Immigration Rules.

6 The judge's decision was promulgated on 24 November 2014. The respondent sought leave to appeal. Upper Tribunal Judge Deans, sitting as a judge of the First Tier Tribunal refused leave to appeal on 12 January 2015. The respondent renewed their application to appeal and on 1 May 2015, Upper Tribunal Judge Eshun granted permission to appeal.

The Hearing

7 Mr Kandola for the respondent submitted that the judge had misdirected himself in law and failed to apply the entire provisions of Section 117B of the 2002 Act. He was critical of the judge for considering the second appellant's circumstances first. He argued that false logic had been applied by the judge to find (at [18]) that it would be unreasonable for the second appellant to return to Nigeria, arguing that the judge had not considered that the first appellant (the mother of the second and third appellants) would return with both children to Nigeria. He argued that the misdirection in law and the flaws in logic vitiated the finding that it was unreasonable for the second appellant to leave the UK and so undermined the whole basis of allowing the appeals for each of the appellants. He argued that the judge had taken an incorrect approach to Section 117B of the 2002 Act

and that had he considered each of the factors set out there as part of the balancing exercise, a different decision would have been reached.

8 Ms Uwaezuoke, Solicitor for the appellants argued that the judge correctly directed himself in law and that there are no errors contained within the decision. Ms Uwaezuoke reminded me that the first and second appellants' appeals were allowed within the Immigration Rules and the third appellant's appeal was allowed after considering Article 8 outwith the Immigration Rules. She argued that a careful reading of each paragraph of the decision clearly indicates (in line with Dube (ss.117A-117D) [2015] UKUT 00090 (IAC)) the judge considered each of the factors of Section 117B of the 2002 Act. I was urged to dismiss the appeal and allow the decision to stand.

Analysis

9 In **Dube (ss.117A-117D)** [2015] UKUT 00090 (IAC) it was held that (i) Key features of ss.117A-117D of the Nationality, Immigration and Asylum Act 2002 include the following: (a) judges are required statutorily to take into account a number of enumerated considerations. Sections 117A-117D are not, therefore, an a la carte menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty-bound to "have regard" to the specified considerations. (b) these provisions are only expressed as being binding on a "court or tribunal". It may be that the Secretary of State will consider it in the interests of good administration and consistency of decision-making on Article 8 claims at all levels to have express regard to ss.117A-117D considerations herself, but she is not directly bound to do so. (c) whilst expressed in mandatory terms, the considerations specified are not expressed as being exhaustive: note use of the phrase "in particular" in s.117A(2): "In considering the public interest question, the court or tribunal must (in particular) have regard – ". (d) section 117B enumerates considerations that are applicable "in all cases", which must include foreign criminal cases. Thus when s.117C (which deals with foreign criminals) states that it sets out "additional" considerations that must mean considerations in addition to those set out in s.117B. (e) sections 117A-117D do not represent any kind of radical departure from or "override" of previous case law on Article 8 so far as concerns the need for a structured approach. In particular, they do not disturb the need for judges to ask themselves the five questions set out in **Razgar [2004] UKHL 27**. Sections 117A-117D are essentially a further elaboration of Razgar's question 5 which is essentially about proportionality and justifiability. (ii) It is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form.

10 In **AM (S 117B) Malawi [2015] UKUT 260 (IAC)** the Tribunal held that when the question posed by s117B(6) is the same question posed in relation to children by paragraph 276ADE(1)(iv), it must be posed and answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin; **EV (Philippines)**. It is not however a question that needs to be posed and answered in relation to each child more than once.

11 The error that the judge made is that his starting point was considering the second appellant's appeal in isolation. The judge is correct that the second appellant is a qualifying child for the purposes of Section 117B(6) of the 2002 Act, but the consideration of whether or not it is reasonable for the second appellant to leave the UK did not take account of the facts and circumstances of all family members. The judge did not adequately consider the immigration history of each of the appellants nor did he consider the position of the first and third appellants before coming to the conclusion that the second appellant faced the prospect of return to Nigeria alone.

12 It is only once the judge decided that the outcome of the appeal for the second appellant that he moved on to consider the first and third appellants and his decision in relation to the second appellant was determinative of the appeals of the first and third appellants. He effectively made the first and third appellants dependant upon the appeal of the second appellant which is an incorrect approach.

13 Although it is clear from the decision that the judge considered Section 117B(6) of the 2002 Act, what is not clear is his interpretation of the phrase "*...the public interest does not require removal where a person has a genuine and subsisting parental relationship with a qualifying child...*" It is equally not clear that he considered the other balancing factors set out in Section 117B of the 2002 Act. It therefore appears that an inadequate balancing exercise has been undertaken. I therefore find that the decision contains material errors in law and requires to be remade.

My Findings of Fact

14 The first appellant entered the UK illegally in or about April 2004. The first appellant has never had leave to enter the UK nor leave to remain in the UK.

15 On 25 April 2007, the second appellant was born in the UK. On 13 September 2008, the third appellant was born in the UK. On 16 December 2012, the first appellant delivered her third child in the UK.

16 The first appellant is separated from the father of the second and third appellants. The first appellant has sole responsibility for the second and third appellants. Their father occasionally sees them.

17 None of the appellants have ever had leave to enter or remain in the UK. On 13 August 2008, the first appellant submitted an application for leave to remain in the UK outside the Immigration Rules. Her claim was rejected. On 3 October 2008, the first appellant submitted an application for leave to remain in the UK listing the second and third appellants on her claim. Her claim was refused on 20 July 2009 without a right of appeal. The first appellant sought reconsideration and the decision was maintained on 2 October 2009.

18 On 3 March 2010, the first appellant submitted an application as the dependent spouse of her partner's parallel application for leave to remain. That application was refused with no right of appeal on 28 January 2011. On 30 November 2012, the first

appellant submitted an application for leave to remain on the basis of Article 8 ECHR with the second and third appellants as her dependents. That application was refused on 15 July 2013 without a right of appeal.

19 The appellants sought reconsideration of the refusal of 15 July 2013. On 9 June 2014, the respondent adhered to the decision of 15 July 2013 and issued decisions to remove each of the appellants. It is against those decisions that the appellants appeal.

20 The second appellant is a qualifying child for the purposes of Section 117B(6) of the 2002 Act.

21 The first appellant was 26 when she entered the UK. She is now 36 years of age. The second appellant attends primary school where she is making good progress. She plays a musical instrument and enjoys sport and dancing. The third appellant goes to the same primary school as the second appellant. He is making good progress there. He enjoys sport and school clubs. Both the second and third appellants have a number of friends.

22 The first appellant's youngest child lives with all three appellants.

23 The first appellant has not had the benefit of anything more than two or three years of primary school education. The first appellant has lost contact with her relatives in Nigeria. Her parents have died. The first appellant does not have a home to go to in Nigeria and does not have either income or employment in either the UK or Nigeria.

The Immigration Rules

24 The first appellant cannot succeed under Appendix FM of the Immigration Rules because she does not meet the requirements of E-LTRPT2.2; it is beyond dispute that the first appellant is (all three appellants are) present in the UK in breach of immigration laws. The respondent correctly goes on to consider whether or not Paragraph EX.1 applies.

25 It is a matter of concession that the first appellant has a genuine and subsisting parental relationship with each of her children and that the second appellant has lived in the UK continuously in the UK for at least seven years. The test then becomes that "*...it would not be reasonable to expect the child to leave the UK*". The respondent's decision would cause upheaval for all three appellants. The effect of the respondent's decision would be that all three appellants would return to Nigeria as one family unit. They will have their own mutual support but, on return to Nigeria, they will enter the country without a home to go to and without a source of income and will have to start from the very beginning.

26 There is, however, no evidence before that any of the appellants would face anything more than a period of upheaval. There is no evidence placed before me to indicate that any of the appellants would face destitution on return to Nigeria. The first appellant has already demonstrated that she is sufficiently resourceful to travel from Nigeria to the UK (where she had no home and no source of income) and to establish herself in the UK. There is no evidence placed before me to indicate that the first appellant's resourcefulness has diminished with the passage of time. It is therefore logical

to conclude that she would be able to return to Nigeria and make provision for her children there - where she will be entitled to work and so generate an income. On the first appellant's own evidence, she has not worked in the UK in the 11 years that she has been in the UK because she is not allowed to work. On the first appellant's evidence, she relies on the charity of her local social work department and the community of faith at her church.

27 The question of reasonableness requires consideration of the best interests of the children. I am mindful of Section 55 of the Borders, Citizenship and Immigration Act 2009, and the case of ZH (Tanzania) v SSHD [2011] UKSC 4.

28. I remind myself of the cases of Azimi-Moayed and others (decisions affecting children; onward appeals), [2013] UKUT 00197. It is the intention of the SoS to ensure that the Appellants and the first appellants youngest child, stay together. It has long been established that it is in the interests of children to remain with their parents. The Respondent's decision maintains the unity of this family and does not separate the children from their mother. The interests of the children are served because the integrity of the family unit is not challenged.

29. There is insufficient evidence to enable me to make a finding in fact that it would be unreasonable for the second appellant to return to Nigeria. That therefore draws me to the conclusion that the appellants cannot succeed under Appendix FM.

Paragraph 276ADE

30 Because of the ages of each of the appellants and the length of time they have been in the UK, none of the appellants can fulfil the requirements of Paragraph 276ADE(1)(iii) to (v) of the Immigration Rules. In order to succeed under Paragraph 276ADE(1)(vi), the appellants would have to demonstrate that they have no ties (including social, cultural or family) with Nigeria.

31 The first appellant has been in the UK for 10 years. The second and third appellants have lived all of their short lives in the UK, but all three appellants are all Nigerian citizens. The first appellant spent the first 26 years of her life in the UK. It is at least implied that the father of the second and third appellants is a Nigerian citizen who is present in the UK without leave to remain in the UK. No reliable evidence that cultural ties to Nigeria have been broken is placed before me. In her witness statement dated 2 October 2014, the first appellant speaks of her fear of return to Nigeria because of a combination of the general situation there and her fear of restricted economic advantages. No evidence is offered of a loss of all ties to Nigeria. I can only therefore come to the conclusion that the appellants cannot fulfil the requirements of Paragraph 276ADE(1)(vi). The appellants cannot succeed under the Immigration Rules.

Article 8 ECHR

34 Section 117 is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation

they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within Razgar.

35 Section 117B(1) provides that the maintenance of effective immigration control is in the public interest. I consider Section 117B(6) because the second appellant is a qualifying child, but I have already found that it would not be unreasonable to expect each of the appellants to leave the UK. I therefore have to find that the second appellant does not benefit from the operation of Section 117B(6).

36 The appellants all speak English and so the public interests set out in Section 117B(2) are met. None of the appellants are financially independent; as I have already indicated, the appellants rely on the local social work department and charity. Section 117B(3) operates against them.

37 The appellants are all in the UK unlawfully. Section 117B(4) operates against them. Section 117B(5) does not require to be considered in this appeal.

38 There are therefore more factors in Section 117B weighing against each of the appellants than in their favour.

39 The effect of the respondent's decision would be that the private life that the appellants have established in the UK would come to an end. They would have to move from their home, they would be separated from their friends, they would be removed from the UK education system and would have to start afresh in Nigeria. However, that private life has been established almost by stealth whilst the appellants have been in the UK illegally. The first appellant has already demonstrated that she is a resourceful young woman. The second and third appellants are young, intelligent and able. They face a big change in their life but there is nothing before me to indicate that it is a change to which they cannot adapt.

40. In Zoumbas v SSHD 2013 UKSC 74 it was held that there was no "substance in the criticism that the assessment of the children's best interests was flawed because it assumed that their parents would be removed to the Republic of Congo.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. When one has regard to the age of the children, the nature and extent of their integration into United Kingdom society, the close family unit in which they lived and their Congolese citizenship, the matters on which Mr Lindsay relied did not create such a strong case for the children that their interest in remaining in the United Kingdom could have outweighed the considerations on which the decision-maker relied in striking the balance in the proportionality exercise (paras 17 and 18 above). The assessment of the children's best interests must be read in the context of the decision letter as a whole." that there was 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 United Kingdom 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-knit 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 into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being".

41. In the case of EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 Lord Justice Lewison, stated that the best interests of the children must be made on the basis that the facts are as they are in the real world and if neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus Lord Justice Lewison thought that the ultimate question was whether it was reasonable to expect the child to follow the parent who had no right to remain to the country of origin.`

42. I therefore find that the respondent's decision is not a disproportionate breach of any of the appellants' article 8 ECHR rights.

Conclusion

43. I therefore have to find that the respondent's decision is not a disproportionate breach of any rights that the appellants might have in terms of Article 8 ECHR.

Decision

44 The decision promulgated on 24 November 2014 contains a material error of law. I therefore set it aside.

45 I remake the decision.

46 The appeals of all three appellants are dismissed under the Immigration Rules.

47 The appeals of all three appellants are dismissed on Article 8 ECHR grounds.

48 There is no need for an anonymity direction.

Signed

3rd August 2015

Deputy Upper Tribunal Judge Doyle