



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/28371/2014**

APPEAL NUMBER:

**IA/28372/2014
IA/28374/2014**

THE IMMIGRATION ACTS

**Heard at: Field House
on 10 September 2015**

**Decision and Reasons
Promulgated
on 21 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

**MR OLASUNKANMI JAMES OYENIYI
MISS FUNMILOLA TOMILOLA OYENIYI
MISS ADESEWA OMOWUMI
NO ANONYMITY DIRECTION MADE**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellants: Mr N Garrod, counsel (instructed by AO & Associates Solicitors)

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are Nigerian nationals. They are the father and his two daughters, born on 28 August 1959, 31 January 1993 and 14 December 2005 respectively.
2. They appeal with permission against the decision of First-tier Tribunal Judge Greasley who in a decision promulgated on 12 March 2015 dismissed their appeals against the respondent's decision to refuse to grant them EEA Residence cards under the Immigration (EEA) Regulations 2006.
3. In granting permission, First-tier Tribunal Judge P J G White found that the Judge gave adequate reasons for his findings on the evidence that the first appellant was a party to a marriage of convenience.
4. However, he stated that it is arguable that in his consideration of Article 8, the Judge gave inadequate consideration to the best interests of the children. In granting permission to appeal, the Judge expressly alerted the parties to the fact that there was at that time an argument as to whether the refusal of an application for EEA residence cards engages the consideration of Article 8.
5. Mr Garrod submitted on behalf of the appellants that there was no legitimate justification for removing a child such as the third appellant. The Judge erred in not applying s.117B(6)(b) of the 2002 Act in favour of the third appellant. Removing that child cannot be proportionate to the legitimate aims of s.117B(1). It is also contended that the Judge wrongly stated that Mr Adeboye's parents originated from Ghana. His parents were from Nigeria. Accordingly, the Judge did not give proper consideration to his evidence in arriving at the decision. Moreover, at [34] the Judge stated that there are legitimate justifications why it is proportionate and lawful for the appellant and his children to return to "Algeria". However, the first appellant's case is that he is from Nigeria, not Algeria. This is an indication that the Judge "totally failed to give the evidence before him proper consideration before arriving at his decision." This shows that the Judge is biased in arriving at the decision.
6. The mistake by the Judge as to whether the appellants should be returned to Nigeria as opposed to Algeria did not feature as part of Mr Garrod's oral submissions before the Tribunal. In any event, I find that the reference to Algeria did not in the circumstances constitute a material error of law for the reasons referred to below.
7. Mr Garrod submitted that the Judge failed to have regard to the best interests of the children in accordance with s.55 of the Borders, Citizenship and Immigration Act 2009. The appellant had arrived in the UK with his two children on 5 August 2010 and accepted that the third appellant was born on 14 December 2005. She has accordingly arrived in the UK when she was just four years old and remained here ever since. She would thus have lost all social, cultural and family ties with Nigeria.

8. Mr Whitwell on behalf of the respondent submitted in line with the Rule 24 response that there appears to have been little by way of evidence advanced in respect of the minor appellant's best interests. Against the background of "deliberate fraud" it was open to the Judge to conclude that their best interests were served by their returning to Nigeria as a family unit.
9. Mr Whitwell referred to the recent decision in Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC), promulgated on 4 August 2015. The pending decision was referred to by Judge White at paragraph 5 of his grant of permission.
10. The Upper Tribunal, presided over by the President, the vice President and an Upper Tribunal Judge, found that where no notice under s.120 of the 2002 Act has been served, and where no EEA decision to remove has been made, an appellant cannot bring a human rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in JM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature.
11. It is common ground that no notice under s.120 of the Nationality, Immigration and Asylum Act 2002 had been served in this case; nor has any decision to remove been made. Moreover, the refusal letters in the individual cases advised the appellants that if they did not leave the UK, they might be subject to removal action. They also stated that the immigration rules now included provisions for applicants wishing to remain in the UK on the basis of their family or private life. As they had not made a valid application for Article 8 consideration, consideration was not given as to whether their removal from the UK would breach Article 8 of the Human Rights Convention.
12. Notwithstanding the decision in Amirteymour and others, Mr Garrod sought to mitigate its effect by contending that there is a statutory duty imposed on the Tribunal under s.55 of the 2009 Act.
13. However, I accept Mr Whitwell's submission that as a matter of principle the Tribunal's decision in Amirteymour similarly precludes an appellant from raising a discrete s.55 claim. Moreover, consideration of the best interests of the child constitutes a primary consideration in an Article 8 assessment involving children. It is an inherent part of that assessment. In the circumstances, I find that the decision of the respondent was in accordance with the law and the 2006 Regulations.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error of law and the decision shall accordingly stand.

No anonymity direction is made.

Signed

Dated: 20 October 2015

Deputy Upper Tribunal Judge Mailer