



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33147/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 8th June 2015

Decision and Reasons Promulgated
On: 21st July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

Secretary of State for the Home Department

and

CAB

(anonymity direction made)

Appellant

Respondent

Representation:

For the Appellant: Mr Whitwell, Senior Home Office Presenting Officer

For the Respondent: Mr Alabi, Solicitor (Advocates)

DETERMINATION AND REASONS

1. The Respondent is a national of Ghana born in 1970. On the 15th January 2015 the First-tier Tribunal (Judge O'Flynn) allowed his appeal against a decision of the Secretary of State to remove him from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999¹. The Secretary of State now has permission to appeal against the decision of the First-tier Tribunal.

¹ Decision dated 8th August 2014

Background and Matters in Issue

2. The Respondent came to the UK in 1999 and overstayed. His partner M arrived in 2001 and also overstayed. They have had three children since their arrival. C1 was born in April 2003, C2 in November 2004 and C3 in July 2011. On the 29th September 2012 applications were made for them all to be granted leave to remain. The applications were refused on the 6th November 2013 but no appealable decision was made. Judicial review proceedings were launched and the matter was settled by consent. The Secretary of State served each member of the family with a notice of a decision to remove them under s10².
3. The refusal letter that accompanied the decisions listed all five members of the family. It addressed the Respondent's claim to remain in the UK on human rights grounds, and his failure to establish a case under either Appendix FM or 276ADE. It then addresses 'leave outside the Rules', and s55 of the Borders, Citizenship and Immigration Act 2009 and in that context addresses the Article 8 rights of the children. It is accepted that both C1 and C2 had been in the UK for over seven years – a reference to paragraph 276ADE(1)(iv) of the Rules – but since their parents had been refused, not that their removal would be disproportionate.
4. At the appeal before the First-tier Tribunal the Secretary of State requested that the appeal be adjourned. The Presenting Officer pointed out that only CAB had appealed. The suggestion was made that the other family members could submit out of time appeals to be joined as appellants. The First-tier Tribunal declined to take this course on the basis that his partner M and C3 could be treated as CAB's dependants. As for C1 and C2, the Tribunal was under the impression that they had both now naturalised as British citizens. With that in mind he found that it would be wrong to adjourn.
5. The first finding in the determination is that the appeal of CAB must be allowed under Appendix FM of the Rules, along with his dependants. It is accepted that he failed on "eligibility" grounds because of the length of time he has overstayed. Referring to E-LTRPT.1.1, 2.2-2.4 and 3.1 it is found that "on the face of it" those requirements were not met. Although it is not spelled out presumably the First-tier Tribunal was here referring to E-LTRPT.2.3 (a) which states that the applicant must have sole parental responsibility for the child. The determination goes on to address EX.1. Finding that the elder children have been in the UK for over seven years and that their removal would not be reasonable, the appeal is allowed under the Rules.
6. The Tribunal then turned to Article 8. The statutory provisions set out in s117A-D of the Nationality, Immigration and Asylum Act (as amended) are set out in full. The Tribunal considers the five Razgar steps and having reached the question of proportionality, noted its evaluation of CAB as being a "deeply unimpressive witness". The Tribunal rejected his evidence that he had not been working illegally. It carefully considered the fact that maintenance of immigration control is in the

² Although we have not seen these decisions, we were informed of this by Ms Isherwood at hearing with no challenge by Mr Alabi.

public interest. In his favour the Tribunal considered the provisions of s117B(6). Having found the two eldest children to be British, and thus “qualifying” the Tribunal further found that their removal would not be reasonable to expect them to go to Ghana. The determination refers to the guidance in ZH (Tanzania) and the appeals are all allowed under the Immigration Rules and human rights law.

Errors of Law

7. On the 11th May 2015 we heard representations on whether the determination of the First-tier Tribunal contained errors of law such that it should be set aside. On that day the Secretary of State was represented by Ms Isherwood, and CAB by Mr Alabi. Our findings were as follows.
8. The first error in this decision is in the approach taken to the ‘appellants’ before him. The Secretary of State had served five notices of a decision to remove and in those circumstances it was open to each family member to appeal. They did not do this, instead electing to pursue their appeals as “dependents” of CAB. It was of course open to the Tribunal to consider the right of other family members in the context of the Article 8 claim³, but it was not possible for the Tribunal to “allow the appeals under the Immigration Rules” as it purports to do in this determination. There was only one appeal before the Tribunal.
9. The second is that in allowing that appeal under the Immigration Rules the Tribunal appears to have misunderstood the nature of EX.1. Having already found that CAB did not meet the Eligibility or relationship requirements in Appendix FM it was not open to the Tribunal to go on and apply EX.1 as if it were a free standing provision: Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 00063 (IAC).
10. Thirdly we find that the Tribunal has not conducted a complete proportionality balancing exercise. The determination has set out s117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) in full. It is not however apparent from the findings that all of the relevant sub-sections have been addressed in the reasoning. At paragraph 26 the Tribunal properly directs itself to the matters of effective immigration control, and obliquely touches on whether CAB might be considered “financially independent” in its finding that he has been working unlawfully. No consideration is given to whether he speaks English or what bearing his lack of immigration status might have on his relationships and private life in the UK. It may be that in making its positive findings on s117(6) the Tribunal did not consider it necessary to go through each of (1)-(5) since (6) could be treated as a ‘trump’. This was the wrong approach. In Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) the Upper Tribunal held that the factors in 117B(1)-(6) are not to be treated as an “a la carte menu of considerations”. Each must be addressed. In this case the Respondent contends that the failure to do so led to the Tribunal omitting, in its assessment of (6), to weigh in the balance factors which might be said to show the

³ Beoku-Betts [2008] UKHL 38

childrens' removal from the United Kingdom to be reasonable. That complaint is justified.

11. Finally the determination contains an error of fact in that C2 is not in fact a British national. Although he was born here and has lived here continuously for over ten years, Mr Alabi agreed before us that C2 does not have British nationality, nor has he yet applied to naturalise. It may be that this is not an error that had any material bearing on the outcome of the case, since it is accepted that C1 is indeed a British citizen and they are both "qualifying children" for the purpose of the Rules: it is a moot point whether the rights of two qualifying children weigh more than one. It is nevertheless an error that the Respondent raises in her grounds of appeal and given our findings above, adds to the impetus to set this decision aside.
12. At the hearing before us in May there was insufficient time to re-make the decision. CAB's family were not present and we considered that in the re-making it might be helpful to hear directly from C1 and M about their circumstances. The matter was therefore adjourned to be re-made at a later date.

The Re-Made Decision

13. At the outset of the hearing there was some discussion about whether the remaining family members wanted to lodge out-of-time appeals and whether this was a matter that should be remitted to the First-tier Tribunal so that the matters could all be heard together. It was agreed that the Tribunal would proceed to re-make the decision in Mr CABs appeal without waiting for other family members to be joined to the proceedings: Mr Alabi indicated that there was a problem with funds to pay the appeal fees and we considered that any further delay would not be in anyone's interests. The parties agreed that the rights of the children and M could be taken into account 'in the round' when considering Article 8.
14. Our starting point is to dismiss the appeal under the Rules. CAB cannot qualify on private life grounds under paragraph 276ADE(1)(vi). Whilst we accept that he will find it difficult to return to Ghana and he will face some obstacles in finding housing, employment and education for his children, these cannot be said to be "very significant". We heard evidence that he still has a large extended family living in Eastern Ghana and although he has little contact with them now, this remains a resource of support for him. He and M have managed to cope in the UK, where they have not had any status at all. We reject the suggestion in the evidence of CAB and M that they will be destitute if returned to Ghana. There may be a high unemployment rate in Ghana but there was no evidence before us to suggest that there was any particular impediment to either of the adults in this family finding work. Nor can CAB meet the requirements of Appendix FM, for the reasons set out above.
15. We therefore turn to Article 8. We accept that CAB has lived continuously in the UK since 1999. During the 16 years that he has spent here he has, we accept, established a private life. There was evidence of this in the documentary evidence before us, but since it is not disputed we need not set that out here. We note only that part of that private life is the relationship he has with his mother, who is in her late 60s and

suffers from health problems including high blood pressure. We accept and find as fact that CAB shares a family life with his partner and three children, at least one of whom, C1, has become a British national and so is entitled to remain living in the UK unencumbered by immigration control. We accept that CABs removal, with all or part of his family unit, would be an interference with his Article 8(1) rights to the extent that the Article is engaged.

16. We accept that the decision to remove persons with no leave to remain is one rationally connected to the legitimate Article 8(2) aim of protection of the economy, and that it is in law one that the Secretary of State is entitled to make.
17. We therefore turn to the question of proportionality. We must have regard to all of the factors set out in s117B of the NIAA 2002:

117B Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where –
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the

United Kingdom.

18. The maintenance of effective immigration controls is in the public interest. CAB came to the UK as a visitor in 1999 and never left. He has therefore stayed for approximately 16 years in this country with no leave or authority to do so. He does not presently qualify for leave to remain under the Rules. We have attached significant weight to that fact.
19. We are satisfied that CAB can speak fluent English and that this has no doubt aided his integration into the United Kingdom. It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English are less of a burden on taxpayers, and are better able to integrate into society. This is not therefore a factor that weighs against CAB.
20. There is no evidence to suggest that CAB or indeed his partner M have ever claimed public funds. We accept that they have supported their family themselves. We do not accept that this has been by the charity of others or because M makes a living plaiting hair. We do not accept CAB's evidence that he has never worked in the UK. On C1's birth certificate the Registrar recorded CAB's occupation as "kitchen porter". CAB told us that he had just said that because he was receiving money and payments in kind from his church where he helped in the kitchen at events. On C2's birth certificate the Registrar has recorded his occupation as "local government officer". In response to Mr Whitwell's questions CAB said that he had "just said that to put something" - he had forgotten what fictional job he had put on C1's birth certificate so had simply said the first job that came into his mind. We do not find it credible that the occupation "local government officer" would just pop into his head. We find it far more likely that at the time of C1's birth he was working as a kitchen porter and that by the time C2 was born in 2004 he was working as a local government officer. CAB has been working illegally and this is not something we are prepared to weigh in his favour. That is not the sort of financial independence that parliament had in mind when they approved s117B(3). There is certainly no evidence before us that CAB earns a salary that would bring him within the level of income required by the Rules. That said we also accept that if CAB and M were to have their status regularized they would work hard and contribute to the economy.
21. Virtually the whole period that CAB has been establishing his Article 8(1) private life in the UK he has been here unlawfully. For that reason we should attach little weight to it.
22. Mr Alabi submits that notwithstanding all of this, CAB's appeal under Article 8 should be allowed because of the terms of s117B(6). It is accepted that the eldest two children in this family are "qualifying". C1 is now British. Once they have the money to do so CAB and M intend to apply for C2 to naturalise. He has lived in the UK longer than ten years since birth and is *prima facie* entitled to citizenship. There is no dispute that CAB has a genuine and subsisting parental relationship with his

children. The question is whether it would be “reasonable” for the child(ren) to leave the UK.

23. CAB’s eldest child now aged 12. She has lived here all her life. She does not need to show that she meets the requirements of the Immigration Rules, because she is a British citizen. The question arises in her father’s appeal “is it reasonable to expect her to leave the UK”? The Immigration Directorate Instruction ‘Family Migration: Appendix FM Section 1.0b *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*’ (“the IDI”) sets out the Secretary of State’s policy in such cases:

‘Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.

...

Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.’

24. That policy statement is consistent with the position adopted in Sanade and Ors (British Children - Zambrano - Dereci) [2012] UKUT 00048 (IAC), and approved by the then President Blake J:

“93. Finally, we note that a further question on which we asked for the respondent’s assistance was in these terms:

“Does the respondent agree that in a case where a non-national parent is being removed and claims it is a violation of that person’s human rights to be separated from a child with whom he presently enjoys family life as an engaged parent, that a consequence of the CJEU’s judgment is that it is not open to the respondent to submit that an interference can be avoided because it is reasonable to expect the child (and presumably any other parent/carer who is not facing deportation/removal) to join the appellant in the country of origin? If not why not?”

94. To this Mr Devereux replied on 24 November 2011:

“We do accept, however, that in a case where a third country national is unable to claim a right to reside on the basis set out above **it will not logically be possible, when assessing the compatibility of their removal or deportation with the ECHR to argue that any interference with Article 8 rights could be avoided by the family unit moving to a country which is**

outside of the EU”.

95. We shall take this helpful submission into account when we consider the application of Article 8 to each appellant’s case. We agree with it. This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union **or to submit that it would be reasonable for them to do so**. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ZH (Tanzania). If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation.

[emphasis added]

25. Mr Whitwell did not resile from either the concession made in Sanade or the clear terms of the IDI. He rather submitted that the Secretary of State was not requiring C1 to go anywhere. She is not being removed, and whether she goes to Ghana with her family is therefore a matter of choice for her parents. Whilst that is technically correct this is something of a Hobson’s choice. She could be separated from her parents and siblings to live here. She could remain here with her elderly and ailing grandmother, or to be placed in the care of the state. Both would be to the detriment of the economy, since grandmother is not working and would, we presume, claim the benefits to which she would be entitled if her granddaughter were to live with her. Both would be significantly contrary to her best interests. We do not doubt that C1 enjoys a warm relationship with her grandmother but there is no evidence before us that this woman would be prepared or even able to look after her grandchild on a full time basis. Alternatively C1 could go to Ghana with her family, and be deprived of the rights and freedoms she is entitled to enjoy as a citizen of the UK, and the EEA. The reality is therefore, that if her father is removed to Ghana, she will have to go with him. Whatever the merits of the Ghanaian education system, whether or not she would have the benefit of meeting other family members and growing up in a culture that reflects her own heritage, these considerations fall away in the light of C1’s British passport: the Secretary of State’s own position is that it would not be reasonable to expect her to leave the UK.
26. We therefore find, in accordance with s117B(6) that the public interest does not require the removal of CAB or his partner M. Mr Whitwell realistically conceded that if their appeals were to be allowed under Article 8, so too would the appeals of C2 and C3.

Decisions

27. The determination contains error of laws and it is set aside.
28. We re-make the decision in the appeal by allowing it on human rights grounds.

29. Due to the young age of the children involved in this appeal we make the following direction for anonymity having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”.

Deputy Upper Tribunal Judge Bruce
11th July 2015