



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/49256/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 9th June 2015

Decision and Reasons Promulgated
On 15th July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Damian Arinze Nwosu
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Richardson, Counsel instructed by Morgan Mark Solicitors
For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Nigeria born on the 29th January 1975. He appeals with permission¹ the decision of the First-tier Tribunal (Judge MR Oliver) to dismiss his appeal against a decision to refuse to vary his leave to remain and to remove him from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006.

¹ Permission was refused on the 22nd January 2015 by First-tier Tribunal Judge Page but granted upon renewal by Upper Tribunal Judge Eshun on the 30th April 2015.

2. The Appellant came to the United Kingdom as a visitor on the 13th August 2013. He then made an application for leave to remain under Appendix FM/Article 8. He submitted that he was in a subsisting relationship with a British national and that they have a child together who had, at the date of application, indefinite leave to remain.
3. By the date of the hearing before the First-tier Tribunal the couple had had another child, and both children had been granted British nationality. The Appellant also claimed to have a parental relationship with his partner's child from an earlier relationship. It was submitted that he was presently caring for the children whilst she worked, and that he had been offered work himself. The younger child had complex health problems, suffering from a haematological disorder.
4. Judge Oliver notes at the outset of his reasoning that it was "common ground" that the Appellant could not succeed under the Immigration Rules. Although it is not expressly explained why, it would appear from the refusal notice that the Appellant had failed to supply specified evidence in respect of funds, and because he was a visitor he could not satisfy the 'eligibility' requirements under Appendix FM.
5. In proceeding to consider Article 8 'outside of the Rules' the Tribunal noted that the eldest child had been conceived when the Appellant's partner had visited him in Nigeria. The child had been born in the UK in May 2008 and the Appellant had thereafter become a "part-time Dad", seeing his son only on visits. The Tribunal considered that the family life could be maintained in the same way. There was no need for the British partner or children to relocate to Nigeria. The Appellant could carry on making lengthy visits as he had done between 2008 and 2013. Although the "strongest" factor was the best interests of the children, there was no need for any of them to leave the country. The determination then says this:

"I accept that for the children, viewed at the date of hearing, the appellant has been a big presence in their lives. Quite apart from earlier visits the oldest child has spent the last fifth of his life with a present father, while the youngest child has spent all but 3½ months of his life with a present father..."
6. The Judge goes on to remind himself that the Appellant did not meet the requirements of the rules and that the Appellant could not therefore call upon Chikwamba [2008] UKHL 40. There is a strong public interest in removing persons who do not qualify for leave to remain under the Rules. In conclusion he states: "I accept that the appellant does not suffer from a consideration of paragraph 117B of the rules, but in all the circumstances I find that the public interest in the maintenance of a firm but fair immigration control outweighs the family life interests of the appellant and his family. I am not satisfied that it has been shown that the best interests of the children are served by the appellant's continued presence in the United Kingdom, but in any event this is not a "trump card" when considered alongside the public interest". The appeal is thereby dismissed.

7. The sole ground upon which permission has been granted is the alleged failure of the First-tier Tribunal to engage with the mandatory considerations in s117B of the Nationality, Immigration and Asylum Act 2002, and in particular with s117B(6).

Error of Law

8. Although this determination refers to s117B there is, Mr Tarlow accepts, a failure to engage with the provisions therein. Although it might be said that the Appellant could not hope to gain any positive weight from factors such as his ability to speak English, there had not been a proper consideration of whether, pursuant to s117B(6), it would be “reasonable” to expect his British children to leave the UK. Nor, Mr Tarlow contended, had there been a proper consideration of whether the Appellant had a “genuine and subsisting parental relationship” with them; he was not prepared to concede that the phrase “big presence” denoted such an Article 8 family life. Overall the parties were in agreement that these omissions meant that the decision must be set aside to be remade.

The Re-Made Decision

9. I accept and find as fact that the Appellant shares a family life with his partner and two children. However it may be characterised when he was a “part-time Dad” he has been living with them in the UK since August 2013. I find that his removal would interfere with that family life and that Article 8 would be engaged.
10. I find that the decision to remove persons, such as the Appellant, without any leave to remain in the UK is a measure rationally connected to the legitimate Article 8(2) aim of ‘protection of the economy’ and that the Secretary of State has the power in law to take such a decision.
11. In addressing whether or not the decision is proportionate I must have regard to those factors set out in s117:
 - (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.

12. I remind myself that the maintenance of effective immigration control is in the public interest. The Appellant has not, as far as I have been made aware, remained in the UK without leave² but he currently seeks leave to remain in a category that is not eligible for: to that extent the decision to remove him is in the public interest.
13. The Appellant speaks fluent English. He is financially self-sufficient in that he and his partner do not claim any public funds. She runs her own business and he looks after the children to enable her to do so. These are not factors that can weigh against him.
14. Sub-paragraph (4) does not apply to the Appellant since his relationship with a qualifying partner was formed in Nigeria. He has never been here unlawfully. Nor does (5) since the Appellant is not relying on the private life he might have established since his last entry.
15. The crux of the matter, as identified at error of law stage, is whether the public interest requires the Appellant's removal at all. I find as fact that he has a genuine and subsisting parental relationship with two qualifying children. Both his children are British citizens. They have always known him as their father and notwithstanding the fact that he could only spend limited time with them prior to 2013 he has been considered to be part of *their* family lives. He has lived permanently with them since August 2013. He contributes to their day to day care. He takes them to the park, and to doctor's appointments. He feeds and bathes them. He is their father. The question is whether it is reasonable to expect them to leave the UK.
16. Mr Richardson points to current Home Office policy to submit that it is not. In Sanade and Ors (British Children - Zambrano - Dereci) [2012] UKUT 00048 (IAC) the Respondent made a concession, approved by the Tribunal, which still features in the current guidance to case-owners. The relevant paragraphs of Sanade appear at paragraph 93 on:

² This application having the effect of extending his leave to enter pursuant to s3C of the Immigration Act 1971

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]

17. That has become known as the 'Sanade concession', and it still appears as a statement of policy in the Respondent's current guidance document "Appendix FM 1.0 *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes (April 2015)*":

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**.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

18. It might be thought in light of that concession, when read with s177B(6), that this is the end of the matter and that the appeal must be allowed. There are certainly good reasons why the children should not be expected to go to Nigeria. Their mother's

business in the UK is creating wealth, paying taxes and supporting them. If she were required to go to Nigeria (as would be the case with such young children) that business would likely be lost. The boys themselves are settled here with their elder brother who is unlikely to be able to travel with them since his father is a British national. They are doing well at nursery. Awesomefidel needs regular check-ups with the specialist clinicians who have been treating his haematological disorder since birth. I agree with the logical conclusion of the policy: it is not reasonable to expect the children to leave.

19. Mr Tarlow argued that s117(6) could not be determinative of the matter, and that in fact the real question was why can't the Appellant return to Nigeria and apply for entry clearance? The intention of parliament in enacting s177B was no doubt to simplify and harmonise Article 8 decision-making. It is therefore unfortunate that the trenchant terminology of s117B(6) does not appear to leave room for manoeuvre: *the public interest does not require* the Appellant's removal. There is therefore nothing on the Respondent's side of the scales. Mr Tarlow in effect asks me to read in to the section an additional provision reading "the public interest does require removal where qualifying children can reasonably remain in the UK without the departing parent". That would certainly be consonant with Article 8 jurisprudence predating the Immigration Act 2014. It would not however be in accordance with the law as it is set out in s117B, nor indeed with the express provisions of EX.1, the exception in Appendix FM that this Appellant could have successfully relied upon had he overstayed his visit visa before making his application.

Decisions

20. The determination contains an error of law and it is set aside.
21. I re-make the decision in the appeal by allowing it on human rights grounds.
22. I make no direction for anonymity. I was not asked to do so and on the facts it is not necessary.

Deputy Upper Tribunal Judge Bruce
19th June 2015