



IAC-AH-CJ-V2

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/39531/2014
IA/39532/2014
IA/39533/2014
IA/39534/2014
IA/39535/2014

THE IMMIGRATION ACTS

Heard at Field House

On 27th January 2016

**Decision & Reasons
Promulgated**

On 31st March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MRS AHAOMA GOLD BENSON (1)
MR BENSON AHAOMA AMAOGU (2)
[N B] (A MINOR) (3)
[T B] (A MINOR) (4)
[E B] (A MINOR) (5)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms S Akinbolu (Counsel)

For the Respondent: Mr S Walker (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellants are citizens of Nigeria. The first Appellant was born on 24th March 1976, the second Appellant is her husband born on 4th August 1996. The third to fifth Appellants are their children. The first and third

Appellants entered the United Kingdom on 24th October 2002 as visitors and thereafter remained as overstayers. The second Appellant entered the United Kingdom with entry clearance as a visitor on 12th March 2005 valid until 2nd May 2005. He left the United Kingdom but returned on 16th August 2005 with the benefit of a two year multiple entry visit visa valid until 5th August 2007. Since that date he has been an overstayer. The fourth and fifth Appellants are children of the first and second Appellants. Both were born in the UK. The fourth Appellant was born on [] 2010 and the fifth Appellant on [] 2006.

2. The relevant application from which this appeal stems relates to a letter of 27th March 2014 requesting the Secretary of State to consider the Appellants' applications under Article 8 of the European Convention of Human Rights with reference to Section 55 of the Borders, Citizenship and Immigration Act 2009. I acknowledge that there had been previous applications in April and May 2012. The first application was deemed invalid due to the incorrect form and the second application for leave to remain outside the Rules was refused on 17th July 2013 with no right of appeal.
3. The current application was refused by the Secretary of State by a Notice of Refusal dated 29th September 2014. That appeal came before Judge of the First-tier Tribunal Holmes sitting at Stoke-on-Trent on 27th January 2015. In a decision and reasons promulgated on 12th February 2015 the Appellants' appeals were dismissed under the Immigration Rules. The first Appellant's appeal was however allowed on human rights grounds and the second to fifth Appellants' appeals were allowed to the extent that they were dependent upon the first Appellant's human rights claim.
4. On 23rd February 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 17th April 2015 Judge of the First-tier Tribunal Reid granted permission to appeal. The grounds argued *inter alia* that the judge had made a material misdirection in law with reference to *Edgehill [2014] EWCA Civ 402* as the decision under appeal was outside the "two month window" and that the judge consequently failed to have proper regard to the public interest as set out in the Rules and failed to lawfully engage with reasonableness as required by Section 117B(1) of the 2002 Act (as amended).
5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. For the purpose of continuity throughout the appeal process the Benson family are referred to herein as the Appellants and the Secretary of State as the Respondent. The Appellants appear by their instructed Counsel Ms Akinbolu. The Secretary of State appears by her Home Office Presenting Officer Mr Walker.

Submissions/Discussion

6. Mr Walker states that he relies on the Grounds of Appeal. The first of those grounds is that he notes that the First-tier Tribunal Judge considered the case of *Edgehill & Anor v Secretary of State for the Home Department [2014] EWCA Civ 402* and concluded that the decision of the Secretary of State was not in accordance with the law as it should have been decided with regard to the provisions in force prior to 9th July 2012. He contends that the position regarding applications prior to the July 2012 Rule change was clarified in *Singh v SSHD [2015] EWCA Civ 74* where the court held that “*Edgehill* only obtained as regards decisions taken in the two month window between 9th July and 6th December 2012”. He contends that the decision in this case was taken on 29th September 2014 and therefore was outside the window expressed by the Court of Appeal. Accordingly it is submitted that *Edgehill* had no relevance to the instant appeal and that this is pertinent because it impacted upon the First-tier Tribunal Judge’s engagement with the Rules and the weight that is to be afforded in the subsequent proportionality assessment as an instrument of immigration control. Secondly he refers me to paragraphs 2(a)-(j) of the Grounds of Appeal submitting that the judge has failed to properly address the public interest factors therein and that the judge has failed to lawfully engage with the concept of reasonableness as required by the “second” limb of Section 117B(6) because the scope of assessment in that regard has been through the “prism of education” which is too narrow. Further the Secretary of State contends that the First-tier Tribunal Judge has failed to have due regard to the public interest factors that along with the concept of reasonableness require an assessment of both the interests of the children and the countervailing factors pursuant to the public interest that are expressed, but not limited to, those factors contained in Section 117B.
7. Ms Akinbolu submits that any error of law was immaterial to the outcome. She notes at paragraph 19, Judge Holmes concluded that “had the Respondent correctly applied the Rules as they stood before 9th July 2012, her conclusion would inevitably have been that the applications fell outside them”. And at paragraph 31 that Judge Holmes proceeded to consider whether the provisions of the 2012 Rules would have been met, concluding that had the provisions of Appendix FM and paragraph 276ADE been applicable, neither parent would qualify under the Rules and none of the children would qualify under Appendix FM. However he found that the third Appellant would have met the requirements of paragraph 276ADE had they been in force.
8. Consequently, whilst she accepts the ratio of *Edgehill* has been subsequently clarified by the Court of Appeal in *Singh*, she submits that in the present case that error was immaterial and that Judge Holmes’ decision was clear, applying both the principles of the 2012 Rules and the provisions of Section 117A-D of the 2002 Act which she submits reflect parliament’s view of the matters which fall to be regarded when considering any assessment of the weight to be afforded to the public interest in this case.

9. So far as the public interest test is concerned, she points out that the judge made express reference to the provisions of Section 117A-D of the 2002 Act and addressed the statutory considerations applicable to an assessment of the public interest. She refers me to the view expressed in *Dube (ss.117A-117D) [2015] UKUT 90 (IAC)* and the findings of the panel at paragraphs 25 to 27 and applying those principles the First-tier Tribunal Judge set out clearly the reasons why he allowed the Appellants' appeal, making express reference to the wealth of higher court jurisprudence in this field.
10. She points out that there have been no challenges made to the facts and that the eldest child [NB] has now been in the UK for eleven years and is now aged 13 and that the fourth and fifth Appellants are respectively aged 5 and 9 years and have been in the UK all their lives. She reminds me that no adverse consequences can be imposed upon children because of decisions made by their parents and that there is no reason why the findings by the judge of financial support would not continue from friends in the church. She reminds me that the third Appellant had lived in the United Kingdom for a significant period, exceeding that considered of greater significance for development as set out in the authorities of *Zoumbas [2013] UKSC 74* and *Azimi-Moayed [2013] UKUT 197* and that the third Appellant's education has reached a critical stage such that a move to Nigeria would cause significant disruption. As the First-tier Tribunal Judge put it "all aspects of their existence other than their emotional ties to their parents" would have to start afresh. She contends that there is no material error of law and asked me to dismiss the appeal.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because

an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

13. This is one of those cases which seems with increasing regularity to come before the Tribunal, namely a case where a claim is pursued under Article 8 of the European Convention of Human Rights predominantly supported by the length of time that young children have remained in this country when considered against the immigration history of their parents and by direct consequence the position of the children themselves. It is true that the immigration history of the first and second Appellants is appalling. They are lengthy overstayers. And that is a factor that must be taken into consideration, particularly when applying the public interest. However the children are now aged respectively 13, 9 and 5. It is accepted by the Secretary of State that the claims of the Appellants all rise and fall together, i.e. it would be inappropriate to return the adults without the children. Family life must continue to be maintained together. An application by the third Appellant now would meet the Immigration Rules. The fifth Appellant has been in the country all his life and is now aged 9. He is already entering a formative stage of his education. The fourth Appellant has now started school.
14. It was against this background that Immigration Judge Holmes carried out a very detailed analysis. The facts of this matter are not in dispute. Even if there is an error in law in the way in which the judge has applied *Edgehill* (and he cannot be criticised because *Singh* was not available for him to consider at that stage), whilst there was an error of law by the judge, that has to be looked at in the context of the decision and the findings in particular at paragraphs 31 to 34 of the First-tier Tribunal Judge and in such circumstances I am satisfied that any error of law disclosed therein is immaterial on that aspect.
15. So far as the consideration of the public interest is concerned, the grounds effectively amount to little more than disagreement. The judge has given very detailed consideration to the position of this family at paragraphs 17 to 29 including the views expressed by the Court of Appeal in *EV (Philippines) [2014] EWCA Civ 834*. These matters are addressed in particular in great detail at paragraph 29 of the First-tier Tribunal Judge's consideration.
16. Whilst I acknowledge that Section 117B sets out the public interest considerations applicable in all cases and that that includes the maintenance of effective immigration control, it is necessary to give detailed consideration to paragraph 117B(6), namely to the effect that 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 UK. These factors, whilst not set out as such within the determination, are given consideration at paragraph 36 of the judge's decision.

17. Overall this is a well thought out and well constructed decision. The judge has looked at all the countervailing factors and considered the question of public interest and proportionality. He has made a finding that the children could not, without excessive hardship, either go to live in Nigeria with their parents or remain in this country while their parents were sent abroad. Those were findings he was entitled to make. It is against this background that the appeal is brought and I am satisfied for all the above reasons that this is a well constructed, well reasoned and well thought out decision which discloses no material errors of law and on that basis the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law. The appeal of the Secretary of State is consequently dismissed and the decision of the First-tier Tribunal is maintained.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT FEE AWARD

No application is made for a fee award and none is made.

Signed

Date

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Deputy Upper Tribunal Judge D N Harris