



Upper Tribunal

IA467462014; IA467532014;

(Immigration and Asylum Chamber)

IA467622014; IA467682014

Appeal Numbers:

THE IMMIGRATION ACTS

Heard at Field House

On 17 March 2016

Determination

Promulgated

On 24 May 2016

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

MRS ADEOLU TOLULOPE MORAH

[M1]

[M2]

[M3]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr James Collins, Counsel, instructed by Springfield Solicitors

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

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.
2. The appellants appeal against the decision of the First-tier Tribunal dismissing the appellants' appeal against a decision taken on 4 November 2014 to refuse leave to remain.

Introduction

3. The appellants are all citizens of Nigeria (except the fourth appellant who is a citizen of the USA) comprising a family unit. The second appellant was born in 2006 in London, the third appellant was born in 2008 in London and the fourth appellant was born in 2004 in Chicago, entering the UK when he was two months old. The first appellant arrived in the UK on 29 December 2005 with entry clearance as a visitor. She overstayed in the UK and on 27 September 2012 the appellants made an application for leave to remain under Article 8. That application was refused on 20 May 2013. After representations were made and a previous appeal lodged with the First-tier Tribunal, the decision was maintained on 22 January 2014 and 4 November 2014.
4. The first appellant married MM in Nigeria in 2002. She resigned from her job with ADC Airlines in 2003 when she fell pregnant. She had previously visited the UK and returned in September 2003. However, she travelled to the USA in December 2003 to visit a family member and the fourth appellant was born there. She returned to the UK with the fourth appellant in March 2004. MM joined her with leave to remain as a student in June 2004 and the first appellant successfully applied for a second five year visit visa in 2005. The first and fourth appellants and MM returned to the UK in May 2005 and lived as a family. The second and third appellants were born in the UK. The marriage broke up in 2007 and MM returned to Nigeria.
5. The Secretary of State concluded that the requirements of Appendix FM of the Immigration Rules ("the Rules") were not met and that there were no grounds to grant leave to remain outside the Rules. Nigeria has a functional educational system and it was in the best interests of the child appellants to remain with their mother. Any interference with private life was proportionate. The applications were refused.

The Appeal

6. The appellants appealed to the First-tier Tribunal and attended an oral hearing at Taylor House on 4 August 2015. The First-tier Tribunal found that the appellants did not meet the requirements of Appendix FM. The children had all lived in the UK for more than 7 years and were qualifying

children under section 117D of the 2002 Act. The only question was whether it was reasonable to expect them to leave the UK under section 117B(6). The judge found that the first appellant was deliberately lying when she said that the second and third appellants had never visited Nigeria – they had probably done so in 2009. The judge considered that the only significant private lives of the children were after they were four years old. The third appellant was autistic and had considerable support in the UK but removal was still reasonable. Similar reasoning was applied to the other child appellants who would suffer some disruption to their education but could adapt to life in Nigeria. They could re-establish contact with MM and would have more money in Nigeria. The first appellant relied upon charity from friends and did not have enough money to buy birthday cakes and presents in the UK.

7. The judge found that the interference with the private and family life of the appellants would not have consequences of such severity as to outweigh the compelling public interest considerations in the case. The first appellant had the private life that one would expect of a single mother of three children. She did not work and relied upon the charity of friends and the church. She had two children on the NHS without entitlement and educated the children at public expense. MM had paid the rent for the previous eight months. The first four years of a child's life have little importance for their private life. It was in the best interests of the children to remain with their mother. The appeals were dismissed.

The Appeal to the Upper Tribunal

8. The appellants sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law by failing to give proper consideration to the reasonableness test and failed to consider the relevant case law. The finding that the first appellant took all three children back to Nigeria in 2009 was unsustainable because the visa application was made in a different date of birth from the second appellant. In Azimi-Moayed, Blake J only stated that seven years from age 4 was likely to be more significant than the years between three and seven. The judge was wrong to in effect write off the first four years of each of the children's lives in the UK. The third appellant is autistic and there was copious evidence as to how serious his condition was and the judge failed to address how the disruption to his routine caused by removal would impact on him. In respect of the fourth appellant, the judge failed to properly consider the impact of being uprooted from the only life he knows and the analogy with transfer from junior school to a senior school was irrational. The report of the independent social worker received only the barest mention and little analysis.
9. Permission to appeal was granted by First-tier Tribunal Judge Astle on 4 February 2016. It was arguable that the judge failed to properly consider the case law and the other grounds were all arguable.

10. In a rule 24 response dated 15 February 2015 the respondent submitted that the judge had carried out a very careful assessment of each child's particular needs and reached a reasoned conclusion. Thereafter the judge considered the private lives of the appellants and took into account the appalling abuse of the immigration system by the first appellant. The grounds amounted only to disagreement.
11. Thus, the appeal came before me

Discussion

12. Mr Collins submitted that all three children are qualifying children and the second appellant was born in the UK on [] 2006. It seemed odd that there was a bare reference to a different child in the refusal letter in relation to the holiday in Nigeria. The judge misunderstood Azimi-Moayed at paragraphs 35, 37 and 38 of the decision. That was a clear error of law. The judge did not consider the impact of disruption on the fourth appellant and there was very little analysis of the social worker report. The reference to "manifestly unreasonable" at paragraph 36 was the wrong test. There were repeated references to discounting the first four years of residence in the UK. There was nothing about the negative points of integration in Nigeria.
13. Mr Kotas submitted that the decision was sustainable and defensible. The judge did not attach a great deal of weight to the finding about the holiday in Nigeria at paragraph 28 of the decision. The correct test was applied at paragraph 27. Paragraph 36 was not referred to in the grounds. The only real issue was about deducting the first 4 years. What the judge was doing in effect was indicating that he had the Azimi-Moayed approach in mind. The judge referred to no significant private life rather than no private life. There is no extended private life for very young children and the judge correctly rounded the matter off at paragraph 44 of the decision. The judge did not treat the children homogeneously and found that they would go with the first appellant and would benefit from the support mechanism available from MM in Nigeria. This was a considered decision and the first appellant's immigration history was relevant to the claim.
14. The key legal issues in relation to these appeals are not straightforward. The provisions of paragraph 276ADE of the Rules that was in force at the relevant time are as follows;

"Requirements to be met by an applicant for leave to remain on the grounds of private life

276ADE. The requirements to be met by an applicant for leave to remain on the

grounds of private life in the UK are that at the date of application, the applicant:

- (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
- (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
- (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
- (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
- (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
- (vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.”

The relevant provisions of section 117 of the Nationality, Immigration and Asylum Act 2002 are as follows;

“117A *Application of this Part*

- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
 - (a) breaches a person's right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
 - (a) in all cases, to the considerations listed in section 117B, and
 - (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
- (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

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.

117D Interpretation of this Part

- (1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

- (a) is a British citizen, or
- (b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

- (a) is a British citizen, or
- (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act). “

15. The issue of proportionality involves striking a fair balance between the rights of the appellants and the public interest. In assessing proportionality, the “best interests” of any children must be a primary consideration (see **ZH (Tanzania) v SSHD (2011) UKSC 4** and section 55 of the Borders, Citizenship and Immigration Act 2009). Whilst the best interests of the child are not necessarily determinative, a child’s best interests are a weighty consideration, albeit one that can be outweighed by sufficient weight of public interest concerns (see **ZH (Tanzania)** *per* Lady Hale at [33]).
16. A significant issue in this appeal is the fact that the third appellant is a qualifying child, as defined in section 117D and therefore falls within section 117B(6) of the 2002 Act. The judge had to consider whether it was reasonable to expect her to leave the United Kingdom. The recent case law remains relevant, whilst taking into account that the case law effectively pre-dates the commencement of sections 117A - D (28 July 2014).
17. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197(IAC), Mr Justice Blake held that as a starting point, it is in the best interests of children to be with both their parents and if both parents are being removed from the UK then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary. It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period. Seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
18. In EV (Philippines) and others v SSHD [2014] EWCA Civ 874, Lord Justice Clarke held that in determining whether the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here and also to take account of any factors that point the other way. A decision will depend on a number of factors such as the children’s age, the length of time in the United Kingdom, how long they have been in education, what stage their education has reached, the extent to which they have become distanced from the country to which it is proposed that they return, how renewable their connection may be, to what extent they will have linguistic, medical or other difficulties in adapting to life in that country and the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

19. I find that the judge made material errors of law in considering the best interests of the children and in the assessment of reasonableness under section 117B of the 2002 Act. The judge deducted the first four years of the children's lives when considering the strength of their private lives in the UK at paragraphs 35, 37 and 38 of the decision. There is nothing in the case law or statute to justify such an approach which is a clear error of law. The reference to "manifestly unreasonable" at paragraph 36 of the decision suggests that the judge had the wrong test in mind when considering reasonableness under section 117B. The consideration of the social worker report at paragraphs 35 and 39 of the decision is not adequate - there is no analysis of the report as a whole and no findings on the key conclusions of the report.
20. There is a further error of law in that the judge has only considered unreasonableness under section 117B and has made no findings in relation to Appendix FM or paragraph 276ADE of the Rules, both of which were considered in the refusal letter. Oddly, the judge considered Article 8 after making findings in relation to section 117B which suggests a degree of confusion. Section 117A of the 2002 Act states that Part VA of the 2002 Act applies when the tribunal is required to determine whether a decision breaches a person's right to respect for private and family life under Article 8 and as a result would be unlawful under section 6 of the Human Rights Act 1998. Consideration of section 117B therefore correctly forms part of the Article 8 assessment rather than a free standing exercise. The judge also failed to consider section 117B (1) - (5) in relation to any of the appellants - contrary to Miah (section 117B NIAA 2002 - children) [2016] UKUT 00131 (IAC).
21. I accept that the finding at paragraph 28 of the decision that the first appellant deliberately lied to the tribunal and probably took the children to Nigeria in 2009 effectively ignores the material evidence that the entry clearance application said to be for the second appellant was actually made in a different date of birth. Failing to consider material evidence is a further material error of law. The finding clearly influenced the judge in relation to the general credibility of the first appellant and a finding that an appellant has deliberately lied to the tribunal is always a serious matter.
22. Thus, the First-tier Tribunal's decision to dismiss the appellants' appeals under the Rules and Article 8 involved the making of errors of law and its decision cannot stand.

Decision

23. Mr Collins invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.

24. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed 

Date 21 May 2016

Judge Archer
Deputy Judge of the Upper Tribunal