



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

Appeal Number: IA/47945/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 18th May 2016**

**Decision & Reasons
Promulgated
On 1st June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

**MR KEHINDE MONSURU BALOGUN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Hawkin, Counsel

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

DECISION AND REASONS

1. The Appellant is a national of Nigeria who applied for leave to remain here on the basis of his family and private life in the United Kingdom and his appeal was dismissed by First-tier Tribunal Judge Wylie in a decision promulgated on 21st October 2015.
2. The judge noted that the Appellant and his wife married in 2002 and that they had three children, one of whom was a British citizen namely [S] born

on [] 2005. The judge found that it would be possible for the child to remain in the United Kingdom with extended family members who are British citizens who had leave to remain. The paternal uncle had given evidence that it would be better for him to stay with them here. The judge concluded that it was in the best interests of all three children that they lived in the family unit with each other and their parents and if the parents felt that there will be benefits such as to outweigh this if the eldest child remained in the United Kingdom with his uncle or other family members that was a matter for them.

3. Grounds of application were lodged. It was said that the Appellant was the primary carer of his oldest child and yet in the judge's finding that [S] could remain with extended family members was not something that was ever put to the Appellant or any of the witnesses during the hearing. Secondly the judge's approach was contrary to the clear dicta of the Court of Justice in **Ruiz Zambrano v ONEM (Case C-34/09) (CJEU) (8th March 2011)**. Thirdly the judge's own finding clearly highlighted factors that it would make it unreasonable to expect [S] to move to Nigeria. Fourthly the judge's consideration of paragraph 276ADE(1)(iv) was incomplete - reference was made to **Sanade and Others (British children - Zambrano - Dereci) [2012] UKUT 00048 (IAC)**. Fifthly there were very significant obstacles to the Appellant's and his wife's integration in Nigeria; sixthly the judge's consideration of Article 8 was flawed and finally the judge had failed to make proper findings in relation to the reasonableness of the Appellant's children being expected to go and live in Nigeria.
4. Permission to appeal was duly granted.
5. A Rule 24 notice was lodged by the Secretary of State submitting that the judge provided sustainable reasons including that the British national child could remain here with the extended family members. The nationality of the child was not a trump card and the place of residence would be the choice of the child's parents but in the circumstances was a very real viable carer alternative.
6. Thus the appeal came before me on the above date.
7. For the Appellant Mr Hawkin relied on the terms of the Grounds of Appeal. The child [S] was a British citizen. There was considerable well-established case law that indicated it would not be reasonable to send the child to Nigeria and Section 117B(6) of the 2002 Act was primary legislation. The public interest did not require her removal. I was referred to **PD and Others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC)** where it was said that it was the obligation of a judge to firstly apply the Immigration Rules to each individual applicant and if appropriate then consider Article 8 outside the Rules. Had the judge done that then the judge would have seen that the child was a British national who could not be returned to Nigeria and, as such, the appeal could only go one way. So material was the error that the appeal should

simply be allowed outright. Furthermore, the judge had engaged in speculation by making a “massive” procedural error in relying on the account of the uncle that he could look after the child without that matter being put to the Appellant or any of the witnesses.

8. For the Secretary of State Mr Walker relied on the terms of the Section 24 notice.
9. I reserved my decision.

Conclusions

10. It has often been said that although nationality is not a “trump card” it is of particular importance in assessing the best interests of any child and as Mr Hawkin indicated it is trite law that that a British national child cannot be removed. To conclude that the child can simply follow their parent to the parent’s country of nationality ignores the fact that the child would be deprived of the country of their own and their citizenship and all the advantages that this entails. There would be a social and linguistic disruption of their childhood as well as a loss of their homeland, including the loss of educational opportunities. There is an intrinsic importance of citizenship.
11. The best interests of the child are a primary consideration which means they must be considered first. In this case we have the benefit of primary legislation in terms of Section 117B(6) of the 2002 Act which indicates that removal of this Appellant is *not* required where it would not be reasonable for the child to go to Nigeria. Accordingly, contrary to the judge’s decision, the terms of the legislation were very much in favour of the Appellant remaining here under Article 8 ECHR. It would plainly be wrong to separate this family. No argument to the contrary was suggested and for [S] to enjoy the benefits of her nationality she needs the Appellant and her family to be with her.
12. In passing it has to be said the judge also fell into material error in concluding that the British citizen child [S] could remain with her uncle and the extended family. There was next to no evidence to justify such a conclusion. The uncle’s remarks go no further than showing the closeness of a family as a family unit. In the unlikely event that this was a real issue before the First-tier Tribunal the judge would have had to have recalled the witnesses, particularly the Appellant, to put the issue on a formal footing. No doubt the Appellant would be aghast to find that the judge was using kind remarks from his brother to justify separation of the family.
13. However, for the reasons stated, it is clear that the judge erred in law in concluding that the child [S] could either be removed to Nigeria or remain here with the Appellant’s brother. Whether the Appellant would face significant obstacles to the reintegration of him and his wife in Nigeria was not the point – the Appellant is entitled to succeed in this appeal because

he should not be separated from his daughter [S] who is entitled to stay here and cannot be removed.

Notice of Decision

14. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
15. I set aside the decision.
16. I remake the decision in the appeal by allowing it.

No anonymity direction is required or is made.

Signed

Date 1st June 2016

Deputy Upper Tribunal Judge J G Macdonald