



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/16419/2016
HU/18289/2016
HU/18293/2016
HU/18294/2016

THE IMMIGRATION ACTS

Heard at Field House
On 30th July 2018

Decision & Reasons Promulgated
On 28th August 2018

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

BAA
EAF
EAF
IAF

(ANONYMITY DIRECTIONS MADE)

Respondents

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondents: First Appellant, in person

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Rowlands promulgated on 14 February 2018 in which the appeals against the decision to refuse the applications for leave to remain on the basis of family and private life dated 13 June 2016 were allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with the First Appellant and her three children as the Appellants and the Secretary of State as the Respondent.

2. The Appellants are all nationals of Nigeria, born on 16 February 1982, 10 June 2008, 31 October 2009 and 16 December 2014 respectively. The First Appellant is the mother of the remaining Appellants, who are three of her four children. The First Appellant claims to have entered the United Kingdom on 28 April 2002 with a visa valid for six months. She has remained unlawfully in the United Kingdom ever since and only sought to regularise her stay here on 23 July 2010 when an application was made for leave to remain on the basis of private and family life, albeit initially rejected, it was resubmitted and then refused on 26 October 2010. A review was requested, which was refused and a further application made on 5 July 2012 which was refused on 22 August 2013. An application made on 7 October 2015 was also rejected and on 21 December 2015 a statement of additional grounds was received by the Respondent which was treated as a further application for leave to remain. The other, Appellants are all children who were born in the United Kingdom and have remained here without any leave to remain since.
3. The Respondent refused the application on 13 June 2016 on the basis that none of the Appellants could meet the requirements of the Immigration Rules, either under Appendix FM or paragraph 276ADE. In relation to Appendix FM, paragraph EX.1 was given express consideration and it was accepted that the First Appellant was in a genuine subsisting parental relationship with the other three Appellants, one of whom had resided in the United Kingdom for over seven years and was therefore a qualifying child, however, it was not considered unreasonable to expect the children to leave the United Kingdom as part of the family unit. There would be no language barriers on return and the First Appellant, as a Nigerian national who had resided there for 20 years, could assist with integration.
4. In relation to the First Appellant's private life, she did not meet the residence requirements set out within paragraph 276ADE, nor was it considered that there would be any very significant obstacles to her reintegration into Nigeria because she has spent the majority of her life there and would have retained cultural ties. As to the private lives of the three child Appellants, all were Nigerian citizens who would be returning as a family unit and able to integrate into Nigeria without any language barriers. The youngest child was only two years old and would not therefore have formed any meaningful relationships outside of the immediate family. The First Appellant would be able to maintain her children in Nigeria and provide for their safety and welfare. There is a functioning educational system available to the child Appellants in Nigeria and a healthcare system which could be accessed if needed. There was a lack of evidence of any current medical conditions or treatment in relation to the child Appellants. The best interests of the children were considered under section 55 of the Borders, Citizenship and Immigration Act 2009 with a conclusion that it would be in the children's best interests to remain with their mother and to return to Nigeria.
5. Judge Rowlands allowed the appeal in a decision promulgated on 14 February 2018, purportedly on "immigration grounds", a point to which I return below. In essence, the First-tier Tribunal found that it would be unreasonable to expect the child

Appellants to relocate to Nigeria because they had spent all of the lies in the United Kingdom and know no other society or culture and have no connection with Nigeria other than it being the birth place of their parents.

The appeal

6. The Respondent appeals on three grounds as follows. First, that the First-tier Tribunal erred in law in treating the best interests of the children as the primary consideration and failing to balance these against the public interest in this case, including the First Appellant's poor immigration history and the family's financial dependence on the state. Secondly, that the First-tier Tribunal erred in law in failing to make any findings on whether the child Appellants had a genuine and subsisting relationship with their father, what if any level of contact they had with him and how this impacted, if at all on their assessment of the best interests and whether it was reasonable to expect him to leave the United Kingdom. Thirdly, that the First-tier Tribunal failed to give adequate reasons for its conclusion that it would be unreasonable to expect the child Appellants to leave the United Kingdom.
7. Permission to appeal was granted by Judge Davies on 12 June 2018 on all grounds.
8. At the oral hearing, Ms Isherwood on behalf of the Respondent relied on the written grounds of appeal and made further oral submissions. In particular, she highlighted that there were no findings made in relation to the child Appellants' relationship with their father, with contradictory evidence before the First-tier Tribunal as to their relationship. The Appellants' case being that they had little contact with the father, who has no status in the United Kingdom, but the medical evidence referred to parents in the plural and involvement of 'dad' which suggested full involvement and called into question the First Appellant's credibility. The First-tier Tribunal failed to engage with these points at all made no findings as to this relationship, which was a relevant material consideration to the assessment of reasonableness.
9. Further, although the First-tier Tribunal referred to the cases of MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705 and EV (Philippines) v Secretary of State Stayed for the Home Department [2014] EWCA Civ 874, the guidance contained therein was not followed in the findings reached in these appeals. In particular, there was evidence before the First-tier Tribunal of the availability of education and health care facilities in Nigeria; it was not for the Respondent to contradict the Appellants' claim to have no family or property in Nigeria and the adverse immigration history and reliance on public funds were relevant factors which should have also been taken into account when assessing the reasonableness of the child Appellants leaving the United Kingdom.
10. Ms Isherwood accepted that an application for naturalisation had been made in relation to the eldest child, the Second Appellant. This application had been made after the decision of the First-tier Tribunal and could not therefore be relevant to the error of law stage of this hearing. If the decision of the First-tier Tribunal was set

aside, the outcome of this application would however be relevant and could be taken into account if made by the time of any future hearing.

11. The First Appellant attended the hearing person as although she has legal representatives on record in relation to the appeals, she was unable to afford representation for this hearing. She provided evidence of the application for naturalisation by the Second Appellant and essentially sought the mercy of the Upper Tribunal based on what she described as a challenging family situation with three of her children having significant health problems. She also described a somewhat turbulent relationship with the children's father but some involvement from him to help with looking after the three children to carry out his role as a parent, such that he was told to do certain things in relation to their medical problems.
12. I explained to the First Appellant the role of the Upper Tribunal in determining whether there has been an error of law in the First-tier Tribunal's decision and what evidence can be taken into account in that regard. The First Appellant made no further submissions in relation to the decision of Judge Rowlands specifically.

Findings and reasons

13. The First-tier Tribunal's decision sets out the Appellants' claim and evidence, including immigration history and the Respondent's reasons for refusal. The findings of fact are not clearly distinguished from a recitation of the evidence and submissions but appear to be contained in paragraphs 18 to 20 which state as follows:

"18. The family circumstances are now clearly set out. The first Appellant appears to be claiming that she is a single parent who is reliant on financial support from Social Services and her local council. She lives with the three other Appellants and their younger sibling. They have minimal contact with her father although according to the school records he has called for them regularly and according to the letter from the solicitors he is now part of her appeal. However he is also Nigerian and appears to have no status in the United Kingdom otherwise he would not be seeking to make an application to be joined her appeal.

19. The children were born in United Kingdom and have lived here all of their lives, now 9, 7 and 3 years. The second and third Appellants attend [] in [] and the school records show that the second Appellant has a medical condition called Hypo-Plastic Left Heart Syndrome. The third Appellant has a diagnosis of Autism Spectrum disorder, diagnosed in 2015 and receives additional support at school.

20. The Appellant claims that she has no family or property in Nigeria and I have no evidence to contradict that part of her claim."

14. Judge Rowlands identifies the conflict in the evidence as to the child Appellants' relationship with their father but fails to resolve it, in fact he fails to make any findings at all as to that relationship. There is further no attempt to make any

express assessment of the child Appellants' best interests in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009.

15. Judge Rowlands goes on to find that if he was considering the first Appellant's claim in her own right, little weight should be given to private life and there would be no significant obstacles to her re-establishing life in Nigeria such that her removal would be proportionate outside of the Immigration Rules. Similarly, if the fourth Appellant were the only child under consideration in the appeal, Judge Rowlands found that removal is a family unit would be proportionate given that there were no particular issues with this child who is still very young.
16. Judge Rowlands then identifies that the Appellants' appeals are all determined essentially by the question of whether it would be reasonable to require the Second and Third Appellants to be removed from the United Kingdom (albeit without any express reference as to whether this assessment is undertaken within the Immigration Rules pursuant to paragraph 276ADE(1)(iv) and/or outside of the Immigration Rules pursuant to section 117B(6) of the Nationality, Immigration and Asylum Act 2002), both of whom have been resident in the United Kingdom for all their lives and for more than seven years. The findings on this point are as follows:

*"24. My attention was drawn to the case of **MA (Pakistan) [2016]** a leading case on the question of the removal of adults with children involved. Reference was made in that case to the issue of a child having been here for seven years and how that must be given significant weight and when carrying out the proportionality exercise. I believe that the same applies to whether or not it is reasonable to remove a child. It is said that after such a period of time the child will have put down roots and developed social, cultural and educational links to the United Kingdom such that it was highly disruptive if the child was required to leave the United Kingdom. That disruption might get more serious as they got older. I have noted that the second Appellant is actually nine years old and been here all his life. It was suggested that in such cases there were very strong expectations that the child's interest would be to remain in United Kingdom with his parents as part of a family unit and that should be given primary consideration. In the case of **EV (Philippines)** some factors were set out when considering the best interests of children including the age, length of time they have been here, how long they have been in education, the stage that their education is at and to what extent they have become distanced from the country that they may have to return to. I have noted that neither of the children have ever been to Nigeria and that they both appeared to be progressing well in education. Indeed the third Appellant actually has a specific special needs set out to cover him.*

*25. There were further factors set out in the case of **PD & Others [2016]** where it was also pointed out that the poor immigration history of the parents should not be taken against the children.*

26. Taking all these factors into account I reach a conclusion that it would be unreasonable to expect the children to relocate to Nigeria because they have spent all of their lives in the United Kingdom where they know no other society or culture and have

no connection with Nigeria other than being the place of birth of their parents. Having reached the conclusion that it would be unreasonable to expect them to move then I believe that the whole family should be expected to stay in the United Kingdom and all of their appeals should succeed."

17. The findings set out above are very brief and wholly inadequate in relation to the best interests of the children and as to their relationship with their father. The reasons which then follow as why the appeal is allowed fail to follow the relevant case law set out therein and are similarly wholly inadequate such that it is not possible to identify lawful reasons for the decision.
18. As the Court of Appeal confirmed in MA (Pakistan), when considering the question of reasonableness under section 117B(6) (which would apply equally to paragraph 276ADE(1)(iv) of the Immigration Rules), regard should be had not only to the best interests of the children but also to the conduct of an appellant and other matters relevant to the public interest. Lord Justice Elias further confirmed in AM (Pakistan) & Ors v Secretary of State for the Home Department [2017] EWCA Civ 180 that section 117B(6) was a self-contained provision where the wider public interest consideration can only come into play via the concept of reasonableness within the section itself.
19. In paragraph 47 of MA, Lord Justice Elias held that *"Even where the child's best interests are to stay, it may still not be unreasonable to require a child to leave. That will depend upon careful analysis of the nature and extent of links in the UK and in the country where it is proposed he should return."* He went on to refer to the decision of Lord Justice Christopher Clark in EV (Phillipines) v Secretary of State for the Home Department [2014] EWCA Civ 874 as to how a tribunal should apply the proportionality test where wider public interest considerations are in play in circumstances where the best interests of the child are that he should remain in the United Kingdom, finding that the same principles would apply on the wider construction of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. That decision refers to factors to consider to determine the best interests of a child and then how emphatic an answer falls to be given to the question of whether it is in the best interests of the child to remain, as to how much weight should be given to that compared to the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country, including whether the applicants have no entitlement to remain and if they have a poor immigration history.
20. Having set out the factors relevant to an assessment of the best interests of children in paragraph 35 (including those quoted by the First-tier Tribunal in its paragraph 24 quoted above, in paragraph 36 of EV (Phillipines), Lord Justice Clark held, *"The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interest that he should not return, the need to maintain immigration control*

may well not tip the balance. By contrast if it is in the child's best interest to remain, but only on balance (with some factors pointing the other way), the result may well be the opposite."

21. At best, it can be inferred that the First-tier Tribunal considered, for the limited reasons set out in paragraph 26 of its decision, that the best interests of at least the Second and Third Appellants were to remain in the United Kingdom and therefore it was unreasonable to expect them or the other Appellants as part of the same family unit to leave. In so doing, the First-tier Tribunal has materially erred in law in failing to follow the correct approach to the question of whether it is reasonable to expect a qualifying child to leave the United Kingdom in accordance with MA Pakistan because of inadequate findings as to best interests and a complete failure to balance those against the public interest in removal. There were clear public interest factors relied upon by the Respondent in this case, including the adverse immigration history of the First Appellant and financial dependence on the state which have simply not been taken into account at all by the First-tier Tribunal.
22. For these reasons it is necessary to set aside the decision of the First-tier Tribunal and remit the appeal to be heard de novo for a fresh decision to be made on the appeals.
23. Finally, although not an express ground of appeal submitted by the Respondent, I deal with an additional point as a *Robinson obvious* error of law by the First-tier Tribunal, which is the basis upon which the appeal was formally allowed. In the final part of the decision, it is recorded that the appeal is "allowed on immigration grounds". There is no such ground of appeal upon which an appeal could be allowed.
24. Section 82 of the Nationality, Immigration and Asylum Act 2002 provides that a person may appeal to the Tribunal where the Secretary of State has decided to refuse a human rights claim and pursuant to section 84 of the same, the only ground of appeal against such a decision is that the removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998. This is the only ground upon which this appeal could be allowed and the First-tier Tribunal has no power to allow an appeal on non-specific "immigration grounds". Although the error is not of itself material in the present appeal as the First-tier Tribunal's decision must be set aside in any event for the reasons set out above, it is important to highlight the error in this case to avoid its repetition.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit the appeals to the First-tier Tribunal (Hatton Cross hearing centre) to be heard de novo by any Judge except Judge Rowlands.

Directions

Any further evidence to be relied upon by the Appellants (for example including, but not limited to, evidence relating to the Second Appellant's application for naturalisation) shall be filed with the First-tier Tribunal and served upon the Respondent no later than 14 days prior to the hearing of the remitted appeals.

The First-tier Tribunal may issue further directions as required.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their 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.

Signed



Date 9th August 2018

Upper Tribunal Judge Jackson