



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

Appeal Numbers: IA/04499/2015
IA/04483/2015
IA/04508/2015

THE IMMIGRATION ACTS

**Heard at: Birmingham
On: 6th April 2018**

**Decision Promulgated
On: 17th April 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**AMMO
AFJO
OBFO**

Appellants

And

Secretary of State for the Home Department

Respondent

Representation:

For the Appellants:

Mr Howard, Fountain Solicitors

For the Respondent:

Mr Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are all nationals of Nigeria. They are respectively a father and his two minor children who seek leave to remain in the United Kingdom on human rights grounds.

Anonymity Order

2. There is no reason why the identity of the adult Appellant should be protected. The case does however turn on the presence in the United Kingdom of the two minor Appellants. I have had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders. I am concerned that identification of the adult Appellant could lead to identification of children involved and I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies to, amongst others, both the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Introduction

3. This is now a matter with some considerable history, the preliminary hearing in the present appeals having been heard in the First-tier Tribunal as long ago as the 29th April 2015. The appeals were adjourned on several occasions before being dismissed, in a determination dated 12th July 2016, by the First-tier Tribunal (Judge J.W.H Law).
4. The Appellants, whose cases were at that time linked to the appeal of their wife/mother EEIO (IA044882015), appealed to the Upper Tribunal.
5. In a written decision dated the 6th July 2017, attached at Appendix A, I found that at least one ground of appeal had been made out and that the First-tier Tribunal had erred in its approach to s117B(6) of the Nationality, Immigration and Asylum Act 2002. To that extent I set the decision aside and indicated my intention to re-make the decisions in the linked appeals myself. I then made the following directions:

“I note the unchallenged finding of fact by the First-tier Tribunal that both adults have lived in this country since 1997. The First Appellant gives his precise date of arrival as 10th May 1997. It appears to me that absent any ‘suitability’ issues he *prima facie* now qualifies for leave to remain under the terms of paragraph 276ADE(1)(iii) of the rules:

“(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment);”

I direct that the Respondent now give urgent consideration to whether AMMO should now be given leave to remain pursuant to

this provision, taking into account the terms of paragraph 276AO of the Rules:

276AO. For the purposes of paragraph 276ADE(1) the requirement to make a valid application will not apply when the Article 8 claim is raised:

- (i) as part of an asylum claim, or as part of a further submission in person after an asylum claim has been refused;
- (ii) where a migrant is in immigration detention. A migrant in immigration detention or their representative must submit any application or claim raising Article 8 to a prison officer, a prisoner custody officer, a detainee custody officer or a member of Home Office staff at the migrant's place of detention; or
- (iii) in an appeal (subject to the consent of the Secretary of State where applicable).**

The Respondent is to advise the Tribunal in writing no later than 4pm on the **4th August 2017** as to whether leave to remain is to be granted to AMMO on the basis of the long residence provision currently in the rules at paragraph 276ADE(1)(iii).

The Appellants will have until 4pm on the **11th August 2017** to advise whether they wish to pursue this appeal.

Liberty to apply.

Subject to the responses to my directions the matter will be set down for rehearing in Birmingham on the first available date in September 2017".

6. Regrettably that timetable was unduly optimistic on my part, since for reasons unknown the tribunal administration did not send my decision to the parties until the 15th August 2017 and the appeal was not re-listed until the 7th March 2018.
7. The Secretary of State's response to my directions was set out in an email from SPO Mr Mills on the 13th September 2017. The contents of that email can be summarised thus:
 - i) The Respondent does not accept that either of the adult Appellants should now be given leave to remain in light of paragraph 276ADE(1)(iii);
 - ii) The rule requires the applicant to have accrued 20 years residence *at the date of application*. Notwithstanding what 276AO might suggest to the contrary, this requirement of the rule must be complied with. If the adult Appellants in this case wish to avail themselves of the 'long residence' provision in 276ADE(1)(iii) they need to make fresh applications;

- iii) In any case AMMO may not be granted leave to remain under that provision because he has two criminal convictions such that the 'suitability' requirements under paragraph 276ADE(1)(i) would be engaged.

Sub-section (i) requires that the applicant "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".

S-LTR 1.6 states that an application will be refused where:

"The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within the paragraphs S-LTR 1.3 to 1.5) character of associations, or other reasons, make it undesirable to allow them to remain in the UK"

AMMO was convicted on the 9th April 2010 of an offence under the Fraud Act 2006 and received a sentence of 6 months in prison. On the 27th March 2012 he was convicted of an offence under the Identity Documents Act 2010 and received a further custodial sentence of 6 months in prison.

- iv) Mr Mills was of the view that these convictions, coupled with AMMO's "very poor immigration history", would mean that leave under 276ADE(1)(iii) may well be refused.

8. It was not possible to proceed with the hearing on the 7th March 2018 because until the hearing started, Mr Howard had been quite unaware of the position articulated in Mr Mills email. Accordingly he needed time to take instructions and respond to the matters raised. His right to do so was particularly acute given that the new submissions were expressly contrary to the Respondent's position in her refusal letter of the 13th January 2015 where it was accepted in respect of all four applicants that the 'suitability requirements' of the Rules were met. I therefore adjourned the appeals - again - and directed that the Respondent provide further details about the convictions themselves and the legal foundation of her new argument. As for the appeal of Mrs EEIO, I severed it from the present proceedings and indicated that a determination would be promulgated in due course, allowing her appeal on human rights grounds. On the unchallenged findings of fact made by the First-tier Tribunal this woman has lived in the United Kingdom since 1997, and since it is agreed that in her case no suitability requirements arise, I was satisfied, in light of the provisions of 276ADE(1)(iii), that the Secretary of State could not show her removal to be proportionate.

9. The hearing today is therefore to finally resolve the outstanding appeals of AMMO and his children. The following facts are agreed:

- i) AMMO has lived in the United Kingdom since May 1997 and so has accrued 20 years and 11 months continuous residence.
- ii) On the 7th January 2013 AMMO was convicted of two criminal offences arising from the same set of circumstances. He was caught working illegally, and had used someone else's passport to obtain that employment. He was convicted of one count of making a false representation to make gain for self (working illegally) for which he received a sentence of 6 months imprisonment. He was also convicted of one count of possessing a false identity documents (using the false passport to gain employment) and for this he received a sentence of a further 6 months in prison, to be served concurrently. He served a total of three months in prison before being released on licence.
- iii) Master OBFO was born in this country in November 2011. He has accrued a period of continuous residence of 6 years and 5 months.
- iv) Miss AFJO was born in this country in October 2008. She has accrued a period of continuous residence of 9 years and 6 months.
- v) EEIO, mother of the two minors and wife of AMMO, is a Nigerian national is without leave to remain in the UK. She has however succeeded in her appeal.
- vi) Neither child has ever been to Nigeria. Both are in full time education in the UK.

Discussion and Findings

10. The relevant parts of paragraph 276ADE(1) of the Rules are as follows:

276ADE (1). 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. to S-LTR.4.5. in Appendix FM; and
- (ii) has made a valid application for leave to remain on the grounds of private life in the UK; an

- (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment)

....

11. AMMO last made an application for leave to remain on human rights grounds in February 2012 when by any reckoning, he had not accrued 20 years continuous residence. Mr Mills points to that prerequisite to submit that this would preclude the Tribunal from allowing the appeal with reference to paragraph 276ADE(1)(iii).

12. As I indicated in my earlier directions, I do not agree. Under the terms of paragraph 276AO it appears to me that it is open to the Tribunal, on appeal, to dispense with the requirement that a formal application is made:

276AO. For the purposes of paragraph 276ADE(1) the requirement to make a valid application will not apply when the Article 8 claim is raised:

(i) as part of an asylum claim, or as part of a further submission in person after an asylum claim has been refused;

(ii) where a migrant is in immigration detention. A migrant in immigration detention or their representative must submit any application or claim raising Article 8 to a prison officer, a prisoner custody officer, a detainee custody officer or a member of Home Office staff at the migrant's place of detention; or

(iii) in an appeal (subject to the consent of the Secretary of State where applicable).

13. Mr Mills argued forcefully that this provision did not apply to the temporal requirement in the opening section of paragraph 276ADE(1); rather it only had the effect of removing the formal requirement at sub-paragraph (ii). What the point of that might be it is difficult to discern. It would mean that 276AO expressly removes the requirement to make an application in the context of 276ADE(1)(ii) but implicitly preserves that requirement in respect of the Rule overall. If an Article 8 claim such as this is only being 'raised' in the context of an appeal it would ordinarily be the case that it could not have been 'raised' in the earlier application. If Mr Mills is correct it is difficult to see in what circumstances rule 276AO might have any utility at all.

14. It seems to me that a more straightforward way of interpreting the provision is that where on appeal the case has developed so that a *prima facie* Article 8 claim is now made out, that is a matter that can be taken into consideration. That is consistent with the 'one-stop' approach to the appellate system. It is also consistent with the wording in the amended version of s85 of the Nationality, Immigration and Asylum Act 2002:

Section 85

- (1) An appeal under section 82(1) against the decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
- (2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in a statement which constitutes a ground of appeal of a kind listed in section 84 the decision appealed against.
- (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
- (4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of decision.
- (5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
- (6) A matter is a “new matter” if –
 - (a) it constitutes a ground of appeal of a kind listed in section 84, and
 - (b) the Secretary of State has not previously considered the matter in the context of –
 - (i) the decision mentioned in section 82(1), or
 - (ii) a statement made by the appellant under section 120.

15. If the words in parenthesis at paragraph 276AO(iii) “subject to the consent of the Secretary of State where applicable” are read in conjunction with section 85(5) the scheme becomes clear. The Tribunal is able to approach human rights appeals in a holistic and pragmatic fashion, saving the need for the multiple applications, considerations and possible appeals that the ‘one-stop’ procedure was designed to avoid, whilst the Secretary of State is protected from the unanticipated appellate ambush.

16. The question therefore arises: is this a new matter such that the consent of the Secretary of State is required before it can be considered? In Mahmud (s85 NIAA 2002 – ‘new matters’) [2017] UKUT 488 (IAC) the Tribunal gave guidance on what might be considered a ‘new matter’ under the statute, and found itself broadly in agreement with the Respondent’s stated policy position:

1. *Whether something is or is not a ‘new matter’ goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.*

2. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.
3. In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive.

17. Mr Mills very realistically conceded that it would be difficult, in these circumstances, to argue that the additional time accrued by AMMO could amount to a 'new matter'. His original claim was on the basis of the 'long residence' provisions; that matter has now been considered twice by the Secretary of State; the long residence was now a bit longer; that did not amount to a new factual matrix.

18. Drawing all of this together I find that paragraph 276AO enables me to consider, in the context of this appeal, whether AMMO qualifies for leave under 276ADE(1).

19. I am satisfied that he has met the 'long residence' requirement at paragraph (iii) of that provision. He has lived in this country for 20 years and 11 months and even deducting the full length of his sentence (of which he only served half), he has still accrued twenty full years.

20. The next question is whether he can meet the 'suitability' requirements set out in Appendix FM and imported into 276ADE(1) by operation of sub-paragraph (i). The Respondent seeks to rely, in particular, on paragraph S-LTR.1.6 which states that leave will not be granted where:

"The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within the paragraphs S-LTR 1.3 to 1.5) character of associations, or other reasons, make it undesirable to allow them to remain in the UK"

21. Mr Mills helpfully looked at the Respondent's own policy guidance to see if it could offer any assistance on what kind of conduct might engage paragraph S-LTR.1.6. The *Criminality Guidance* is concerned exclusively with criminality that would trigger the automatic deportation provisions, and is silent on the relevance of offences attracting sentences of less than 12 months. The document *Family Migration: Appendix FM Section 1.0b Family Life (as a partner or parent)*

and Private Life: 10 Year Routes is not that illuminating since it simply reiterates the language of the rule itself. It does note that "it is possible for an applicant to meet the suitability requirements, even where there is some criminality". Before me the parties agreed that it must be a fact-sensitive enquiry. Matters such as the frequency and nature of the offending will be relevant, as will the passage of time: Ruhumuliza (Article 1F and 'undesirable') [2016] UKUT 00284 (IAC). The parties further agreed that in this context, the question of AMMO's 'suitability' is inextricably bound to the question arising under s117B(6), namely whether it is 'reasonable' for the qualifying child to leave the UK. His convictions have relevance to both questions.

22. The matter of parental convictions falling short of the deportation criteria recently arose as an issue in a case before the President of the Upper Tribunal, Mr Justice Lane. In MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088(IAC) the President and Upper Tribunal Judge Lindsley were asked to consider the case of a child who had been in the UK over eight years, but whose mother had overstayed, had made an asylum claim found to be baseless, and had committed an offence of fraud. Having referred itself to the principles set out in MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705 the panel found:

33. On the present state of the law, as set out in MA, we need to look for "powerful reasons" why a child who has been in the United Kingdom for over ten years should be removed, notwithstanding that her best interests lie in remaining.

34. In the present case, there are no such powerful reasons. Of course, the public interest lies in removing a person, such as MT, who has abused the immigration laws of the United Kingdom. Although Mr Deller did not seek to rely on it, we take account of the fact that, as recorded in Judge Baird's decision, MT had, at some stage, received a community order for using a false document to obtain employment. But, given the strength of ET's case, MT's conduct in our view comes nowhere close to requiring the respondent to succeed and Mr Deller did not strongly urge us to so find. Mr Nicholson submitted that, even on the findings of Judge Martin, MT was what might be described as a somewhat run of the mill immigration offender who came to the United Kingdom on a visit visa, overstayed, made a claim for asylum that was found to be false and who has pursued various legal means of remaining in the United Kingdom. None of this is to be taken in any way as excusing or downplaying MT's unlawful behaviour. The point is that her immigration history is not so bad as to constitute the kind of "powerful" reason that would render reasonable the removal of ET to Nigeria.

23. This decision notwithstanding, Mr Mills urged me to consider the matter on its facts. The mother in MT and ET received a community order, whereas AMMO was sent to prison. I have borne that in mind. I note however that the offence was in essence the same - the use of a false instrument to obtain unlawful employment. On the scant facts revealed by the determination I cannot know,

but one obvious explanation for the inconsistent sentences may be that MT was a single mother at the time of the sentencing.

24. The burden of proof in respect of S-LTR 1.6 lies on the Secretary of State. The offence committed by AMMO is not one that can simply be overlooked. It is plainly to the detriment of society that people seek to circumvent the immigration rules, and criminal law, by using false documents to procure work that they are not entitled to do. I also bear in mind however that the convictions arose from the same set of circumstances, and that there has been no other offending in a long period of residence. I would not go so far as to describe this fraud as a "run of the mill" offence but I accept that where someone has overstayed for 20 years there is perhaps an implicit acceptance that in doing so they will at some point have worked illegally. Having considered all of these factors, and the circumstances as a whole, I cannot be satisfied that the convictions in 2013 render AMMO's presence in the UK to be undesirable or that it would be conducive to the public good to refuse to grant him leave. I therefore allow his appeal on human rights grounds. His removal cannot be said to be proportionate because he has demonstrated that he meets the requirements of paragraph 276ADE(1)(iii) of the Rules.
25. It follows that I need not make any findings on s117B, since Mr Mills accepted that if both parents succeed on Article 8 grounds, it would follow that both children would do so too. For the sake of completeness I do so briefly. The family all speak fluent English, and whilst this is a matter that will aid their integration, it is one that must remain neutral in my balancing exercise. It is in the public interest that persons who seek leave to remain are financially independent. Although AMMO has apparently worked in order to support his family, I do not think it proper that I can take illegal employment into account as a positive matter weighing in his favour. This family cannot therefore be said to be financially independent and this is a matter that must weigh against AMMO in the balancing exercise. I can attach only a little weight to the private life that AMMO has accumulated whilst here, since his status has always been unlawful. All of those matters must be weighed in the balance when I assess whether it is 'reasonable' for the qualifying child of this family to leave the UK.
26. My starting point in the assessment of the other side of the scales is the presumption, inherent in the rule and policy and confirmed in MA (Pakistan), that it will be in this child's best interests to remain in this country. AFJO has lived here since she was born and is now approaching her tenth birthday. She attends school in this country, has friends and other relationships outside of the immediate embrace of her family, for instance with teachers. I could find nothing in the evidence to displace the presumption that it would be in her best interests for this status quo to be maintained, regardless of the fact that these friendships, other relationships and education could no doubt in time be replicated in Nigeria. In order to find that it would be reasonable for her to go to Nigeria with her parents I must identify strong reasons for doing so. On the

evidence before me, and applying the approach taken by the Court of Appeal in MA (Pakistan), and by the President in MT & ET, I conclude that the Respondent has not demonstrated that such reasons exist. It is manifestly unreasonable to expect AFJO to leave the UK at this stage.

27. I would therefore allow the appeal of AMMO in the alternative 'outside of the rules' with reference to the proportionality factors set out in s117B(1)-(6). The Secretary of State for the Home Department expressly accepts that in those circumstances the children would also succeed in their appeals on human rights grounds.

Decision

28. The appeals are allowed on human rights grounds.

Upper Tribunal Judge Bruce
10th April 2018