



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

Appeal Number: HU/01500/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 16th January 2019**

**Decision & Reasons Promulgated
On 13th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

**MR SAMSON ADESEUN MAFIMISEBI
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Adebayo, Solicitor instructed by David & Vine Solicitors

For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria whose appeal was dismissed by First-tier Tribunal Judge Ross in a decision promulgated on 14th June 2018.

2. Permission to appeal was initially refused but granted by Upper Tribunal Judge Pitt who said that it was arguable that the judge took a wrong approach in the assessment of whether it was reasonable for the oldest child to leave the UK – reference was made to **KO (Nigeria) [2018] UKSC 53**. All the grounds were said to be arguable.
3. Thus, the matter came before me on the above date.
4. For the Appellant Mr Adebayo relied on his grounds. The judge had done very little to address the best interests of the Appellant’s children and had determined the fate of the children by reference only to the Appellant’s conduct which was wrong in law. In particular, reference was made to well-known case law, namely **ZH (Tanzania)** and **Zoumbas** and it was said the judge did not carry out any form of assessment of the children’s best interests. There was no well-rounded assessment using all the factors that were relevant to the welfare and wellbeing of a child including their emotional stability. The judge had taken the wrong approach by failing to ask himself any question relating to the children’s’ best interests.
5. Mr Adebayo stated to me that given what was said in **KO (Nigeria)** it was clear that the judge was wrong to blame the parent for refusal of the appeal. The judgment should be set aside and a fresh decision made in favour of the Appellant. If that proposition was not to be successful, then his secondary position was that the decision should be set aside and the case remitted to the First-tier Tribunal for a rehearing. It was pointed out that the eldest child was now a British citizen.
6. For the Secretary of State Ms Jones referred to **KO (Nigeria)** and said that the judge had done what was required of him. He had referred to the best interests of the children. He had recognised and had said in paragraph 17 (final sentence) that it was well established that the children should not be blamed for the immigration transgressions of their parents. In paragraph 18 he had taken account of the school reports relating to the children. In these circumstances Ms Jones argued that the decision should stand.
7. I reserved my position.

Conclusions

8. It should be said that the decision of Judge Ross is set out very clearly and generally correctly and is straightforward enough to follow. It is true, as Ms Jones pointed out, that the judge recognised that as was pointed out in **Zoumbas** the child should not be blamed for the conduct of its parents. The judge also recognised that the children were doing well at school.
9. Unfortunately, what the judge did not address is what were the best interests of the children as at the date of the hearing. The judge noted the argument (paragraph 19) that it was certainly in their best interests to remain in the UK but the judge does not deal with that. The judge went on to come back to the question as to what were the best interests of the

children (paragraph 22) but considered that this question should be answered based on whether it was reasonable to expect the children to leave the United Kingdom together with their mother. The judge accepted that it would not be in the children's best interests for their father to leave the UK without them.

10. The judge concluded (paragraph 23) that the Respondent had proved that it was reasonable to expect the children to leave the United Kingdom.
11. For some reason the judge avoids the central question in this case, namely what was in the best interests of the children although he recognised that this was a primary consideration. However, that was the question that he was due to answer and he failed to deal with that central issue and as such, there is a material error of law in this decision.
12. In my view further fact-finding is necessary because it is important to have clear factual findings on what are the best interests of the children. This question needs to be answered before a decision is made on whether to dismiss or allow the appeal. As it happens one of the children (I was told by Mr Adebayo) is now a British citizen which would grant weight to the Appellant's case that he should be allowed to remain here. However, given that there is a material error of law in the judge's decision I think the sensible way forward is to set the decision aside and remit the appeal to the First-tier Tribunal for a rehearing.
13. The matter will therefore have to be heard again by the First-tier Tribunal and the decision of Judge Ross is therefore set aside in its entirety. No findings of the First-tier Tribunal are to stand. Under Section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 the nature and extent of the judicial fact-finding necessary for the decision to be re-made is such that it is appropriate to remit the case to the First-tier Tribunal.

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 remit the appeal to the First-tier Tribunal.
17. No anonymity order is made.

Signed *JG Macdonald*

Date 5th February 2019

Deputy Upper Tribunal Judge J G Macdonald