



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/16115/2017**

Appeal Numbers:

U/16120/2017

H

/16126/2017

HU

/16130/2017

HU

THE IMMIGRATION ACTS

Heard at Field House

**Decision
Promulgated
On 22 May 2019**

&

Reasons

On 9 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**RAMOTU HASSAN
MOJEED G ADEGBOYEGA**

A A

F A

(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer.
For the Respondent: Ms A Childs, counsel.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal promulgated on 24 January 2019 allowing appeals by the applicants against the decision dated 15 November 2017 refusing them leave to remain in the UK on human rights grounds. In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicants as the appellants and the Secretary of State as the respondent.

Background

2. The appellants are citizens of Nigeria. The first appellant was born on 3 March 1980 and is the partner of the second appellant born on 31 December 1961. They have three children, a son born on 5 February 2010, a daughter on 24 December 2012 and a third child on 5 November 2018. Their immigration history can briefly be described as follows. The first appellant was issued with a visit visa on 11 January 2005 valid until 11 July 2005 and the second appellant a visit visa on 17 January 2005 valid until 17 July 2005. There is no evidence that this was used for making a legal entry. In any event, on 20 July 2005 he made a further entry clearance application but, as he failed to attend for an interview, entry clearance was refused.
3. There is no formal record of when the first and second appellants entered the UK. In her witness statement the first appellant claims that she arrived in April 2001 to work as a maid. The second appellant claims that he arrived in 1996 with the help of an agent. On 5 February 2010 the third appellant was born in the UK. On 24 February 2010 the second appellant made an application for leave based on his long residence, but this was refused. On 24 December 2012 the fourth appellant was born in the UK. In February 2013 the second appellant was arrested as an overstayer and on 4 March 2013 he applied for leave on human rights grounds. His application was refused and he appealed against this decision.
4. In his appeal heard in April 2014 before the First-tier Tribunal (IA/02973/2014), the second appellant claimed that he had entered the UK on 16 March 1996 but his evidence was not believed and the judge proceeded on the basis that he had been in the UK for 8 years and not 18 years as he claimed. The judge was not satisfied that the appellant met the requirements of para 276ADE(1) of the Rules or that removal to Nigeria would be in breach of article 8 on either private or family life grounds. The appeal was dismissed and after his appeal rights were exhausted, he and his dependants were served with the relevant notices that they had no right to remain in the UK.
5. On 3 March 2016 the first appellant lodged a human rights application which was refused and certified on 20 April 2016. On 28 April 2016 further submissions were lodged and these were rejected under para 353 of the Rules on 17 August 2016. The first appellant issued judicial review proceedings and on 16 February 2017 permission to proceed was granted. On 16 August 2017 a consent order was agreed, the proceedings were withdrawn and the respondent agreed to reconsider the further

submissions. The decision to refuse leave to remain was maintained in the decision of 15 November 2017, the subject of this appeal.

The Hearing before the First-tier Tribunal

6. At the hearing before the First-tier Tribunal it was conceded that the requirements of the Rules could not be met as none of the children of the family had completed seven years residence at the date of application. By the date of hearing on 16 January 2019 their third child had been born who, although not formally a party to the appeal, was now part of the family. It was conceded that there was no new evidence to show that the second appellant had been present for the time he claimed and in the light of Devaseelan [2002] UKIAT 702 and the findings made the previous appeal, it was indicated that the appeal would proceed on human rights grounds on a freestanding basis [16].
7. It was argued on behalf of the appellants that they could not return to Nigeria with their three children as both the culture and the educational system would be alien to them. They regarded the UK as their home and did not speak any of the local languages in Nigeria and would not be in a position to turn to anyone for assistance [20]. The family were living with a friend in the UK and the second appellant derived an income from the property which he rented to a local authority in Kent. They wished to remain in the UK as a family unit [21]. The third appellant was now a qualified child within the provisions of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 as he had been living in the UK for more than seven years. It was argued that it would be unreasonable to expect him to leave the UK and that the other members of the family should therefore be given leave to remain with him [22].
8. The judge accepted the evidence that the third appellant had had treatment in August 2012 when he underwent tongue reduction surgery at Great Ormond Street Hospital, suffered from delayed speech, had been classified as child with special educational needs and was still receiving speech and language therapy at the hospital [25]. He found that if the family had to return to Nigeria, they would face immediate destitution given that there was no one there they could turn to for any initial or long-term help [27]. He found that there would be no real or viable support networks available particularly in relation to the three children [28]. He found with this backdrop in mind that it would not be in their best interests to make them go to Nigeria and it would be particularly difficult for the third appellant who was now nine years of age, given his medical circumstances. He also found that the youngest child suffered from sickle cell disease [29].
9. He took it account that the first and second appellants had no leave to remain but they had demonstrated a genuine subsisting relationship with all of their children and, in particular, the third appellant who he found could not reasonably be expected to leave the UK and whose best

interests were to remain here as part of one overall family unit. The judge therefore concluded that the public interest did not require any of the appellants to be removed in their circumstances which he found to be exceptional in nature when taken together [45]. The appeal was, accordingly, allowed under article 8.

The Grounds of Appeal and Submissions

10. The grounds can be summarised as arguing that the First-tier Tribunal erred in law in the following ways: the judge did not take notice of the findings in the previous appeal where it was found that the second appellant was not a credible witness; no adequate reasons were given why the family would face destitution on return to Nigeria when they had family there, had been found to be financially independent in the UK and owned property which was being let; there was no assessment of whether the third appellant would have access to medical treatment if needed on return to Nigeria; the finding that the youngest child had sickle cell disease was simply based on an assertion and there was no other evidence to support this contention; the judge had made findings without taking all the facts into account and had failed in particular to consider the circumstances in which the assessment of reasonableness had to take place, the fact that the children were liable to removal because both their parents had overstayed, so failing to take into account the guidance in KO (Nigeria) [2018] UKSC 53 that in these circumstances the question was simply whether it was reasonable to expect a child to follow parents with no right to remain to the country of origin.
11. Mr Tufan adopted these grounds in his submissions. He argued that the judge had failed to assess the relevant issues in the light of the previous findings in the earlier appeal and the guidance in KO (Nigeria). The only factor in the appellant's favour was the fact that the third appellant had now been in the UK for over seven years. He had had a operation on his tongue but there was no evidence to suggest that any further treatment would not be available in Nigeria and the medical evidence simply showed that a number of follow-up appointments had been made. The medical evidence did not suggest that there was now any serious medical condition which could only be treated in the UK. He argued further that the judge had failed to give any adequate reasons for his finding that the family would be destitute in Nigeria or to give proper weight to the considerations in s.117B and particularly to the public interest in maintaining immigration control in circumstances where no member of the family had the right to remain.
12. Ms Childs submitted that the judge had reached findings properly open to him on the evidence and the fact that they might be regarded as generous did not mean that his decision was not in accordance with the law. The

judge had referred to KO Nigeria in his decision. He had given sustainable reasons for his finding that it would not be reasonable for the third appellant to return to Nigeria. The fact that he had now been in the UK for nine years was a weighty factor. The judge had referred to the immigration history of the first and second appellants, but he was entitled to conclude in the light of the evidence before him that it would not be reasonable for the third appellant to return there. Nigeria was not a cheap country to live in and it was not unreasonable to find that it would be a struggle for the family on return.

Assessment of whether the First-tier Tribunal Erred in Law.

13. I shall consider the grounds in the order set out at in [10] above. It is argued that the judge failed to take into account the findings in the previous decision in accordance with the principles in Devaseelan. This authority was mentioned in [16] but in the context of explaining why the appeal was being pursued on human rights grounds only. However, the previous decision remains the starting point so far as the factual basis of the claim is concerned, subject to events subsequent to that decision and any further evidence which might affect the findings previously made. The previous judge took into account the operation on the third appellant's tongue but found that there was no medical evidence to suggest that he would have any specific difficulties in travelling to or adapting to life in Nigeria. She found that the second appellant and his partner had family there and the means to resettle. She did not accept the second appellant's evidence that he had been in the UK since 1996.
14. The judge did not refer to the previous decision in his analysis of the evidence. It was potentially relevant to a number of his findings of fact such as the finding that the appellants would be destitute on return, had no family there they could look to for support or help and more generally to his finding that the appellants' circumstances were exceptional in nature when taken together. He failed to take the previous decision as the starting point and in consequence failed to take relevant evidence into account.
15. It is then argued that the judge gave no adequate reasons for his finding that there was a serious possibility of facing immediate destitution on return. This finding sits uneasily with the evidence that the appellants have a property which, although subject to a mortgage, is generating rental income, the finding that they are currently financially independent [48] and also with the findings in the previous decision. The judge has accordingly left matters of account which were clearly relevant to his assessment of reasonableness or failed to give adequate reasons for this finding.
16. The next ground is that there was no assessment of whether the third appellant would have access to medical treatment on return to Nigeria. The judge said that the third appellant had been classified as a child with

special educational needs and was still receiving speech and language therapy at the hospital. However, he was discharged from the Speech and Language Therapy Service to Mainstream Schools in 2015: see the report at A67-9 and his school reports show good progress: see the report at A102-4. This ground is not in itself determinative, but it does support the argument that the judge did not take all relevant matters into account.

17. There is little substance in the argument that the judge was wrong to find that the youngest child suffered from sickle cell disease in the absence of evidence confirming this but even so, there was no further consideration of how this diagnosis affected the issues of reasonableness or proportionality.
18. The final ground relates to the assessment of reasonableness within s.117B(6). In KO Nigeria the Supreme Court made it clear that when assessing reasonableness in this provision, the proper context was the real-world position in which the children found themselves.

19. Lord Carnworth said at [18]:

"On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain...".

20. I am satisfied that the judge failed to assess reasonableness from this starting point, that in circumstances where both parents had no right to remain it would normally be reasonable for their children to return with them. The judge has referred to the appellant's parents overstaying as a serious matter at [43]. In [45] he said that they had no leave to remain but they had demonstrated genuine and subsisting relationships with all of their children and, in particular, the third appellant who he found could not reasonably be expected to leave the UK and whose best interests were to remain as part of one overall family unit and this led him to conclude that the public interest did not require any of the appellants' removal. This summary of his findings does not indicate to me that the judge approached the question of reasonableness on the basis that the normal expectation would be that the family should leave the UK or explain why their circumstances were exceptional in nature.
21. I am also satisfied that when considering s.117B the judge at [48] appears to have given significant weight to the fact that the appellants were fluent in English and were currently financially independent without giving any adequate consideration to the public interest in the maintenance of immigration control. In Rhuppiah v Secretary of State [2108] UKSC 58, the

Supreme Court at [57] confirmed that the factors in s117B(2) and (3) should not be read as imputing a public interest against removal when those conditions were met. It is correct that the judge referred to the fact that the first and second appellants had not had leave for many years and that this was a serious matter but there is no real indication that their very poor immigration history was properly taken into account.

22. Accordingly, I am satisfied that the judge erred in law when assessing whether it would be reasonable to expect the third appellant to leave the UK and that he failed to give proper weight to the public interest when assessing whether removal would be disproportionate. I am also satisfied that he failed to give adequate reasons for his findings that the appellants would face immediate destitution on return or why their circumstances taken together could be described as exceptional.
23. For these reasons I am satisfied that the judge erred in law such that the decision should be set aside. Both representatives submitted that in these circumstances the proper course would be for the appeal to be remitted to the First-tier Tribunal for a full rehearing. As the judge erred in his approach to the context in which the evidence should be assessed, I am satisfied that this is the proper course to take as there needs to be full rehearing.

Decision

24. The First-tier Tribunal erred in law. The decision is set aside. It is remitted to the First-tier Tribunal for reconsideration by way of a full rehearing before a different judge.

Signed: H J E Latter
2019

Dated: 20 May

Deputy Upper Tribunal Judge Latter