



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/22953/2013
IA/22959/2013

THE IMMIGRATION ACTS

Heard at Glasgow
on 17 July 2014

Determination promulgated
On 18th July 2014

Before

MR C M G OCKELTON, VICE PRESIDENT
& UPPER TRIBUNAL JUDGE MACLEMAN

Between

SUSAN ABIODUN EMMANUEL
OLALUWA AYODEJI DAVID EMMANUEL

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr D Byrne, Advocate, instructed by Drummond Miller
Solicitors

For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION and REASONS

1. The appellants are nationals of Nigeria, mother and son. They appealed to the First-tier Tribunal against decisions of the Respondent on 3 June 2013 refusing them further leave to remain and giving directions for their removal. Judge J C Grant-Hutchinson dismissed their appeals. They now have permission to appeal to this Tribunal.
2. In view of the decision we make, which we communicated at the hearing, we do not need to say a great deal about the circumstances of the case. The facts were the subject of exemplary treatment by the First-tier Tribunal judge. She considered the claims that had been made based on article 3 of the ECHR and decided that she was not being told the truth. She went on to consider the claim under article 8. She noted the

evidence that the second appellant had not been in any one place in the United Kingdom for any considerable length of time, and she noted that the first appellant was on record as having praised the education system in Nigeria as essentially identical to that in this country. She decided that the history of the family, and the resilience and resourcefulness of the second appellant, meant that there was no good reason to say that it would be disproportionate to require the appellants to leave the United Kingdom.

3. It is with considerable regret that we have come to the conclusion that her determination must be set aside for error of law. Mr Byrne raised three grounds. The first was that the judge had failed to take into account the decision of this Tribunal in Azimi-Moayed [2013] UKUT 197 (IAC) which, he submitted, had the effect that a child with an immigration history like the second appellant's should be allowed to remain in the United Kingdom absent compelling circumstances. The second ground was that there had been a brief window during which the second appellant, had he made a proper application and had the application been decided within a few weeks, would have been granted leave. The third ground was that the judge had assessed proportionality by reference to the circumstances on return rather than the undesirability of departure. We think nothing of the second and third grounds: the application was not made, and in any event the suggestion that it would have been decided within a few weeks is wholly speculative and wholly implausible. So far as concerns ground three, the matters the judge took into account were clearly relevant; the weight she gave to them was a matter for her.
4. The first ground, however, has a little more substance. Azmi-Moayed is mentioned in the judge's determination: she implies that it is not really relevant because in the present case there are individual facts and so it is not necessary to rely on any vague general principles. However, the case purports to set out a summary of the jurisprudence on this area. We are inclined to doubt whether its specific guidance (if it gives any on its own authority) is of very much value. For example, the reference, which Mr Byrne pressed on us as relevant, to a child's having been in the United Kingdom for seven years, may be a summary of an interpretation and application of expired guidance in deportation cases: it is not otherwise easy to see why seven years was chosen rather than six or eight (so far as we know there is no research demonstrating the importance of the seventh anniversary of a migratory event in the general development of children). What that case does point out, however, is that there are decisions of the Tribunal and the courts in this area, and with respect it is far from clear that the judge took them fully into account. Nevertheless if that had been the only matter that caused us concern, we should have been very slow to displace the judge's decision. This was a case in which, as so often happens, 'the best interests of the child' were invoked without any real consideration of proving them by evidence. It does seem unlikely that a child's moving

with his family to a different country even after seven years residence – for example if a parent obtains a job in the USA – is to be regarded as contrary to a child’s best interests; and it is therefore far from clear why the answer should be different if the removal is proposed by the Secretary of State. Presumably it is not the case that when removal is supported by the parents it is to be presumed to be in a child’s best interests but when proposed by the Secretary of State it is presumed not to be in the child’s best interests; but some of the decisions, read in the context of the general realities of family life, might suggest that.

5. The judge does, however, appear to have made a mistake of fact that in the circumstances falls to be treated as an error of law. In his own statement the second appellant appears to be making an appeal for his adult sister to be allowed to remain in the United Kingdom; and he appears also to be making reference to the need to continue to see his father. The judge did not, so far as we are aware, make any enquiry as to the status of those two other family members. She knew of their existence, and her findings of fact and of credibility embrace the father as well as the first appellant; but she did not consider the possibility that they had outstanding applications or appeals. When we inquired we were told that indeed they have appeals pending that have been sisted to await the outcome of the present appeal.
6. It is obviously unsatisfactory that appeals of members of the same family, raising independent issues but based in part on the same facts, should be allowed to become or remain separated in this way. Given the way in which the judge treated, and needed to treat, the evidence of the second appellant’s parents’ history, we are absolutely confident that she would have considered that all four appeals needed to be heard together so that an assessment could be made of the evidence that took it all into account and reached the same conclusions in relation to each of the four appeals.
7. For that reason we have reached the view that the present appeals should be allowed, the determination set aside, and that we should remit these appeals to the First-tier Tribunal to be determined afresh. None of Judge Grant-Hutchinson’s findings of fact are preserved; but of course the evidence taken before her is evidence in the appeals. Given that all three paragraphs of First-tier Tribunal rule 20 apply to the four appeals, we direct that the present appeals be heard together with the appeals of Stephen Emmanuel and Esther Aduragbeni Emmanuel by a judge of the First-tier Tribunal other than Judge J C Grant-Hutchinson. Given the rifts in the family, the Tribunal must be prepared to make proper arrangements to obtain the best evidence from all those who intend to give it. Those arrangements are to be made in a directions hearing at the Glasgow First-tier Tribunal hearing centre on 4 August 2014.

C. M. G. Ockelton

17 July 2014

Vice President