



**The Upper Tribunal
(Immigration and Asylum Chamber)
IA/50256/2013**

Appeal number:

THE IMMIGRATION ACTS

**Heard at Field House
On November 19, 2014**

**Determination
Promulgated
On November 25, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

**MS VICTORIA UMORU
(NO ANONYMITY DIRECTION MADE)**
Respondent

Representation:

For the Appellant: Mr Avery (Home Office Presenting Officer)

For the Respondent: Mr Westmaas, Counsel, instructed by
Greenland Lawyers LLP

DETERMINATION AND REASONS

1. Whereas the respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The appellant, born July 27, 1971 is a citizen of Nigeria. She came to the United Kingdom as a visitor in 2006 and was accompanied by her five children who at the date of the original hearing were aged eighteen, sixteen, twelve, ten and eight years of age. She took no steps to regularise any of their statuses until September 2012 when she submitted applications on behalf of them all under paragraph 276ADE HC 395 and article 8 ECHR. These applications were rejected on October 4, 2012 because incorrect fees were enclosed. The error was corrected on December 12, 2012 and the respondent thereafter considered the applications and refused them all on August 21, 2013 and at the same time a decision to remove them was also taken. This appellant was offered an in-country right of appeal but the children were only offered an out of country appeal.
3. The appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on November 27, 2013. On August 29, 2014 Judge of the First Tier Tribunal Seelhoff (hereinafter referred to as the "FtTJ") heard her appeal. He refused it under the Immigration Rules but allowed it under article 8 ECHR in a determination promulgated on September 8, 2014.
4. The respondent lodged grounds of appeal on September 15, 2014 and on October 17, 2014 Judge of the First-tier Tribunal Pooler granted permission to appeal finding it arguable the FtTJ had possibly erred in his approach to the article 8 assessment by failing to give reasons for finding compelling circumstances not recognised by the Rules which would give rise to consideration of the appellant's circumstances by reference to article 8 ECHR.
5. The appellant and her children all attended the hearing before me and were represented by counsel.

SUBMISSIONS

6. Mr Avery adopted his grounds of appeal and submitted:
 - a. The FtTJ erred by failing to consider the applications under the Rules first and foremost.
 - b. Where the appellant did not meet the Rules the FtTJ had to approach the appellant's appeal from the premise the Rules had to be complied with and where the Rules were not met the FtTJ must have regard to that fact.

- c. The FtTJ failed to have regard to the public interest in maintaining immigration control. The FtTJ's comments in paragraph [22] were erroneous because the tests set out in Section 117B of the 2002 Act underpinned the Rules rather than superseded or replaced them.
 - d. The FtTJ allowed the appeal because he concluded that removal would be disproportionate in light of the fact the children had been here for over seven years and the majority of them were attending school. The FtTJ failed to have regard in assessing the public interests Sections (2) to (5) of Section 117B and allowed the appeal because of section 117B(6).
 - e. The FtTJ failed to deal with the appeal having regard to the fact it was the appellant's appeal and approached the appeal as if it was the children's appeal. The FtTJ failed to take into account any of the factors that related to the appellant and simply allowed the appeal as he felt removal was not in the public interest because of the children's length of stay and the fact they were in education.
 - f. Mr Avery reiterated that the FtTJ did not consider the application under the Rules and whilst there had been consideration of Section 117B this was incomplete and failed to take into account the principles of EV (Philippines) & Ors v SSHD [2014] EWCA Civ 874 where the Court of Appeal set out how "best interests of the child" should be approached.
 - g. The appellant was an overstayer who had been here unlawfully since the expiry of her "visa" in or around 2007. The FtTJ should have assessed her claim in the real world and on that basis and the child's interests should have been considered in that light.
 - h. By concentrating solely on the children the FtTJ materially erred.
7. Mr Westmaas responded to the respondent's grounds of appeal and submitted there was no error in law. He submitted:
- a. The FtTJ approached the decision with the Rules in mind because he set out the law in paragraph [5] of his determination. He noted the respondent's position in paragraph [12] of his determination but then went onto make findings between paragraphs [16] to [21] of his determination.

- b. The FtTJ took into account the appellant's immigration history and attached no weight to her claim that she knew nothing of the immigration procedures. He found she knowingly overstayed illegally but he found his main focus had to be the children and their best interests.
 - c. He accepted the children and the appellant had a genuine and subsisting relationship and that they had each lived here for over eight years at the date of hearing. He also took into account their ages and the fact one of the children was in the middle of her GCSE's as well as the general school reports.
 - d. He concluded the children were well integrated and had spent their formative years in the United Kingdom. Removing them would be disruptive and given the importance of consistency in education he found it would not be in their best interests to be removed from their schooling.
 - e. All these assessments were under the Rules and it is submitted the FtTJ took the Rules as his starting point. He then proceeded to consider the appeals outside of the Rules and the fact there was no public interest in removing a child where it would be unreasonable to expect that child to leave.
 - f. The FtTJ then noted that the private life created by the appellant should have minimal weight attached to it as it was created whilst the appellant was here unlawfully. He accepted she had family life with her children and that removal, whilst legal, would not be in the public interest and consequently he properly allowed the appeal.
8. I reserved my decision on all issues.

MY FINDINGS ON ERROR IN LAW

9. Two issues have arisen as a result of the permission granted by Judge of the First Tier Tribunal Pooler. The first issue forms the first ground of appeal namely that the FtTJ erred by not considering the application under the Rules. The second issue concerns whether the FtTJ gave full consideration to the public interest issues that are set out in the Immigration Act 2014 and cases such as EV.
10. In paragraph [5] the FtTJ noted,
- “In the first instance it is for the appellant to prove that she meets the requirements of the

Immigration Rules in respect of private life. If she does not meet the immigration rules I must consider her article 8 claim in the context of the Immigration Rules, current case law and in the context of Sections 117A and 117B of the 2002 Act.”

11. The FtTJ commenced his consideration of the application correctly as he acknowledged the application had to be considered under the Rules. However, the rest of paragraph [5] of his determination is merely a recital of Section 117B of the 2002 Act which is the public interest considerations in article 8 cases. The FtTJ set out case law she had regard to in paragraph [6] but this case law is only concerned with the best interests of the children. It should be noted that that Upper Tribunal decision of Azimi-Moayed and others (decisions affecting children; onward appeals) Iran (Rev 1) [2013] UKUT 197 (IAC) has to be considered in light of the Court of Appeal decision of EV that was handed down on June 25, 2014 (two months before the hearing before the FtTJ).
12. To understand the FtTJ’s approach it is necessary to look at the findings that are set out from paragraph [15] of his determination. The FtTJ recorded that the appellant’s representative accepted the appellant could not meet the Rules and by implication that meant she could not meet Appendix FM or paragraph 276ADE, which of course is article 8 within the Rules. There is a string of authorities that provide guidance on how to approach the thorny issue of what happens where a person does not meet the Immigration Rules.
13. The correct approach is to look at the appellant’s claim and to ask whether the claim satisfies the Rules and if it does not meet the Rules then the FtTJ should consider whether there is anything exceptional or compelling so that removal would be unjustifiably harsh. If the answer to that question is “yes” then the FtTJ should then consider article 8 ECHR and apply the test set out in Razgar [2014] UKHL 00027 and that includes a proportionality assessment.
14. There is no reference to what aspects of Appendix FM or paragraph 276ADE the appellant met. The FtTJ simply assessed the article 8 claim placing great weight on the children’s best interests. The assessment he carried out between paragraphs [15] and [21] is clearly not, as Mr Westmaas invited me to find, an assessment under the Rules but is merely the FtTJ’s assessment under article 8 with reference in part to Section 117B of the 2002 Act which is of course legislations he must have regard to when assessing article 8 ECHR.

15. At paragraph [22] the FtTJ the set out the Gulshan test as being “appeals can only succeed outside the rules in *unusual circumstances*”. This is not the test to apply when considering whether an appeal could succeed.
16. It is clear the appellant could not satisfy paragraph 276ADE(iii) to (vi) and by implication she cannot succeed under the Rules under the umbrella of “private life”.
17. The appellant is single and lives with her children. In order to succeed under the Family Life Rules, as the parent of a child, she had to satisfy Sections R-LTRPT and E-LTRPT of Appendix FM. She could not satisfy this requirement because the children were neither British nor settled here and the children had not at the date of application been living here for at least 7 years.
18. The appellant is unable to succeed under Appendix FM because the children are neither settled nor British and that ignores any other problems the appellant may have in meeting the Rules. In particular, she could not satisfy E-LTRPT 3.1 or any of the financial requirements set out in E-LTRP4.1 or 4.2. She cannot take advantage of Section EX.1 because of the earlier issues. Although the appellant speaks English she is not from a country set out in GEN1.6 of Appendix FM and must therefore demonstrate she satisfies E-LTRPT 5.1.
19. The FtTJ has considered none of the above.
20. Although I am satisfied the FtTJ erred in his approach to family and private claims I am satisfied that this was not material because the FtTJ has clearly given reasons why he intended to consider the application outside of the Rules. He took the view, as he was entitled to, the Rules did not cover her family situation. There is therefore no material error on the first ground of appeal.
21. The real issue is whether the subsequent assessment contained a material error. It is here that the FtTJ’s failures set out above become relevant because any proportionality assessment must have regard to all factors including any compliance with the Immigration Rules.
22. Mr Westmaas has submitted the FtTJ did have regard to all matters and he points to paragraph [15] of the determination.
23. The FtTJ noted in paragraphs [15] to [21] of his determination:

- a. The appellant came to the United Kingdom and deliberately overstayed and knew the majority of her residence was illegal.
 - b. He rejected her claim to have no knowledge of immigration procedures.
 - c. She neglected to resolve her immigration status.
 - d. The focus of his considerations was the children and their best interests and whether it would be reasonable to expect them to leave.
 - e. The children had all spent eight years and two months as at August 2014 in the country. Three of the children had spent their most formative years here but they had all spent more of their formative years in the United Kingdom as against Nigeria.
 - f. The two eldest minor children, in particular, were well integrated in the United Kingdom.
24. The FtTJ, quoting from Section 117B(6), found there was no public interest in requiring the parent of a qualifying child to leave the United Kingdom.
25. Whilst Mr Westmaas sought to persuade me that there was no error in law in the FtTJ's approach I am satisfied the assessment was flawed because the FtTJ placed far too much emphasis on the children without having regard to any countervailing circumstances.
26. Numerous authorities remind us that the children's interests are a primary consideration but they are not the only consideration.
27. The FtTJ acknowledged certain negative issues in paragraph [15] of his determination and whilst there was a reference to this in paragraph [24] of his determination the FtTJ overlooked, in his balancing exercise, the importance of the public interest and also what the Courts have said about children who are not British.
28. Mr Avery referred me to the decision of EV. This decision was not placed before the FtTJ it seems albeit it appears to have been handed down some two months earlier. Mr Avery reminded me what the Court of Appeal said in that case when considering the best interests of the children and the Court leaves no room for any doubt as to what weight should be given to children who are not British and whose parents have no legal right to remain in the United Kingdom.
29. The Court of Appeal stated in EV (Phillipines) & Ors v SSHD [2014] EWCA Civ 874:

“35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

55. Underlying these statements of principle is the real world fact that the parent has no right to remain in the UK. So no counter-factual assumption is being made and the interests of the other family members are to be considered in the light of the real world facts....

58. In my judgement therefore the assessment of the best interests of the children must be made on the basis the facts are as they are in the real world. If neither parent has the right to remain then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?

59. On the facts of ZH it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.

60. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide

medical treatment for the world, so we cannot educate the world.”

30. The FtTJ had regard to their ages, their length of time here and education but he failed to have regard to the matters set out in paragraph [35(d) to (g)] of EV and he also failed to attach any weight to the fact the mother had no right to remain here in her own right. The FtTJ should have approached the case from the position that neither the children nor the appellant had any legal basis to stay here and then balanced those matters that he felt were in her favour.
31. Mr Avery’s submissions about the FtTJ’s approach go to the heart of how an article 8 claim should be considered. The FtTJ in this appeal was entitled to place weight on the children’s best interests but he failed to approach the proportionality correctly. It is the FtTJ’s failure to have full regard to the public interest that leads to me to find there is a material error.
32. Both representatives had agreed that I could remake this decision if there was an error without any further submissions.

ASSESSMENT OF ARTICLE 8 CLAIM

33. I approach this issue on the basis that this is a case, which should be considered outside of the Rules. I have given my reasons earlier for this finding.
34. Applying the approach contained in Razgar I find there was both family and private life and removal would interfere with private life but not necessarily family life because the family would, if removed, be removed as a family. Interference was in accordance with the law and in pursuit of one of the legitimate aims set out in Article 8(2). The issue was therefore whether the interference was proportionate to the pursuit of the legitimate aim.
35. I accept the FtTJ’s findings in paragraphs [16] to [18] of his determination. I also accept the eldest minor children are integrated into the United Kingdom and removal would be a disruption to the life they have come to know. I would also accept the three younger children have more experience of life in the United Kingdom than Nigeria and in the case of the youngest two children they probably have little or no memory of Nigeria.
36. However, the children have achieved this position because the appellant came to the United Kingdom for a visit and deliberately overstayed. The FtTJ heard the evidence and

reached that conclusion and also made further adverse findings as set out in paragraph [15] of the determination.

37. In assessing the article 8 claim I must have regard to the fact the children are not to blame for the appellant's actions but I must also not lose sight of the fact this is the appellant's application.
38. Section 117B sets out those factors that must be considered when the public interest is being looked at and I find as follows:
 - a. The maintenance of immigration control is in the public interest.
 - b. The appellant speaks English and presumably has at times supported herself and her family here albeit illegally.
 - c. She is currently not financially independent and is therefore a burden on the taxpayer.
 - d. The private life created was at a time when the appellant and her children were here unlawfully.
 - e. Private life has been created when their immigration status was precarious.
 - f. The public interest does not require removal where she has a genuine and subsisting relationship to a qualifying child (which she does) and it would not be reasonable to expect the child to leave the United Kingdom.
39. I have to consider whether Section 117B(6) of the 2002 Act is a trump card for the appellant in light of the fact it states that where there is such a relationship public interest does not require removal. I am satisfied that this is an important issue but it is qualified by Section 117B(6)(ii) which sets out a "reasonableness" test. If having considered all of the evidence I thought it would not be reasonable to expect the child to leave then the mother's application would succeed under article 8 ECHR.
40. The Court of Appeal in EV made clear the desirability of being educated at public expense in the UK could not outweigh the benefit to the children of remaining with their parents. Just as the United Kingdom could not provide medical treatment for the world, so it could not educate the world. In assessing where a child should live the Court of Appeal made clear that this should be with their parent/parents. At paragraph [58] of EV the Court of Appeal confirmed the assessment of the best interests of the children must be made on the basis the facts are as they are in the real world. This appellant has no personal right to remain in the United Kingdom and that is the background against which the assessment should be conducted.

41. Is it therefore reasonable to expect the child to follow the parent with no right to remain to the country of origin?
42. The children's best interests are a factor to consider but those interests must not be looked at in isolation and they are not a trump card. In Zoumbas v SSHD [2013] UKSC 74 the Supreme Court stated:

“25... It was legitimate for the decision-maker to ask herself first whether it would have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance. When one has regard to the age of the children, the nature and extent of their integration into United Kingdom society, the close family unit in which they lived and their Congolese citizenship, the matters on which Mr Lindsay relied did not create such a strong case for the children that their interest in remaining in the United Kingdom could have outweighed the considerations on which the decision-maker relied in striking the balance in the proportionality exercise (paras 17 and 18 above).”

43. I have had regard to the positive findings made in respect of the children as set out in paragraph [35] above but in carrying out the final question posed in Razgar and the question posed in Section 117B(6)(ii) I also have to have regard to the matters set out above in paragraph [23] above and in considering the best interests of the children I must also take into account the views of both the Courts particularly in Zoumbas and EV. Section 117B(6) does not require removal in the public interest where the appellant has a genuine and subsisting relationship with a qualifying child but only where it would be unreasonable to require that child/children to leave the United Kingdom.
44. These children are Nigerian. They were all born there and they do not qualify for UK citizenship. They have benefited from education and health care whilst here unlawfully here but educational and health facilities are available in Nigeria. The children have integrated well (including the adult child) and those attending school appear to be progressing well. However, I am first and foremost assessing the appellant's appeal and there is nothing, apart from the issues surrounding her children, anything positive that can be said about her claim. She failed in her own right to satisfy the Immigration Rules and she has established private life whilst here unlawfully and her actions

have prevented her children from being brought up in their own country.

45. Balancing all of these matters carefully I find that it would not be unreasonable to require the children to leave the United Kingdom with their mother. The FtTJ rejected the appellant's fears and they would be returning to their country of birth.
46. I find it would be proportionate to require the appellant to leave the United Kingdom.

DECISION

47. There was a material error of law in so far as article 8 is concerned. I set aside that decision and I dismiss the appeal on human rights grounds.
48. For the sake of clarity I confirm the appellant's appeal under the Immigration Rules is also dismissed.
49. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed:

Dated: **November 24, 2014**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not alter the fee award decision.

Signed:

Dated: **November 24, 2014**

Deputy Upper Tribunal Judge Alis