



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/46157/2014

IA/46164/2014

IA/46173/2014

IA/46177/2014

IA/46182/2014

THE IMMIGRATION ACTS

**Heard at Manchester Piccadilly
On 23rd March 2016**

**Decision & Reasons Promulgated
On 12th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

E T O

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J O A O

(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Balroop of Green land Lawyers LLP

For the Respondent: Ms Johnstone Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. An anonymity direction was made previously in respect of these Appellants and shall continue.
2. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
3. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Davies promulgated on 1 May 2015 which dismissed the Appellants appeals on all grounds.

Background

4. The Appellants are a husband and wife, citizens of Nigeria together with their 3 children.
5. Central to this appeal is that the third Appellant was born in the UK on 12 June 2005 and therefore at the time of the application in issue (27 March 2013) she had been in the UK for 7 years and at the time of the hearing in April 2015 she had been in the UK for 9 years and 10 months.
6. The Appellant and her husband claimed to have entered the UK in 2004, Their three children were then born on 12 June 2005, 16 July 2009 and 21 February 2012 respectively.
7. On 27 March 2013 the Appellants applied for leave to remain on the basis of their family and private life. This was refused.
8. On 23 April 2014 the application was reconsidered and the decision was maintained.
9. 6 October 2014 a consent order was signed for the reconsideration of the application.
10. On 30 October 2014 the Secretary of State refused the Appellant's application.

The Judge's Decision

11. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Davies ("the Judge") dismissed the appeal against the Respondent's decision. The Judge :

- (a) Noted at paragraph 5 of the decision that the Appellants representative conceded that the Appellants could not meet the requirements save and except the third Appellant who at the time of the application had been in the UK for 7 years and therefore potentially met the requirements of paragraph 276ADE(1)(iv) and he therefore stated that the issue for him was to determine whether *“it was reasonable to expect her and the other Appellants to leave to UK and return to Nigeria as a family unit.”*
 - (b) He noted again at Paragraph 32 of the decision that this was the issue he had to determine as advanced by the Representative in submissions.
 - (c) He found that it was probable the parents entered the UK illegally.
 - (d) He noted the concession made that only the third Appellant could potentially meet the requirements of the Rules and it was for the Appellants to satisfy him that it would be unreasonable to expect the third Appellant to leave the UK.
 - (e) He found that there was no evidence before him to suggest that it would be unreasonable for the Appellants all to return to Nigeria together.
 - (f) At paragraph 46 he found that the family would be able to re establish themselves in Nigeria as they had when they came to the UK. He noted they were all in good health and there was no evidence to suggest they could not work or find accommodation.
 - (g) He found there would be a disruption to the children’s education but there was a functioning education system in Nigeria. English is widely spoken in Nigeria.
 - (h) He rejected the assertion that the female Appellants were at risk of FGM because this was a claim made very late in the proceedings and there was no basis to conclude that the husbands family would know of their return.
 - (i) He considered the appeal under Article 8 outside the Rules taking into account those factors set out in section 117B of the Nationality Immigration and Asylum Act 2002.
12. Grounds of appeal were lodged and on 6 July 2015 First-tier Tribunal Judge Landes gave permission to appeal suggesting that it was arguable that the Judge should have considered the best interests of the children separately from the family.

13. There is a Rule 24 response dated 9 July 2015 which argues that there was no evidence before the Judge showing why it would be in the children's best interests to remain in the UK.

14. At the hearing I heard submissions from Mr Balroop on behalf of the Appellants that

(a) That the only issues that he wished to pursue from the grounds were that the Judge had failed to take into account the best interests of the children; had failed to engage with the fact that the third child was a 'qualifying child' for the purpose of section 117B (6) of the 2002 Act and that the Judges assessment of the public interest was flawed.

(b) In the assessment of reasonableness at paragraph 46 the Judge focused on the parents before considering the child. There was no adequate assessment of the third Appellants circumstances for the purposes of either paragraph 267ADE(1) or s117B(6) .

(c) It did not automatically follow that of the parent goes so should the child.

(d) The Judge set out the parent's immigration history at paragraphs 42-44 but this was not relevant to the child.

(e) In his assessment of the public interest factors the Judge was factually mistaken to suggest that the Appellant used an interpreter nor was the family in receipt of public funds.

15. On behalf of the Respondent Ms Johnstone submitted that :

(a) She relied on the Rule 24 notice.

(b) The Judge applied the correct test as assessed whether it was reasonable for the third Appellant to leave the UK and concluded that it was.

(c) Mr Balroop relied on the impact leaving the UK would have on her education and her family but the Judge relied on the evidence before him.

(d) There was no evidence before him that the Appellants were financially independent.

(e) She relied on PD and Others (Article 8-conjoined family claims) Sri Lanka [2016] UKUT 00108(IAC) to suggest that any consideration of a claim such as this had to consider and take into account the circumstances of all family members.

Finding on Material Error

16. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

17. This was an application by a husband and wife and their three children for leave to remain in the UK based on their family and private life established in the UK for 10 years as illegal overstayers. The three children were all born in the UK and the third Appellant had been in the UK for 7 years at the time of the application and nearly 10 years at the date of hearing.

18. The Judge noted at paragraph 5 in his decision that the legal representative conceded that the issue for the Judge to determine was whether the third Appellant met the requirements of paragraph 276ADE(1) (iv) which are that at the time of application she :

"... is under the age of 18 years and has lived in the UK for at least 7 years....and it would not be reasonable to expect the applicant to leave the UK ;"

19. The implicit thrust of the Representatives argument appeared to be that if the child succeeded all of the remaining family members would succeed under Article 8 as they could not themselves meet either Appendix FM or Paragraph 276ADE(1).

20. It is argued that the Judge fell into error because he did not consider the best interests of the children. I am satisfied that he did and that this is clearly reflected when the decision is read as a whole. I note that at paragraph 9 of the decision

the Judge notes that the refusal letter considered took into account section 55 of the Borders, Citizenship and Immigration Act 2009 and set out those factors that it considered relevant to that issue : that the Appellants would return to Nigeria as a family unit; there was no evidence that they would not be supported in Nigeria; the children could continue their education in Nigeria where there was a functioning education system and their safety and welfare could be protected by their parents. Even allowing for a degree of disruption their best interests would be served by them remaining with their parents who had no right to remain in the UK.

21. I am satisfied that in his very detailed analysis of whether it was reasonable for the Appellants and their children to return to Nigeria while he did not specifically refer again to the best interests of the children the Judge considered those factors referred to at 20 above as relevant to the children best interests and analysed all of the material considerations that he had before him. I do not accept the assertion that he was obliged to look at the third Appellant separately from his parents as PD makes clear the provisions of the Rules and Article 8 have to applied to each Appellant separately and this will require consideration of the claim jointly.

22. Therefore in assessing whether it was reasonable for the third Appellant to leave the UK and return with her parents to the country of their nationality the Judge was entitled to consider those factors that were also relevant to the issue of the child's best interests and this he did at paragraphs 46-48. The evidence before him that he accepted gave no hint of a suggestion that the welfare of the children was threatened by the immigration decision in question, or that the children's best interests were undermined: there was certainly no evidence from any other source he noted , either educational, from background material or a social worker to suggest that such a move would not be in the child's best interests. I note of course that the provisions of paragraph 276ADE(1)(iv) envisage the possibility that it may be reasonable for a child who has been in the UK for more than 7 years to leave the UK and in the fact specific circumstances of this case based

on the evidence before him it was open to the Judge to conclude that this was such a case.

23. Having assessed the best interests of the children and the issue of reasonableness of leaving the UK the Judge was not required to address it again: AM (S 117B) Malawi [2015] UKUT 0260 (IAC) where the headnote 6 summarises :

“When the question posed by s117B(6) is the same question posed in relation to children by paragraph 276ADE(1)(iv) it must be posed and answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin; EV (Philippines). It is not however a question that needs to be posed and answered in relation to each child more than once. “

24. It is argued that the Judge's assessment under Article 8 was flawed because he failed to properly set out the provisions of s 117B of the 2002 Act and was based on factual mistakes in relation to them speaking English and being financially independent. I find this argument has no merit. The Judge heard evidence from the adult Appellants and read a letter from a friend who claimed to support them and rejected that evidence as incredible and this was a finding open to him: again the writer of the letter did not attend court to have her evidence tested and the Judge had no other evidence such as bank statements to prove the payment of funds to the Appellants. He was entitled to find the evidence was not credible. The Judge at paragraph 13 refers to an interpreter when no interpreter was used. That was a factual error and while it is one of the considerations under s117B such a mistake made no material difference to the outcome in the case as I am satisfied that the Appellants can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of their fluency in English.

25. Mr Balwoop suggested that the parents' immigration history was of no relevance to the decision to be made. I am satisfied that as part of his findings the Judge considered as PD requires him to the material facts that related to all of the

Appellants. He could not ignore the adverse history of the parents but nowhere in the decision does he suggest that it is of relevance to the decision in relation to the children: it is simply part of the factual matrix of findings that he makes. He was of course entitled to take it into account in his Article 8 assessment having determined that it was reasonable for the family to return as a unit to Nigeria as it was a public interest factor relevant to the importance of immigration control.

26. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1) : *“Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.”*

27. I was therefore satisfied that the Judge’s determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

Signed

Date 9.5.2016

Deputy Upper Tribunal Judge Birrell