



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

Appeal Numbers: IA/22346/2015
IA/22349/2015
IA/22352/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 4th July 2017**

**Decision & Reasons
Promulgated
On 10th July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

**FOD (FIRST APPELLANT)
AED (SECOND APPELLANT)
ARD (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellants: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr B Bundock, Counsel instructed by Southwark Law
Centre

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.

2. The Appellants are citizens of Nigeria and they appealed to the First-tier Tribunal against the decision of the Secretary of State of 29th May 2015 to refuse to grant them leave to remain on human rights grounds. First-tier Tribunal Judge Flynn allowed the appeal. The Secretary of State's application for permission to appeal against that decision was granted by First-tier Tribunal Judge Lambert on 15th May 2017.

Background

3. The background to this appeal is that the First Appellant (the mother) entered the UK as a visitor in 2007 or 2008. The Second Appellant, the First Appellant's son, was born in the UK on [] 2009. The Third Appellant, the First Appellant's daughter, was born in the UK on [] 2012. The Appellants were dependants on an application for leave to remain made by the First Appellant's husband. That application was refused and an appeal against that decision was dismissed by First-tier Tribunal Judge E M M Smith in a decision promulgated on 5th February 2013. The First Appellant submitted a further application for leave to remain on 29th January 2015. The basis of this application was that the First Appellant is no longer with her husband. It is the First Appellant's case that she and her son are sickle cell carriers and her daughter has sickle cell disease. It is her case that her husband left the family on 17th April 2014. The First Appellant fears that her daughter would be subject to female genital mutilation if they return to Nigeria. It is the First Appellant's case that she suffers from severe levels of depression and anxiety and has lost contact with her family in Nigeria.
4. At the hearing in the First-tier Tribunal the Presenting Officer made an application for an adjournment on the grounds that an allegation of trafficking had been made by the First Appellant and that she had received a reasonable grounds decision on 10th August 2016 but that no final decision had been made. It was submitted that the First Appellant should claim asylum. That application was opposed by the Appellants' representative who said that the First Appellant did not intend to claim asylum. The judge refused the application for an adjournment being satisfied that it was in the interests of justice for the appeal to proceed without further delay. The appeal proceeded on human rights grounds only.
5. In her findings the First-tier Tribunal Judge noted that the Appellants' representative had acknowledged that the Appellants cannot satisfy the requirements of the Immigration Rules and the judge agreed with that. She noted that the appeal was solely on the basis of human rights and the judge concluded that there were strong grounds for considering Article 8 outside the Rules as it was clear that the children have lived continuously in the UK since birth and that the Second Appellant is now over 7 years old [35]. The judge considered the case law and found at paragraph 43 that the First Appellant was a credible witness, noted that the First Appellant was reasonably likely to be a victim of trafficking and considered that this decision adds weight to the First Appellant's account.

6. The judge considered the evidence from Consultant Psychiatrist Dr Fairweather and the report of an independent social worker, Mr Horrocks. The judge made a number of findings of fact at paragraph 48. The judge assessed the best interests of the children and found that it is in the best interests of the children to remain in the UK with their mother. The judge attached weight to the fact that the Second Appellant is a qualifying child. The judge took account of the Third Appellant's serious medical needs. The judge took into account Section 117B of the Nationality, Immigration and Asylum Act 2002. The judge concluded at paragraph 58 that the circumstances of the Appellants are exceptional for the following reasons:

“The mother's serious mental conditions; the third Appellant's serious physical conditions; and the professional opinion (including the other reports that I have read but not quoted) that all three of them have suffered and are affected by trauma”.

7. The judge allowed the appeals of the Second and Third Appellants on the basis that it would be unduly harsh to remove the children from their settled life in the UK to a country where they have no ties or knowledge and it would be difficult for the children to integrate there. As the judge considered it unreasonable to separate the mother and her children she also allowed the appeal of the First Appellant.

Discussion

8. The Secretary of State relies on four main grounds of appeal which were amplified by Mr Tufan at the hearing. The first ground contends that the First-tier Tribunal Judge failed to make any finding as to whether the First Appellant meets the Immigration Rules under private life before embarking on a freestanding Article 8 analysis. In the grant of permission to appeal First-tier Tribunal Judge Lambert points out that at paragraph 35 of the decision the judge specifically finds that the Appellants cannot satisfy the requirements of the Immigration Rules. Mr Tufan did not therefore rely on this ground but did submit that the judge had to look at whether there were compelling circumstances before going on to consider the case outside of the Rules under freestanding Article 8. However, it is clear to me on reading paragraph 35 of the decision that the judge accepted the concession made by the Appellants' representative that the Appellants cannot satisfy the requirements of the Immigration Rules and the judge went on to find that there are:-

“strong grounds for considering Article 8 outside the Rules, since it is clear that the children have lived continuously in the UK since birth and that this is now over seven years in the case of the Second Appellant”.

9. In these circumstances I am satisfied the judge did consider the situation in relation to the Rules and did give consideration as to whether it was appropriate to go on to consider Article 8 in these circumstances before doing so. There is no error in relation to this matter.

10. The second contention put forward by the Secretary of State within the first ground is that the judge's consideration of the public interest is both inadequate and incomplete. It is contended that the judge failed to consider all of the public interest considerations under Section 117B of the Nationality, Immigration and Asylum Act 2002. In particular, it is contended the judge failed to consider whether the parties are financially independent and not a burden on taxpayers. It is contended that on the facts of this case this family is wholly reliant on public finances for maintenance and accommodation and has derived significant benefit for complex care needs from the NHS for treatment for all the family and the children have received education in the UK at significant cost when they have had no lawful status. It is contended that, given the significant burden on the public purse, this was a matter that should have weighed heavily against the Appellants in the proportionality exercise. It is contended that little weight ought to have been accorded to the Appellants' private lives in the balancing exercise. Mr Tufan submitted that the judge should have considered all of the factors in Section 117B, including 117B(6) in light of the decision in **MA (Pakistan) [2016] EWCA Civ 705**. He contended that the judge had to consider whether it was reasonable for the children to leave the UK and that reasonableness had to be looked at in light of all of their circumstances.
11. Mr Bundock submitted that when the decision is read as a whole it is clear that the judge was aware of the public funds issue from Section 117B(2). He pointed out that at paragraph 55 the judge said that the best interests of the children must be weighed against other important factors *"including the Respondent's important public duty of maintaining effective immigration control, to which Section 117B requires me to attach important weight"*. He submitted that this demonstrates that the judge had in mind all of the requirements of Section 117B. He also submitted that, in citing the guidance from **EV (Philippines) [2014] EWCA Civ 874** which set out all of the relevant factors in assessing the best interests of the child, the judge showed that he was mindful of all relevant matters, including the Appellants' reliance on public services.
12. I accept Mr Bundock's submission in this regard. In my view it is clear in particular from paragraph 55 the judge had in mind all of the requirements of Section 117B as weighing in favour of public interest. The judge again referred to the public interest as set out in Section 117B at paragraph 56. The judge took into account that the immigration history of the First Appellant is poor and that most of her residence has been without leave.
13. The second ground of appeal contends that the judge acted unfairly in refusing to adjourn the appeal in the light of the fact that a new matter had been raised in relation to the allegation that the First Appellant had been trafficked.
14. Mr Tufan submitted that at paragraph 48 where the judge concluded that it is reasonably likely that the First Appellant is a victim of trafficking, he failed to have regard to the fact that the reasonable grounds decision was

not conclusive in relation to that issue. Mr Bundock agreed with that assessment of the reasonable grounds decision, however he submitted that it was clear that the judge was determining the appeal only on Article 8 grounds. He submitted that the judge did not attach undue weight to this issue and he submitted that the reasonable grounds decision was taken into account only after the judge had made positive credibility findings about the First Appellant.

15. At paragraph 43 the judge said that she found the First Appellant to be a credible witness and noted that the reasonable grounds decision had not yet been made in relation to a conclusive grounds decision but concluded that this decision adds weight to the Appellants' account. I accept Mr Bundock's submission that it is clear that the judge made positive credibility findings in relation to the Appellants and took the reasonable grounds decision into account only in this context. There is no error in the judge's approach to that part of the evidence.
16. I accept Mr Bundock's submission that there was no unfairness in the judge's approach to the adjournment request as the Secretary of State had been given an opportunity to consider the matter before the case proceeded and an opportunity to cross-examine the First Appellant.
17. The third ground of appeal contends that the judge made a material misdirection in law in relation to the medical issues. It is contended by the Secretary of State that the judge failed to have regard to **Akhalu (health claim: ECHR Article 8) [2013] UKUT 400 (IAC)** which says that it is important to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of healthcare facilities in all but very few rare cases. Mr Tufan submitted that a health case has to be an exceptional case among exceptional cases. Mr Bundock submitted that the judge has not given the healthcare needs of the Appellants disproportionate weight. In his submission this was a secondary consideration. He submitted that the focus in the judge's decision is on the social vulnerability of the children and the trauma they have experienced. He submitted that there was no error in relation to **Akhalu**.
18. I accept that the judge did not give any undue weight to the medical issues. The judge noted the Third Appellant's serious medical needs, but attached significant weight to the fact that there is strong evidence to show that the Third Appellant:-

"would be unlikely to be able to access such help (*in Nigeria*) due to her poor mental health and non-existent support from her family as well as the high degree of likelihood that she would not have sufficient funds".
19. It is clear that the judge attached significant weight to the best interests of the children, their unusual vulnerability, the difficulty the First Appellant would have in coping upon return to Nigeria and her lack of support there

[49 to 51]. The judge also took account of the fact that the Second Appellant is a qualifying child and the challenges he would find in making the transition to life in Nigeria. I am satisfied that the judge took into account the health issues but in the wider context of all of the evidence as to the particular vulnerabilities of the First Appellant and the difficulties the family would face in accessing healthcare in Nigeria. There was no error in this approach.

20. The fourth ground of appeal contends that the judge failed to reconcile the apparent precarious situation the family would face upon return to Nigeria with the fact that the First Appellant was able to support herself or be supported there for 37 years of her life before coming to the UK. Mr Bundock submitted that the judge's focus was correctly on the current and future position of the First Appellant rather than how she had survived in Nigeria in the past and the judge had reached clear findings on the basis of her assessment of the credibility of the Appellants. I agree that the judge was looking at the situation upon the First Appellant's return to Nigeria with two children rather than her previous stay there as a single person. In terms of the adaptability of the young children, Mr Bundock submitted that the judge had that factor in mind as set out in the extract from the report from the social worker at paragraph 46 of the decision. I agree that the report of Mr Horrocks sets out the particular vulnerability of these children and the potential trauma they would suffer if required to relocate to Nigeria. It is clear that the judge took into account the particular evidence in this case.
21. In response to Mr Bundock's submissions Mr Tufan highlighted the fact that the Secretary of State's bundle contained the previous decision of First-tier Tribunal Judge E M M Smith in relation to the First Appellant's husband. He submitted that it is clear that the judge did not use this decision as her starting point in accordance with the principles set out in the case of **Devaseelan [2002] UKIAT 00702**. Mr Bundock pointed out that this issue had not been raised in the Grounds of Appeal. I note that the decision of First-tier Tribunal Judge Smith relates to the First Appellant's husband. There is no reference in First-tier Tribunal Judge Flynn's decision to any submission on the part of either party that that decision should form the starting point for her findings in accordance with the guidance in **Devaseelan**. There is no criticism of the judge's decision in this regard in the Secretary of State's Grounds of Appeal to the Upper Tribunal. Although Mr Tufan submitted that this was an obvious issue I do not agree as it could be that because that decision related to the First Appellant's husband rather than to the First Appellant that it was decided that it would not form the basis for First-tier Tribunal Judge Flynn's decision. In any event, there is nothing before me to indicate one way or another why that was not the approach taken by the Secretary of State at the hearing before First-tier Tribunal Judge Flynn. As this has not formed part of the Grounds of Appeal and was not before the First-tier Tribunal Judge I do not consider it appropriate to open this issue.

22. Considering all of the Grounds of Appeal I am satisfied that the judge took into account all of the evidence before her. The judge reached findings in relation to that evidence which were open to her on the basis of the evidence. There are no material errors in this decision.

Notice of Decision

23. There is no material error in the decision of the First-tier Tribunal Judge.
24. The decision of the First-tier Tribunal shall stand.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 7 July 2017

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 7 July 2017

Deputy Upper Tribunal Judge Grimes