



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

Appeal Numbers: HU/01353/2016
HU/02994/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 14th December 2017**

**Decision & Reasons
Promulgated
On 16th January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

**SAO
AKEO
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Gentili of Counsel, instructed by Islington Law Centre
For the Respondent: Mr P Duffy, HOPO

DECISION AND REASONS

1. These are the appellants' appeals against the decision of Judge Devittie made following a hearing at Taylor House on 10th February 2017.

Background

2. The first appellant is a citizen of Nigeria born on [] 1987. She arrived in the UK as a visitor on 13th June 2013. Her first child was born a year later, and is a British citizen. Her second child, the second appellant, was born on [] 2015. She applied for leave to remain in the UK on the basis of her family and private life here on 4th August 2015 and was refused on 30th December 2015 and it was this refusal which was the subject of the appeal before the Immigration Judge.
3. The judge considered that the appellant had lied about her purpose in coming to the UK and concluded that the birth of her child was part of a carefully contrived plan by her in order to gain residence status in the UK. The weight to be attached to the fact that one child was a British citizen was therefore limited. The return of the children to Nigeria would not be adverse to their best interests in any way since all their family ties were in Nigeria. He took into account the public interest and the maintenance of effective immigration control and dismissed the appeal.
4. The appellants sought permission to appeal on the grounds that the judge had taken into consideration immaterial factors in order to determine whether they qualified for leave to remain under paragraph EX1 of Appendix FM and had failed to take into account relevant case law and Home Office guidance in reaching his decision.
5. Permission to appeal was granted by Judge Doyle on 20th September 2017.
6. At the hearing Mr Duffy said that he could not defend the determination. He accepted that there was an error of law and had no objection to the decision being remade and allowed in favour of the appellants.

Findings and Conclusions

7. The judge erred in law.
8. First, his belief that the birth of the child was part of “a carefully contrived plan” in order to gain residence in the UK was irrelevant to the issue of whether it would be reasonable to expect the child to leave the UK.
9. Second, he failed to take into account, inter alia, the decision in R on the application of MA and Others [2016] EWCA Civ 705 where it was held that strong countervailing factors were required to justify an interference with a child’s private life where there has been seven years’ residence, the more so where as here, the child is British.
10. Third, he failed to take into account the Home Office’s own guidance set out in the current Immigration Directorate Instruction Family Migration: Appendix FM, Section 10B Family Life (as a Partner or Parent) and Private Life: Ten Year Routes which reads:

“11.2.3 Would it be unreasonable to expect a British citizen child to leave the UK?

Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.

Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer.”

11. Mr Duffy acknowledged that he could not pursue the argument, made in the reasons for refusal letter, that the child was not entitled to a British passport since there had been clear evidence before the passport office that the child was so entitled and he had no DNA evidence to question that decision. There was no evidence that the father of the child had any contact with the appellant or his son, and no basis upon which to argue that he would be able or willing to care for the child in the UK..
12. In the light of Mr Duffy’s proper concession, the appellants’ appeal, in line with the respondent’s own guidance, falls to be allowed.

Notice of Decision

13. The original judge erred in law. The decision is set aside. It is remade as follows. The appellants’ appeals are allowed both within the Immigration Rules with respect to paragraph EX1 and outside the Rules under Article 8.

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 him 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.

Deborah Taylor

Signed

Date 13 January 2018

Deputy Upper Tribunal Judge Taylor