



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/24287/2016
HU/24299/2016
HU/24297/2016

THE IMMIGRATION ACTS

Heard at Field House
On 24th August 2018

Decision & Reasons Promulgated
On 14th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

MRS F.A.A.
MR O.O.A
MISS T.O.A.

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Malik, Counsel
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity direction was made by the First-tier Tribunal. It is appropriate to continue that direction because much of the evidence relates to a minor.

DECISION AND REASONS

1. The Appellants are a family of three. They are all citizens of Nigeria. The First Appellant, F.A.A., is the wife of the Second Appellant, O.O.A. The Third Appellant, T.O.A., is their 8-year-old daughter (date of birth 25.02.2010).
2. They appeal with permission against the decision of a First-tier Tribunal (Judge S J Clarke) dismissing their appeals against the Respondent's refusal of their applications for leave to remain on human rights grounds. The Second and Third Appellants applied as the dependants of the First Appellant. The date of the Respondent's refusal is 5th October 2016. The applications were refused because none of the Appellants were able to meet the requirements found in paragraph 276ADE of the Immigration Rules and it was said there were no exceptional circumstances in their cases.
3. Permission to appeal Judge Clarke's decision, was granted by FtTJ Landes. The grant of permission focussed on paragraphs 4 and 5 of the Grounds (T.A.O.'s best interests). The relevant part of the grant of permission reads as follows

"It is arguable that as set out at paragraphs 4 and 5 grounds the judge did not adequately assess TOA's best interests simply by finding that her best interests were to remain with her parents as a family unit. This error is arguably a material one given that the judge placed weight on the appellants' private lives for the reasons she explained so that I cannot say that it would inevitably have made no difference to the judge's ultimate conclusion if she had found that it was in TOA's best interests to remain in the UK."

4. With regard to Grounds involving the Article 8 claims of the adult Appellants, Judge Landes continued by saying:

"I do not consider that the other grounds would have merit if they stood alone and if there were not even arguably an error in the assessment of the child's best interests."

5. Thus the matter comes before me to determine whether the decision of the First-tier Tribunal contains a material error to the extent that the decision must be set aside and re-made.

Error of Law Hearing

6. Before me Mr Malik appeared for the Appellants and Mr Walker for the Respondent. Mr Malik's submissions relied on the grounds seeking permission (paragraphs 4 and 5). His main criticism of the decision amounted to saying that the FtTJ had not demonstrated that she had engaged with all the evidence before her. For example there was no proper evaluation of whether T.O.A.'s development had moved away from focus on her parents to engagement with the wider community. There was no evaluation of the evidence relating to T.O.A.'s education. Whilst it was accepted that at the date of hearing T.O.A. had been in the UK for five years only, nevertheless she had now entered education here. Drawing those matters together meant that the FtTJ

had failed to properly assess the evidence in the round when conducting the proportionality exercise under Article 8. That amounted to a material error which impacted on the whole decision and thereby rendered it unsafe.

7. Mr Walker on behalf of the Respondent, although not conceding the issue, accepted that the Appellants had shown an “exemplary family history” and agreed that the FtTJ may not have properly looked at all the evidence in the round.
8. Both representatives were of the view that if I found that there was an error of law in the FtT’s decision, it would then be necessary for a re-hearing to take place. Up-to-date evidence would now be needed on the basis that time had passed since the date of the original decision made by the Respondent in October 2016.

Error of Law Consideration

9. I find I am satisfied that the FtT decision contains a material error of law and I now give my reasons for this finding.
10. The difficulty in these appeals, I find, arises from the failure of the FtTJ to refer to Section 55 of the Borders, Citizenship and Immigration Act 2009, and to specifically address the best interests of T.O.A. in that context. It is well established that Section 55 of the Borders, Citizenship and Immigration Act 2009 requires a free-standing assessment of best interests and nowhere does the judge self-direct herself on Section 55. Therefore I find I am not able to discern from the decision itself that she has kept it in mind.
11. In **ZH (Tanzania) [2011] UKSC 4**, the Supreme Court held that the best interests of a child must be a primary consideration, and that this means that they must be considered first. Whilst it is accepted that those best interests can be outweighed by the cumulative effect of other factors, nevertheless best interests must rank higher than other considerations and it is not merely one consideration that is to be weighed in the balance alongside other competing factors.
12. The jurisprudence has long held that the best interests assessment should normally be carried out at the beginning of the balancing exercise. The judgment of Lord Thomas LCJ in **Hesham Ali (Iraq) v SSHD [2016] UKSC 60**, emphasised the importance of making clear findings on material issues of fact.
13. Whilst the instant decision discloses an assessment of the circumstances of each of the Appellants including T.O.A., nevertheless the decision as far as I can see is unstructured to the extent that consideration of best interests appears to have become indistinguishable with the proportionality assessment. It is not possible to establish what the conclusion was on best interests, independent of other countervailing factors.
14. In the circumstances, I find, the decision cannot stand and it must be set aside to be remade. Whilst I agree with Judge Landes’ finding that it is hard to see how the other grounds put forward would succeed if they stood alone, nevertheless I am of the view that all factors are inextricably linked to the extent that I am unable to preserve any

findings from the FtT's decision. I find therefore that the decision should be remitted to the First-tier Tribunal on the basis that the findings made by the FtTJ are unclear on the crucial issue which lies at the heart of these appeals. The appeal should be heard by a judge other than Judge S J Clarke.

15. I would observe that whilst case management is solely a matter for the First-tier Tribunal, I note that both the FtT hearing and the appeal to the Upper Tribunal were heard in London hearing centres. There was no good reason put forward to me why this was so. The Appellants reside at an address in Wallsend, Tyne and Wear. Their address is very close to the North Shields Hearing Centre and since the First and Second Appellants will need to give evidence at the rehearing, it seems that this hearing centre would be an appropriate venue.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law such that the decision should be set aside. I set aside the decision. I remit the appeal to be decided afresh in the First-tier Tribunal (not Judge S J Clarke).

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

Unless and until a Tribunal or court directs otherwise, the Appellants are 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 Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

C E Roberts

Date

11 September 2018

Deputy Upper Tribunal Judge Roberts