



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25564/2015
IA/31423/2015
IA/31428/2015

THE IMMIGRATION ACTS

Heard at Manchester
On 29th June 2018

Decisions & Reasons Promulgated
On 10th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MISS TEMITOPE FUNMILAYO BIHARY
MISS MARIA OLUWATOMISIN BABYEJU
MR OLUFEMI OREOLUWA BABYEJU
(NO ANONYMITY DIRECTION MADE)

Appellants

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr J Pratt of Waddell Taylor Bryan, Solicitors
For the respondent: Mr A Tan, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The first appellant has been given permission by Upper Tribunal Judge Jackson to appeal the decision of First-tier Tribunal Judge Alis, who dismissed her appeal

against the respondent's refusal of her application for leave to remain on human rights grounds. Her children Maria and Olufemi had already been granted permission to appeal the dismissal of their appeals on the basis they arguably satisfied Paragraph 276 ADE. It was arguable that if they met the requirements of the immigration rules this had a material impact on the first appellant's article 8 claims outside the rules.

2. First-tier Tribunal Judge Alis found that the first named appellant came to the United Kingdom in December 2005. Her two children joined her on 10 December 2006. Maria was born on 22 November 1996, and her brother Olufemi on 16 December 1998. Their applications were made on 23 June 2014, and the refusal issued on 19 June 2015. At the date of application therefore, Maria was aged 17 and her brother 15 and had been in the United Kingdom 7 years
3. First-tier Tribunal Judge Alis concluded that the appeal was restricted to human rights considerations albeit through the prism of any relevant immigration rules. Regarding the first appellant, the judge did not see very significant obstacles to her reintegration into life in her home country, Nigeria. Regarding her children, the second and third appellants, the judge concluded they did not satisfy the relevant immigration rules. In respect of their freestanding article 8 rights, by the time of the hearing they were adults. The judge noted that they potentially could succeed if a further application were made on the basis they were now aged between 18 and 25 and had spent more than half their lives in the United Kingdom. However, the judge concluded that to expect them to return was not disproportionate.
4. In reaching this conclusion the judge stated that they only met the rules because events have moved on since application was made and referred to a delay in their appeal being listed because of non-payment of the appeal fee.
5. It was argued that the judge erred in law because in considering their human rights he was required to consider the position as at the date of hearing.

The Upper Tribunal hearing

6. At hearing Mr Pratt started by making the point that in the human rights case the starting point was the situation as at the date of hearing and submitted in the instant case First-tier Tribunal Judge Alis did not do that. There had been a long delay between the application being made and the decision issued. When the application was unsuccessful there was further delayed because the law firm instructed to lodge the appeal was closed down. Time passed before the appeal could be reinstated.
7. In terms of the rules, when the initial application was made the first appellant's children were minors who had been in the United Kingdom for seven years. In that situation the issue arising under paragraph 276 ADE was whether it was reasonable to expect them to leave. However, by the time matters came to hearing they were over 18 years of age and under 25 years and had spent more than 50% of their lives in the United Kingdom.

8. At paragraph 54 the judge took cognizance of this point. At paragraph 58, the judge referred to the respondent's instructions, which stated that the rules reflect the respondent's approach to the proportionality issue between the individual's rights and the public interest in immigration control. At paragraph 39 the judge had noted the appeal was restricted to human rights issues and emphasised that in assessing any appeal regard had to be had to compliance with the rules.
9. Mr Pratt made the point that the first appellant came here with the children when they were young and had been with them all of their lives. He argued it would be unreasonable to expect the second and third appellant to leave the United Kingdom when, if they made an application now under the rules it would succeed. The error in respect of how their appeals were dealt with in turn affected the consideration of her appeal.
10. Mr Tan made the point that going by the date of application the second and third appellants did not meet the rules.

Consideration.

11. In relation to the second and third appellant's this appeal throws up a dichotomy between the immigration rules and the notion of looking at human rights through the prism of the rules. The relevant rule in their situation, paragraph 276 ADE, is predicated in (1) (i) an application being made. The timing of the application impacts upon whether considered under paragraph 276 ADE (iv) or (v). There is a distinction, with the former having the precondition that it would not be reasonable to expect the applicant to leave.
12. Because of the limited right of appeal the judge was not looking at the rules directly, but initially through the prism of the rules. This accords with the jurisprudence and the acceptance of the rules are meant to be article 8 compliant. The rules reflect the respondent's policy as a proportionate response to immigration control.
13. When the application for leave was made the relevant rule was paragraph 276 ADE (iv) given the then ages of the second and third appellants. However, by the time their appeal came to be heard through the passage of time age wise they had moved into the next category. If the appeal were purely under the rules the first category would continue to apply.
14. First-tier Tribunal Judge Alis recognised the effect of the passage of time in relation to the relevant rule. At paragraph 44, he recognised that the second and third appellants were not responsible for their mother overstaying. He stated that their status should be legitimised unless there was a good reason not to do so. Nevertheless, the judge concluded they did not meet the rule and referred to having regard to the 'bigger picture'. The challenge has not been to the conclusion that they could reasonably leave. Instead, the focus has been that with the passage of time they into the next category, 276 ADE (v), which is prescriptive.
15. This was not the position at the date of application but was at the time of hearing. Consequently, applying the rules simpliciter the conditions were not met. The

dichotomy, however, is that human rights are to be considered as at the date of hearing and the ability to meet a rule is relevant to the proportionality exercise. A further fact is that if the second and third appellant were to make an application at this point in time then it should succeed.

16. The judge appreciated the point argued but did not see merit in it referring to a delay in listing the appeal causing events to have 'moved on since then application'. As explained by Mr Pratt there was a delay because their solicitor's practice was wound up and the appeal had to be reinstated. The appellants can hardly be blamed for this.
17. The point arising is a narrow one but it is my conclusion that the judge did materially err in law by not having proper regard to matters as at the date of hearing. At the date of hearing the second and third appellants did meet the applicable immigration rules but for an application starting the clock.

Remaking the decision.

18. There is no dispute about the chronology. Paragraph 276 ADE (v) is prescriptive and if an application when now made the conditions would be met. The second and third appellants are doing well in their studies but there is evidence, their progress has been hampered by their lack of status. Rather than delay matters further I would remake the decisions in their cases, allowing the appeals under article 8. In doing so I have had regard to the public interest factors set out in section 117 B. The second and third appellants are fully integrated here. They came here as children and cannot be held responsible for the fact they were withheld leave.
19. Allowing their appeals has obvious implications for the first appellant. Given that I have set aside the decision in respect of the second and third appellants it would be unsafe to allow the dismissal of the first appellant's appeal to stand. Unfortunately, however I am not in a position to remake her appeal. Her appeal will require a de novo hearing in the First-tier Tribunal which will have to explore not only her private life but the family life enjoyed with the second and third appellants who are now adults.

Decision.

20. The decision of First-tier Tribunal Judge Alis materially errs in law and is set aside. I remake the decision in respect of the second and third appellants allowing their appeals. The first appellant's appeal is remitted to the First-tier Tribunal for a de novo hearing.

Francis J Farrelly
Deputy Upper Tribunal Judge

Fee Order

Although the second and third appellants have succeeded in their appeals it would not be appropriate for any fee order to be made if a fee was paid. This is because the decision made was one open to the respondent and matters have only changed following argument.

Directions in relation to the first appellant

1. Relist for a de novo hearing in Manchester, excluding First-tier Tribunal Judge Alis.
2. The appellant's representative should prepare a fresh appeal bundle focusing upon her private and family life, bearing in mind that her two children are now adults. This will require consideration of what they are doing and any mutual dependency. The section 117 B factors will have to be addressed.
3. There is no need for an interpreter unless the appellant's representatives indicate to the contrary.
4. The hearing should last no more than one and a half hours.

Francis J Farrelly
Deputy Upper Tribunal Judge.