



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05788/2018
HU/05789/2018
HU/05790/2018
HU/05791/2018
HU/05794/2018

THE IMMIGRATION ACTS

Heard at Field House
Oral determination given following hearing
On 21 January 2019

Decision & Reasons Promulgated
On 08 March 2019

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JN
CA
NN
IN
JN

(ANONYMITY DIRECTION MADE)

Claimants

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Claimants: Mr O Sobowale, Counsel instructed by Fursdon Knapper Solicitors

DECISION AND REASONS

1. This the appeal of the Secretary of State against a decision of First-tier Tribunal Judge Hussain who following a hearing at Birmingham on 3 October 2018, in a decision and reasons promulgated on 17 October 2018 had allowed the appeals of a family against the decision of the Secretary of State refusing them leave to remain under Article 8. For ease of convenience throughout this decision I will refer to the

Secretary of State, who was the original respondent, as “the Secretary of State” and to the various members of this family, who were the original appellants, as “the claimants”.

2. The claimants are all nationals of Nigeria and comprise of a mother and father and their three children. The first claimant arrived in the United Kingdom on a student visa in November 2008, and was followed by the second claimant in 2013. Their first child, who is the third claimant, was born in the United Kingdom on 14 December 2011 and he is therefore now 7 years old although at the time of the decision under appeal he was not quite 7. The other two claimants were born respectively on 17 September 2013 and 9 May 2016, and thus were (and remain) 5 and 2 years old respectively.
3. The claimants were originally here lawfully but have not had leave to remain since May 2013. The first claimant had a medical problem but it is not suggested that he is entitled to remain in this country pursuant to any Article 3 rights which he may have; it is however suggested that he should be allowed to remain under Article 8.
4. The claimants, and in particular the parents, have made previous attempts to remain which have not been successful, the last application being in April 2016. It is not clear how or when the fifth claimant, who was born a month later, came to be added as a claimant but by the time the Secretary of State considered the applications the fifth claimant had been born and so his rights were considered as well. However, in decisions which were made on 15 February 2018, their applications were all refused. The claimants appealed against this decision and, as already noted, in a decision of First-tier Tribunal Judge Hussain, promulgated on 17 October 2018 following a hearing at Birmingham some fourteen days earlier, Judge Hussain allowed their appeals.
5. The basis of his decision for present purposes can be set out succinctly. Judge Hussain had in mind as a very strong factor that the third claimant, the oldest child, was just shy of 7 years old and in his words, as he stated at paragraph 30 of his decision, “Despite the first child not having quite reached the age of 7 years of age, I am satisfied that the Secretary of State still needs to show ‘strong reasons’ for refusing leave in this case”. This was on the basis that it would not be reasonable to remove the oldest child because it would not be in his best interests. He made clear that this was the basis of his decision at paragraph 33 when he stated that, “The benchmark ... remains that there is a presumption of grant unless there are strong reasons for refusing leave”. He added that:

“In addition to the ‘sins of the parents’, the Secretary of State points to the fact that the children would be leaving with their parents and they can continue to enjoy the activities they enjoy in the United Kingdom in Nigeria. These together with the ‘sins of the parents’ however do not amount, in my judgment,

to strong reasons and do not remove the presumption of grant so strongly emphasised by Elias LJ [in *MA (Pakistan)* [2016] EWCA Civ 705]”.

Surprisingly, in the decision there is no reference at all to the provisions now set out within Section 117B of the Nationality, Immigration and Asylum Act 2002, which Section (as is clear from Section 117A(1)):

“applies where a court or Tribunal is required to determine whether a decision made under the Immigration Acts –

- (a) breaches a person's right to respect for private and family life under Article 8, and
- (b) as a result would be unlawful under Section 6 of the Human Rights Act 1998”.

6. It is further provided under Section 117A “Application of this Part” at sub-Sections (2) and (3) as follows:

“(2) ... In considering the public interest question, the court or Tribunal must (in particular) have regard –

- (a) in all cases, to the considerations listed in Section 117B, and
- (b) in cases concerning the deportation of foreign criminals, to the considerations listed in Section 117C.

(3) In sub-Section (2), ‘the public interest question’ means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)”.

7. In this case, therefore, the claim to remain and the appeal against the refusal of the application being founded upon what are said to be the claimants’ Article 8 rights, it was incumbent upon the judge to have in mind the considerations (to which the Tribunal **must** have regard) set out in Section 117B.

8. Unsurprisingly, the Secretary of State has appealed against Judge Hussain’s decision, in particular because he did not appear to have had any regard to these provisions within Section 117B.

9. There is one other factor which also comes into play now when considering the Secretary of State’s appeal and it is this. Although this decision was promulgated a few days before the decision of the Supreme Court in *KO (Nigeria) and Others v SSHD* [2018] UKSC 53 was handed down, nonetheless that decision has retrospective effect and the decision of Judge Hussain has to be considered now in light of the Supreme Court’s decision in *KO*.

10. Although Mr Sobowale attempted valiantly to persuade the Tribunal that at the very least it was implicit within the decision that the judge had had regard to the factors set out within Section 117B, that is not at all apparent from the decision itself. There is no specific finding one way or the other as to whether or not the claimants would be financially independent as required under Section 117B(3); the sole consideration that was given to this factor was that they had attempted to work when they could. It was, however, noted at paragraph 5 that currently the family had been declared destitute because they were not allowed to work and that they were currently being maintained by Coventry City Council “at considerable expense to the British taxpayer identified as £42,432 per year”. It may be that the judge would have found, had he considered this, that this sum would not require to be spent were they to be granted leave, but the decision lacks any such finding. It is also not clear that the judge appreciated that little weight needed to be given to the private life of the applicants because it was established at a time when their immigration status was precarious and also when they were all of them here unlawfully (see 117B(4) and (5)).
11. What the judge does seem to have regarded as the primary and indeed almost unanswerable factor was that the oldest child was now nearly 7 years old and he clearly had in mind what Elias LJ had stated in *MA (Pakistan)* which he read as being a “presumption of grant unless there are strong reasons for refusing leave”. The difficulty with reliance on this interpretation of the ratio in *MA (Pakistan)* is that it cannot survive what is stated by the Supreme Court at paragraphs 18 and 19 of *KO*, which is as follows:

“18. ... On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. [There is then a citation of what was ‘well-expressed’ by Lord Boyd in *SA (Bangladesh) v SSHD* [2017] SLT 1245] ...

19. [Lord Boyd] noted (paragraph 21) that Lewison LJ had made a similar point in considering the ‘best interests’ of children in the context of Section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v SSHD* [2014] EWCA Civ 874, paragraph 58 [which is then set out] ...

To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* paragraph 40, I would respectfully disagree. There is nothing in the Section to suggest that ‘reasonableness’ is to be considered other than in the real world in which the children find themselves”.

12. That, in this case, must be that the Tribunal has to consider whether or not it is reasonable for these children to return with their parents to Nigeria in the context (in the real world) that the parents have no right to remain in this country and that the children would normally be expected to follow their parents where the parents should be expected to go.
13. Obviously, Judge Hussain did not have this guidance in mind (as he could not have done because it had not been handed down by the time his decision was promulgated) but also he failed even to acknowledge the existence of Section 117B of the 2002 Act, notwithstanding the requirement set out within Section 117A of that Act that the Tribunal **must** (my emphasis) have in mind the considerations listed in Section 117B when considering an application under Article 8.
14. It follows that this decision cannot stand but must be re-made.
15. Circumstances will obviously have moved on since the time the decision was made and all relevant factors will have to be considered. It is therefore appropriate to remit this appeal back to the First-tier Tribunal sitting in Birmingham (which is where the family currently live) so that it can be re-heard by any judge other than Judge Hussain. It is not appropriate to retain any findings but the hearing will be de novo.

Decision

I set aside the decision of First-tier Tribunal Judge Hussain as containing a material error of law and direct that the appeal be re-heard in the First-tier Tribunal sitting at Birmingham by any judge other than First-tier Tribunal Judge Hussain.

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.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a long, sweeping tail on the letter 'g'.

Upper Tribunal Judge Craig

Date: 27 February 2019