



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06561/2017
HU/06563/2017
HU/06564/2017
HU/06566/2017
HU/06567/2017

THE IMMIGRATION ACTS

Heard at Field House
On 15 January 2019

Decision and Reasons Promulgated
On 15 February 2019

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

G M O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

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

Anonymity should have been granted at an earlier stage of the proceedings because the case involves child welfare issues. I find that it is appropriate to make an order. 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.

Representation:

For the appellant: Ms S. Akinbolu, instructed by DF Solicitors
For the respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant and his wife and three children appealed the respondent's decision dated 17 May 2017 to refuse a human rights claim.
2. First-tier Tribunal Judge James ("the judge") dismissed the appeal in a decision promulgated on 12 June 2018, concluding that it would be reasonable for the children to leave the UK and proportionate for the family to return to Nigeria.
3. The appellants appeal the First-tier Tribunal decision on the following grounds:
 - (i) It is accepted that in the absence of a Home Office Presenting Officer the judge had a "reasonable inquisitorial function" but argued that, in dismissing the appeal, the judge unfairly relied upon issues that were not raised by the respondent and did not give the appellants a fair opportunity to respond to the points in submissions if they were going to be taken. In particular, the judge found that the second appellant worked illegally providing child care for a relative in return for payment without putting counsel on notice that this might be a matter that could weigh against the appellants in the balancing exercise.
 - (ii) The First-tier Tribunal failed to attach "significant weight" to the fact that that the oldest child was a 'qualifying child' who had resided in the UK for a continuous period of seven years: *MA (Pakistan) v SSHD* [2016] 1 WLR 5093 referred.
 - (iii) The First-tier Tribunal made an error of fact relating to the period of overstaying, which was capable of making a material difference to the weight to be given to the appellants' immigration history. The judge failed to consider what weight should be placed on the respondent's delay and made unsustainable findings relating to the funds that were said to be available in a Tier 1 (Entrepreneur) application made in 2013.

Decision and reasons

4. This is a borderline decision because the judge's findings were comprehensive, but after having considered the grounds of appeal and the submissions made by both parties I conclude that the First-tier Tribunal cannot stand and must be set aside.
5. The ground relating to procedural fairness was not supported by a witness statement from counsel who represented the appellants at the First-tier Tribunal hearing or a copy of his note of proceedings. However, the same counsel who attended the hearing drafted the grounds of appeal. It is clear from the

comprehensive decision written by the judge that matters relating to the second appellant providing child care for her brother in law and his family were aired during the course of the evidence at the hearing. However, if a negative inference were to be drawn from the evidence, and it was not a matter raised in the decision letter, fairness required the judge to give the appellants' representative a fair opportunity to make submissions on the point in the absence of a Home Office Presenting Officer: see *MNM (Surendran guidelines for Adjudicators) Kenya* * [2000] UKIAT 00005. Although the allegation has not been properly evidenced it is reasonable to assume that, according to his professional duties, counsel would not seek to mislead the court in the grounds of appeal. The allegation has not been made out with any certainty but does cast doubt on whether some points that were taken against the appellants were highlighted to counsel so that he could address them in submissions.

6. The judge considered the position of the children at [24-29]. Apart from mentioning the two younger children at [24] the findings focussed solely on the position of the eldest child. The judge referred to the correct test under section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") i.e. whether it was 'reasonable' to expect a child who had been continuously resident in the UK for a period of seven years to leave the UK [25]. The findings that she made relating to the practicalities of return and whether his parents could support him in the transition to Nigeria were open to her to make.
7. However, in my assessment, what is lacking from the decision is any clear findings as to where the best interests of the children lay or any evaluative assessment of the weight that should be placed on the ties established by the oldest child. The Court of Appeal in *MA (Pakistan)* noted that the respondent's policy guidance stated that "significant weight" should be placed on the fact that a child is likely to have established ties to the UK over a period of seven years. The failure of the judge to make clear findings relating to the interests of all three children and failure to indicate whether significant weight was properly given to the oldest child's length of residence amounts to an error of law.
8. The other matters raised in the grounds are incidental but are relevant to whether the decision can stand. In assessing what weight to place on the immigration history of the parents the judge found that they had been overstayers since 25 February 2013, when in fact their lawful leave was extended by operation of section 3C of the Immigration Act 1971 pending an appeal against a decision to refuse leave to remain as a Tier 1 (Entrepreneur) Migrant. The appellants' appeal rights were deemed exhausted on 27 May 2014 at which point leave extended under section 3C came to an end. At that point, the appellants remained without leave, but the parents acted promptly to make a fresh application for leave to remain on human rights grounds on 26 June 2014 (i.e. within a month although not within 28 days) which then led to the chain of events leading to the decision that is the subject of


this appeal. During the period of overstaying they were pursuing a human rights claim. It seems unlikely that this point, taken alone, would be sufficient to set aside the decision, but an accurate assessment of the appellants' immigration history is needed in order to place appropriate weight on the public interest considerations.

9. Although none of the grounds, taken alone, might be sufficient to show a material error of law that would justify setting aside the decision, I conclude that, cumulatively, they render the decision unsustainable given the anxious scrutiny required in cases involving important human rights issues and the best interests of children.
10. The usual course of action would be for the Upper Tribunal to set aside and remake the decision given that there is a detailed account of the evidence given by the appellants and their witnesses at the First-tier Tribunal hearing and that much of their immigration history and the family circumstances are not in dispute. Exceptionally, I find that it is appropriate to remit the case to the First-tier Tribunal for a fresh hearing in light of the question marks raised about procedural fairness and the absence of a Home Office Presenting Officer on the last occasion. The respondent will want to ensure that he is represented on the next occasion to avoid similar problems.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The case is remitted to the First-tier Tribunal for a fresh hearing

Signed 
Upper Tribunal Judge Canavan

Date 12 February 2019