



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08377/2017
HU/08378/2017
HU/08380/2017

THE IMMIGRATION ACTS

Heard at Birmingham
On 11th January 2019

Decision & Reasons Promulgated
On 23rd January 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

FATIMOH [M]

AKEEM [S]

[O S]

(NO ANONYMITY DIRECTION MADE)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellants: Mr Mohzam of Burton and Burton Solicitors

For the respondent: Mrs Eboni, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant had been given permission to appeal the decision of First-tier Tribunal Judge Somal who, in a decision promulgated on 5th April 2018, dismissed the appellant's appeal against the respondent's decision refusing them leave to remain.
2. The 1st 2 appellants are the parents of the 3rd appellant who was born in the United Kingdom on 10 August 2008. They have another child who was 5 years old at the time of the original appeal hearing. All are nationals of Nigeria.
3. Permission to appeal was granted on the basis the judge arguably erred in not allowing the appeal in the circumstance, where the 3rd appellant was a qualifying child. It was also arguable that the judge failed to take into account the argument about delay on the part of the respondent in dealing with a reconsideration request made in 2010.
4. The 1st 2 appellants said they entered the United Kingdom in February 2003. Their 2nd child was born on 10 August 2008. On 7 September 2010 the 1st appellant applied for leave to remain with her husband and their child as dependents. This was refused on 22nd October 2010. The family continues to remain here and there was in a further decision refused leave on 20 July 2017. That decision is a subject matter of the present proceedings.
5. First-tier Judge Somal considered the position of the children and concluded that at their age they were adaptable and can adjust to life in Nigeria. The judge referred to section 117 B(6) stating it was self-contained provision in the issue to be determined was whether it would be unreasonable to expect the children to leave the United Kingdom. The judge considered the child removal was justified and referred to her age and the stage she was at in her education.

The Upper Tribunal hearing.

6. At hearing I was provided with a copy of the British passport issued to the 3rd appellant on 27 November 2018. I was also provided with the latest instructions to decision-makers dated 19 December 2018 in light of the decision in KO (Nigeria) and Others (Appellants) v Secretary of State for the Home Department (Respondent) [2018] UKSC 53.
7. It is accepted by the respondent that the 1st and 2nd appellant's are in a genuine and subsisting parental relationship with the 3rd appellant. It is now confirmed that the 3rd appellant is a British citizen. The new Guidance poses the question whether the

consequence of refusal will be that the child is required to leave the United Kingdom. In the present instance, given that the 3rd appellant is living with her sibling and with her parents as a family unit, if her parent's application is refused she most likely will go with them. Page 68 of the Guidance provides that where there is a qualifying child, as here, the starting point is that the child would not normally be expected to leave. It is in the child's best interests for the whole family to remain together. Therefore, if the child is not expected to leave then the parents will also not be expected to leave.

8. In light of the above, Mrs Eboni accepts there is a material error of law in the decision in relation to article 8. She submitted that the appeal should be allowed and the decision remade by me allowing the appeals. The argument over delay is no longer an issue.
9. Having considered the undisputed facts and the jurisprudence I am in agreement with this. First-tier Judge Somal did not have the benefit of KO (Nigeria) and Others (Appellants) v Secretary of State for the Home Department (Respondent) [2018] UKSC 53 and the updated guidance. However, I am required to apply the law as it is now understood and find the decision made is not sustainable.

Decision

The decision of First-tier Judge Somal is set aside. I remake the decision allowing the appeals.

Francis J Farrelly
Deputy Upper Tribunal Judge.

11 January 2019