



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/16013/2018
HU/15959/2018, HU/15960/2018
HU/15961/2018, HU/15963/2018
HU/15964/2018

THE IMMIGRATION ACTS

Heard at Manchester

On 11th June 2019

**Decision &
Promulgated**

On 22nd July 2019

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(I) A K E

(II) O O

(III) J E A E

(IV) G T E

(V) V D E

(VI) A A B E

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr H Sadiq (Solicitor), Adam Solicitors

For the Respondent: Mr C Bates (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Lloyd-Smith promulgated on 16th March 2019, following a hearing at Manchester on 5th March 2019. In the determination, the judge dismissed the appeal of the Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The first Appellant is a male, and was born on 25th September 1973, and is a citizen of Ghana. The second Appellant, his partner, was born on 1st June 1978; the third Appellant, their eldest child, was born on 12th July 2009; the fourth Appellant was born on 29th July 2013, and is their next child; the fifth Appellant was born on 30th June 2012, and is the child born after that; and the final Appellant was born on 9th April 2018 and is the youngest child. All of them are citizens of Nigeria (with the exception of the first Appellant who is a citizen of Ghana).

The Appellants' Claim

3. The Appellants applied for leave to remain in the UK on the basis of their family and private life. The essence of their claim is that the first Appellant entered the UK in 1998, in 2012 he made an application for leave to remain on the basis of his private life, which was refused and he was served with a notice in 2014 of his liability for deportation as an illegal entrant. He then made further representations about his relationship with his partner and three children under Article 8 in that same year and these representations were rejected. The Appellant was appeal rights exhausted in January 2015. In October and November 2016 removal directions were set. In March 2018 the Appellant's solicitors made further representations. In June 2018 the Appellant was encountered working illegally. He then produced further evidence in support of his claim. The Appellant's partner, the second Appellant, was herself issued with a visit visa valid from 7th March 2009 to 31st January 2010, but refused entry. She successfully appealed that decision and entered the UK on 7th June 2009.
4. In this appeal the claim of the first and second Appellants is principally based upon the rights of their four children, all of whom were born in the United Kingdom and the eldest of whom has spent nine years in this country, so that it is argued that it is in their best interests to remain in this country, and not to be removed with their parents.

The Judge's Decision

5. The judge held that "it is generally accepted that the best interests of a child are best served by that child remaining with their parents" (paragraph 27). That being so, the judge observed that, "I have to say that the first two Appellants have been in a precarious position in relation to their status in the UK since their arrival" and that "it can never have been in their contemplation that they would be able to automatically

remain in the UK and they have known since 2014 that they have no right to be in this country” (paragraph 27).

6. The judge then went on to consider the position of the children and observed that:

“In the context of this case, however, there are certain features which mean I do not find that it would be unreasonable to expect the children to leave the UK and I find that there are powerful reasons why removal is appropriate. The family would be leaving as a unit and therefore would remain together, which is clearly in the children’s best interests.” (Paragraph 28).

7. The appeals were dismissed.

Grounds of Application

8. The grounds of application state that the judge erred in having regard to irrelevant considerations and by failing to consider Section 117B(6) of the 2002 Act, and in failing to consider submissions about the application of **MA (Pakistan) [2016] EWCA Civ 705**; as well as wrongly applying the Supreme Court decision in **KO (Nigeria) [2018] UKSC 53**.
9. On 17th April 2019, permission to appeal was granted on the basis that it was arguable that the judge did not give adequate reasons for the finding that it would not be unreasonable to expect the third Appellant, who is a qualifying child, to leave the United Kingdom.

Submissions

10. At the hearing before me on 11th June 2019, Mr Sadiq, appearing on behalf of the Appellants, made the following fundamental point before me. He asserted that, although there was case law to the effect that with very young children, their best interests are invariably served by their remaining with their parents, that did not mean to say that the children’s position, with respect to what serves their best interests, is not deserving of a separate consideration, without any influence upon that consideration of the position of the parents.
11. In this case, however, the judge appears to have conflated the fact that the first two Appellants had, “appalling immigration histories” (see paragraph 17) with the requirement to have regard to the best interests of the children as a primary consideration. He submitted that there were two revealing statements by the judge in this regard. First, the judge, although entitled to consider the position of the children in “the real world circumstances” (paragraph 25), had posed the question before the Tribunal as follows: “The ultimate question is whether it is reasonable to expect the child to follow the parent, with no right to remain, to their country of origin” (see paragraph 24). Mr Sadiq submitted that this was not the ultimate question. The ultimate question was what was in the best interests of the children as a primary question. Second, he submitted that

the judge was wrong to have concluded on the basis that “it is generally accepted that the best interests of a child are best served by that child remaining with their parents”, because there was no established rule that this was “generally accepted” in that each case had to be looked on its own specific facts and then a decision reached as to what would be in the children’s best interests.

12. For his part, Mr Bates submitted that this was a case where the judge had throughout been cognisant of the fact that the children’s best interests had to be considered (see paragraph 24 onwards). The judge had applied the relevant case law of **MT** and **ET** (see paragraph 26). He had dutifully followed the latest Supreme Court case of **KO (Nigeria) [2018] UKSC 53** (see paragraph 24) and it was simply incorrect for whoever drafted the grounds of application to suggest that the case of **KO (Nigeria)** was materially different because it involved cases where the parents had committed criminal offences, because of jurisprudence with respect to the position of the children, was not confined to cases where a criminal offence had been committed by the parents.

Error of Law

13. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of TCEA 2007 such that I should set aside the decision and remake the decision. My reasons are as follows.
14. First, this is not a case where the judge has given specific attention to the position of the eldest child, the third Appellant, who was a “qualifying” child, in terms of what would be in his “best interests”.
15. Second, what is in the “best interests” of the children is well set out by the judge himself (at paragraph 18) where he observes “it is clearly the case that the best interests of the children is to remain in the UK, a country in which all were born and one had spent nine years of his life here”, particularly as the school reports of the children are such that: “It is apparent that all of the children have an excellent attendance record and the teachers all speak very highly of them, as individual pupils. It is also apparent that the school records and evidence that the children are well-integrated and are doing well”, and the head teacher had actually said of the eldest child, the third Appellant, that he is ‘a model pupil’. He is polite, kind and caring. He tries very hard with his work and takes part in various sporting activities” (paragraph 18).
16. It has to be recognised that the judge, in so explaining matters in relation to the children also had said that “none of the children are at what can be described as a crucial stage of their education” (paragraph 18). Be that as it may, when it came to a consideration of how the balance of considerations fell to be applied, the judge was wrong to proceed on the basis that “it is generally accepted that the best interests of a child are

best served by that child remaining with their parents” (paragraph 27), when he had already observed (at paragraph 18) that the best interests of the children was to remain in the UK, and especially one of them, namely, the third Appellant, who was a “qualifying child”, but with respect to whom the judge did not give any individuated separate consideration as a child who now had that status.

17. From the premise that the judge adopted, it was then stated that,

“I find that there are powerful reasons why removal is appropriate. The family would be leaving as a unit and therefore would remain together which is clearly in the children’s best interests. Given the school reports and the high regard the teachers hold the children in there is nothing to suggest that with the support of their family, they would be unable to adapt to the child in lifestyle” (paragraph 28).
18. This last observation, in fact, takes what was in the “best interests of the children, namely, to remain in the UK where they were doing very well at school, and to conflate it with the public interest in the removal of the parents, and this proposition has not been made out. It is not made out because the onus is upon the Respondent Secretary of State. This is confirmed by the fact that the Supreme Court decision in **KO (Nigeria) [2018] UKSC 53** concluded that in assessing whether it was “reasonable to expect” a qualifying child such as the Appellants’ children to leave the UK, a court or Tribunal was not to engage in a balancing exercise, weighing the impact upon the child against the public interest. On the other hand, the effect of **KO (Nigeria)** in relation to the proper interpretation of Section 117B(6) of the 2002 Act as set out in paragraphs 17 to 19, is to disprove the Court of Appeal decision in **MA (Pakistan) [2016] EWCA Civ 705**.
19. The position now is in that in assessing whether it is “reasonable to expect” a qualifying child to leave the UK, the focus must be exclusively upon the position of the child, and whereas this has always been the established position to date, the immigration status of a parent may be relevant in assessing “in the real world the impact a parent’s removal may have on child’s ‘best interests’, even though the focus must remain on the position of the child”.
20. What ultimately requires the judge’s attention is the Immigration Directorate Instruction: Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes August 2015. The guidance that is given here is to the effect that:

“The requirement that a non-British citizen child has lived in the UK for a continuous period of at least the seven years immediately preceding the date of the application, recognises that over time children start to put down roots and integrate into life in the UK. ...”.

21. The guidance goes on to say that in these circumstances, where the balance swings more in favour of a child such that it would be generally unreasonable to expect the child to leave the UK, the position is that “Strong reasons would be required in order to refuse a case with continuous UK residence of more than seven years”. The matter, accordingly, ought to have been approached on this basis. Accordingly, the judge fell into error taking the approach that was taken in this case.

Notice of Decision

22. The decision of the First-tier Tribunal amounted to an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Lloyd-Smith, pursuant to practice statement 7.2(b) of the Practice Direction.

23. An anonymity order is made.

24. This appeal is allowed.

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

Date

Deputy Upper Tribunal Judge Juss

12th July 2019