Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21081/2014

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre	**Decision Promulgated**
On 13 October 2015	**On 27 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FUNMILAYO BOLANLE IGBINYEMI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr M Moksud, International Immigration Advisory Services

DECISION AND REASONS

1. The First-tier Tribunal did not direct anonymity of this appeal and there is no reason why it should be anonymised in the Upper Tribunal.

2. The appellant Secretary of State argues that the decision and reasons statement of First-tier Tribunal Judge J S Law, which was promulgated on 6 November 2014, is wrong in law. The two interrelated grounds of appeal can be summarised: (i) the judge failed to have proper regard to the

© CROWN COPYRIGHT 2015

statutory public interest considerations contained in sections 117A-D of the Nationality, Immigration and Asylum Act 2002 (as amended), and (ii) the judge failed to give adequate reasons as to why the best interests of the children outweighed the public interest that should have been considered.

3. Mr Mills reminded me that when deciding whether Judge Law erred in law I could not take into consideration facts that arose after the date of his decision.

4. At the date of decision, neither of Mrs Igbinyemi's two children had lived in the UK for over seven years and neither was a British citizen. As a result, Mrs Igbinyemi could not benefit from the provisions of paragraph EX.1(a) (cc) of appendix FM to the immigration rules because neither of its provisions were met when Judge Law determined the appeal. Despite the clear nature of the applicable immigration rules, at paragraph 10 of his decision, Judge Law came to the conclusion that it would not be reasonable under paragraph EX.1 to expect the two children to leave the UK. Mr Mills suggested such a finding was legally perverse.

5. Mr Mills next submitted that Judge Law had been confined to considering whether Mrs Igbinyemi met the provisions of paragraph EX.1(b) and whether there were insurmountable obstacles to family life with her partner continuing outside the UK yet the judge made no clear findings on this issue. Judge Law recorded that between the Home Office refusal of her application to vary leave and the date of hearing her partner had secured indefinite leave to remain. Mr Mills submitted that at no point has Judge Law explained why this of itself amounted to an insurmountable obstacle or what other insurmountable obstacles existed that prevented Mrs Igbinyemi and her partner continuing their family life overseas.

6. Mr Mills relied on similar arguments in relation to whether Mrs Igbinyemi could have succeeded under the parent route of appendix FM or under paragraph 276ADE. Judge Law looked at paragraph 276ADE in paragraph 17 of his decision and reasons statement but came to no conclusion whatsoever. Instead Judge Law appeared to move directly to consider article 8 outside the immigration rules but in so doing did not have regard to the statutory public interest considerations. The lack of structure made it difficult not only to find any reasoned findings but also left significant doubt as to whether the judge had applied the relevant law.

7. Mr Mills concluded his submissions by arguing that Judge Law's finding that it would not be reasonable to expect the children to go to Nigeria with their mother was not only legally perverse but it was also unsound because he had failed to consider the fact that they had been brought up by parents who are Nigerian and the children would have the help of their parents to integrate into Nigerian society and culture.

8. Mr Moksud relied on his rule 24 response that was submitted on 27 April 2015. The response focused on the fact that the children were now both British citizens and that it was in their best interests to remain in the UK. I

reminded Mr Moksud that when deciding whether Judge Law's had erred in law I could not have regard to new facts. The response also argued that Judge Law's decision was rational and Mr Moksud developed this submission arguing that there was logic to Judge Law's finding that it was not reasonable to expect the children to leave the UK given they were born here and their father had been granted indefinite leave to remain. However, Mr Moksud acknowledged that it was not entirely clear what Judge Law meant when he referred to s.71 and article 8(3) in paragraph 17 of his decision. With regard to the latter reference it was acknowledged that it could be a reference either to article 8(2) or article 3 since the judge was discussing the medical needs of the children at that juncture.

9. Having heard from the representatives and having considered the decision and reasons statement I am in no doubt that it is legally unsound because it is not possible to identify what law the judge was applying or what findings he had made in relation to the applicable law. In other words, I agree with and adopt Mr Mills' exposition of the errors. Because of the nature of the legal errors I can only set Judge Law's decision aside.

10. In order to remake the decision I discussed with Mr Mills and Mr Moksud whether any of Judge Law's factual findings might be preserved. As I indicated at the end of our discussion, I can find no reason to depart from his finding that it would not be reasonable to expect the children to leave the UK, given the additional evidence now available.

11. It was not disputed that by the time of the hearing the children's father was settled in the UK and that they had both been born and brought up in this society. The settlement of their father indicated that one of their parent's long term future was in the UK. Judge Law was also aware of the children's serious medical condition and the fact that they were already accessing treatment in the UK to which they were entitled through their father's immigration status. That remains their situation.

12. Although I accept that Judge Law's finding was premature in that the children did not fall into either category described in paragraph EX.1.(a) (cc), and for that reasons was legally perverse, it is accepted at the date of remaking the decision that the children are both British citizens and the eldest has been in the UK for more than seven years. These facts add to the findings already made regarding whether it would be reasonable to expect the children to leave the UK. It would clearly not be in their best interests to leave and that makes any expectation for them to do so to be unreasonable.

13. Mr Mills accepted that if I were to preserve Judge Law's finding or make my own finding that in all the circumstances it was not reasonable to expect the children to leave the UK, then the appeal must succeed. Because I do make such a finding, I allow the appeal against the original Home Office decision. The appeal is allowed because the appellant meets the provisions under the ten year partner route because the criteria of paragraph EX.1(a) are met.

14. As a result there is no need for me to consider article 8 directly or to consider the statutory public interest considerations because of the provision contained in s.117B(6) of the 2002 Act.

Decision

The decision and reasons statement of Judge Law contains an error on a point of law and is set aside and to this extent the Secretary of State's appeal to the Upper Tribunal is allowed.

In remaking the decision, the original appeal against the Home Office refusal is allowed.

Signed Date

Judge McCarthy
Deputy Judge of the Upper Tribunal