IAC-BH-PMP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/29623/2014
IA/29628/2014
IA/29615/2014
IA/29625/2014
IA/29626/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 July 2015	**On 17 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

BOLANIE MUINAT OLAJADE
ALEX OMOTYOSO AJAYI OLA
ITUNOULUWA OLUWATAMILORE AJAYI DEBORAH
OKFEOLUWA OLUWATOFUNMI AJAYI SHARON
NOEL OKIKIOLUWA AJAYI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms R Akther of Counsel instructed by Owens Solicitors
For the Respondent: Ms E Savage of the Specialist Appeals Team

DECISION AND REASONS

The Appellants

1. The Appellants are citizens of Nigeria. The first two Appellants are the parents of the other three Appellants born in 2005, 2008 and 2009. The first Appellant arrived with leave to enter as a student in 2004 which expired on 31 March 2009. Three days before her leave expired the first Appellant applied for further leave as a student which was rejected for non-payment of fees. A further application out of time was made which was refused. The effect is that since 31 March 2009 the first Appellant has been an overstayer. Her partner arrived in the United Kingdom in 2002. There is no documentary evidence relating to his arrival and it would appear he entered illegally.

2. On 28 March 2012 the first Appellant made an application for leave to remain on the basis of her private and family life with her partner and her children. On 10 June 2013 this was refused with no right of appeal. The first Appellant issued an application for judicial review which was settled on the basis that the Respondent would re-consider her application and if refused, give her an in-country right of appeal.

3. On 9 July 2014 the Respondent refused the application of the first Appellant with her partner and their three children as her dependants. The Respondent in her reasons letter noted the eldest child met the requirements of paragraph 276ADE(iv) of the Immigration Rules but considered the Appellant, her partner and their children could return to Nigeria as a family unit. She went on to consider her duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 and her obligations under Article 8 of the European Convention. She concluded that it was not disproportionate to remove the first Appellant, her partner and their children to Nigeria.

4. The Appellants sought to appeal the decision of 9 July 2014 under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds refer to the Respondent's obligations under Section 55 of the 2009 Act and the Respondent's Code of Practice "Every Child Matters". Reference was made to the best interests of the child and case law cited.

The First-tier Tribunal's Decision

5. By a decision promulgated on 31 March 2015 Judge of the First-tier Tribunal Ruth dismissed the appeals of all the Appellants. They applied for permission to appeal which on 4 June 2015 Judge of the First-tier Tribunal Reid granted on the grounds that it was arguable the Judge had erred in law by not considering whether the Respondent had discharged her duties under Section 55 of the 2009 Act and that his proportionality assessment in his consideration of the Article 8 claim was flawed for lack of reference to the provisions of Sections 117A-D of the 2002 Act. Additionally at the date of the hearing before the Judge two of the children had been in the United Kingdom for more than seven years and he had not taken into

account the length of time the second child had been in the United Kingdom.

The Hearing in the Upper Tribunal

6. The first Appellant and her partner attended. Ms Akther submitted that the Respondent in her reasons letter had failed to take into account her Section 55 of the 2009 Act and in particular her Code of Practice. No copy of the code was produced to the Tribunal. Additionally, he had failed to consider the factors referred to in Section 117B of the 2002 Act and to note that by the time of the hearing before him the two older children had been in the United Kingdom for more than seven years, albeit the second child by only one day.

7. The Judge had failed to take account of the jurisprudence of *Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC).* He had not assessed the reasonableness of requiring the children to return to Nigeria. All of them had been born in the United Kingdom which the Judge had not acknowledged.

8. The Judge had failed to apply the reasonableness test identified in Section 117B(6) of the 2002 Act and to have taken into account that by the date of the hearing the two older children had been in the United Kingdom for more than seven years. He had focused on the requirements of para 276ADE of the Immigration Rules which required the applicant or required the child to have been in the United Kingdom for seven years at the date of application. He had correctly noted that none of the three children met this requirement but had failed to appreciate that by the time of the hearing for purposes of Section 117B two of the children had been in the United Kingdom for seven years or more. The Judge had generally failed to take account of the Code of Practice issued by the respondent in relation to Section 55 of the 2009 Act. The decision contained material errors of law and should be set aside.

9. The Judge had not adequately considered the first Appellant's position and why and how she had become an overstayer, referred to in para 17 of his decision. There was a "*Basnet*" issue which he had not taken into account.

10. In response Ms Savage for the Respondent submitted that the reasons letter had dealt adequately with the Section 55 issue and the Judge had also dealt with it at para 28 of his decision noting that there was no real dispute about the history and circumstances of the Appellants and at paras 53 following when he had considered what were the best interests of the children and that they were a primary consideration. He had taken account at paras 40 and 41 of the length of time the children had been in the United Kingdom and that there was nothing in the decision which was contrary to the learning in *Azimi-Moayed*. The Judge had made a careful

assessment of the children's position and the Respondent's duties under Section 55 of the 2009 Act.

11. It was accepted the Judge had not referred expressly to Section 117B of the 2002 Act but he had considered the length of time the children had been in the United Kingdom and found there was no dispute that the Appellants formed a family unit. At paras 40, 54-62 and 66 of his decision he had taken all relative factors into account in assessing the reasonableness of the Respondent's decision. He had effectively considered all the relevant factors identified in Section 117A-D of the 2002 Act and there was no need for any express reference to the statutory authority: see *Dube (ss.117A-117D) [2015] UKUT 90*. The Judge had considered the reasonableness of return in relation to each of the children.

12. The Judge's findings that the "*Basnet*"point about the rejection of the first Appellant's application for further leave in 2009 could not be criticised on the basis of the little evidence there was before him and that the subsequent application had been refused. If there was any error in this respect it was not material. The decision should stand.

13. In response Ms Akhter re-iterated that the Judge had not considered the Code of Practice "Every Child Matters". He had not dealt with issues arising out of the factors required to be considered by Section 117B and had made no findings that the second child at the date of hearing was a qualifying child for purposes of Section 117B. He had erred in not looking beyond the scope of para 276ADE or taking into account the jurisprudence of *EV (Philippines) and Others v SSHD [2014] EWCA Civ 874*. He had failed to make a reasonableness assessment individually in respect of each of the children and the decision was flawed.

Findings and Consideration

14. I am satisfied that the Judge has taken into account the relevant factors identified in Section 117B. English language was not an issue. There were no details of the first Appellant's partner's earnings, if any. The Judge noted at paragraph 47 the Appellants were reliant on financial support from members of their church. The evidence is that they are not self-sufficient. He took into account the immigration histories of the first Appellant and her partner, giving little weight to them as required by Sections 117B(4) and (5).

15. He had taken into account that at least one of the children was a "qualifying child" within the meaning of Section 117D(1). That he did not expressly deal with the second child whose seventh birthday was the day before the First-tier Tribunal hearing is not of great materiality. The Judge had taken account of the length of time the eldest child had been in the United Kingdom (more than seven years) for purposes of para.276ADE of the Immigration Rules and I find that having done so his failure to distinguish the different date for the relevant assessment of the child's

age for the purposes of para.276ADE and Section 117B is not of great substance. The important point being that he was aware that the eldest child had been in the United Kingdom for more than seven years: see para 55 of his decision.

16. He took into account the difficulties the family and in particular the children would face on removal at paragraphs 57-60 and noted that the best interests of the children were "not a trump card". Further, Section 117B(6) states the public interest does not require a person's removal where the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. That the public interest as a matter of law and policy may not require removal in such circumstances is not the same as the public interest requiring the person and the qualifying child to remain in the United Kingdom effectively as of right. Section 117B simply lists the factors to be taken into account by a Tribunal when assessing a claim under Article 8 and the proportionality of removal. Section 117A(3) explains this in more detail by defining "the public interest question" doing so "by reference to the legitimate public objectives contained in Article 8(2)". The Judge assessed the proportionality of the proposed removal of the Appellants, including the children, at paragraphs 63-66.

17. There was little, if any, evidence about the situation which the Appellants would face on return to Nigeria there was only a short statement from the first Appellant complaining about what had happened to her application for further leave as a student in 2009 and the existence of her three children. There was evidence referred to in paragraph 37 of the Judge's decision that the first Appellant's mother is in Nigeria with whom she is in contact and that her partner has a sister there.

18. The circumstances of the Appellants are very different from those of the Appellants in *JO and Others (Section 55 duty) Nigeria [2014] UKUT 00517 (IAC)*, particularly since the eldest child in *JO and Others* could have met the minimum seven year residence requirement of Appendix FM para.EX1. Additionally there appears to have been considerably more information available about what would have been the family's position on return to their country of origin. The Upper Tribunal stated:

> "... the question of whether the duties imposed by Section 55 have been duly performed in any given case will invariably be an intensely fact-sensitive and contextual one. In the real world of litigation, the tools available to the court or Tribunal considering this question will frequently, as in the present case, be confined to the application or submission made to the SSHD and the ultimate letter of decision ..."

19. I have taken account of what was said in *EV (Philippines) and Others v SSHD [2014] EWA Civ 874* at paragraphs 36 and 37. The latter states:-

> "In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the

fact that, ex-hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

20. While the decision might be criticised for its failure expressly to refer to Section 117B or indeed Section 55, such matters do not amount to material errors of law. The Judge adequately assessed the relevant factors and in particular those relating to the children and found that in all the circumstances it was reasonable to expect them to return with their parents to Nigeria and that such a conclusion was proportionate to the State's need to maintain proper immigration control.

NOTICE OF DECISION

The decision of the First-tier Tribunal did not contain material errors of law such that it should be set aside. Accordingly, it shall stand.

The appeal of the Appellants is dismissed.

No anonymity direction is made.

Signed/Official Crest Date 17. vii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal