Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/31865/2014
IA/31875/2014
IA/31880/2014
IA/31891/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 18 February 2015	**On 12 June 2015**

Before

THE HONOURABLE MRS JUSTICE THIRLWALL DBE
UPPER TRIBUNAL JUDGE PINKERTON

Between

1. H
2. W
3. A
4. B
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Hussain
For the Respondent: Mr I Jarvis

DECISION AND REASONS

1. The appellants are Nigerian citizens. The first appellant, H, 40, is married to the second appellant who is 32. The third and fourth appellants are

their sons A, born 4/2/09 and B born on 16/11/2011. The family live together in Swindon, along with the second appellant's brother, O (dob 18/03/79). This is their appeal against the decision of a judge of the First Tier Tribunal promulgated on 18/11/ 2014 dismissing their appeal against the decision of the Respondent not to grant them leave to remain in the United Kingdom.

2. It is the appellants' case that the judge erred in

   i. failing to acknowledge that the first appellant had a legitimate expectation to receive indefinite leave to remain and

   ii. failing to have regard to the duty in section 117A of the Nationality, Immigration and Asylum Act 2002.

Permission to appeal was granted on both grounds by a judge of the First Tier Tribunal on 12/1/15.

Background

3. We take the chronology from the decision of the FTT judge:

1998	H graduated as a Bachelor of Engineering at a University in Nigeria
25 09 2005	H arrived in the UK with a Student Visa to 31 January 2007, subsequently extended on five occasions to 13 April 2014
22 01 2008	W arrived in the UK as the dependent of H
04 02 2009	A was born in the UK
16 11 2011	B was born in the UK
11 01 2012	H was awarded an MBA in Information Technology at the University of Wales

The application

4. The family applied to remain in the United Kingdom under Article 8 of the European Convention of Human Rights. Their then solicitors submitted that they had established family life here and were integrated into the community. Both H and W had good employment. The family was financially independent. The older child was attending primary school.

5. It was not suggested at that stage (or at any time since then) that the appellants could succeed under the Immigration Rules.

6. However, reliance was placed upon the fact that the older child was "highly myopic".

The refusal

7. In her letter of 24th July 2014 the Respondent considered the applications under the Immigration Rules and concluded, inevitably, that the requirements of the Rules were not met. She then considered whether the applications revealed "exceptional circumstances" which would engage Article 8. She concluded that they did not. The appellants lodged a notice of appeal. Again, it was acknowledged that the appellants could not meet the requirements of the Immigration Rules but said that "there are exceptional circumstances in this case which should be taken into consideration when assessing Article 8". The particular circumstances relied on were the fact that A has "high myopia" and B has speech and language problems which are being treated in the United Kingdom. Ground 4 read "the Home Office… did not go on to consider Article 8 of the ECHR or section 55 of the 2009 Act which is an error of law. The appellant submits that when going through the **Razgar** test, he can maintain his dependence without recourse to public funds and he is not a drain on benefits. The appellant will continue to pay for his dependants if he receives further leave to remain".

8. The first and second appellants were not represented at the First – Tier Tribunal hearing. They gave evidence.

9. Although it was not suggested that the requirements of the Immigration Rules were met the judge, correctly, considered the position under the Rules. He concluded, correctly, that there was no evidence to suggest that these cases came within the Rules. He went on to say (paragraph 27) "having found that the requirements of the Rules are not met, I must ask if there are arguably good grounds, that is to say exceptional circumstances in these cases not sufficiently recognised under the Rules". He considered the medical condition of the 2 children (myopia and "glue ear") and concluded that there was nothing out of the ordinary about the condition of the children and "consequently there are no exceptional circumstances which apply to these cases". Nonetheless he went on to consider Article 8. He accepted that the appellants had family life in the United Kingdom. He accepted that removal to Nigeria would interfere with it. He took into account that the first appellant came to the United Kingdom with temporary leave for the express purpose of study. That purpose had been fulfilled and he has gained a valuable qualification which he could use in his home country. The judge then said "he has never had a legitimate expectation that he and the family can remain here indefinitely. Leave had at all times been temporary and conditional". He concluded having made certain other findings that Article 8 was not engaged and he was therefore bound to dismiss the appeal.

The appeal

Legitimate expectation

10. The grounds referred at length to a number of cases which deal with the doctrine of legitimate expectation. Most recently, in an Immigration context, in **Mehmood v Secretary of State for the Home Department**

[2014] UKUT 00469 (IAC) McCloskey J, President of the Upper Tribunal (Immigration and Asylum Chamber) conducted a magisterial review of the relevant authorities, beginning with **R v North and East Devon Health Authority, *ex parte* Coughlan** [2001] QB 213. He concludes (paragraph 18) that "the first question in every case of this *genre* is whether the public authority concerned made an unambiguous representation, promise or assurance devoid of any relevant qualification." We agree. The first appellant cannot begin to establish such a representation, promise or assurance here. He could not have had a legitimate expectation that he would be granted indefinite leave to remain. Indeed, until the phrase appeared in the FTT decision it was never suggested that he had a legitimate expectation. There was good reason for that. Pararaph 4 of the grounds reads "the first appellant arrived in the UK as a student. At that time the Home Office policy was that one who "clocked" up to ten years lawful leave would be entitled to indefinite leave to remain". We accept that. We accept that the appellant hoped that he would be able to stay in the UK for ten years and then would be allowed to stay thereafter. We would be prepared to accept that he did not expect the Home Office policy to change and planned his life accordingly but none of that comes anywhere near answering the first question in the affirmative. The fact is that the appellant was in the UK on a student visa throughout. There is simply no basis for the assertion that "when he left Nigeria he had a legitimate expectation to receive ILR after 10 years". This ground is unarguable. We turn to Ground 2.

Failure to Consider section 117A

11. Section 19 of the Immigration Act 2014 inserted a new Part 5A into the Nationality, Immigration and Asylum Act 2002. Section 117A provides that Part 5A "applies where a court or tribunal is required to determine whether a decision made under the Immigration Act breaches a person's right to respect for private and family life under Article 8". Part 5A came into force in July 2014, some 4 months before the hearing before the FTT. The judge failed to refer to section 117A or indeed Part 5A at all.

12. So far as material Part 5A provides as follows

> "PART 5A Article 8 of the ECHR: public interest considerations
>
> 117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and

> …
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> 117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> …

117C is not relevant. There is no need to refer to the interpretation provisions.

13. On behalf of the appellants Ms Hussain submitted that Section 117A(2) required the FTT, when considering the public interest question, (ie whether an interference with a person's right to respect for private and family life is justified under Article 8(2), to have regard to the relevant considerations in 117B. We agree. She put particular emphasis on the public interest matters at 117B (2) and (3), set out above. There is no need for us to repeat them. It is the case that the appellants speak English and are both in secure employment. It follows that they are not a burden on taxpayers. But Ms Hussain submitted, in accordance with paragraph 8 of the grounds, that in those circumstances the public interest considerations in this case were all one way "..[T]hose who speak English and are financially independent arguably have a stronger case under part 5A than they would have done before. Further, in any case where there is *no* public interest in removal of the applicant should therefore *always* succeed because, in a proportionality balancing exercise,

one side of the scales is stated by Act of Parliament to be empty (sic)." This is not entirely easy to follow. 117B sets out the Article 8 public interest considerations applicable in all cases. The first of these at (1) is the public interest in the maintenance of effective immigration controls. That is in the balance from the outset in all cases. Whilst we can accept that a person who speaks English and is financially independent is in a better position than someone who does neither, we cannot accept that the effect of subparagraphs (2) and (3) is somehow to give to a person who cannot succeed within the rules an automatic route to success outside the rules.

14. The submission also overlooks the provisions of subsection 117B (5) ie that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. This is different from the position under subsection (4) which is concerned with the weight to be given to private life or a relationship formed with a qualifying partner "that is established by a person at a time when the person in the United Kingdom unlawfully". Whilst as a matter of ordinary language the status of a person who is in the UK unlawfully may be said to be precarious, the word precarious does not necessarily connote unlawfulness. On the contrary it often does not. We are quite satisfied that the appellants who have relied throughout on temporary visas, have always had a precarious immigration status. It is inescapable that the private life of all four appellants has been developed at a time when their immigration status is precarious. We are reinforced in our view by the decision in **AM (anonymity Direction) v Secretary of State for the Home Department (CMG Ockleton, VP, Deputy Upper Tribunal Judge Holmes) [2015 UKUT] 0260 (IAC)** who considered the same question very recently "In our judgment all those who have been granted by the respondent a defined period of leave to enter the UK, or to remain in the UK …hold during the currency of that leave, an immigration status that is lawful, albeit "precarious". And at paragraph 32 "To put the matter shortly, it appears to us that a person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave. It is precisely because such a person has no indefinite right to be in the country that the relationships they form ought to be considered in the light of the potential need to leave the country should the grant of leave not be forthcoming."

15. It is against that background that we consider the FTT judge's approach to Article 8. We recorded above that at paragraph 27, having found that the requirements of the rules were not met, the judge asked himself whether there were "arguably good grounds, that is to say exceptional circumstances in these cases not sufficiently recognised under the Rules". In so far as he was referring to a gateway or threshold test of arguability he was relying, we think, on part of paragraph 29 of **R(on the application of) Nagre v SSHD [2013] EWHC 720.** However, in **MM (Lebanon) [2014] EWCA Civ. 985 t**he Court of Appeal found that "there was not much utility" in a preliminary or threshold stage (of an arguable case) before an Article 8 claim could be considered outside the rules. That said,

it is not apparent that the judge applied a threshold test in any event. He did consider whether there were exceptional circumstances. No complaint is made about that approach of itself. Since the hearing the Court of Appeal have considered the question of exceptional circumstances again in **SS (Congo) and others [2015] EWCA Civ 387** . At paragraph 33 the judgment of the Court reads "… it is accurate to say that the general position outside the sorts of special contexts referred to above [which do not exist here] is that compelling circumstances would need to be identified to support a claim for grant of Leave to Remain outside the new Rules in Appendix FM. In our view that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in **MF (Nigeria)** in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focussed consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in **Nagre** at paragraph 29, which has been tested and has survived scrutiny in this court, see eg **Haleemudeen [2014] EWCA Civ.558** at [44], per Beatson LJ". We assume that is a reference to the second half of paragraph 29 in **Nagre** namely the consideration of whether "there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave".

16. We do not think the fact that the judge was looking for "exceptional circumstances" rather than considering whether there were "compelling circumstances (not sufficiently recognised under the rules)" could have made any difference to his conclusions on the facts of this case. The judge accepted, without hesitation that the appellants enjoyed family life in the United Kingdom. He accepted that A suffers from severe myopia and B has glue ear but he concluded, correctly in our judgment and certainly not arguably wrongly, that those conditions were not sufficient, as has been submitted to him, to constitute exceptional (and we would add) or compelling circumstances. The facts taken at their highest did not, in our judgment, even arguably constitute compelling circumstances (not sufficiently recognised under the rules).

17. In any event, having come to the conclusion that there were no exceptional circumstances the judge went on to consider the position under Article 8. He concluded that the interference with the appellants' family life was not of such gravity to engage Article 8, given that family life would continue in Nigeria where they would also have the benefit of contact with their extended family. He did not deal explicitly with their right to respect for their private life but it is implicit from paragraph 30 that he considered that employment, education and healthcare would all be available in Nigeria and so, it follows, that there was no (or only minimal) infringement of the right to respect for private life protected by Article 8. Had the judge found that Article 8 was engaged he would have been bound to find the infringement proportionate to the legitimate aim of maintaining an effective system of immigration control.

18. Whilst it was a plain error of law not to consider Section 117 we are satisfied that on the facts of this case it would have made no difference. We have reviewed all of the evidence the judge saw and heard. There is no doubt that the family enjoy family life in the United Kingdom. They are to be removed to Nigeria as a family. Whilst that will involve disruption to them it will not affect their family life. W's brother lives with the family. He is an adult and is now a British citizen. He does not wish to leave the UK. He has some mental health difficulties but those difficulties do not lead to the balance being weighed more heavily against removal. As to their private life both parents have settled, good employment, as the judge acknowledged. The evidence shows a circle of friends. They will make friends in Nigeria. The children are settled at school and are happy there but they can go to school in Nigeria. They have some medical needs which can be met in Nigeria.

Section 55 of the Borders Citizenship and Immigration Act 2009

19. Independently of the requirements of part 5A of the 2002 Act the FTT judge was required by section 55 of the 2009 Act to consider the circumstances of the children of the family. Although he did not specifically refer to the provision it is plain that he gave appropriate consideration to the children's circumstances, as had the Secretary of State before him. The absence of a reference to section 55(1) is not fatal to a decision. What matters is the substance of the consideration of the wellbeing of the child. It was no doubt for that reason that no complaint was made in the grounds of appeal or at the hearing before us about the absence of any reference to the provision. It is not necessary to repeat the findings we have already made in respect of the children's education, social, health and other needs. In the circumstances of this case it is plain that the best interests of these two young children are served by their being with their parents who care for them and promote their welfare in every possible way.

20. Notwithstanding the errors of law in this case we cannot see that any other outcome was possible than that the appeals to the FTT would fail.

21. Accordingly the decision of the First-Tier judge to dismiss these appeals is upheld.

22. The direction previously given granting anonymity continues unless or until a tribunal or court directs otherwise.

Signed: Date: 9 June 2015

The Honourable Mrs Justice Thirlwall DBE