Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/37311/2014**
IA/37313/2014

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly **Decision and Reasons Promulgated**
On 15 July 2015 **On 28 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

TITILAYO BELLO
KOREDE SAMUEL BELLO
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Nicholson counsel instructed by GMIAU
For the Respondent: Ms C Johnson Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This

is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Bruce promulgated on 16 December 2014 which allowed the Appellants appeal and held that it was disproportionate and unlawful under Article 8 of the European Convention on Human Rights to remove them to Nigeria.

Background

3. The Appellants are a mother and son born on 5 June 1964 and 5 February 2007 respectively. They are nationals of Nigeria but the second Appellant was born in the UK and had at the date of the Judges decision lived in the United Kingdom for 7 years and 10 months.

4. The first Appellant came to the UK in October 2003 with a two year multiple entry visa but never returned to Nigeria.

5. On 4 July 2012 the Appellants made applications to be given leave to remain in the United Kingdom on the grounds that they had established private lives in the United Kingdom.

6. On 24 January 2013 the Respondent refused the decisions but refused to make appealable decisions. The Appellant launched judicial review proceedings which were settled by consent on 15 April 2014 with the Respondent agreeing to make a removal decision which gave rights of appeal before the First-tier Tribunal and that decision was made on 4 September 2014..

7. The refusal letter gave a number of reasons for the refusal:

(a) The first Appellant did not meet the requirements of the parent route.

(b) The first Appellant did not meet the private life requirements of paragraph 276ADE in view of the length of time she had lived in the United Kingdom and the fact that it was not accepted that she had lost all ties to Nigeria.

(c) The second Appellant could not meet the requirements of the child route because his mother had not been granted leave under FM.

(d) He could not meet the private life requirements because at the time of the application he had not lived in the United Kingdom for at least 7 years.

(e) There were no exceptional circumstances in relation to either Appellant.

(f) S 55 of the Borders Citizenship and Immigration Act 2009 was taken into account.

(g) Paragraph 353B was also considered.

The Judge's Decision

8. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Bruce ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found :

(a) The new Rules introduced in July 2012 codified where the government considered that the balance should be struck when weighing the rights of the individual against the rights of the state.

(b) The refusal letter was wrong to apply a test of exceptionality to a grant of leave outside the Rules the question was simply whether the decision is a disproportionate and therefore unlawful interference with the applicants' Article 8 rights.

(c) The applications were made before Article 8 was codified into the Immigration Rules and the Rules were not therefore directly applicable however while viewing it as a hypothetical exercise it was a reminder of where the balance is to be struck when considering claims in respect of private life.

(d) She determined that the correct approach to the applications was to consider Samuels best interests as a primary consideration and therefore she considered his position before that of his mother.

(e) Samuel could not succeed under Appendix FM because his mother did not have leave under Appendix FM.

(f) The Judge considered 276ADE on the basis the application being made as of the date of hearing.

(g) The Judge asserted that she was obliged to consider whether Samuel had lived in the United Kingdom for 7 years and whether it would not be reasonable for him to leave the United Kingdom.

(h) The Judge then considered how the development of the qualifying period of residence of 7 years.

(i) She referred to the Respondent's Immigration Directorate Instructions guidance in determining whether removal is reasonable which referes to teh requirement for 'strong reasons' and those factors identified as possible strong reasons.

(j) She then examined Samuel's situation in relation to his education.

(k) She then examined the social and economic circumstances of the first Appellant in the United Kingdom and Nigeria. She did not accept that the frist Appellant had been truthful in her assertion that she lived a hand to mouth existence in Nigeria or that she and the first Appellant would be destitute if they returned.

(l) The Judge did not accept that she was truthful about her circumstances in the United Kingdom and found her evidence that she had not worked in the United Kingdom was unreliable.

(m) She concluded that those who had helped the Appellant in the United Kingdom could help her on her return to Nigeria.

(n) She took into account in relation to the public interest those factors set out in s117B of the Nationality Immigration and Asylum Act 2002 as amended and in relation to s117B (1)-(5) she found that none weighed heavily in the Appellant's favour.

(o) However she then considered s117B(6) and found that the first Appellant had a relationship with a qualifying child and it would not be reasonable to expect that child to leave the United Kingdom.

(p) She found that given the second Appellant would at the date of the decision have met the requirements of paragraph 276ADE(1) (iv) the Respondent could not show that removal was proportionate.

(q) She then considered the position of the adult Appellant and found that she met the requirements of EX.1 if she had applied at the date of hearing and therefore the Respondent could not show that her removal was proportionate.

(r) She allowed the appeals under Article 8.

9. Grounds of appeal were lodged arguing :

(a) The Judge misdirected herself as to the appropriate test to apply under Article 8 outside the Rules.

(b) The Judge was wrong to find that Appendix FM was not directly applicable.

(c) The Judge misdirected herself on the law as it applied to the removal of children and should have applied the guidance in EV (Philippines) and Others [2014] EWCA Civ 874

(d) The Judge misdirected herself in relation to s 117B(vi) in that it did not say that the public interest was defeated in the circumstances proscribed but that the public interest did not require removal. S11B(vi) was not determinative of the issue of proportionality.

10. On 9 February 2015 First-tier Tribunal Judge Hollingworth gave permission to appeal.

11. At the hearing I heard submissions from Ms Johnson on behalf of the Appellant that :

(a) She conceded that any error made in relation to ground 1 or 2 of the grounds of appeal was not material to the outcome and she only intended to pursue ground 3.

(b) The Judge had not made clear findings as to what would await the Appellants on return to Nigeria and this was material to the outcome of her decision.

(c) She reiterated that the Judge had apparently treated s 117B(vi) as determinative of the outcome of the case and was in error in that.

12. On behalf of the Respondent Mr Nicholson submitted that :

(a) The Respondent was merely trying to re argue the merits of the case.

(b) The Grounds of Appeal sought to rely on EV but that was distinguishable from this case in that the child in that case had lived in the United Kingdom for less than 5 years. In this case the best interest of the child was to remain in the United Kingdom.

(c) The Judge did not in relation to paragraph 117B(vi) say that the public interest was defeated by the applicability of this provision. She used that provision together with what was said in the IDIs to assist in determining what was reasonable in relation to the removal of the child.

(d) The Judge had considered every positive and negative factor in determining the position of the child and reached a conclusion that was open to her.

Finding on Material Error

13. Having heard those submissions I reached the conclusion that the Tribunal made no errors of law of law that were material to the outcome of the decision.

14. The approach adopted in the refusal letter was, although the applications were made prior to the change in the Immigration Rules on 9 July 2012, to consider the applications by reference to Appendix FM and paragraph 276ADE. This approach has since been confirmed in paragraph 56 of Singh and Khaled [2015] EWCA Civ 7 as the correct approach which confirmed at paragraph 56

> "(1) When HC 194 first came into force on 9 July 2012, the Secretary of State was not entitled to take into account the provisions of the new Rules (either directly or by treating them as a statement of her current policy) when making decisions on private or family life applications made prior to that date but not yet decided. That is because, as decided in Edgehill, "the implementation provision" set out at para. 7 above displaces the usual Odelola principle.
>
> (2) But that position was altered by HC 565 – specifically by the introduction of the new paragraph A277C – with effect from 6 September 2012. As from that date the Secretary of State was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE–276DH in deciding private or family life applications even if they were made prior to 9 July 2012. The result is that the law as it was held to be in Edgehill only obtained as regards decisions taken in the two-month window between 9 July and 6 September 2012."

15. Thus the Judge was in error in suggesting that the new Rules were not directly applicable in this case as the decision was made after the narrow window of 9 July -6 September 2012 identified in Singh.

16. However Ms Johnson rightly conceded that this error was not material to the outcome of the decision given that the Appellant could not have met paragraph 276ADE(1) (iv) or EX.1 as both required the calculation of the period of residence to be made by reference to a period of 7 years prior to the date of application which the child in this case did not meet at that time.

17. The Judge allowed this appeal under Article 8 outside the Rules and was obliged to assess the Appellants circumstances as at the date of the decision. The grounds do not appear to me to identify any factor in relation to the circumstances of either of the Appellants that the Judge failed to take into account in her lengthy and detailed analysis of their circumstances but appears to disagree with the weight that the Judge has attached to those factors. Weight is of course a matter for the Judge.

18. I am satisfied that in determining whether the decision to remove the child was proportionate at the date of the hearing the Judge used the new Rules to assist her in assessing proportionality given that those Rules were a codification of where the Government considered the balance should be struck when weighing the rights of the individual against the rights of the state (paragraph 6). She also took into account at paragraph 9 the Respondent's own Guidance in the Immigration Directorate Instructions that '*strong reasons will be required in order to refuse a case with continuous United Kingdom residence of more than 7 years'*. As Mr Nicholson rightly pointed out in this case, unlike EV, the child Appellant had at the time of the hearing accrued in excess of 7 years residence.

19. The Judge herself examined in detail the child's circumstances in paragraphs 11-14. She examined the circumstances of the mother and the child in the UK and Nigeria in 15-17. She then took into account the provisions of s117B of the Nationality Immigration and Asylum Act 2002 in paragraph 19 identifying that the question of

whether it is reasonable to remove a child must be determined without reference to the public interest factors set out at 117B(1)-(5).Nowhere did she suggest that s 117B(1) (vi) was determinative of the issue it was one of the factors that she took into account when the decision is read as a whole. At paragraph 20 she concluded that in the light of her factual findings and the history of the rule, the jurisprudence and the IDIs that none of the facts underpinning the case amounted to "serious reasons" (given the inverted commas I am satisfied this was a typographical error in that she was referring to the IDIs) to remove him from the United Kingdom. Nowhere in the refusal letter or in the decision can I identify what factors or circumstances were advanced by the Respondent in this case as a strong reason to remove the child given his length of residence. The Judge was entitled to conclude that the first Appellant's poor immigration history could not be held against him and to conclude that had an application been made at the date of hearing the second Appellant would have succeeded under paragraph 276ADE9iv) and therefore ask herself could the decision to remove be proportionate.

20. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1): "*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge."*

21. I was therefore satisfied that the Judge's determination in relation to Article 8 when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

22. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

23. **The appeal is dismissed.**

Signed Date 27.7.2015

Deputy Upper Tribunal Judge Birrell