



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/44367/2014  
IA/44370/2014  
IA/44371/2014  
IA/44378/2014  
IA/44380/2014  
IA/44383/2014

THE IMMIGRATION ACTS

Heard at Field House, London  
On the 23<sup>rd</sup> November 2015

Decision & Reasons Promulgated  
On 17<sup>th</sup> December 2015

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

(1) NYA  
(2) BH  
(3) KSA  
(4) KEA  
(5) FA  
(6) LJ

~~(Anonymity Direction not made)~~

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss Atcha (Solicitor)

For the Respondent: Mr Bramble (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant [NYA] had applied for Leave to Remain in the United Kingdom on the basis of his family and private life under Appendix FM of

the Immigration Rules, but his application had originally been refused by the Respondent in a decision dated the 23<sup>rd</sup> October 2014. The other Appellants are dependents of [NYA], and were treated as dependents on his claim.

2. [NYA] sought to appeal against the Respondent's decision, and that appeal came before First-tier Tribunal Judge Lagunju on the 25<sup>th</sup> February 2015, with a decision promulgated on the 24<sup>th</sup> April 2014 in which he allowed the appeal on Article 8 grounds outside of the Immigration Rules in respect of the First Appellant, [NYA] and his 5 dependents. The Respondent sought to appeal that decision to the Upper Tribunal, and the Error of Law hearing was heard by Deputy Judge of the Upper Tribunal Symes on the 16<sup>th</sup> October 2015.
3. Deputy Judge of the Upper Tribunal Symes found that the Respondent's grounds of appeal against the First-tier Tribunal Judge's decision were made out and the decision of First-tier Tribunal Judge Lagunju was fairly scant in its reasoning and that there was no acknowledgement that two of the children were aged 7 years old and that the children's interest was essentially treated as a trump card, without sufficient regard to the adverse immigration history and precarious situation of both parents. It was further found that the First-tier Tribunal had relied upon findings that the children had "friends, education and activities here" to contrast with what the First-tier Tribunal Judge found would be "upheaval and possible negative effects [following] removal to an entirely different culture and country" which was said to be motivated by wholly oral evidence and unrecorded in the written decision. Deputy Judge of the Upper Tribunal Symes therefore simply gave directions that the Appellant may produce further witness statements of documentary evidence and the Respondent may produce further documentary evidence, such material to be provided within 14 days.
4. It was on that basis that the case came before me today. Miss Atcha on behalf of the First Appellant and his dependents informed me that she had faxed through to the Tribunal last week a further bundle of documents for use at the hearing, being in excess of 140 pages. Although this largely replicated the bundle before the First-tier Tribunal Judge, it now was said that it also contained a significant amount of further evidence. However, sadly, that bundle had not reached the file before me, although it had been served upon and received by the Respondent.
5. Mr Bramble on behalf of the Respondent indicated that the expectation had been that the case would have been retained by Deputy Judge of the Upper Tribunal Symes, although I noted and pointed out to the parties that Judge Symes had indicated that the case could be heard by any Judge in his note on the file. However, Mr Bramble indicated that at

the time when the case had been discussed before Judge Symes, at that stage he was not aware what he was going to write in his error of law decision and that the decision by Judge Symes was very brief and had not mentioned within it what further approach should be taken, although there had been discussions about this at the original hearing. However, Mr Bramble accepted given the findings in Judge Symes' decision regarding the reasoning of the First-tier Tribunal Judge been very scant and the findings regarding the children having friends, education and activities here, such as to outweigh the public interest in removal and the upheaval and negative effectives of removal, that as Judge Symes indicated that these findings had been made wholly based upon oral evidence unrecorded in the written decision, that in effect a complete rehearing, *de novo*, would be required in order to determine the proportionality issue in respect of Article 8 and it would be appropriate in such circumstances, as the case was now proceeding before a different Judge, for the case to be remitted back to the First-tier Tribunal for a *de novo* hearing rather than for me to conduct a substantive rehearing of the Article 8 issue in the Upper Tribunal.

6. Miss Atcha on behalf of the Appellant and his dependents agreed and argued that in order to give a fair hearing and a *de novo* hearing in the First-tier Tribunal was now required given the findings of Deputy Upper Tribunal Judge Symes and that the case should be remitted back to the First-tier Tribunal.
7. I agree with that submission and find that it is in the interests of justice in this case for the case to be remitted back to the First-tier Tribunal to be reheard *de novo* before any Judge other than First-tier Tribunal Judge Lagunju. Given Deputy Upper Tribunal Judge Symes' findings regarding the lack of reasoning and there were findings made upon oral evidence which was unrecorded in the written decision, I agree that it would be necessary to conduct a complete new hearing of the appeal which would involve considerable fact-finding and a reassessment of the credibility of the Appellant and his dependents and the effect that removal would have upon them.
8. This is not a case where there can be preserved findings of fact, given the brief decision of Deputy Upper Tribunal Judge Symes in the original Upper Tribunal decision. It would not be in the interests of justice to seek to rehear the case in its entirety in the Upper Tribunal, as any appeal from such findings that I make would lie solely to the Court of Appeal, rather than an appeal to the Upper Tribunal, were the decision made at the First-tier level. It is in the interest of justice that the appeal be remitted back to the First-tier Tribunal where the appeal of the Appellant and his dependants can be properly determined afresh and a *de novo* hearing undertaken in respect of all issues, at First-tier Tribunal level.

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9. Further, given that the bundle which Miss Atcha says that she faxed through on the 18<sup>th</sup> November 2015 has not reached the file, I have directed the Appellant to file a further copy of the bundle sought to be relied upon no later than 14 days before the date of any case management hearing or substantive hearing, whichever is the earlier, at the First-tier Tribunal.

#### Notice of Decision

A material error of law having been found in the decision by Deputy Judge of the Upper Tribunal Symes on the 16<sup>th</sup> October 2015, the appeal is remitted back to the First-tier Tribunal for hearing *de novo*.

The Appellant to refile the further bundle of documents and statements said to have been faxed to the Tribunal on the 18<sup>th</sup> November 2015, within 7 days of any case management hearing or further substantive hearing at the First-tier Tribunal, whichever date is the earlier.

Signed

Dated 23<sup>rd</sup> November 2015



Deputy Judge of the Upper Tribunal McGinty