



IAC-TH-WYL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/15542/2014
IA/15546/2014
IA/15551/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 23 March 2016**

**Decision & Reasons Promulgated
On 12 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

**AA - FIRST APPELLANT
BB - SECOND APPELLANT
CC- THIRD APPELLANT
(ANONYMITY ORDER MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss C Charton, Legal Representative
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. An anonymity has not been made hitherto in these proceedings. However, in light of the age of the third appellant such an order is now made.

2. The appellants are citizens of Nigeria. The first appellant and second appellant are partners and parents of the third appellant who was born in the United Kingdom on 19 October 2010 and has Down's syndrome.
3. They appealed against a decision of the respondent dated 19 February 2014 refusing to vary their leave to remain in the United Kingdom and against the decisions to remove them by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.
4. The appellants appealed that decision and a hearing took place on 6 November 2014 before Judge of the First-tier Tribunal Callow. At that hearing evidence was heard and submissions made and the judge, at its conclusion, reserved his decision. However, on 19 December 2014 he issued directions in the following terms:-

"Background

1. AA (the first appellant) and BB (the second appellant) are partners. They are the parents of CC (the third appellant).
2. The appellants' appeals were heard by me at Taylor House on 6 November 2014. At the conclusion of the hearing I reserved my decision.
3. Subsequent to the hearing of the appeals and prior to finalising my decision for promulgation it is in my opinion in the interests of justice for the hearing of the appeals to be re-opened. At the hearing:
 - (a) Reference was made to certain JR proceedings and in respect of which a limited number of incomplete documents were filed;
 - (b) Reliance was placed on the respondent's '*Guidance - Specified application forms and procedures - version 11.1*' and a subsequent version (paras 6, 12 & 16 of the grounds of appeal);
 - (c) Reference was made to the respondent's policy on '*Discretionary Leave*' (paras 12 & 30 of the first appellant's witness statement);
 - (d) Reliance was placed on the decision of *R (SM) [2012] EWHC 1144 (Admin)*; *[2013] WLR (D) 169*;
 - (e) Since the hearing of the appeals I am aware of the decision in *R (A) [2014] EWCA Civ 1334*; *[2014] WLR (D) 435*; and
 - (f) In the alternative reliance was placed Article 3 and 8 (Health).

DIRECTIONS

- A. An adjourned notice of hearing is to be issued listing the appeal to be heard on Monday 26 January 2015 at Taylor House at 10am.
- B. The appellants must file and serve a supplementary bundle of documents five days before the date of the resumed hearing of the appeals inclusive of:
 - (a) A copy of the Upper Tribunal's determination dismissing the appellants' JR application;

- (b) As at the applicable dates copies of all relevant versions of the respondent's '*Guidance – Specified application forms and procedures*' and '*Guidance – Discretionary Leave*' issued between January 2011 and February 2014.
- C. The appellants are not required to attend the hearing, but are free to do so should they wish.
- D. For reasons of continuity the respondent is requested to instruct Mr Bose to represent the respondent. (Should he not be available, the matter must nonetheless proceed to be heard).
- E. The representatives instructed to appear must be in a position to address the significance and weight to be attached to the said Guidance, the decision of *R (A)* and as to Article 3 & 8 (Health) the cases of *GS and EO (Article 3 – Health Cases) India [2012] UKUT 397 (IAC)* and *Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC)* and any other relevant decisions.

J J Callow

Judge of the First-tier Tribunal"

5. The appeal hearing was therefore resumed on 26 January 2015.
6. Thereafter in a decision promulgated on 28 May 2015 the appellants' appeals were dismissed on Article 8 grounds. The judge found at paragraph 20 of his decision that the respondent erred in law in considering the provisions of Appendix FM and paragraph 276ADE.
7. The appellants sought permission to appeal which was granted by Upper Tribunal Judge Warr. His reasons for so doing are dated 2 October 2015 and state:-

"The determination is a very lengthy and careful one. The full hearing took place in November and the decision was reserved. However the judge reopened matters, gave directions on 19 December 2014 and the hearing resumed on 26 January 2015 and the determination issued on 28 May 2015.

The appellants appear to be arguing that the judge erred in requiring the appellants to adduce evidence of the respondent's policies in the particular circumstances of the case.

The case is an unusual one and was plainly given careful scrutiny and it is no doubt in that context that the apparent delay between the initial hearing and the date of the determination needs to be considered.

There is potential scope for argument raised by the grounds in respect of the procedures adopted in this case. I do not limit the arguments to this aspect of the case however. All the grounds of appeal may be argued.

The expectations of the appellants should not be raised unduly by the grant of permission since, as First-tier Judge Davies observed, the determination is composed "with great care and precision"."

8. Thus the appeal came before me today.

9. Miss Charton relied on the grounds seeking permission to appeal. They are firstly that the judge failed to give any consideration to the fact that the respondent had repeatedly compromised the position of the appellants and that this is against natural justice (delay), that the respondent failed to make a lawful decision and applied the wrong Rules and policies in place at the time of the application, that the judge erred (in fact, law and procedure) by failing to apply the correct test to ascertain whether the appellants' claims can succeed under Article 8, and that he failed to consider and have proper regard to the third appellant and his best interests. Miss Charton emphasised that in considering Article 8 the judge had failed to take account of the delay caused by the respondent's handling of the application and to apply relevant case law thereto.
10. Mr Melvin submitted that Judge Callow directed himself appropriately and that his decision contained a comprehensive and detailed analysis of the position of all three appellants and particularly that of the third appellant and his medical condition. The judge was entitled to come to the conclusions that he did at paragraph 31 of his decision and that it had not been established that in all the circumstances there was any exceptionality involved in the third appellant being returned to Nigeria and that the circumstances found did not meet the high threshold under Article 3.
11. Judge Warr granted permission to appeal on the basis of the "procedures adopted in this case" but did not limit the arguments to that particular aspect and accordingly all grounds were before me.
12. The nub of the first ground is that the judge failed to give sufficient weight to delays experienced by the appellants through no fault of their own. On any plain reading of the decision that is not the case. The judge has set his conclusions into the context of the findings that he has made regarding the history of these appellants' applications to the respondent. The judge's directions for the filing of additional evidence do not prejudice the appellants. If anything they afforded the appellants a further opportunity to pursue their case.
13. The second ground is flawed. It submits that the respondent should have made her decision under the "old style" Article 8 principles and policies in existence at the time of the application. The respondent's decision is dated 19 February 2014 and does not fall within the window between 9 July and 6 September 2012 and accordingly there is no error in the way the application, let alone the appeal, was approached.
14. The third ground maintains that the judge failed to properly assess this case "and the respondent's behaviour throughout" by failing to take into account the delay caused by the respondent in processing the appellants' applications and the principles within the authority of EB (Kosovo) v SSHD [2008] UKHL 4. Again, on any plain reading of this decision that is simply not the case. The judge has come to the conclusions that he did acknowledging the full history of the appellants' applications and appeal.

15. Finally, it is suggested that the judge has erred in his approach to the best interests of the third appellant with particular reference to background evidence regarding children with Down's syndrome in Nigeria. It is suggested that the judge has failed to apply "anxious scrutiny". Again on any plain reading of this decision this ground can quite simply not be sustained. It is a decision which extends to 22 pages where the judge has with great care and precision analysed all the evidence and made findings based on it. He has taken into account the totality of the appellants' history of dealings with the respondent including that of delay. There is a clear balancing exercise in relation to Article 8 and all the grounds are in fact no more than a disagreement with findings which have been properly made and which are legally adequate.
16. Whilst I recognise what is said in the reasons given by Upper Tribunal Judge Warr regarding the apparent delay between the initial hearing and the date of decision this was not an issue of any emphasis in the submissions of Miss Charton. In any event whilst there is a delay by reason of the hearing being concluded on 26 January 2015 and the decision not promulgated until 28 May 2015 there is nothing to suggest that this is anything other than a thorough, careful and compassionate analysis of the totality of the issues that Judge Callow faced. There is no material before me to suggest that any of the three appellants have been prejudiced by this delay. The judge has given cogent and sustainable reasons for the decision that he has come to and the grounds amount to no more than a disagreement with that decision without identifying any material error of law whatsoever.

Conclusions

17. The remaking of the decision of the First-tier Tribunal did not involve the making of an error of law.
18. I do not set aside the decision.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 30 March 2016.

Deputy Upper Tribunal Judge Appleyard