Upper Tribunal
(Immigration and Asylum Chamber)
Appeal Number:
IA325862014

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 26th January 2016	**On: 8th June 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Michael Olugbenga Akinola
(no anonymity direction made)

Respondent

For the Appellant: Ms Willocks-Briscoe, Senior Home Office Presenting Officer
For the Respondent: Mr AO Ogundero, Counsel instructed by Supreme Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Nigeria date of birth 11th July 1962. On the 31st July 2015 the First-tier Tribunal (Judge I. Malcolm) allowed his appeal against a decision to remove him from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999. The Secretary of State now has permission to appeal against the First-tier Tribunal's decision[1].

Background and Matters in Issue

[1] Permission granted by First-tier Tribunal JM Holmes on the 2nd December 2015

2. It would appear that the Respondent arrived in the United Kingdom sometime in 2006. His stay to date has all been unlawful.

3. In May 2013 the Respondent made an application for leave to remain on the grounds that he had a family life in the UK. At that stage this consisted of his relationship with his wife, Mrs Beatrice Akinola and their children C1 born in December 2003 and C2 born in February 2005. It is accepted that they entered the UK in 2006.

4. The Secretary of State refused the application on the 18th June 2013. As the applicants had no leave at the date of their application, this decision did not attract a right of appeal. Judicial review proceedings were launched which resulted in a consent order to the effect that the matter would be reconsidered, and if no leave was granted, the applicants would be granted an in-country right of appeal. Some time after this Mrs Akinola and the children were granted discretionary leave to remain. This is due to expire in 2017.

5. On the 5th August 2014 the Secretary of State refused to grant the Respondent leave. Applying first the provisions in Appendix FM it was concluded that the application could not succeed under the 'partner' route since the Beatrice Akinola only held DL and was not therefore settled in the UK. Nor could it succeed under the 'parent' route since he was not the sole carer for the children. The terms of EX.1 were not therefore relevant since there was no route applicable to the Respondent. Consideration was given to paragraph 276ADE. The Respondent had not lived in the UK 20 years, nor could he qualify under sub-paragraph (vi) since it could not be said that there were "no ties" to him relocating to Nigeria. In respect of Article 8 the Secretary of State directed herself that leave could only be given 'outside of the Rules' if the applicant could show that the consequences of refusal would be "unjustifiably harsh". Applying that test it was found not to be met since there was nothing to prevent the whole family relocating to Nigeria together.

The Decision of the First-tier Tribunal

6. When the matter came before the First-tier Tribunal the Respondent relied on his family life with Beatrice and the children, who had now been joined by C3, born in November 2014. He told the Tribunal that although he did not live with his wife and children this was because their accommodation was not big enough. He lived somewhere else and travelled to the family home each day to help look after the children. He would occasionally sleep over when his wife was working nightshift. They did not want to return to Nigeria because the children had lived here a long time and were used to life in Britain. The adults would find it difficult returning after such a long time and would face

obstacles in securing accommodation and employment.

7. First-tier Tribunal Judge Malcolm dismissed the appeal with reference to Appendix FM of the Immigration Rules. Neither the Respondent's partner nor children had settled status in the UK and so the questions raised by paragraph EX.1 did not arise: as paragraph 42 of the determination notes, "EX.1 is not free standing". In examining the Respondent's private life the Tribunal considered paragraph 276ADE(1)(vi). I note that the test applied in the determination was whether the Respondent could show that he faced "very significant obstacles" to his reintegration in Nigeria, rather than the old *Ogundimo*[2] test of "no ties" applied in the refusal letter. Nothing turns on it, for on the facts as found by the Tribunal, the Respondent could not succeed under either.

8. Turning to Article 8 the determination begins by setting out the framework recommended in Razgar [2004] UKHL 27, and recites the relevant sections of Part V of the Nationality, Immigration and Asylum Act 2002. There is a finding that the Respondent does enjoy a family life in the UK and that the consequences of the decision are of such gravity that the Article is engaged. The decision was one lawfully open to the Secretary of State and she took it in pursuit of the legitimate aim of "maintenance of immigration control". As to proportionality the Tribunal weighed the following matters in the balance: that the Respondent has never had any status and his status was "precarious" [54], that the children are not British but have lived the majority of their life in the UK and have leave to remain until 2017 [55], and that the best interests of the children are a primary consideration [56]. It is accepted that the Respondent is closely involved in the care and upbringing of his children and that there is a genuine and subsisting parental relationship [38]. Having directed himself to s117B of NIAA 2002 Judge Malcolm notes the terms of s117B(6):

> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

9. It is found that the children are "qualifying children" in that they have lived in the UK for a continuous period of 7 years or more. In respect of whether it is "reasonable" that they leave the UK the determination says the following:

> "62. Given the ages of the two elder children and the fact that they have lived in the UK since 2006 and that they have no experience or

[2] Ogundimo v SSHD [2013] UKUT 60 (IAC)

> knowledge of life in Nigeria and also given the degree of the integration into life in the UK I considered that it would not be reasonable to expect either or the children to leave the United Kingdom and accordingly in this case the public interest consideration did not weigh heavily in the balance of proportionality.
>
> 63. As detailed the children have been given further leave to remain. Given the Appellant's relationship and close contact with the children I considered that the effects on the children of the requirements of the Appellant to leave the UK would not be in the best interests of the children.
>
> 64. Given the background of the children I did not consider it reasonable to expect that the children could not return to Nigeria with the Appellant (and his wife).
>
> 65. Accordingly for the reasons stated and in particular taking into account the best interests of the children I did not identify a strong countervailing factor or compelling reason which would make the removal of the Appellant proportionate and reasonable"

10. It was on this basis that the appeal was allowed.

The Secretary of State's Appeal

11. The Secretary of State now appeals on the following grounds:

i) There has been a material misdirection in law

ii) There has been a failure to give adequate reasons

iii) The determination does not adequately address the public interest as it is expressed in Part V of the Nationality, Immigration and Asylum Act 2002

12. Although these were the heads of claim identified in the grounds, the particulars in fact boil down to the same point made under each. That is that the First-tier Tribunal has failed to adequately explain why the substantial weight to be attached to the public interest was outweighed by the rights of an individual who has never had any lawful right to be in the United Kingdom. The Secretary of State does not accept the view expressed by the President in Treebhowan (section 117B(6)) [2015] UKUT 00674 (IAC) is correct. Nor does the Secretary of State accept that the First-tier Tribunal has taken the correct approach to whether it is 'reasonable' that the children in this case leave the UK. It is submitted that it would be open to the Respondent to go back to Nigeria and re-apply for entry clearance. Alternatively it would be reasonable for the whole family to go there together. Ms Willocks-Briscoe submitted that the Tribunal had erred in assuming that it would be in the best interests of the children to remain in the UK. There was not evidence before the Tribunal to justify that conclusion.

The Response

13. Mr Ogundero opposed the appeal on all grounds. He submitted that the determination contained clear findings that were open to the Judge on the evidence before him and in those circumstances there could be no justification for interfering with the determination.

The Hearing

14. At the conclusion of the hearing on the 26th January 2016 I indicated to the parties that I would be prepared to delay promulgation of my decision until the parties had had an opportunity to make further submissions in writing. The reason for that was that I was aware that the Upper Tribunal was about to report a case on the approach to be taken to the question of "reasonableness" in the context of paragraph 276ADE(1)(iv) of the Rules and section 117B(6) of the Nationality Immigration and Asylum Act 2002. The parties agreed that this would be helpful. I further indicated that if in the interim the higher courts made comment on the *ratio* of Treebhowan, submissions should be made about that too.

15. In the event the decision on reasonableness was not promulgated until the 18th March 2016: PD and Others (Article 8 - conjoined family claims) [2016] UKUT 108 Directions were sent to the parties requesting written submissions. The Respondent sent in further submissions on the 6th May 2016. No further submissions have been received by the Secretary of State, nor any application for any further adjournment pending resolution of the Treebhowan issue.

My Findings

Ground 1

16. Ground 1 is that there has been a material misdirection in law because the First-tier Tribunal failed to consider whether the Respondent could return to Nigeria in order to make an application for entry clearance. Reliance is placed on R (on the application of Chen) v SSHD (Appendix FM- Chikwamba- temporary separation- proportionality) IJR [2015] UKUT 00189 (IAC).

17. This ground is misconceived. It was never the case of the Respondent that this was a *Chikwamba* situation since it has always been accepted that he failed by some measure to meet the requirements of the Rules, and could not hope to do so in an application for entry clearance. The reasoning in the determination was in no way predicated on a *Chikwamba* logic, since there were no prospects of success upon an application for entry clearance. The whole point was that if the Respondent were to be returned to Nigeria, there would be an effective severance of family life, unless

Beatrice and the children travelled with him.

Ground 2

18. This leads to the second ground, which formed the centrepiece of Ms Willocks- Briscoe's very well made submissions. The Secretary of State contends that the determination is flawed for a failure to consider whether the entire family could be reasonably expected to return to Nigeria.

19. The parties agreed that in answering that question the Tribunal was obliged to focus on the position of the Respondent's children. These were children who have lived in the UK since 2006. At the date of entry C1 was 2 years old and C2 was still a babe in arms, being only a few months old. At the date of the appeal before the First-tier Tribunal C1 was 11 years old and C2 was 10. They had both been in the UK for over 9 years. The question before me is whether the First-tier Tribunal gave adequate reasoning for its finding that it would not, in these circumstances, be reasonable for these children to go to Nigeria. Two reasons are given. The first was the degree of integration of the children into life in the UK, and the second was the fact that they have "no experience or knowledge of life in Nigeria".

20. The genesis of what became known as the 'seven year rule' was the Secretary of State's concession set out in a document known as DP5/96. That policy, and those which followed, created a general, but rebuttable, presumption that enforcement action would "not normally" proceed in cases where a child was born here and had lived continuously to the age of 7 or over, or where, having come to the United Kingdom at an early age, 7 years or more of continuous residence had been accumulated[3]. As the policy statement[4] which accompanied the introduction of paragraph 276ADE (1)(iv) puts it: "a period of 7 continuous years spent in the UK as a child will generally establish a sufficient level of integration for family and private life to exist such that removal *would normally not* be in the best interests of the child" [my emphasis]. The current policy reaffirms that this is the starting point for consideration of the rule. The Immigration Directorate Instruction 'Family Migration: Appendix FM Section 1.0b *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes'* ("the IDI") gives the following guidance:

> 11.2.4. Would it be unreasonable to expect a non-British Citizen child to leave the UK?
>
> The requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots

[3] For a detailed history of the rule and its development see Dyson LH in Munir v SSHD [2012] UKSC 32 paras 9-13

[4] The Grounds of Compatibility with Article 8 of the ECHR: Statement by the Home Office (13 June 2012) at 27.

> and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and *strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.*
>
> The decision maker must consider whether, in the specific circumstances of the case, it would be reasonable to expect the child to live in another country.
>
> The decision maker must consider the facts relating to each child in the UK in the family individually, and also consider all the facts relating to the family as a whole. The decision maker should also engage with any specific issues explicitly raised by the family, by each child or on behalf of each child.

21. These policy statements recognise that after a period of seven years residence a child will have forged strong links with the UK to the extent that he or she will have an established private life outside of the immediate embrace of his parents and siblings. It is that private life which is the starting point of consideration under this Rule. The relationships and understanding of life that a child develops as he grows older are matters which *in themselves* attract weight. The fact that the child might be able to adapt to life elsewhere is *a* relevant factor but it cannot be determinative, since exclusive focus on that question would obscure the fact that for such a child, his "private life" in the UK is everything he knows. There is therefore in my view no error in the Tribunal in the present case having attached significant weight to the fact that these children are wholly integrated into life in the UK, with a corresponding lack of knowledge about life in Nigeria. As PD makes clear, "reasonableness" is not to be equated with "proportionality" as it is understood in the context of Article 8 outside of the Rules. The finding that it would not be reasonable to expect the children to leave the UK was one open to the Tribunal for the reasons that it gives. That the Secretary of State appears, in another context, to share that conclusion is demonstrated by the fact that the children have been given leave to remain.

Ground 3

22. The final ground concerns the weight to be attached to the public interest. It is submitted that the determination has not given adequate or substantive consideration to the factors set out in s117B(1)-(5) of the 2002 Act. Reference is made to the fact that the Respondent has never had any legitimate expectation of being able to remain here and has placed a burden on public services by his presence, and will continue to do so. Those points are undeniably well made. The fact remains however that Parliament has framed the legislation in such a way that one factor is capable of displacing all others that come before it in cases such as this. Section 117B(6)

plainly states that the public interest does not require the Respondent's removal where a) he has a genuine parental relationship with b) a child who has been here for over seven years and c) it would not be reasonable to expect that child to leave the UK. Since the First-tier Tribunal found all three of these requirements to have been met, it follows that it did not err in finding that the public interest did not require the Respondent's removal: Treebhowan applied.

Decisions

23. The determination of the First-tier Tribunal contains no error of law and it is upheld.

Upper Tribunal Judge Bruce
5th June 2016