Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/41475/2014
IA/41575/2014
IA/41460/2014
& IA/41577/2014

THE IMMIGRATION ACTS

Heard at Field House
On 22 January 2016

Decision and Reasons Promulgated
On 17 February 2016

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Peterjohn Oborkpa Ezo Emasiobi
Frances Funke Ebanehita Emasiobi
Oghenefejiro Hensley Emasiobi
Oghenemaro Christabel Emasiobi
[No anonymity direction made]

Claimants

Representation:
For the claimants: Mr AN Ikie, solicitor
For the appellant: Mr S Staunton, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are husband, wife, son and daughter of the same family, all citizens of Nigeria, with dates of birth as given in the case file.

2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Clarke promulgated 26.6.15, allowing variously on immigration and human rights ground the linked appeals of the claimants against the decisions of the Secretary of State to refuse their applications for further leave to remain in the UK on human rights grounds and to remove them from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 21.5.15.

3. First-tier Tribunal Judge Grimmett granted permission to appeal on 2.10.15.

4. Thus the matter came before me on 22.1.16 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out below, I found no material error of law in the making of the decision of the First-tier Tribunal such as to require the decision of Judge Clarke to be set aside.

6. The relevant background is set out in the case papers and summarised in Judge Clarke's decision. In essence the first claimant first came to the UK in 2004 and was joined in 2007 by his wife and their two children. At all times they have had limited leave to remain, last extended to 25.8.14. On 21.8.14 and thus within extant leave, the claimants applied for further leave to remain on the basis of their private and family life. The applications were considered under Appendix FM and paragraph 276ADE and refused, accompanied by decisions to remove from the UK.

7. Judge Clarke concluded that as at the date of hearing the first claimant met the 10-year long-residence requirements of paragraph 276B, by which time he had accumulated 10 years' continuous lawful residence in the UK.

8. The Secretary of State could not have considered paragraph 276B as the first claimant did not meet the 10 year requirement either at the date of application or decision and it was not in any event an application made by him. That issue was first raised in the grounds of appeal to the First-tier Tribunal. It is relevant to note that even the at the date of the submission of the grounds of appeal on 5.11.14, the first claimant still could not meet the 10-year requirement, which Mr Ikie told me was only reached on 23.11.14. What the grounds suggest is that by the time the appeal comes on for hearing he would have reached the 10-year milestone. Such a prospective claim cannot be an effective ground of appeal against the decision of the Secretary of State, but it certainly served to put the Secretary of State on notice that this issue would be raised at the First-tier Tribunal appeal hearing. As it happened, there was no response to the grounds of appeal and in fact the Secretary of State had no representative at that appeal hearing.

9. Mr Ike pointed out that the Secretary of State served on the claimants one-stop notices under section 120 of the 2002 Act, requiring them to inform the Secretary of State of any reasons why they consider they should be allowed to remain in the UK. He relied on the Court of Appeal decision of AS (Afghanistan) v SSHD [2009] EWCA

Civ 1076, in which the court held at §84 that as the service of such a notice is in the discretion of the Secretary of State, there being no obligation to do so, the Secretary of State "will presumably do so only if he is content that the Tribunal should consider any matters put forward in response to it." It was said that whilst the Secretary of State is normally the primary decision-maker in immigration matters, in practice the Tribunal makes many decisions which are indistinguishable from those made by the Secretary of State. Section 85(2) imposes a duty on the Tribunal to consider any matter raised in a statement made in response to a section 120 notice, insofar as it constitutes a ground of appeal against the decision under appeal. The court held that these provisions do not restrict that duty to considering only grounds that relation to the reasons for the decision made. It is obvious that section 120 notice is designed to raise any new grounds for challenging the decision, rather than simply challenging the reasons for the decision, including those which could be capable of supporting a fresh application.

10. In the grounds of application for permission to appeal the Secretary of State accepts that it was open to the First-tier Tribunal Judge to consider the issue of long-residency under paragraph 276B, which was raised in the grounds of appeal. I pointed out to Mr Ike he did not need to argue that point.

11. However, it appears to me that the Secretary of State's grounds have confused different aspects of paragraph 276B. The first ground is that the judge erred in concluding that as there was no evidence to the contrary, the appellant had satisfied 276B(ii). That ground goes on to state that it is an essential requirement to have regard to the public interest. "It is respectfully submitted that it is insufficient to simply state that because there was no evidence to the contrary before him, the appellant satisfied this requirement." That is a misreading of the decision of the First-tier Tribunal. Judge Clarke addressed the public interest at §35 of the decision, taking into account the various factors, including those specified under 276B(ii)(a) to (f). In this consideration the judge did not state that there was no evidence to the contrary. That was in relation to the subsequent requirement of paragraph 276B(iii), that of the general ground for refusal, which the judge addressed in the first part of §36 of the decision, stating, "There was no evidence before me that Mr Emasiobi falls for refusal under the general grounds for refusal."

12. Clearly, the author of the grounds of application for permission to appeal has confused and conflated the judge's treatment of 276B(ii) and 276B(iii). I find no error of law in the way in which the judge assessed the public interest. As far are 276B(iii) and the general grounds for refusal, I note that even now the Secretary of State does not suggest there are any such grounds and did not in fact rely on that issue in the grounds for application for permission to appeal.

13. Where there is a real issue is the point made towards the end of §1 of the grounds that, "As the application was considered under a completely different rule, this particular requirement has never been explored by the SOS and as such there would have been no evidence placed before the First-tier Tribunal, which renders the positive conclusion of the IJ unsound." In essence, the Secretary of State submits that

if the First-tier Tribunal Judge felt that the first claimant now met the requirements of paragraph 276B, the judge should have allowed the appeal only to the extent of finding that the decision was not in accordance with the law and awaits a decision from the Secretary of State that is in accordance with the law. I do not accept this proposition. The decision of the Secretary of State was in accordance with the law as the first claimants circumstances then stood. I am satisfied that it was open to the judge to consider all the elements of paragraph 276B on the available evidence. As the Secretary of State had issued a section 120 notice it was up to the Secretary of State to draw the Tribunal's attention to any factors which suggested that the first claimant did not meet the requirement, or why the public interest required the application to be refused.

14. The second ground of appeal is that the First-tier Tribunal Judge erred in finding the first claimant met the English language requirements of paragraph 276B, stating that the judge was not provided with the required evidence. The rather late in the day served Rule 24 response of the claimants points out that at A24 is a Knowledge of Life in the UK pass certificate, and the degree certificate at A26 appears to meet the requirements of Appendix KoLL. Mr Staunton conceded this issue and I need address it no further other than to accept that the first claimant met this requirement.

15. The third ground of appeal falls away if there is no error in relation to the First-tier Tribunal's consideration of paragraph 276B and need be considered no further.

16. The final ground of appeal is to suggest that the First-tier Tribunal Judge failed in the consideration of the remaining family members in making no assessment of their cases under the Immigration Rules, and simply proceeded to consider the cases on the basis of article 8 ECHR. However, at §38 of the decision the judge noted that at the date of the application the other claimants could not meet the requirements of the Rules and continued, "That being the case the next step was to consider whether or not the Appellants had demonstrated that they had a good, arguable case that leave should be granted under article 8 outside the Immigration Rules." The judge in fact mistakes the current law on this issue, which is that there is no need to establish a "good arguable case," only that there should be compelling circumstances not adequately addressed within the Rules to justify considering granting leave to remain on private and/or family life grounds outside the Rules under article 8 ECHR. See Singh [2015] EWCA Civ 74, where it was held that there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances, of a particular case, all the issues have been addressed in the consideration under the Rules.

17. However, I find no material error in this regard. It is quite clear that the other claimants could not meet the Rules and in the light of the fact that the judge found the first claimant husband and father did meet the Rules for leave to remain it was inevitable that there would have to be a family life assessment outside the Rules as to the proportionality of requiring them to leave when he is entitled to remain. Judge Clarke went on to conduct that article 8 assessment and concluded that it would be disproportionate to remove them. That was a conclusion open to the judge and for

which cogent reasons have been given. The grounds do not in fact challenge the assessment made, only the decision to consider their circumstances outside the Rules without identifying compelling circumstances. There is no merit in this challenge and thus no material error of law.

Conclusion & Decision:

18. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of each appellant remains allowed.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order. Given the circumstances, I also make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The decision of the First-tier Tribunal Judge to decline to make a fee award because the basis of allowing the appeal was not a ground before the Secretary of State and could not have been considered by the Secretary of State is valid and I adopt the same reasoning.

Signed

Deputy Upper Tribunal Judge Pickup

Dated