IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50461/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 February 2016	**On 12 April 2016**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAMUEL OYESOLA OYEDELE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondent: Mr S Tampuri, Tamsons Legal Services

DECISION AND REASONS

1. The respondent is a citizen of Nigeria and his date of birth is 19 July 1975. I shall refer to him as the appellant, as he was before the First-tier Tribunal.

2. The appellant made an application for leave to remain in May 2012 which was refused by the Secretary of State on 22 October 2014. The appellant appealed against that decision and his appeal was allowed by First-tier Tribunal Judge Hussain in a decision dated 23 August 2015 and promulgated on 1 September 2015 following a hearing on 10 July 2015. Permission was granted to the Secretary of State by Judge of the First-tier Tribunal J M Holmes on 13 January 2016. Thus the matter came before me.

3. Judge Hussain set out the circumstances of the appellant's case. It is accepted that since 2009 the appellant has not been in the UK lawfully. He has a partner here, Miss Oseni, and they have three children here. The children's dates of birth are 23 July 2007, 28 July 2009 and 7 May 2011. The appellant's partner and the three children were granted discretionary leave on 27 March 2012 and this expires on 26 March 2017.

4. According to the Secretary of State (see page 3 of the decision letter) this was granted on the basis that Miss Oseni was a single parent. This was not challenged by the appellant at the hearing before Judge Hussain. The judge heard evidence from the appellant, Miss Oseni, the appellant's brother, Mr Adebayo and Mr Adesua. The judge considered the appeal under the Immigration Rules and concluded that it could not succeed. There was no counter-challenge to this finding.

5. At [31] the judge concluded that “the question that I now have to ask is whether his case is exceptional to merit consideration under Article 8 conventional principles” and he went on to conclude that the appellant is the father of three young children with whom he has family life and that he has a genuine and subsisting relationship with his partner. The judge concluded that the “gravity of consequence of the appellant's removal from the United Kingdom is such that there should be consideration under Article 8 principles”. The judge concluded that removal was likely to have an impact on the welfare of the children. The judge at [34] considered Section 117B of the Nationality, Immigration and Asylum Act 2002 and concluded that it was in the appellant’s favour that he is a fluent English speaker and that he has maintained himself independently and is likely to do in the future. The judge also concluded that Ms Oseni works and earns sufficiently to support the family.

6. The judge then went on to consider reasonableness in the context of 117B(6) and he found as follows:

> “35. I take into account that the appellant has at least one child who has been in the United Kingdom for more than 7 years and the final question is whether it is reasonable to expect that child to leave the United Kingdom. I find that it is not; firstly because it must surely be a weighty factor the fact that not long ago the Secretary of State decided to grant this child, her mother, as well as her sibling who has been here for less than 7 years, leave to remain. In April 2015 the Secretary of State decided to grant

leave to remain to the youngest of the children. Therefore there appears to be a recognition of some eligibility of the family (with the exception of the appellant) to remain in this country. The appellant's partner who has been here since the age of 16 years has not left this country. She is undertaking studies as well as working. The children have never left the United Kingdom. They are in full-time education here. There is no risk of recourse to public funds. There is nothing in the appellant's history or conduct to suggest that his presence is not conducive to public good. I accept that the appellant has no close relatives remaining in Nigeria. I also accept that his wife has been an orphan since she was young. Looking at the totality of the evidence in the round, as I am required to do, I find that it is not reasonable to expect the appellant to rupture his family life with his partner and children in the United Kingdom. I also find that it is not reasonable to expect the appellant's children to uproot themselves from this country in favour of a life in Nigeria."

Error of Law

7. The judge materially erred in law. The assessment of reasonableness pursuant to section 117B (6) of the 2002 Act is inadequately reasoned. There was very little evidence before the judge relating specifically to the children and their best interests. The judge attached weight to what he perceived to be recognition of eligibility because the appellant's partner and children had been granted discretionary leave to remain, but there was inadequate enquiry made into the basis of this leave which was an issue raised by the respondent. There was inadequate assessment made of the eldest child's circumstances and from the scant evidence relating specifically to this child it is not clear how the judge reached a conclusion that it would not be reasonable to expect the child to leave the UK. Thus the judge made a material error of law and I set aside the decision.

8. It may be that if it is found, after a proper consideration of the evidence, that the appeal should be allowed under section 117B (6) following the decision of Mr Justice McCloskey in Treebhawon and Ors (section 117B (6) [2015] UKUT 00674, the public interest in section 117B (6) prevails over the public interests in section 117(1) – (3) and there would be no need for further consideration of the wider public interest. In any event, the FtT purported to make a wider assessment considering section 117B generally but in doing so fell into error for the reasons identified in the grounds. The judge did not attach sufficient weight to the public interest; indeed I can find no reference to the public interest in the decision or to the fact that the appellant has been here unlawfully since 2009.

9. Mr Tampuri submitted that the only issue that the judge needed to consider was the impact of separation on the family because that in reality would be the practical effect of the Secretary of State's decision in the

light of the fact that the appellant's family has lawful status here. However, this is misconceived and conveniently ignores the unchallenged assertion by the respondent that the appellant's wife was granted discretionary leave to remain on the basis that she was a single parent. In any event, discretionary leave expires in 2017. It was incumbent on the judge to consider Article 8 on the basis that the whole family would be returning to Nigeria. They are indeed all citizens of Nigeria and they are not settled here.

10. Both parties agreed that the matter should be remitted to the First-tier Tribunal for a rehearing.

11. It is expected that both parties produce a copy of the appellant's partner's application for discretionary leave to remain and the respondent's letter granting discretionary leave as these documents will hopefully shed light on the basis of the grant. If the appellant now wises to argue that discretionary leave was not granted on the basis asserted by the respondent, this has not previously been raised and it is likely that the FtT will take that into account and expect corroborative evidence to be produced by the appellant establishing that it was granted for another reason. This is entirely a matter for the judge deciding the case.

12. The judge has made limited findings of fact at [35] and there it may be that there is no good reason to go behind those, but ultimately that is a matter for the First-tier Tribunal who no doubt will be hearing evidence afresh.

Notice of Decision

13. The decision of the First-tier Tribunal is set aside and the matter is remitted to the FtT.

No anonymity direction is made.

Signed Joanna McWilliam Date 16 March 2016

Upper Tribunal Judge McWilliam