Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/08390/2015
HU/08392/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing	
On 20 July 2017	**On 17 August 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

EDIDIONG [U] (FIRST APPELLANT)
[R E] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr T Ojo, Legal Representative, CW Law Solicitors
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants in this case are both nationals of Nigeria. The first appellant was born in 1975 and the second appellant is her son who was born on [ ] 2008 in the UK. The first appellant has a poor immigration

history. She entered this country in 2003 with entry clearance as a student; she was granted further to remain up until 2007, and then subsequently to 2009 (there having been a small period in between when she did not have leave). After that date the first appellant remained in this country without leave. Further applications which she made for leave to remain were rejected in 2011 and 2013, but she remained without leave.

2. The second appellant, the first appellant's son, was born, as already noted, in May 2008 and has remained in this country ever since, apart from three weeks in 2009 when the first appellant returned with him to Nigeria, presumably in order to visit relatives in that country.

3. In July 2015 (that is after the second appellant had passed his 7th birthday) the first appellant applied for leave to remain on the basis of her family and private life in this country. This application was refused in a decision of the respondent made on 7 October of that year. The first appellant then applied for leave to remain on the basis of a relationship with a Mr Robert Lawrence, to whom she was not married, and in circumstances where Mr Lawrence did not live with her. Although it was acknowledged that the first appellant had a genuine and subsisting parental relationship with the second appellant, her child, the respondent considered that the eligibility criteria under the Rules were not engaged.

4. The respondent considered the first appellant's position under paragraphs 276ADE of the Rules, but concluded that none of the requirements set out within paragraph 276ADE(1)(iii) to (vi) were satisfied (with regard to (vi) the appellant had spent her formative life in Nigeria and it was accordingly not accepted that there would be very significant obstacles to her reintegration into that country on return, given that she had spent the majority of her life there and was familiar with the language, culture and society).

5. The respondent also made a refusal decision in relation to the second appellant, and in respect of both appellants, the respondent concluded that there were no exceptional circumstances such as should warrant the grant of leave to remain under Article 8 outside the Rules. The respondent in her decision did take into account the need to safeguard and promote the welfare of children in the United Kingdom in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009, but considered that both appellants could return to Nigeria as a complete family unit.

6. The appellants appealed against the refusal decisions and their appeal was heard before First-tier Tribunal Judge Greasley sitting at Harmondsworth (which at the time was being used for Taylor House appeals as Taylor House was then being refurbished) on 13 October 2016. In a Decision and Reasons promulgated on 25 October 2016 Judge Greasley dismissed the appeals. The appellants now appeal against that decision with leave having been granted by First-tier Tribunal Judge P J M Hollingworth on 5 April 2017.

7. This appeal was listed originally before Upper Tribunal Judge Eshun and there were subsequently directions given by the Resident Judge, Upper Tribunal Judge Dawson, which were made on 13 June 2017. I will refer to these below.

8. In the course of his decision, Judge Greasley did not refer to what is set out within Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (which is contained within Part VA of that Act introduced by Section 19 of the Immigration Act 2014 and effective from 28 July 2014). Although the judge did make reference to what is set out within Sections 117B(4) and (5) (whereby it is enacted that little weight should be given to a private life or relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully, and also that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious), Section 117B(6) is not mentioned. This provides as follows:

> "(6) In the case of a person who is not liable to deportation [and the first appellant is not], 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. What is a "qualifying child" is defined at Section 117D under "Interpretation of this Part" as follows:

> "(1) In this Part—
>
> ...
>
> 'qualifying child' means a person who is under the age of 18 and who—
>
> (a) is a British citizen, or
>
> (b) has lived in the United Kingdom for a continuous period of seven years or more".

10. Although what is "continuous" is for the purposes of continuous residence is not defined within Section 117D, in the respondent's published guidance (very helpfully provided by Mr Ojo, representing the appellants today) it is stated as follows:

> "Short periods outside the country – for example for holidays or family visits – would not count as a break in the seven years required. However, where a child has spent more than six months out of the UK

> at any one time this should normally count as a break in continuous residence unless any exceptional factors apply".

11. It is clear therefore that for the purposes of this appeal, in light of the respondent's guidance, the second appellant must be regarded as a qualifying child in that he has lived in the UK for a continuous period of seven years. Accordingly, before deciding whether or not, for Article 8 purposes, it was in the public interest to remove the first appellant, consideration had to be given to whether it would be reasonable to expect the second appellant to leave the UK as required by Section 117B(6)(b) (it being accepted as is the case that the first appellant has a genuine and subsisting parental relationship with her son, the second appellant). So far as the second appellant is concerned, obviously the length of time he had been present in this country was a very relevant consideration when considering his Article 8 rights.

12. At paragraph 27 of his decision Judge Greasley said as follows:

> "I also conclude that the appeal in relation to the second appellant must also be refused in relation to the child route as the second appellant is not able to meet the eligibility criteria within paragraph E-LTRC1.6 [because his mother did not have leave to enter or remain] and nor does he satisfy or engage the eligibility criteria contained within paragraph 276ADE."

13. Then, however, dealing with the crucial aspects of this case, Judge Greasley stated as follows:

> "Mr Shoye, for the appellant, conceded that the second appellant had not resided for a continuous seven-year period in the United Kingdom."

14. As I have made clear above, the second appellant had in fact resided for a continuous seven year period in the United Kingdom, not just prior to the hearing but also prior to the application which was made, because he had been born in May 2009 and the application was not made until July 2016. Furthermore, in the grounds it is stated in terms that no such concession was made. Even if such a concession had been made, given that the child had only been away from the United Kingdom for some three weeks in 2009, the judge should arguably have appreciated that such a concession should not have been made; however, as noted, it is denied in the grounds that such a concession was in fact made.

15. When this appeal came before Judge Eshun, she directed that it would be appropriate for Mr Shoye to be available to give evidence as to precisely what may or may not have been conceded and subsequently on 13 June 2017 Upper Tribunal Judge Dawson directed as follows:

> "It is noted that the Presenting Officer who appeared before the First-tier Tribunal Judge has provided a note dated 13 October 2016 in

> respect of his understanding of matters at the hearing. The appellant's representatives are directed to file with the Upper Tribunal and serve on the respondent any further evidence it is intended to be relied on in support of the assertion that the concession had not been made ... That evidence is expected to include a copy of any contemporaneous note of the proceedings by Mr Shoye before the First-tier Tribunal."

16. Subsequently, Mr Shoye was present at the hearing before this Tribunal in which he confirmed (as was contained in a witness statement which he had provided for this hearing) that he had not made such a concession and Ms Pal, on behalf of the respondent chose not to cross-examine him on this point. It was Mr Shoye's position that the only concession he made was that the mother, the first appellant, could not succeed under the Rules, although it is clear that when making this concession he did not have in mind the provisions of Section 117B(6), but rather that the mother could not succeed under the parent Rules as such.

17. Accordingly, it is clear that the crucial issue in this appeal was whether or not, having regard to the best interests of the child as a primary, although not paramount factor on the one hand, but on the other hand the public interest in removing people such as the first appellant with a bad immigration history, it was "reasonable" to require the child to leave the UK. It is on that basis the proportionality exercise should have been conducted but it was not.

18. Having regard to my finding that the concession as recorded in paragraph 27 had not in fact been made, Ms Pal accepted that absent such concession the decision made by First-tier Tribunal Judge Greasley was not sustainable, and in my judgement she was right to accept this; this error was clearly material.

19. The consequence is that the appeal will have to be reheard, and as no findings can be retained, the appropriate course is that the appeal be remitted to Taylor House for rehearing by any judge other than Judge Greasley, and I will so order.

Decision

The decision of First-tier Tribunal Judge Greasley is set aside as containing a material error of law and this appeal is remitted to Taylor House for rehearing before any judge other than First-tier Tribunal Judge Greasley.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Dated: 25 July 2017