



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06072/2017
HU/06073/2017

THE IMMIGRATION ACTS

Heard at the Cardiff Civil Justice Centre
On 12 September 2018

Decision & Reasons Promulgated
On 13 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

DIO
and
NCO

(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Grubb, Counsel, instructed by Jasvir Jutla & Co Solicitors.

For the Respondent: Mr Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1 The appellants appeal against the decision of Judge of the First tier Tribunal O'Brien dated 9 March 2018 dismissing their appeals against the respondent's decision of 21 April 2017 refusing their applications for leave to remain and refusing their human rights claims.

- 2 The appellants are nationals of Nigeria. The first appellant is the father of the second. The first appellant entered the United Kingdom in November 2005 as a student, and gained subsequent grants of leave to remain as a student. There was also a short period of discretionary leave, and the first appellant's last leave to remain expired on 30 September 2011. The first appellant's wife, AOO, had joined the first appellant in the UK on 28 January 2008 and was granted leave to remain in line with him.
- 3 The second appellant was born in United Kingdom in December 2008 and was 9 years and 1 month old at the time of hearing before the judge. There are three other children: OOU, OCO, and C. At the date of hearing before the judge these children were respectively 7 years and 9 months, 5 years and 8 months, and 1 year old.
- 4 An application for leave to remain was made by the first and second appellants on or around 20 June 2016. At that time, the second appellant was the only one of the children who at that time had resided in the United Kingdom for seven years. Although in the hearing before me, Ms Grubb appeared to suggest that the first appellant's wife and the three other children were dependents of the present appeal, as far as I can determine, they are not. The application of June 2016 was in the first appellant's name, citing the second appellant as a dependent. The notice of decision dated 21 April 2017 was addressed to both of them. The notice of appeal to the First-tier Tribunal names the second appellant as the first appellant's dependent. I am satisfied that both are entitled to be treated as appellants in this appeal. However the other family members are not parties to this appeal, although the judge considered the circumstances of the other children (e.g. at [40, 48]) and I find that it was appropriate to do so.
- 5 The respondent refused the application for leave to remain on the grounds that the first appellant did not qualify for leave to remain under Appendix FM as spouse, given that the first appellant's wife had no leave to remain in the UK. Further, the first appellant was not entitled to leave to remain on private life grounds under paragraph 276ADE(1)(vi) as there were not very significant obstacles to his integration in Nigeria. Further, the second appellant's application for leave to remain was refused under paragraph 276 ADE(1)(iv), on the basis that, notwithstanding that she had been present in the United Kingdom for seven years at the date of application, it would not be unreasonable to expect her to leave the United Kingdom. The respondent was of the view that there were no sufficiently compelling grounds outside the immigration rules to warrant a grant of leave to remain under Article 8 ECHR.
- 6 On appeal, the first appellant gave evidence before judge. The evidence before the judge also included a report of social worker Angeline Seymour setting out an analysis of the best interest of the children of the family.
- 7 In deciding the appeal the judge made certain findings, appearing to accept at [40] that the evidence before him suggested that the children enjoyed and were well integrated into school, and had a network of friends of similar ages. The judge also referred to the evidence of the social worker, to the effect that it would not be in the children's best interests to disrupt the bonds and ties between the children, British society, the education system and their extended family in the United Kingdom. (There was evidence set out in the social work report that both the first appellant and his wife had

cousins in the United Kingdom, who had children, and that their own children maintained strong bonds with their cousins children.) The judge held at [40] that the best interests of the three oldest children favour their remaining in the United Kingdom.

8 However, the judge held that if returned to Nigeria, the family would continue to receive financial assistance from an uncle in the UK [42]; it was not established that the family would not have access to social housing and adequate education in Nigeria [43-44]; the children would not be unfamiliar with Nigerian culture [46]; the children knew some Igbo language [46]; and there will be no risk of harm to the family because of their Christian faith [47].

9 The judge held at [48] as follows:

“In conclusion, the best interests of the elder three children favour remaining in the United Kingdom. However, they are all yet very young; the eldest is only nine years old and has not reached a critical stage of her education. The children are still relatively centred on their home life, which includes an element (likely to be significant) of exposure to Nigerian culture. They either already have some knowledge of Igbo or could acquire as much as is necessary with relative ease. They are all Nigerian citizens and would enjoy all the rights in Nigeria that that entails. Therefore, their best interests only weakly favour their remaining in the United Kingdom.”

10 The judge observed that the family had remained unlawfully in the United Kingdom for nearly 7 years, and had received education and NHS services [49]. The judge held at [51] that notwithstanding the time spent in the United Kingdom by the second appellant and her siblings, it would still be reasonable to expect the children to leave the country. The maintenance of immigration control and the family’s financial reliance on the state strongly outweighed the best interests of children and the personal rights of the family [52-53]. The appeals were dismissed.

11 In grounds of appeal dated 22 March 2018 the appellants argue that the judge materially erred in law, in summary, in:

- (i) failing to properly consider the best interest of the children under s.55 Borders Citizenship and Immigration Act 2009;
- (ii) failing to have regard, when assessing whether the second appellant was at a critical stage of her education, that a child approaching the age of 10 would be in year 5, awaiting to undertake year 6 SAT tests;
- (iii) failing to have adequate regard to evidence about the second appellant’s connections with, and integration into, the United Kingdom;
- (iv) failing, in light of the judge’s finding that it was in the children’s best interests remain in the United Kingdom, to provide reasons which were adequate in law for find that it would be reasonable to expect them to leave the United Kingdom;
- (v) failing to have adequate regard to the first appellant’s period of lawful leave in the United Kingdom prior to 2011;

- (vi) failing to have adequate regard to the fact that within a year, the second appellant would be entitled to be registered as a British citizen, such entitlement being indicative of the strength of the ties that a person resident for 10 years was likely to have to the UK.
- 12 Permission to appeal was granted on 19 April 2018 by Resident Judge of the First tier Tribunal Zucker on the basis that it was arguable that having found the best interests of the three children would be to remain in United Kingdom, the proportionality assessment was flawed.
- 13 I have heard from the parties in the appeal today. I have also provided the parties with an unreported case of [2018] UKAIT UR HU/05865/2016, a case of my own, relevant for the purposes of bringing to the attention of the parties the reported case of MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88 (IAC), and my analysis of that decision.

Discussion

- 14 I find that the judge materially errs in law in the decision. Relevant in this case, where not one but in fact two children of the family had resided in the United Kingdom for more than seven years at the date of hearing, is the authority of MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705:

"46 ... After such a period of time (*7 years*) the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases **there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.**

...

49 Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. However, the fact that the child has been in the UK for seven years **would need to be given significant weight in the proportionality exercise** for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because **it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.**"

(Emphasis added)

- 15 Although the judge quotes from paragraph 49 of MA (Pakistan) at [33], I find that the judge errs in law by failing to actually follow the guidance given within the judgement. The judge does not reject any part of the evidence before him that it would be harmful to the second appellant (and two of her three younger siblings) to leave the United Kingdom. Given that, as per MA (Pakistan) para 46, there will, for a child having lived in the United Kingdom for 7 or more years, be 'a very strong expectation' that the child's best interests will be to remain in the UK, I find that the judge's reasons for

finding that the children's best interests only weakly favour their remaining in the United Kingdom are inadequate.

- 16 The social worker's conclusion that the permanent relocation of the family from the UK was likely to cause significant detriment to the second appellant and her two younger siblings and also to the integrity of the family unit as a whole, with lasting and damaging effect on the children, was an opinion expressed not because of possible adverse conditions on return to Nigeria (which she declined to comment on), but rather, because the children would lose out on their ability to continue with the relationships that they had with their extended family, friends and support networks in the UK (page 12 of 13). I do not see that the judge's findings that conditions on return to Nigeria would not as bad as the first appellant had argued, would detract from the force of the social workers evidence, therefore.
- 17 Further, I find that the judge's characterisation of the children, including the second appellant, as being 'all yet very young' [48] is unsustainable. A child over the age of 9 cannot properly be described as a very young child. This characterisation tends to support the appellant's complaint that the judge failed to have adequate regard to the ties that the second appellant had established in the United Kingdom.
- 18 Further, I find that the judge has failed to properly direct himself in law in failing, as indicated by para 49 of MA (Pakistan), to give *significant weight* in the proportionality exercise to that the fact that the second appellant has been in the UK for seven years (in fact, over 9 years). Further, notwithstanding the judge's reference to MA (Pakistan) at [33], there is nothing to suggest in the conclusion of his decision that's he treated as a starting point the fact that the child should be granted leave to remain unless there are 'powerful reasons to the contrary'.
- 19 In MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88(IAC), (Mr Justice Lane, President) the Tribunal were of the view that the best interests of the child ET, who had been present in the UK from the age of 4 to 14, and had no direct experience of Nigeria, manifestly lay in remaining in the United Kingdom, whether or not there was a functioning education system in Nigeria (para 31). Further, the fact that her mother had overstayed for 10 years, had falsely claimed asylum, and had committing a criminal offence, receiving a community order for using a false document to obtain employment, were not seen as sufficiently powerful reasons to render her daughter's removal to Nigeria reasonable.
- 20 I am also of the view, in light of relevant applicable authorities, that the first appellant's overstaying in the United Kingdom from 2011 onwards could not properly be relied upon as a sufficiently powerful reason to outweigh the best interests of the second appellant.
- 21 As a result of the above mentioned errors of law, I find that the judge's decision is not sustainable in law, and I set the decision aside.
- 22 Having set aside the decision, I invited Mr. Howell for the respondent whether he would have any further submissions to make in relation to the remaking of this decision. He did not.

- 23 In remaking the decision, I take into account, with the passage of time, that the second appellant is now 9 years and 10 months old. I find, applying the guidance in paragraph 46 and 49 of MA (Pakistan) that it is clearly in the best interests of the second appellant, and of the OOU and OCO, now aged 8 years and 5 months, and 6 years and 3 months respectively, to remain in the United Kingdom. They have never visited Nigeria. They are all at school in the UK. They have a network of friends and have close relationships with their wider family in the UK. I take into account the social worker's evidence that permanent relocation of the family from the UK is likely to cause significant detriment to the second appellant and her two younger siblings and also to the integrity of the family unit as a whole, with lasting and damaging effect on the children. That report was in fact prepared on 3 December 2015, over 2 ½ years ago. The children's ties to the UK will only have strengthened in the meantime.
- 24 I attach significant weight in the proportionality balancing exercise to the fact that the second appellant has been present in the United Kingdom for more than seven years (now nearly 10). I find that there are not sufficiently powerful countervailing considerations, even taking into account the first appellant's overstaying in the United Kingdom since 2011 and the family's reliance on education and NHS services, as to why the private life of the second appellant should be disrupted by her being obliged to leave United Kingdom.
- 25 I find that the second appellant meets the requirements of paragraph 276 ADE(1)(iv), i.e. that she had been present in the United Kingdom for at least seven years prior to the date of application, and that in all circumstances, it would not be reasonable to expect her to leave the United Kingdom. The second appellant's positive satisfaction of the immigration rules indicates that the respondent's refusal of her human rights claim amounts to a disproportionate interference with her private life.
- 26 The second appellant is a qualifying child as defined by S.117D, Nationality, Immigration and Asylum Act 2002, and the first appellant has a genuine and subsisting parental relationship with her. Consequent to my finding that it would not be reasonable to require the second appellant to leave United Kingdom, s117B(6) of that Act indicates that the public interest does not require the removal of the first appellant.

Decision

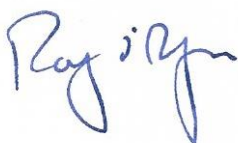
- 27 The judge's decision involved the making of a material error of law.

I set aside the judge's decision.

I allow the appeals of the first and second appellant on human rights grounds.

Signed:

Date: 12.9.18



Deputy Upper Tribunal Judge O'Ryan

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

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

Signed:

Date: 12.9.18

A handwritten signature in blue ink, appearing to read 'Ray O'Ryan', is written over a faint circular stamp.

Deputy Upper Tribunal Judge O'Ryan