



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07396/2016
HU/07397/2016
HU/07399/2016
HU/07402/2016
HU/07404/2016

THE IMMIGRATION ACTS

Heard at Field House
On 6th July 2018

Decision & Reasons Promulgated
On 26th July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

O O I (FIRST APPELLANT)
O S O (SECOND APPELLANT)
J A I (THIRD APPELLANT)
J A I (FOURTH APPELLANT)
E A I (FIFTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr N Sadeghi of Counsel instructed by RAMFEL
For the Respondent: Mrs L Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appeal against a decision of Judge Clapham SSC (the judge) of the First-tier Tribunal (the FTT) promulgated on 13th November 2017, following a hearing on 20 October 2017.
2. The Appellants are Nigerian citizens. The first and second Appellants born 4th April 1976 and 9th March 1982 respectively are partners and are the parents of the third, fourth and fifth Appellants. The third and fourth Appellants are twin girls born 4th October 2008 and the fifth Appellant is a girl born 26th May 2010.
3. The second Appellant claims to have entered the UK in 1998, and the first Appellant claims to have entered in August 2004. According to the Respondent's records the first application for leave to remain was made on 24th September 2009 and refused on 31st August 2010. A further application was submitted on 1st September 2010 and refused on 17th September 2010.
4. Another application for leave to remain was submitted on 28th March 2013 and refused on 16th May 2013. Judicial review proceedings followed which resulted in a further refusal dated 23rd October 2014 which the first Appellant was able to appeal. His appeal was dismissed by Judge Quinn in a decision dated 11th May 2015.
5. A further application for leave to remain based upon family and private life was made in December 2015 and refused on 26th February 2016. It was this refusal that led to the appeals heard by the judge on 20th October 2017.

The First-tier Tribunal Hearing

6. The judge heard evidence from the first and second Appellants. The judge's findings commence at paragraph 44. The judge considered Article 8 outside the Immigration Rules. It does not appear to have been contended on behalf of the Appellants that they could satisfy the Immigration Rules in relation to their family and private lives.
7. The judge took into account the findings made by Judge Quinn in the earlier appeal.
8. The judge found that it would be in the best interests of the children to remain in the UK. They had received education and healthcare without cost to themselves.
9. The judge took into account that the children had resided in the UK for in excess of seven years and described this at paragraph 46 as being "a weighty factor that may point in one direction", but found the length of residence of the children not to be a conclusive issue.
10. The judge found, taking all circumstances into account, that it would be reasonable to expect the Appellants to leave the UK. In making that decision the judge was aware that the twins born in October 2008 have speech and language disorders which require

speech therapy twice a week. The judge found that the public interest in effective immigration control makes removal reasonable and proportionate, and found that the best interests of the children ought not to be regarded as a “trump card”. The appeals were dismissed.

The Application for Permission to Appeal

11. The Appellants applied for permission to appeal to the Upper Tribunal relying upon five grounds.
12. In summary, the first ground contended that the welfare and best interests of the children were not a primary consideration. The second ground submitted that the judge had not carried out an assessment of the best interests of the children.
13. The third ground submitted that the judge had failed to identify any powerful reasons to justify removal. The fourth ground submitted that the judge had carried out a defective assessment of whether it was reasonable for the children to leave the UK. The fifth ground submitted that the judge had failed to acknowledge that the fifth Appellant had lived in the UK for over seven years at the date of the FTT hearing, and had failed to carry out an assessment as to whether it would be reasonable for the fifth Appellant to leave the UK.

Permission to Appeal

14. Permission to appeal was granted by Judge Shimmin of the FTT on 23rd April 2018. It was found arguable “that the judge has failed to adequately assess the best interests and welfare of the children, especially bearing in mind the length of their residence in their UK.”

The Upper Tribunal Hearing

15. On behalf of the Appellants reliance was placed upon the grounds contained within the application for permission to appeal. It was submitted that the judge had not regarded the best interests of the children as a primary consideration. The judge had failed to give weight to the fact that the children were born in the UK and had never visited Nigeria. Two of the children had special educational needs which had not been taken into account.
16. In addition, the judge had failed to take into account that approximately two and a half years had passed since the decision of Judge Quinn.
17. On behalf of the Respondent it was submitted that the judge had not materially erred in law. The judge had considered the best interests of the children at paragraphs 44 and 46 and correctly found at paragraph 46 that “the sins of the parents should not be visited upon the children.”

18. It was submitted that the decision in Azimi-Moayed [2013] UKUT 00197 (IAC) indicates that seven years' residence from age 4 was more significant than having resided in the UK from birth until the age of 7, and the children in this case had not acquired seven years' residence after the age of 4.
19. It was submitted that the judge had taken into account the public interests, noting that the family were supported by public funds, the parents were long-term overstayers, and it was submitted that the judge had taken all relevant factors into account and the grounds amounted to a disagreement with findings properly made by the judge.
20. In response on behalf of the Appellants it was pointed out that the twins, the third and fourth Appellants, had been born in the UK and had lived in the UK in excess of nine years at the date of the FTT hearing.
21. I was invited by Mr Sadeghi to set aside the decision of the FTT, and remake it by finding that it would not be reasonable to expect the minor Appellants to leave the UK, and therefore the requirements of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) are satisfied.
22. Mrs Kenny maintained that the decision of the FTT should stand, but agreed that if a material error of law was found, the decision should be remade by the Upper Tribunal without a further hearing.

My Conclusions and Reasons

23. I reject the submission that the judge did not consider the best interests of the children as a primary consideration. In my view the judge properly considered the best interests as a primary consideration, and concluded at paragraphs 44 and 46 that their best interests would be served by being allowed to remain in the UK. The judge made reference to children in the plural, and in my view considered the third, fourth and fifth Appellants. The judge found at paragraph 46 "that for reasons of education and healthcare it is in the best interests of the children that they be allowed to remain in the UK". The judge was also correct to record at paragraph 46 "that the sins of the parents should not be visited upon the children." The error of law, in my view, lies in failing to analyse MA (Pakistan) [2016] EWCA Civ 705. I accept that the judge made reference to this decision at paragraph 46, but did not accurately summarise the guidance given in that decision.
24. At paragraph 49 of MA (Pakistan) it is stated;

"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."

25. The judge was dealing with two children who had nine years' continuous residence, and a third child with continuous residence of approximately seven years, five months. Therefore section 117B(6) needed to be considered and this is set out below;
- (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.
26. It was not disputed that the first and second Appellants had a genuine and subsisting parental relationship with their three children, who are qualifying children by reason of seven years' continuous residence. The issue therefore was whether it would not be reasonable to expect the children to leave the UK.
27. The judge erred by not appreciating the guidance in MA (Pakistan) in that the starting point in a case involving children with seven years or more continuous residence should be that leave should be granted unless there are powerful reasons to the contrary.
28. The judge did not have the benefit of the guidance given by the president of the Upper Tribunal in MT and ET Nigeria [2018] UKUT 00088 (IAC). That decision involved a child with in excess of seven years' residence, and at paragraph 34 the Upper Tribunal considered whether there were powerful reasons such that leave to remain should not be granted. It was stated that the public interest lies in removing a person such as the parent in that case who has abused the immigration laws of the UK. The parent in that case had a criminal conviction and received a community order for using a false document to obtain employment, and was an individual who had arrived in the UK as a visitor, overstayed, made a claim for asylum that was found to be false, and thereafter pursued various legal means of remaining in the UK. It was found that the parent's immigration history was not so bad as to constitute the kind of powerful reason that would render reasonable the removal of the child to Nigeria.
29. In this case the parents have remained in the UK without leave, and made repeated applications for leave to remain without success. There are no criminal convictions. The family are supported by public funds. In my view the immigration history of the parents in this appeal, is somewhat similar to the immigration history of the parent in MT and ET, although the parent in that case had a criminal conviction, which is not the case here.
30. In my view the immigration history of the parents, does not establish that there are powerful reasons for refusing the three minor Appellants' leave to remain in the UK. Therefore it would not be reasonable to expect the children to leave the UK, and section 117B(6) is satisfied. The judge erred on this issue, and I therefore set aside the decision of the FTT and remake it, by allowing the appeals with reference to Article 8 outside

the Immigration Rules, as the requirements of section 117B(6) are satisfied and therefore the public interest does not require the removal of the Appellants.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision. The appeals are allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

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

I have decided to make an anonymity direction because the third, fourth and fifth Appellants are minors. Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 15th July 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

As I have allowed the appeals I have considered whether to make a fee award. I make no fee award as the appeals have been allowed because of evidence presented to the Tribunal that was not before the initial decision maker.

Signed

Date 15th July 2018

Deputy Upper Tribunal Judge M A Hall