



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07799/2016
HU/07813/2016

THE IMMIGRATION ACTS

Heard at Field House
On 13 July 2018

Decision & Reasons Promulgated
On 30 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) PI (NIGERIA)
(2) VI (NIGERIA)
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D. Revill, Counsel instructed by Paul John & Co Solicitors
For the Respondent: Mr L. Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant is the mother of the second appellant, who was born in the UK on 20 July 2008. The appellants appeal from the decision of the First-tier Tribunal (Judge Carroll sitting at Taylor House on 14 June 2017) dismissing their appeals against the decision to refuse to grant them leave to remain on human rights grounds in circumstances where their previous appeals against an earlier refusal had been dismissed by First-tier Tribunal Judge Taylor following a hearing on 14 July 2015, and this decision had not been set aside.
2. The First-tier Tribunal did not make an anonymity direction. However, as the central issue in the appeal is whether the best interests of the second appellant, VI, should prevail over wider proportionality considerations militating in favour of her returning

to the country of her nationality with one or both of her Nigerian parents, neither of whom is present in the UK lawfully, I consider that it is appropriate that the appellants are accorded anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission to Appeal

3. On 11 May 2018 Upper Tribunal Judge Jackson granted permission to appeal as it was arguable that the Judge had not undertaken a full assessment of the child's best interests, "*although not necessarily by failing to attach weight to her length of residence in the United Kingdom which is clear in the decision is taken into account, but by failing to make any findings about the Second Appellant's relationship, if any, with her father given the accepted evidence that he picks her up from school every day*". The best interests assessment arguably went no further than the appellants remaining together. Further, there was no reference at all to section 117B(6) of the NIAA 2002, nor to paragraph 276ADE(1)(iv) of the Rules, and nor any finding on whether it was reasonable for the child to leave the United Kingdom. It was arguable that the reference to it not being "*unduly difficult*" for the child to adapt to life in Nigeria applied the wrong test.

Relevant Background Facts

4. The appellants are Nigerian nationals. The first appellant was born on 23 February 1970. She was granted leave to enter the UK on 14 January 2003 as a domestic worker for a period of six months. She complied with the conditions of her visa, returning home before her visa expired, and she was granted leave to enter in the same capacity in 2004 and 2005. On the third occasion, she was granted leave to enter for two years from 20 June 2005 until 30 June 2007. She entered the UK in or about June 2005, and overstayed.
5. She gave birth to VI in London on 20 July 2008. VI was fathered by then first appellant's Nigerian partner, EI, whose surname both the first appellant and the second appellant adopted, as appears from VI's birth certificate. The first appellant, who was a co-informant for the birth certificate, said that her occupation was that of a housewife. The father's occupation was not specified.
6. On 1 July 2010 the appellants applied for leave to remain on human rights grounds. The applications were refused on 8 September 2010 with no right of appeal. On 7 December 2010 their legal representatives requested reconsideration, and on 29 December 2014 the applications were refused on reconsideration.
7. Both appellants appealed, and their appeals were heard by Judge Taylor on 14 July 2015. The first appellant's evidence was that she had last seen EI in 2012, and his current whereabouts were unknown. She also said that EI did not have ILR. Judge Taylor also received oral evidence from the appellants' benefactor, Mrs O.
8. Judge Taylor dismissed the appeals as he rejected the first appellant's evidence that there would be very significant obstacles to her re-integration into life and society in Nigeria, where she had a history of employment until the age of 35 and where she had received training as a hairdresser. He did not accept that she did not have family

members in Nigeria, since she had referred to a surviving sibling in earlier correspondence. He also did not accept that the support which she and her daughter received in the UK from Mrs O, who came from the same village in Nigeria and who had been fully maintaining and accommodating the first appellant since 2007 - and the second appellant since birth - would not continue in Nigeria, where Mrs O had properties, including a house which she kept for herself and others which she rented out.

9. In November 2015 the appellants made a fresh application for leave to remain, relying on the fact that VI had now accrued over seven years residence in the UK since birth. On 3 March 2016 the respondent refused the application on the ground that, while the second appellant came within the scope of Rule 276ADE(1)(iv), it was reasonable to expect her to leave the UK with her mother.

The Hearing Before, and the Decision of, the First-tier Tribunal

10. Both parties were legally represented before Judge Carroll. The Judge received oral evidence from the first appellant and her attention was directed to a recent school report for the second appellant, who was just short of her 9th birthday and who was attending primary school.
11. In her subsequent decision, she set out the findings of Judge Taylor at some length. At paragraph [22] she held that much of the oral evidence of the first appellant before her was characterised by evasiveness. At paragraph [24] she held that the evidence did not show that the first appellant enjoyed family life with the father of the second appellant. At paragraph [28] she concluded as follows:

She is still very young. It is indisputably in her best interests to remain with her mother and the appellants would be removed to Nigeria together. The appellants will continue to enjoy their family life together as mother and daughter and there is no evidence to show that they cannot continue to enjoy their private lives in respect of all their essential elements.

The Hearing in the Upper Tribunal

12. After hearing from Ms Revill and Mr Taylor, I ruled that an error of law was made out because, in short, the Judge had not clearly identified, in accordance with authority, the powerful reason or reasons which made it reasonable to require the second appellant to leave the UK. I gave my reasons for so finding in short form, and my extended written reasons are given below.
13. No additional documentary evidence had been filed with the Upper Tribunal for the purposes of remaking the decision, if an error of law was made out. However, I invited Ms Revill to call the first appellant as a witness so that she could be questioned about her current circumstances. She was briefly cross-examined by Mr Tarlow, and she also answered questions for clarification purposes from me. At the conclusion of her evidence, Ms Revill submitted that the appeal should be allowed on remaking, citing **MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC)**. Mr Tarlow acknowledged that the child's private life claim was stronger now

than it was at the date of the hearing before Judge Carroll, but he submitted that there remained powerful reasons why it was reasonable to expect her to leave the country.

Reasons for finding an error of law

14. This is a borderline case in that the Judge was plainly aware of the relevant jurisprudence on how the question of reasonableness should be assessed, and there is some force in Mr Tarlow's argument that powerful reasons for requiring the second appellant to accompany her mother to Nigeria are readily deducible from the Judge's citation of authority and her reasoning on the facts, albeit (as he conceded) these reasons are not expressly identified by her.
15. However justice must not only be done, but must be seen to be done, and I was narrowly persuaded that the Judge's approach fell short of what was required. She did not follow the orthodox approach set out by Clarke LJ in paragraphs [36] to [37] of **EV (Philippines) -v- Secretary of State for the Home Department [2014] EWCA Civ 874**. This is the two-stage approach to the assessment of reasonableness. The first stage is the weighing up of the best interest considerations for and against the child going to the country of which he or she is a citizen, without any immigration control overtones. The second stage is that, having arrived at a conclusion as to where on the spectrum the child's best interests lie, the judicial decision-maker goes on to consider wider proportionality considerations before reaching a conclusion as to whether requiring the child to leave the country with his or her parents is reasonable or not.
16. The Judge fell into error at stage 1, as she did not adequately acknowledge the best considerations in favour of the child remaining in the UK, but focused almost exclusively on the prospects for the child in Nigeria. In addition, the Judge did not make a finding on whether the second appellant's contact with her father was a factor which weighed in favour of her remaining here.
17. A further error was that the Judge did not make a clear or, in the alternative, a sustainable finding on where on the spectrum the child's best interests lay. The possibly unintended implication of her conclusion at [28] is that it is overwhelmingly in the child's best interests to go to Nigeria with her mother. Such a proposition runs directly counter to **MA (Pakistan) and Others, R (on the application of) v Upper Tribunal (IAC) & Anor [2016] EWCA Civ 705** where, in a passage quoted by Judge Carroll at [21], Elias LJ said at [49] as follows:

...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 in 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.

Evidence on Remaking

18. The broad thrust of the first appellant's oral evidence was that there had been no material change of circumstances. VI still saw her father. They were close. VI was continuing to do well at school, and she also participated in after-school clubs, which

“changed” from time to time in terms of the activities undertaken. The examples she gave of after-school activities that had been undertaken by VI at an after-school club were football and swimming. She and EI had resumed their relationship, but EI was not living in the same household as her and her daughter. She was not aware of him having a visa. The church with which she had been actively involved for many years, and around which her social life was orientated, was a Nigerian church. She came from Agbo near Lagos, whereas EI came from another part of Nigeria.

Discussion and Findings

19. I find that the primary findings of fact made by Judge Taylor in 2015 and by Judge Carroll in 2017 hold good, with one exception, which is the status of the relationship between the appellants and EI.
20. Neither Judge Taylor nor Judge Carroll found the first appellant to be an entirely reliable witness, and I too found that the first appellant was evasive on the topic of her relationship with EI. She presented as giving the bare minimum information which she considered to be advantageous to her case, and as holding back on additional information which might be disadvantageous. Against this background, I find on the balance of probabilities that, whatever may have been the true position at the time of the hearing before Judge Taylor:
 - (a) The parents were living together in the same household at the time of VI’s birth;
 - (b) That the household in question was owned by Mrs O, and she was maintaining and accommodating the whole family;
 - (c) That the father did not have status in 2008 at the time of VI’s birth (and hence was dependent on Mrs O for his survival here as was the first appellant), and that he still does not have status;
 - (d) That, if it is true that they split up in 2012, the parents at some point got back together and they had resumed their relationship by the time of the hearing before Judge Carroll;
 - (e) That the parents have remained in a relationship since then and, if it is true that the father is not a member of the same household, this is not because of the status of their relationship;
 - (f) That the father has contact with VI through picking her up from school and taking her home (and that he may have greater contact with her than his mother is letting on, through staying overnight to enjoy conjugal relations with the first appellant and/or through habitually residing in the same household as he used to do at the time of VI’s birth)
 - (g) That there are not insurmountable obstacles (as defined in EX.2) to family life between the appellants and EI being carried on in Nigeria.

21. The sole issue in this appeal is whether the second appellant qualifies for leave to remain under Rule 276ADE(1)(iv), and hence whether the first appellant succeeds in her appeal under s117B(6).

Guidance on the assessment of best interests

22. In **Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)** the Upper Tribunal gave the following guidance:

30. It is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:
- (i) As a starting point in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
 - (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
 - (iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
 - (iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than peers and are adaptable.
 - (v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic wellbeing of society amply justifies removal in such cases.

23. At paragraph [48] of **MA (Pakistan)** Elias LJ cited with approval the explanation given by Clarke LJ in **EV (Phillipines)** at [34]-[37] as to how the Tribunal should apply the proportionality test where wider public interest considerations are in play, in circumstances where the best interests of the child dictate that he should remain with his parents. At [36] Clarke LJ said that if it is overwhelmingly in the child's best interests to remain, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite. Clarke LJ continued in [37]:

In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country

and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

Application of the Guidance

24. The starting point is that there are strong best interest considerations militating in favour of VI remaining in the UK with her mother. As she satisfied the seven year rule at the date of application, and as – at the date of the hearing before me – she is about to reach her 10th birthday and to finish her penultimate year at primary school – the third principle in **Azimi-Moayed** is to the fore.
25. There are best considerations going the other way. VI is not yet a British national, and so the second principle in **Azimi-Moayed** is also very much in play. She would be returning to the country of which she is a national, and to the society to which she belongs by virtue of her Nigerian nationality and parentage. She would be able to enjoy to the full her rights as a Nigerian national, including access to education, and she would enjoy the benefit of being immersed in the social and cultural milieu from which both her parents spring. She would also enjoy the benefit of family reunion with extended family members in Nigeria.
26. As VI has been brought up within a Nigerian diaspora (both at home and at church), and also within a multi-cultural and multi-racial community in London, it should be relatively easily for her to adjust to life and society in Nigeria. VI is a happy, well-adjusted child who is doing very well at school here, and there is no reason to suppose that she will not flourish at a putative new school in Nigeria, albeit with a different set of teachers and fellow pupils.
27. The first principle in **Azimi-Moayed** is also in play, with the qualification that her father is not said to part of her household. Even so, I reject Ms Revill's submission that VI's contact with her father should be seen as a factor which fortifies the case that her best interests lie in her remaining here. On the contrary, as he is in a relationship with her mother, and neither of them has status, *prima facie* it is VI's best interests that he should accompany her and her mother to Nigeria, where he has the right to work and so he would be able to support her financially there, whereas as an irregular migrant here he is unable to make any financial contribution to her care and upbringing.
28. Nonetheless, I accept that the best interest considerations in favour of VI remaining here outweigh those going the other way. But I do not consider that it is overwhelmingly in her best interests to remain here. She has not yet reached the watershed of seven years from the age of four; and she has yet reached a significant milestone in her education in terms of preparing to undertake public exams such as GCSEs.

Wider proportionality considerations

29. There is a strong public interest in the removal of the appellants in view of the adverse immigration history of the first appellant. She overstayed for no good reason; and, as found by Judge Carroll, she chose simply to ignore the outcome of the appeal before Judge Taylor. Although she has not been in the receipt of state benefits, she has

accessed free treatment on the NHS (such as when giving birth to VI long after the expiry of her visa) and free education for her daughter to which she has not been entitled, and for which the expense has been borne by the taxpayer. I accept that in **MT and ET** the parent had a much worse history than the first appellant, and the Tribunal found that this did not constitute a powerful enough reason to make it reasonable for ET, who arrived in the UK in 2007 at the age of four, to leave the country. But ET had a much stronger private life claim than does VI.

Conclusion

30. The second appellant does not yet have a right to remain as a British national, albeit that she is now eligible to apply for naturalisation. The scales will probably be tipped in the second appellant's favour if and when she is naturalised as a British citizen. But as matters currently stand I do not consider that her private life claim is so strong as to outweigh the public interest.
31. I consider that there are sufficiently powerful reasons, as adumbrated in paragraph [29] above, to make it reasonable to expect the second appellant to leave the country, notwithstanding the fact that overall it is in her best interests to remain here with her mother. Accordingly, she does not qualify for leave to remain under Rule 276ADE(1)(iv). By the same token, the appeal of her mother does not succeed under s117B(6). The decision appealed against is proportionate to the legitimate aim of protecting the country's economic well-being and maintaining firm and effective immigration controls.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellants' appeals on human rights grounds (Article 8 ECHR) are dismissed.

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

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 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 26 July 2018

Judge Monson

Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have dismissed these appeals on remaking, there can be no fee award.

Signed

Date 26 July 2018

Judge Monson

Deputy Upper Tribunal Judge