



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11255/2016
HU/12808/2016
HU/12811/2016

THE IMMIGRATION ACTS

Heard at Field House
On 10th July 2018

Decision & Reasons Promulgated
On 13th July 2018

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

DORCAS [O] (1)
AMARACHI [O] (2)
OZIOMA [O] (3)
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel, instructed by Global Solicitors & Advocates
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are citizens of Nigeria. The first appellant is the mother of the second and third appellants, who were born on 27th December 1995 and 14th December 1997 respectively. They all arrived in the UK on 27th April 2008 as visitors and overstayed. On 30th November 2015 they applied for leave to remain in the UK on human rights grounds. Their applications were refused in a decision dated 11th April 2016. Their appeals against the decisions were dismissed by First-tier Tribunal Judge NMK Lawrence in a determination promulgated on the 29th December 2017.
2. Permission to appeal was granted by Judge of the First-tier Tribunal SPJ Buchanan in a decision which states that it was arguable that the First-tier judge had erred in law in failing to appreciate that the third appellant was a child at the date of application and had arguably been in the UK for 7 years at that point in time, and thus by virtue of a failure to determine the appeal with reference with paragraph 276ADE(1)(vi) in relation to this appellant. It was indicated that all grounds could however be argued. Time was also extended for the late lodging of the application in light of the point of communication of the decision to the applicants' solicitors.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. The grounds of appeal firstly contend that the First-tier Tribunal erred in law by applying the higher standard of proof relevant in deportation appeals by reference at paragraphs 6 and 7 of the decision to the case of Kamara [2016] EWCA Civ 813.
5. Secondly it is contended that the appeals in relation to the first and third appellants were wrongly determined as it should have been considered whether it would be reasonable to require the third appellant to leave the UK given her 7 year presence in the UK as a child at the date of application under paragraph 276ADE (1)(iv) of the Immigration Rules, and in turn whether the first appellant could succeed under paragraph EX1 of Appendix FM of the Immigration Rules. In this connection the First-tier Tribunal ought to have been guided by MA (Pakistan) & Ors [2016] EWCA Civ 705 which states that there is a very strong expectation that it would be in the child's best interest to remain in the UK with her parents after this seven year period of time, and to the fact that this matter must be a primary consideration in any proportionality assessment, and that it would require a compelling reason to the contrary to conclude that it would be reasonable to require the child to leave. An addition factor that means that the third appellant cannot reasonably be asked to leave the UK is that she suffers from sickle cell anaemia.
6. Thirdly, it is argued, the First-tier Tribunal failed to look at the third appellant's medical circumstances as a relevant Article 8 ECHR factor, see Akhalu (health claim: ECHR Article 8) Nigeria [2013] UKUT 400.

7. Fourthly, it is contended there was a failure to look at the appeal outside of the Immigration Rules on Article 8 ECHR grounds.
8. Mr Bramble accepted that the First-tier Tribunal had materially erred in law by failing to consider whether the third appellant could meet the requirements of paragraph 276ADE (1)(iv) when it was considered by the respondent that she had been in the UK for seven years as a child at page 6 of 13 of the reasons for refusal letter, although that letter stated she was not entitled to remain as it was reasonable to expect her to leave with her mother and sister as a family unit. He accepted that it was then a consequential error to consider whether the first appellant could meet the requirements of the EX 1 route under Appendix FM of the Immigration Rules or s.117B(6) of the Nationality, Immigration and Asylum Act 2002.
9. I found that the First-tier Tribunal had therefore erred in law, for the reasons I now set out below. I set aside the decision of the First-tier Tribunal in its entirety. I then asked for evidence submissions on remaking. At the end of the hearing I informed the parties that I was not going to give an oral judgement but would send my reasons in writing, however I indicated that I would be allowing the appeals on human rights grounds.

Conclusions – Error of Law

10. The First-tier Tribunal failed to consider that the third appellant was a child at the date of application on 30th November 2015 as she was 17 years old, and that she therefore could, at the date of the decision under appeal, have possibly shown compliance with paragraph 276ADE(iv) of the Immigration Rules, and through her that her mother, the first appellant, was also therefore potentially able to show an ability to meet paragraph EX1 of Appendix FM of the Immigration Rules. If these two appellants were able to show compliance with the Immigration Rules at the date of decision there would be no public interest in their removal under s.117B(1) of the Nationality, Immigration and Asylum Act 2002, and this would be highly relevant to the proportionality of the interference with their private/ family lives represented by their removal, and thus the determination of the human rights appeal. This was a material error as the respondent had identified the applicability of paragraph 276ADE(1)(iv) in the reasons for refusal letter and there was evidence going to the issue of reasonableness of the third appellant being required to leave the UK being set out at page 12 of the bundle in her witness statement, and this was supported by the documentary evidence of her educational achievements and medical problems (particularly the evidence from the Sickle Cell Society and the letter from her consultant haematologist Dr Yardumian dated 21st July 2017) also put before the First-tier Tribunal in the bundle. In circumstances where the first and third appellants could show a material error in the determination of their appeals the appeal of the second appellant was also unsafe as positive outcomes for these two appellants could potentially affect the proportionality of her removal in Article 8 ECHR terms too given her membership of their nuclear family.

Evidence and Submissions - Remaking

11. It was identified by both representatives that there was only one factual matter on which it was needed to call further oral evidence. Mr Karim asked the first appellant to confirm her identity, address and adopt her witness statement. He then asked her to confirm the whereabouts of her son who had remained in Nigeria. The first appellant explained that her son had gone to live in Ghana with his Ghanaian girl-friend as due to her current circumstances she had been unable to send him money to continue his studies in Nigeria. She was unsure whether he would remain permanently in Ghana. She provided a letter she had received from Ghana from her son with the envelope which showed it had been sent from Kumasi in Ghana on 27th June 2018. The contents of the letter were consistent with the first appellant's evidence. She said that the First-tier Tribunal had confused her in the questioning and so she had not initially understood that she was being asked about any children being in Nigeria but about wider family, but that she had explained this to them in her evidence at a later point.
12. Mr Bramble relied upon the reasons for refusal letter, but made no further submissions with respect to the first and third appellants. He added that it was possible with respect to the second appellant that she would not be returning to live alone if she went back to Nigeria as her brother generally lived there, and this meant that she had a less strong case to remain.
13. Mr Karim submitted that I should be guided by MA (Pakistan) at paragraphs 46 and 49. I needed to give significant weight to the third appellant having been in the UK for seven years, and that there was a strong expectation that this meant it was in her best interests to remain in the UK, and that this would only be dislodged if there were powerful reason to find to the contrary. Further, following the guidance in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197, it should be noted seven years of private life ties of children from the age of 4 years are more significant in this connection, and the third appellant's ties were formed between the age of 10 and 18 years. The medical evidence, particularly the report at page 36, added further weight to the arguments that it was not reasonable to require the third appellant to leave, as did her academic achievements and study plans for the future.
14. In this case there were no significant adverse factors: there was no deception as the appellants had simply overstayed, and there was no criminality. Mr Karim therefore argued that it was not reasonable to expect the third appellant to leave the UK, and therefore that she succeeded in her appeal under paragraph 276ADE(1)(iv) of the Immigration Rules and her mother under s.117B(6) of the Nationality, Immigration and Asylum Act 2002
15. In relation to the second appellant Mr Karim argued that her appeal should succeed as she lived with the other two appellants and had family life relationships with them. She also had strong private life ties as she had lived in the UK since she was

12 years old, was educated here and had aspirations to become a barrister. She was likely to be a contributor economically in the future. She should not be blamed for the actions of her mother in causing her to overstay in the UK when she was a child. I should find that on the balance of probabilities her brother was now living in Ghana with his girlfriend and in-laws and that she would be a young, lone female if returned to Nigeria.

Conclusions – Remaking

16. It is accepted by the respondent that the third appellant had spent seven years in the UK as a child at the time of application, and so could meet these aspects of paragraph 276ADE(1)(vi) of the Immigration Rules. The aspect in dispute is whether it was reasonable to require her to leave the UK. It is clear from the guidance of the Court of Appeal in MA Pakistan that there is a strong expectation that it would be in her best interests to remain, and that significant weight must be given to this factor when deciding whether it was reasonable to expect her to leave, but that the immigration history and any other negative matters relating to her family must be part of the balance. I accept the Upper Tribunal guidance taken from Azimi-Moayed that the fact that it was the later part of this appellant's childhood that she spent in the UK would be likely to make her ties to the UK stronger and her removal less likely to be reasonable.
17. The third appellant's uncontested evidence is that she wishes to remain in the UK as this has been her home since she was ten years old. It is the place where she has all of her friends and where she feels safe. She has been successful in studies in the UK and has a level 3 BTEC qualifications in business studies and science, and has a place to do an apprenticeship in bio-medical sciences and thereafter a degree in that subject. She does not wish to return to Nigeria where she would not feel safe as her memories of that country are associated with emotional trauma as when she lived there they lived with her violent and controlling father who subjected her mother to physical and emotional abuse. Further she does not believe she would be able to continue her education there, and is concerned that her sickle cell anaemia would be made worse due to lack of appropriate medical health care and support from family and friends. I find on the basis of the witness evidence and the letter evidence provided to me that the only family support in Nigeria was her brother, but he has now moved to Ghana for an unknown period of time to be with his girlfriend and her family. If she returned she would not have any close family support.
18. The third appellant's concerns about detriment to her health of returning to Nigeria are supported by the Sickle Cell Society in their letter of August 2017 and her consultant haematologist, Dr Anne Yardumian, in her letter of July 2017. This evidence confirms that the third appellant suffers from sickle cell crises during which she has significant bone and joint pain; that she takes medication that it is not believed she would receive in Nigeria; that return to Nigeria would cause her to be at increased risk of serious complications and a shortened life expectancy, particularly as the care in Nigeria is expensive, patchy, frequently involves unsafe

blood transfusion; and that the health of those with sickle cell is significantly more endangered in Nigeria compared to the UK due to the prevalence of malarial infections.

19. I have no hesitation in finding that it is in the third appellant's best interests to remain in the UK given her health and continuity of education reasons for remaining, and her long-standing social integration in this country, and her negative psychological associations of Nigeria with living with her father's violence and abuse. This must be given significant weight when concluding whether or not it would be reasonable to expect her to leave the UK.
20. I do not find that there are powerful reason to find that it would be reasonable to expect the third appellant to leave the UK given her best interest lie strongly in favour of her remaining. She, the first and second appellants are overstayers in the UK. Whilst this is a factor against her, there are no criminal convictions held by any family member, or other additional wrong doing or bad character issues. In fact, to the contrary, there are positive character references from their church, the Shining Light Assembly and two other friends at pages 116 to 119 of the bundle. I therefore conclude that the third appellant could meet the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules at the date of decision, and that as such there is no public interest in her removal under s.117B(1) of the Nationality, Immigration and Asylum Act 2002. I note that she is not currently financially self-supporting as a factor against her, although I find she is likely to be so in the future after completion of her studies. She speaks good English, and I find that she is integrated into society in the UK which is a neutral matter. In the totality of these circumstances I find that she is entitled to succeed in her appeal on Article 8 ECHR grounds as her removal would be a disproportionate interference with her right to respect for private life.
21. As Mr Bramble has acknowledged the fact that it is not reasonable to expect the first appellant to leave the UK then in turn entitles the first appellant to succeed under EX1 of Appendix FM of the Immigration Rules as it is accepted that she is her mother and had and has a genuine and subsisting parental relationship with her, and the the third appellant had lived in the UK for seven years as a child proceeding the application and it was not reasonable to expect her to leave the UK. Once again therefore there is no public interest in the first appellant's removal under s.117B(1) of the Nationality, Immigration and Asylum Act 2002 due to her ability to meet the family life Immigration Rules. A neutral factor is that the first appellant speaks fluent English, and against her is that there is no evidence that she is self-supporting. Only little weight can be given in her favour to her private life ties to the UK as these have all been made whilst she has been unlawfully present. I find however that she is integrated into society in the UK, and that ultimately on consideration of the totality of the evidence she is entitled to succeed in her appeal on Article 8 ECHR grounds as her removal would be a disproportionate interference with her right to respect to family life with the third appellant.

22. This leaves the appeal of the second appellant to be determined. The second appellant is 22 years old and live with the first and third appellants, having entered the UK when she was 12 years old. I find that she has family life ties with the first and third appellants, as I find that she has not moved on to found a family of her own or establish an independent life. I find that she is more than normally financially and emotionally dependent on them, and they on her due to their medical issues: the first appellant having high blood pressure and the third appellant potentially life threatening sickle cell disease. Like the other appellants she had a traumatic early family life in Nigeria due to her father's violence to the first appellant, her mother, making her current family life ties all the more strong and vital to her at the current time despite the fact she is now a young woman rather than a child. She also has strong private life ties with the UK having grown up in this country over the past 10 years, with six of those years being ones when she was a child and adolescent. If she were required to leave this would also separate her from all of her friends, and her strong community ties which she has established through her church membership and voluntary work. I find therefore that removal would interfere with the second appellant's family and private life ties to the UK.
23. In terms of the proportionality assessment against her is the fact that she cannot meet the requirements of the Immigration Rules, and weight must be given to the public interest in the maintenance of immigration control and the removal of those who do not meet the requirements of the Immigration Rules in accordance with s.117B(1) of the Nationality, Immigration and Asylum Act 2002. It is further against this appellant that she is not currently self-supporting, although it is likely that she will become so when she has finished her degree studies in a few years' time. It is a neutral factor that she speaks fluent English and is integrated in the UK. In her favour is the little weigh I am permitted to give to her extensive private life ties in accordance with s.117B(4) of the Nationality, Immigration and Asylum Act 2002, and also the weigh that I find that I can give to her family life ties in the exceptional circumstances of this case whereby the rest of her nuclear family are entitled to remain under the Immigration Rules; the fact that these family ties in the UK go back for a decade - during the majority of this time she was a child, and where I find she needs their emotional support and they need hers due to medical issues and the traumatic family life they all endured in Nigeria. It is also relevant that I do not find that she could join her brother in Nigeria as he has now left that country for an indefinite period to join his girlfriend and her family in Ghana. Although the balancing exercise is finely balanced in the second appellant's case I conclude that it would not be proportionate to her right to respect to family and private life for her to be removed.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal.

3. I re-make the decisions in the appeals by allowing them all on Article 8 ECHR grounds.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 11th July 2018

Fee Award Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals. I have decided to make a whole fee award because the key information supporting documentation which led to this appeal being allowed was provided to the respondent in the representations made by Adel Jibs & Co Solicitors dated 27th November 2015.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 11th July 2018