



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09827/2017

THE IMMIGRATION ACTS

Heard at Birmingham
On 11th January 2019

Decision and Reasons Promulgated
On 23rd January 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

OLAJUMOKE [O]
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr R Martin, Counsel, instructed by 1st Call
Immigration Services

For the respondent: Mrs Eboni, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant had been given permission to appeal the decision of First-tier Tribunal Judge Pacey who, in a decision promulgated on 13th April 2018 dismissed the appellant's appeal against the respondent's decision refusing leave to remain.

2. The appellant has 3 children who at time of decision were aged 9, 7 and 6 with the two 2 elder children having lived in the United Kingdom for over 7 years before the date of application. Because of this paragraph EX 1 of appendix FM and section 117 B(6) were relevant. Permission was granted on the basis it was arguable the judge did not treat the children's best interests as a primary consideration nor did she recognise the significant weight to be attached to 7 years residence in respect of the children.
3. In a Rule 24 response the respondent accepted that the judge failed to direct herself in accordance with MA Pakistan [2016] EWCA Civ 705.
4. At hearing, Mrs Eboni maintained this position and suggested that I remake the decision, allowing the appeal. I was provided with the latest instructions to decision-makers dated 19 December 2018 in light of the decision in KO (Nigeria) and Others (Appellants) v Secretary of State for the Home Department (Respondent) [2018] UKSC 53.
5. The new Guidance poses the question whether the consequence of refusal will be that the child is required to leave the United Kingdom. In the present instance, if her mother's application is refused she will go with her. Page 68 of the Guidance provides that where there is a qualifying child, as here, the starting point is that the child would not normally be expected to leave. It is in the child's best interests for the family to remain together. Therefore, if the child is not expected to leave then the parent will also not be expected to leave.
6. In light of this I would agree that the decision in the First-tier materially errs in law and can be remade allowing the appeal. The First-tier Tribunal Judge did not have the benefit of the latest guidance or the Supreme Court decision. However, I am tasked with applying the law as it is now understood

Decision

The decision of first-tier Tribunal judge Tribunal Judge Pacey materially errs in law and is set aside. I remake the decision allowing the appeal.

Francis J Farrelly
Deputy Upper Tribunal Judge.

Dated 11 January 2019