Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16272/2019
& HU/16273/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Teams* **Decision & Reasons Promulgated**
On 11 August 2021 **On 01 September 2021**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

(1) JEREMIAH UKPE JOHN
(2) DORIS UKPE JOHN
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr. S Karim, Counsel, instructed by Herbert Lewis Solicitors
For the Respondent: Mr. S Kotas, Senior Presenting Office

DECISION AND REASONS

Introduction

The appellants are national of Nigeria. They appeal decisions of the respondent to refuse to grant them leave to remain in this country on human rights (article 8) grounds.

Their appeals were initially considered and dismissed by Judge of the First-tier Tribunal French by means of a decision sent to the parties on 10 December 2019. The appellant was granted permission to appeal. I determined that the decision of Judge French contained material errors of law and so set aside the decision on 28 January 2021.

No findings of fact were preserved.

Remote hearing

The hearing before me was a Teams video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

The appellants attended the hearing remotely.

Anonymity

By means of my decision of January 2021 I set aside a previously issued anonymity order. No application was made by the parties for an anonymity order to be re-issued.

Background

The appellants are husband and wife. They are nationals of Nigeria, and presently aged 51 and 48. They have four children, presently aged 22, 20, 17 and 12. The two elder children are Nigerian nationals, and the two younger children are citizens of the United States of America.

The first appellant trained as an engineer and has worked in several countries including Angola and Azerbaijan as well as in Nigeria. Whilst working in Azerbaijan his wife secured entry to the USA for medical care during both her third and fourth pregnancies.

The first appellant entered the United Kingdom in July 2013 as a Tier 1 (General) Migrant and such leave was varied on two occasions, ultimately expiring on 23 July 2018. An in-time application for indefinite leave to remain was refused by the respondent on 3 January 2019, with no attendant right of appeal. The respondent observed that the first appellant had been absent from this country for 970 days during the qualifying period and so concluded that he was unable to meet the continuous residence requirements of paragraph 245AAA of the Immigration Rules (‘the Rules’). The first appellant was therefore unable to meet the requirements of paragraph 245CD(c) and (d) of the Rules.

The decision was reaffirmed on 14 February 2019 consequent to administrative review.

The appellants applied for leave to remain on human rights (article 8) grounds on 7 March 2019. The respondent refused the applications by a decision dated 17 September 2019. The appellants exercised their statutory right of appeal.

A section 120 'statement of additional grounds' was filed and served in July 2021 with the appellants relying upon their two youngest children having completed 7 years continuous residence in this country.

Decision

On 9 August 2021, some two days before the listed hearing date, the respondent filed a position statement dated the same day and authored by Mr. Kotas. The following was observed:

> '2. By way of letter dated 15 July 2021, the appellants in response to the Section 120 Notice served by the respondent in the these cases seek to raise additional grounds of appeal, namely that the appellants' two youngest children are now 'qualifying children' and that it would not be reasonable to expect them to leave the United Kingdom by reference to 117B(6) of the NIAA 2002.
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> 3. Firstly, the respondent does consent to this new matter being considered by the Tribunal - *Hydar (s. 120 response, s. 85 "new matter", Birch)* [2021] UKUT 176 (IAC) (18 June 2021) refers.
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> 4. Secondly, as to the substantive merits of the argument, the Upper Tribunal will be well familiar with the authorities on this issue so these will not be rehearsed here. In terms of the public interest considerations the SSHD accepts the appellants and their dependants are able to speak English and are financially independent. She further accepts the appellants and their children appear to have a good immigration history overall. The respondent, mindful as she is of the strong public interest in immigration control, nevertheless accepts that in all the circumstances it would not be reasonable for the appellants' daughter Joan to leave the United Kingdom. She has now spent 8 years in the United Kingdom, has been performing well academically and is now at a critical stage of her education and of her personal development and as such it remains in her best interests to remain in the United Kingdom which is a primary consideration. Theoretically she could of course resume her studies in Nigeria, nevertheless, having regard to all the circumstances in this case, the respondent accepts her removal from the United Kingdom would not be reasonable.
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> 5. Separating any of the family appears to be neither in the bests interest of Joan and Michael nor a realistic proposition given the relative ages of all the children and their current educational situation and dependency on their parents. The respondent therefore accepts it inexorably follows the whole family should be granted leave to remain in the United Kingdom.

> 6. Accordingly, in light of the above, the respondent makes no further specific submission in relation to the issue of the appellants' other qualifying child - Michael John – and whether or not it would be reasonable for him to leave the United Kingdom.'

Mr. Karim confirmed on instruction that the appellants were content to accept that their appeal was successful on article 8 grounds in light of the respondent's concession.

I record Mr. Kotas' assurance on behalf of the respondent that the appellants and their four children will be granted leave to remain. I observe that the mechanics of such grants are a matter for the respondent and not this Tribunal.

I take this opportunity to thank both Mr. Kotas and Mr. Karim for the help they provided during the course of the hearing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error on a point of law and was set aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

The decision is remade.

The appellant's appeals are allowed on human rights (article 8) grounds.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 11 August 2021

TO THE RESPONDENT
FEE AWARD

Fees were paid by both appellants.

The appellants were successful consequent to the serving of a section 120 notice in July 2021. In the circumstances, the respondent acted reasonably when making her decision in September 2021 and so no fee award is made.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Dated: 11 August 2021