IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Ce-File Number: UI-2021-001791
UI-2021-001792

First-tier Tribunal No:
HU/01502/2021
HU/01506/2021

THE IMMIGRATION ACTS

Decision Under Rule 34
On the 3 March 2023

Decision & Reasons Promulgated
On the 14 March 2023

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

DENNIS MOSUNMOLA POPOOLA
KHALIDA MOSUNMOLA POPOOLA

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

DECISION AND REASONS

Introduction

1. This is an appeal by the appellants against the decision of Judge of the First-tier Tribunal Clarke ('the Judge'), sent to the parties on 8

November 2021, by which the appellants' appeals against decisions of the respondent to refuse to grant entry clearance were dismissed.

Rule 34 Decision

2. By means of a 'rule 24' response dated 16 February 2022, Mr. Avery, Senior Presenting Officer, confirmed on behalf of the respondent that there was no objection to the decision of the First-tier Tribunal being set aside and the resumed hearing being remitted back to the First-tier Tribunal.

3. Mr. Avery observed, *inter alia*:

> '2. The respondent does not oppose the appellant's application for permission to appeal on the basis that the judge at the First-tier failed to properly address the Section 55 issues in this case.'

4. In considering whether to proceed under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I am mindful as to the circumstances when an oral hearing is to be held in order to comply with the common law duty of fairness and as to when a decision may appropriately be made consequent to a paper consideration: *Osborn v. The Parole Board* [2013] UKSC 61; [2014] AC 1115 and *JCWI v. President of the Upper Tribunal (Immigration and Asylum Chamber)* [2020] EWHC 3103 (Admin), at [6.1 - 6.14].

5. In the circumstances and being mindful of the importance of these proceedings to the appellants, the identified position of the respondent, the expense to the parties of attending an oral hearing and the overriding objective that the Tribunal deal with cases fairly and justly, I am satisfied that it is just and appropriate to proceed under rule 34 of the 2008 Rules.

Background

6. The appellants are mother and minor child. They are nationals of Nigeria.

7. On 16 October 2020, they sought entry clearance to join their sponsor, the husband of the first appellant and the father of the second appellant. The respondent refused the applications on the same day, concluding that they failed to meet the financial and English language requirements of the relevant Immigration Rule.

8. It was accepted by the respondent before the Judge that the first appellant is in a genuine relationship with the sponsor, and the second appellant is their child.

9. The appellants' case before the Judge was that the respondent should have considered exceptional circumstances to exist outside the

Immigration Rules and that it would be unjustifiably harsh for the family unit not to be reunited. Reliance was placed upon article 8 ECHR. Express reliance was placed upon section 55 of the Borders, Citizenship and Immigration Act 2009.

10. The Judge dismissed the appeal noting, *inter alia*, that though the sponsor enjoys indefinite leave to remain, he remains a Nigerian national. It was observed that whilst the sponsor's mother is a British citizen, no evidence was provided as to how long she would be 'happy' for her daughter-in-law and granddaughter to reside with her, how large her house is and whether the appellants would rely upon public funds.

11. The Judge concluded:

> '14. The Appellant and sponsor refer to the difficult conditions in Nigeria to live but they are both nationals of that country and the general conditions of the country being less preferable to them as somewhere to live is a weak point. I find there are no exceptional circumstances which would render the decision unjustifiably harsh. The couple married in Nigeria in 2020 and have spent time together during the pandemic. I have taken into account the medical evidence available and the need for a family unit to be together.
>
> 15. I conclude that the Appellant has [sic] not shown that family life could not continue in Nigeria or with the sponsor continuing his course part-time or deferring it. I have taken into account with care the desire of the mother of the sponsor to help house and finance the couple but I have not heard from her about how long she intends this arrangement to continue.
>
> 16. Drawing the strands together, I do not find that the Appellant [sic] has discharged the burden of proof.'

Grounds of Appeal

12. The appellants advance two grounds of appeal by means of a document lacking any paragraph numbering. Though confused in places, and repetitive, it is appropriate to detail the first ground in full:

> 'The Judge erred in failing to assess or make any reference to the best interest of the child as a relevant factor when assessing exceptional circumstances. It is respectfully submitted that the Judge failed to adequately assess the exceptional circumstances in relation to the best interests of the second Appellant who is a relevant child. The Judge failed to adequately assess this adequately [sic] in respect of the first Appellant and failed to do so at all in respect of the second Appellant.

> GEN.3.1 - GEN.3.3 of the Rules provides that consideration of section 55 of the Borders, Citizenship and Immigration Act 2009 is a factor relevant to proportionality. In entry clearance applications the best interests of children should be taken into account; see *SM (Algeria) v. ECO, UK Visa Section* [2018] UKSC 9 at [19]: *MM (Lebanon)* at [109], *Mundeba* [2013] UKUT 00088 (IAC). The Judge failed to take into account or treat as a primary consideration the best interests of a relevant child as significant consideration or powerful factor to be given weight when assessing proportionality. The Judge erred and in doi8ng so failed to assess as to [sic] relevant factors including the welfare, emotional needs, social and economic environment, age, social background, developmental history and whether there are stable arrangements for the physical care of a relevant child. They raise compelling and compassionate factors relevant to assessing unjustifiably harsh and serious consequences and proportionality in exceptional circumstances.'

13. The second ground is concerned a purported material error of law in respect of the Judge's consideration of the weight to be given to witness statement evidence where witnesses did not attend the hearing.

14. In granting permission to appeal by a decision dated 12 January 2022, Judge of the First-tier Tribunal Nightingale gave detailed reasons for considering the appeal to be arguable, particularly in respect of ground 1:

> '3. Ground 1 is arguable. It is arguable the Judge fell into error, in accordance with *Mundeba*, in failing to give any consideration to the best interests of the second appellant. It is also arguable, in view of the respondent's lack of engagement with these appeal proceedings at any stage, that the Judge erred with regard to the weight to be given to the sponsor's witness statement at paragraph 9.'

Decision on Error of Law

15. Having read the Judge's decision with care, I am satisfied that the respondent has adopted an entirely appropriate approach to the error of law consideration.

16. The Upper Tribunal held in *Mundeba (s.55 and para 297(i)(f))* [2013] UKUT 00088 (IAC), [2014] I.N.L.R. 36 that although the statutory duty under section 55 only applies to children within the United Kingdom, the broader duty establishes that entry clearance officers are to consider the statutory guidance issued under the section, as confirmed by Home Office policy.

17. I observe that section 55 and the decision in *Mundeba* were expressly relied upon by the appellants at paragraphs 9 and 10 of their grounds of appeal to the First-tier Tribunal, dated February 2021.

18. Whilst the appellants may have difficulties in ultimately succeeding, being mindful that as a starting point the best interests of a child are usually best served by being with at least one of their parents, and the second appellant presently resides with their mother, it cannot be said that the appellants could not succeed before a judge reasonably directing themselves.

19. In such circumstances, the failure to consider section 55 is a material error of law and the decision should properly be set aside in its entirety, with no findings of fact to stand.

Resumed Hearing

20. I am satisfied that the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing and so it is appropriate to remit the case to the First-tier Tribunal: paragraph 7.2(a) of the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal.

Notice of decision

21. The decision of the First-tier Tribunal, dated 8 November 2021, involved the making of a material error on a point of law. I set aside the Judge's decision pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

22. No findings of fact are preserved.

23. The decision is to be remade by the First-tier Tribunal sitting in Taylor House

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

Dated: 3 March 2023