Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/24973/2014
IA/24978/2014
IA/24980/2014
IA/24982/2014
IA/24984/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 10 June 2015	**On 25 August 2015**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MRS ADERONKE KUDIRAT OLAIDE
MR SEMIU OLAIDE SALAWU
MISS AISHA YATUNDE OLAIDE
MISS AIRET ADEBOLA OLAIDE
MR AWWAL ABIOLA OLAIDE
(Anonymity order not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr D Stevenson, McGill & Co
For the Respondent: Mrs M O'Brien, Home Office Presenting Officer

DECISION AND REASONS

1) These appeals are brought with permission against the decision of Judge of the First-tier Tribunal David Clapham dismissing the appeals on human rights grounds.

2) The appellants are all members of the same family and are of Nigerian nationality. The first two appellants are a husband and wife and the remaining three appellants are their children, with dates of birth in 2005, 2007 and 2003. The appeals were brought against decisions of the respondent refusing to vary leave on grounds arising under Article 8.

3) The father has been residing in the UK for a considerable period of time. The evidence before the First-tier Tribunal was that the father came to the UK in 2004. The mother came to the UK in July 2006, accompanied by the two older children, who are both girls. To begin with the father had leave as a student but in 2010 his status changed to that of post-study work. His leave in relation to this expired in 2012. When his family arrived they did so as visitors but were given leave as student dependents from February 2007. The youngest child, a boy, was born in the UK.

4) He suffers from asthma and has been admitted to hospital on around six occasions. His asthma is treated with inhalers.

5) The Judge of the First-tier Tribunal considered the best interests of the children, having regard to the cases of Zoumbas [2013] UKSC 74 and Azimi-Moayed [2013] UKUT 00197. In relation to education the judge looked at the case of EV (Philippines) [2014] EWCA Civ 874 in relation to the best interests of the children and their involvement in the education system in Scotland.

6) The judge accepted that the family would wish the children to continue to be educated in the UK. The judge considered the health of the children. Not only does the youngest child suffer from asthma but the oldest child suffered from seizures in Nigeria before coming to the UK. The judge accepted that treatment for asthma, including inhalers, would be available in Nigeria. There was no medical evidence relating to the seizures.

7) The judge found that the best interests of the children would be to remain with their parents. The desirability of being educated in the UK did not outweigh the benefit of the children remaining with their parents. If the parents were removed then it was reasonable to expect the children to go with them. As the family would be returning to Nigeria together there would be no interference with family life. There would be interference with their private life but removal would be proportionate.

8) Permission to appeal was granted on the basis that the judge had failed to have regard to section 117B(6) of the Nationality, Immigration & Asylum Act 2002, as amended. This applies to all appeals heard on or after 28 July 2014. Under this sub-section the starting point is whether it is reasonable

to expect a qualifying child to leave the UK. At least one of the children was a qualifying child and the judge had not taken this into account. This amounted to an arguable error of law.

Submissions

9) At the hearing before me Mr Stevenson pointed out that the hearing before the First-tier Tribunal took place on 14 August 2014 but nowhere had the judge mentioned section 177 of the 2002 Act. Mr Stevenson referred to the cases of Dube (ss.117A-117D) [2015] UKUT 00090 and AM (s 117B) Malawi [2015] UKUT 0260.

10) The question was raised of whether there was any material fact which the judge had failed to have regard. In response Mr Stevenson referred to paragraphs 47-49 of the decision, where the judge referred to EV (Philippines) and Zoumbas. In Zoumbas the residence by the children was for less than seven years and the parents were being removed. Mr Stevenson further submitted that in the present appeal the father now had 10 years continuous residence in the UK, although he did not have this at the date of the hearing before the First-tier Tribunal. All the family's passports were with the Home Office and were not available for the hearing.

11) For the respondent, Mrs O'Brien acknowledged that there was no reference to section 117B in the decision. The judge had, however, given full consideration to the children and considered the question of reasonableness. It was not clear that reference to section 117B would have made a difference. The children had not been in the UK for 7 years at the date of the applications, which were made in July 2012. It was not clear what difference would be made had the judge considered section 117B. The judge looked at the integration of the children and the medical circumstances. He considered all the relevant factors. Even if the decision was re-made with reference to section 117 the same conclusion would be reached.

12) In response Mr Stevenson submitted that the 7 year rule was significant. What was the purpose of this rule if it made no difference by comparison with the circumstances of the family in Zoumbas, where the family had been here for only four years and had a very poor immigration history?

Discussion

13) The omission by the judge in not referring to section 117B of the 2002 Act would not necessarily constitute an error of law provided the judge has had regard to all the relevant factors in carrying out the balancing exercise under Article 8. This point was made by the Upper Tribunal in AM (s 117B) Malawi. In that case the judge had assessed the reasonableness of a qualifying child leaving the UK in accordance with paragraph

276ADE(1)(iv) but not under s 117B(6). The Tribunal found the test was the same under paragraph 276ADE(1)(iv) as it was under section 117B(6).

14) The present appeals are different. The judge did not consider the appeals under paragraph 276ADE(1)(iv) and was not required to do so. This was because paragraph 276ADE(1)(iv) applies only where a child has lived continuously in the UK for at least 7 years at the date of the application. In these appeals the children had not lived in the UK for at least 7 years by the date of the applications, which were made in July 2012. They had however completed 7 years residence by the date of the hearing before the First-tier Tribunal in August 2014. Unlike paragraph 276ADE(1)(iv), section 117B(6) applies where the child has lived in the UK for a continuous period of 7 years or more at the date of the hearing. This is the effect of section 117A(1), which requires a court or tribunal to have regard to the considerations listed in section 117B in determining an appeal on or after the commencement date of 28 July 2014, and the effect of the definition of a "qualifying child" in section 117D(1), which requires that the child is either a British citizen or has lived in the UK for a continuous period of 7 years or more. In terms of section 117B(6), in the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

    (a) the person has a genuine and subsisting parental relationship with a qualifying child, and

    (b) it would not be reasonable to expect the child to leave the United Kingdom.

15) It is not disputed in this appeal that the parents have genuine and subsisting relationships with their three children. The question is whether it would be reasonable to expect the children to leave the UK.

16) It was pointed out by Mrs O'Brien that the Judge of the First-tier Tribunal referred to the issue of reasonableness at paragraph 48 of his decision.

17) The reasoning related to this is, however, at best scanty. As already explained, the reference to reasonableness at paragraph 48 was not made in the context of paragraph 276ADE(1)(iv) and was, of course, not made with reference to section 117B(6).

18) The considerations which the judge had in mind at paragraph 48 in referring to reasonableness are not entirely clear. The judge states that none of the family were British citizens, which is not disputed. He then states that none has the right to remain in the country. This finding is, of course, made without reference to section 117B(6) and therefore the reasoning in this regard cannot be considered adequate. The judge then says if the parents are removed it is reasonable to expect the children to go with them. This is putting the cart before the horse. The argument for the parents under section 117B(6) is that they should not be removed

because it is not reasonable to expect the children to leave the UK. The judge has effectively reversed the question in section 117B(6) by assuming the parents should be removed and then considering whether the children should be removed with them.

19) The judge then refers to the words of Lewison LJ in EV (Philippines) to the effect that the British state was under no obligation to provide education for citizens from other parts of the world. This may be a relevant observation in deciding whether it would not be reasonable to expect the children to leave the UK but it should be considered in the context of the correct question, on the basis that the children are qualifying children within the terms of section 117B(6).

20) The judge rightly considered, as stated at paragraph 53 of the decision, that the family could not remain in the UK merely by preference. The test, however, is not one of preference but one of reasonableness, having regard to the best interests of the children, the length of time which they have resided in the UK, and their degree of integration.

21) The judge went on to find, at paragraph 54, that there would be no interference with family life if the family returned to Nigeria as a unit. This is a conclusion the judge was only entitled to reach having properly considered the question of the reasonableness of expecting qualified children to leave the UK, in accordance either with paragraph 276ADE(1)(iv) or section 117B(6). Indeed the purpose of section 117B(6) is to recognise the existence of family life between a parent and a qualifying child where it would not be reasonable to expect that child to leave the UK.

22) This brief analysis of the judge's decision exposes the flaws in his reasoning as a result of not having considered the proper question in terms of section 117B(6). As a result of the inadequacy in reasoning the judge erred in law and his decision under Article 8 is set aside.

23) In this appeal I do not consider it necessary to have another hearing for the purpose of considering further evidence. The evidence heard by the Judge of the First-tier Tribunal is not significantly disputed so far as the children are concerned. The oldest child was 3 when she came to the UK and the middle child was a year old. The youngest child was born here in May 2007. The children all attend school here. According to her mother the eldest daughter, who is now 11, has a close network of friends. She has a good record at school. She attends music classes and enjoys skiing. The middle child, now 9, has been attending school in the UK. She too has a good network of friends and enjoys reading and gymnastics. The youngest child is attending primary school in Edinburgh. All the children are integrated into the community in Scotland. The youngest child has no experience of living in Nigeria and the 2 older children have little or no memory of doing so.

24) The evidence for the appellant includes school reports and letters from the school attended by the children. These support the mother's evidence. For example, in a letter dated 25 June 2014 the depute head teacher writes of the children's awareness of only British culture.

25) I am satisfied that when the position of the children is properly considered, having regard to their best interests and the length of time for which they have been living in the UK, it would not be reasonable to expect the children to leave the UK. As the parents have genuine and subsisting parental relationships with them, then the public interest will not require their removal. On this basis these appeals will succeed under Article 8 with regard to section 117B(6).

26) Having made this finding it is not necessary to consider the other factors listed in section 117B but I will mention them briefly. The family speak English and the children do not speak any other language. Both parents are capable of working and supporting the family so they should not be a burden on taxpayers. The family's residence in the UK has been lawful but has been precarious, in the sense described in AM (s 117B) Malawi, in that their leave has only ever been for a limited period. This means that in terms of section 117B(5) little weight should be given to their private life. This, however, is subject to section 117B(6). Although section 117B(1) states that the maintenance of effective immigration controls is in the public interest, section 117B(6) makes it clear that the public interest does not require a person's removal where the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. This is precisely the finding I made in respect of this family and accordingly their appeals will succeed under Article 8.

Conclusions

27) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

28) I set aside the decision.

29) I re-make the decision in the appeal by allowing it.

Anonymity

30) The First-tier Tribunal made an anonymity order because of the involvement of children in the appeals. However, as this decision contains very little personal information relating to the children, apart from their names, I do not consider it is necessary to continue with this order and I therefore lift it.

Fee Award Note: this is not part of the determination

Although the appeals are allowed I do not consider it appropriate to make a fee award. In 2013, when the decisions were made against which the appeals were brought, section 117B(6) was not in force, although the underlying principles were acknowledged in case law. It is only since this provision came fully into force that the balancing exercise under Article 8 has been expressed by statute in this form.

Signed Date
Judge of the Upper Tribunal Deans