Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/34154/2015
IA/34155/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 February 2018	**On 16 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MS RAA
AJE
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr O Yekinni, Solicitor, instructed by Supreme Solicitors
For the Respondent: Ms A Everett, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure

© CROWN COPYRIGHT 2018

to comply with this direction could give rise to contempt of court proceedings.

2. The first appellant was born on [ ] 1981 and is a citizen of Nigeria. The second appellant, who was born in the United Kingdom on [ ] 2007, is the first appellant's son and is also a citizen of Nigeria. The first appellant claims to have entered the United Kingdom in August 2003 with her ex-partner who is the second appellant's father. The first and second appellants made an application for leave to remain in the United Kingdom on 26 March 2008 on Article 8 grounds. The respondent refused the appellants' applications because it was considered that the appellants did not meet the requirements of the Immigration Rules and that there were no circumstances outside of the Immigration Rules under Article 8 that would warrant a grant of leave to remain.

The appeal to the First-tier Tribunal

3. The appellants appealed against the respondent's decision to the First-tier Tribunal. In a decision promulgated on 20 June 2017 First-tier Tribunal Judge P S Aujla dismissed the appellants' appeals. The judge considered that it would be reasonable for the second appellant to leave the United Kingdom with the first appellant and that it would be proportionate for the first appellant to be removed from the United Kingdom. The appellants applied for permission to appeal against the First-tier Tribunal's decision and on 14 December 2017 First-tier Tribunal Judge I D Boyes granted permission to appeal.

The appeal to the Upper Tribunal

Submissions

4. The grounds of appeal assert that there were a number of errors made by the judge. It is asserted that the judge does not specifically refer to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the '2002 Act'). This is a significant provision which places qualifying children in a special category. Section 117B(6) specifically states that it is not in the public interest to remove parents of qualifying children. The judge materially erred in failing to recognise what is and what is not in the public interest under the statutory provisions. The judge does not have regard to the case of **Azimi-Moayed and Others (decisions affecting children; onward appeals) Iran [2013] UKUT 197 (IAC)** and has not had regard to the factors that should be taken into consideration when considering the best interests of children. The judge failed to consider and apply paragraph 276ADE(iv) in respect of the appellant and her child and failed to appreciate that the Rules focus on length of residence and therefore the longer a child spends above the seven year benchmark the stronger their ties must be and the stronger the justification must be for disrupting their life.

5. The judge erred in credibility findings. The reasons given for rejecting the evidence of the appellant is unsustainable and arguably irrational given the guidance in **MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC)**. The judge does not give adequate reasons for the adverse credibility findings. The judge erred in failing to have regard to the factors at paragraph 35 of **EV (Philippines) and Others v Secretary of State for the Home Department [2014] EWCA Civ 874**. Paragraph 276ADE(vi), namely the very significant obstacles to integration in respect of the appellant and her minor child, has not been considered. The judge has erred in concluding that the Rules cater for all the Article 8 issues and therefore there is no need to consider Article 8 outside of the Rules. Reliance is placed on **Secretary of State for the Home Department v SS (Congo) and Others [2015] EWCA Civ 387** which concluded that there needed to be an Article 8 assessment outside the Rules.

6. The judge errs by concluding that because the parent is being removed the child can as well. The issue under 276ADE and 117B(6) is whether it is reasonable for the child to relocate. The focus must be on the child first. The judge has essentially put the cart before the horse and has failed to justify why it is reasonable that the child's private life and ties in the UK can be disrupted and for the child to relocate. The judge fails to recognise that removing the appellant would make a nonsense of the British Nationality Act 1981 which allows a child born in the UK to register as a British national at the age of 10. It is also asserted that the First-tier Tribunal Judge's decision is contrary to the principle of natural justice. He does not appear to have exercised the judicial power and capacity as an independent and impartial decision-maker. The decision taken is largely based on a one-sided story.

7. At the hearing Mr Yekinni relied on the grounds of appeal.

8. Ms Everett submitted that the findings regarding the second appellant, although quite brief, are not fatal to an adequate determination. The grounds of appeal quote case law and policy on qualifying children. Although these are serious issues all the grounds are quite generalised. The judge did look at whether or not it was reasonable for the second appellant to leave the United Kingdom. The grounds appear to suggest that it could never be reasonable where a child is a qualifying child. That clearly cannot be right. She submitted there is nothing perverse in the First-tier Tribunal's decision. It cannot be right that once a child is a qualifying child that is the end of the matter. In this case the judge has considered a number of factors at paragraph 35 including the child's age, his level of education, the fact that instruction in Nigeria is in English and that it was free up to the age of 15. The judge considered whether he would be able to assimilate into the Nigerian education system. The judge correctly considered the position of the first appellant because she would be able to assist the second appellant in integrating into life in Nigeria. She submitted that it is not correct that the judge has to justify why it is reasonable. The burden is on the appellant to demonstrate why return or removal would be unreasonable. There were no particular circumstances

provided as to why it would be unreasonable in this case. Rather, the appellants are merely stating that the judge has erred without providing any factors that ought to have been taken into consideration but which were not or factors that were taken into consideration which ought not to have been.

9. Mr Yekinni in reply said that the second appellant has now made an application for naturalisation, however that has not yet been determined. He submitted that there were insufficient reasons in the decision which should show an appellant why they had lost their case.

Discussion

10. The First-tier Tribunal decision set out the background to the case and the issues to be decided. The appellant's representative stated that the first appellant was relying on paragraph EX.1 of Appendix FM of HC395 and the only issue was whether it would be reasonable for the second appellant to leave the UK. The first appellant was not relying on paragraph 276ADE. The first appellant was not called to give evidence. The judge set out various parts of the evidence before him and the submissions made. The judge made the following findings:

> "34. The Appellant was born on [ ] 1981. She came to the United Kingdom in August 2003 when she was 22 years old. She was born and brought up in Nigeria. She was educated there. She spent the first 22 years of her life there compared to 13 years 10 months in the United Kingdom. It would be reasonable to assume that she had family, relatives and friends there. No credible evidence was presented to me to show that she had no family, relatives or friends left in Nigeria. In any event, she is a 35-year old woman who is fit and well. No evidence of any serious health problems was placed before me. She has gained experience from residing in the United Kingdom which she could use to find employment there, especially in the capital Abuja or Lagos. She has resided in the United Kingdom unlawfully throughout the period since her arrival. Section 117B of the 2002 Act clearly applies in her case. Taking her circumstances into account cumulatively, I am left in no doubt that it was reasonable and proportionate for her to be removed from the United Kingdom as someone who had flouted the law for a number of years. Her removal would therefore be fully proportionate.
>
> 35. I now consider whether it would be reasonable to expect the second Appellant to leave the United Kingdom and accompany the Appellant when she is removed to Nigeria. The second Appellant was born on [ ] 2007. He is therefore 9 years and 9 months old. He is still at primary school and therefore not at a crucial stage of his education. The country material, referred to in the decision, clearly stated that the medium of instruction in Nigeria was English. The country material also stated that education was free under the age of 15. He should therefore be able to assimilate into the Nigerian education system without much difficulty. He is still very young and should be able to make friends at school and socially outside school. He had no status in

the United Kingdom. I presume he is a national of Nigeria as the son of a Nigerian mother. There should be no difficulty in the child entering the education system after his return to Nigeria and benefiting from it. As I have already noted, the Appellant is a fit and well 35 years old woman. I see no reason why she should not be able to provide for the child. She might even be able to make contact with the child's father and seek his support. Regardless of that, I find that a young and fit and well 35-year-old mother, who has resided in the United Kingdom for 13 years and gained experience, should be able to sustain herself after her return to Nigeria and adequately provide for the child.

36. Having considered the circumstances of the second Appellant, coupled with those of the Appellant herself, I find that it would be reasonable for the second Appellant to leave the United Kingdom. I therefore find that the Appellant did not satisfy all the requirements of paragraph EX.1 of Appendix FM to the Immigration Rules.

37. It was not argued on behalf of the Appellant that article 8 should be considered outside the Immigration Rules. In any event, I am satisfied that there were no exceptional circumstances for article 8 to be considered outside the Immigration Rules.

38. I have also considered section 55 of the Borders, Citizenship and Immigration Act 2009 regarding the best interests of the second Appellant and his welfare. I am satisfied that it would be in his best interests to remain with his mother, his sole carer, and accompany her to Nigeria.

39. Having considered the evidence in the round, I am satisfied that the removal of the Appellant and the second Appellant from the United Kingdom to Nigeria would be fully proportionate and would not place the United Kingdom in breach of its obligations under the 1950 Convention.

40. The appeals are dismissed in human rights grounds with reference to article 8."

11. I will deal with a number of the grounds of appeal together, namely, the judge has i) not referred to s117B(6), ii) erred in finding that there was no need to consider Article 8 outside the rules, iii) failed to consider paragraph 276ADE, iv) has not had regard to the factors that should be taken into consideration when considering the best interests of children v) failed to appreciate that the Rules focus on length of residence.

12. Paragraph 276ADE was not relied on by the appellant as recorded by the judge. Therefore, there can be no error of law in the judge failing to apply that provision.

13. It is averred by the appellant that s117B(6) specifically states that it is **not** in the public interest to remove parents of qualifying children. In this case the judge did not consider Article 8 outside of the Immigration Rules. There would be no error of law in failing to consider s117 in respect of the Immigration Rules - **Bossade (ss.117A-D-interrelationship with**

Rules) [2015] UKUT 00415 (IAC). However, the appellants appeal against the decision that there was no need to consider Article 8 outside the Immigration Rules. At the hearing, as set out above, it would appear that the appellant was specifically not relying on Article 8 outside of the Immigration Rules. That is also reflected in the judge's summary of submissions. The appeal was argued on whether or not it was reasonable for the second appellant to leave the UK. As there is a child involved I will consider whether it was an error of law for the First-tier Tribunal to have found that there was no need in this case to consider Article 8 outside the Rules.

14. The argument of the appellant is that the Immigration Rules do not cater for the Article 8 rights of the appellants and reliance is placed on paragraph 29 of **SS (Congo)**. This paragraph deals with the proposition that leave outside the Immigration Rules should only be granted in exceptional circumstances. In **Agyarko [2017] UKSC 11** Lord Reed in explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8 made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered. It is arguable that the judge in this case has applied an exceptionality threshold test at paragraph 37. The question then to consider in this case is 'Is there a material error of law in this case'?

15. I have considered the evidence that was before the First-tier Tribunal. I note that the first appellant says in her witness statement that she has had custody and overall care for her child for more than nine years and states that her emotionally vulnerable son was temporarily placed into care due to the abuse suffered at the hands of his father, her ex-partner. The skeleton argument states 'She was a victim of DV and trafficking'. No supporting evidence of this has been produced and there is no indication that the first appellant has any particular problems as a result. There is no evidence that the second appellant is currently suffering from any long-term effects of having been taken into care in 2012 or that, for example, needs any support for his education, health or development. In the skeleton argument produced for the hearing before me and in the grounds of appeal there are no specific issues identified in relation to the second appellant that indicate that there are any particular factors over and above the fact that he has been in the United Kingdom for over nine years (his entire life) and is attending primary school that the judge ought to have taken into consideration. There are no specific issues identified that the judge failed to take into account. No factors were identified in relation to the first appellant that the judge should have taken into account in addition to those set out in the decision.

16. The decision is unstructured and the finding at paragraph 37 is not consistent with the other paragraphs in the decision. The judge has in fact

undertaken a proportionality balancing exercise and has considered s117B when considering whether it would be proportionate to remove the first appellant. The judge has taken into account the first appellant's personal circumstances which essentially are that she has been in the UK for 13 years 10 months, there was no evidence of any health problems, she was likely to have friends and family in Nigeria and was a fit and healthy 35 year old. There is no other evidence that appeared relevant to weigh in the proportionality exercise in favour of the appellant other than the fact that she has a son. There would be no interference in the family life between the appellant and her son as the judge did not consider that there would be any separation and found that it was reasonable to expect the second appellant to leave the UK. Therefore, it is difficult to see how taking this into consideration would have resulted in a different outcome. The judge considered that s117B applied and that, as the appellant has been in the UK unlawfully for the entire time, it was proportionate for her to be removed. Giving due weight to the strength of the public interest in removal, the article 8 claim in this case was not sufficiently strong to outweigh it – this finding was open to the judge on the facts of this case. Although as I set out above there was no error in the judge failing to consider paragraph 276ADE the judge has considered all the factors relevant to the test of 'very significant obstacles'. On the facts of this case there could have been no other conclusion than that there were no very significant obstacles to the first appellant reintegrating in Nigeria.

17. With regard to s117B(6) the judge does not appear to have considered this section. However, the same test applies in s117B(6) as it does in EX.1 and 276ADE(1)(iv) – is it reasonable to expect the child to leave the UK? The same factors should be considered whether applying 117B(6) or EX.1.

18. The judge does have regard to the factors set out in the case of **Azimi-Moayed** and **EV (Philippines)** regarding reasonableness of leaving the UK and best interest of the second appellant. The judge was aware of his age and that he has spent the entirety of his life in the UK. He took into account that he is at primary school and therefore not at a crucial stage of his education, education was free in Nigeria and taught in English so he should be able to assimilate into the Nigerian education system, he is still very young and should be able to make friends at school and socially outside school, the first appellant should be able to sustain herself and adequately provide for him. The judge having already considered the above factors found that his best interests were to be cared for by his mother and to return with her to Jamaica. He found that it was reasonable to expect the second appellant to leave the UK with his mother. The second appellant is still a young child and although he will have started to form friendships and will be integrating into society he will primarily be focused on his mother. The judge took into account all the relevant factors and the findings were open to him on the evidence available.

19. The appellant suggests that removing the second appellant would make a nonsense of the British Nationality Act 1981. This ground is misconceived. The central issue in this case was whether or not it is reasonable to expect

the child to leave the UK. That test applies equally to British Citizen children.

20. The grounds assert that there is a misdirection of fact to approach the appellant, his private and family life etc in an unduly restrictive narrow view and the appellant should be given the benefit of the doubt that to a large extent had given accurate details. It is asserted that the tribunal has unduly given weight to immaterial matters. It is also asserted that the tribunal has made a misdirection of law on a material matter and that the judge erred in 'her' credibility findings, that the reasons given for rejecting the evidence are irrational and that the judge does not give adequate reasons for the adverse credibility findings. None of these grounds are particularised and no further explanation was provided at the hearing. The judge in this case has not made adverse credibility findings. There is no basis for these grounds.

21. There were no material error of law in the First-tier Tribunal decision.

Notice of Decision

The appellants' appeals are dismissed. The decision of the respondent stands.

Signed P M Ramshaw Date 15 March 2018

Deputy Upper Tribunal Judge Ramshaw