IAC-AH-CO-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/07330/2014
IA/01993/2014
IA/01998/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 10th October 2014	**On 6th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR OMOTAYO FESTUS IGWEBUEZE (FIRST APPELLANT)
MS OLANIKE FAITH OKANLAWON IGWEBUEZE (SECOND APPELLANT)
MR TEMILOLUW DANIEL IGWEBUEZE (A MINOR) (THIRD APPELLANT)
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr T Ojo
For the Respondent: Mr M Shilliday, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Nigeria. The first and second Appellants are husband and wife and the third Appellant is one of three children born to the Appellants having been born on 19th September 2006. The first

Appellant first arrived in the United Kingdom in 2003 on a visit visa and was later granted a multiple entry visa in 2005 valid until 20th June 2010. The second Appellant arrived in the UK in 2005 on a visit visa with her oldest child Melodey born on 19th July 2001. She has resided in this country since arriving on that visit visa. The third Appellant was born on 19th September 2006 and the first and second Appellants have a further child Iyadunni Faith born on 29th July 2009. The Appellants have made several applications and representations to the Secretary of State on the basis of their private and family life for the grant of leave to remain outside the Immigration Rules. The last representation was made in October 2013 on the ground that the third Appellant was born in the UK over seven years ago and has resided here without any absence. The Appellants' applications which included two children who are not parties seemingly to this appeal were refused by the Secretary of State on 12th December 2013. At paragraph 3 of the Notice of Refusal sets out in considerable detail the immigration history of the Appellants.

2. The Appellants appealed and the appeal came before First-tier Tribunal Judge Oakley sitting at Hatton Cross on 15th July 2014. In a determination promulgated on 22nd July 2014 the Appellants' appeals were allowed under the Immigration Rules.

3. The Secretary of State lodged Grounds of Appeal to the Upper Tribunal on 22nd July 2014. Those Grounds of Appeal note that the First-tier Tribunal Judge found that it would be unreasonable to expect the third Appellant to leave the United Kingdom and allow the Appellants' appeals under the Immigration Rules. The grounds contend that there has been a material misdirection in law in making such a finding. The Secretary of State accepted that the third Appellant had been in the United Kingdom for over seven years and that one of the first and second Appellants' other children Melodey had been in the United Kingdom for ten years but submitted that it was reasonable for them to leave the United Kingdom with their parents and younger siblings as a family unit and to continue their lives in that country. The Secretary of State noted that the judge had placed a great amount of weight on the third Appellant's and Melodey's education in the United Kingdom but pointed out that the children are not British citizens and have never had a legitimate expectation of being allowed to remain in this country. It was contended that it was therefore not unreasonable for the children to return to Nigeria with their parents and that the children could be educated in Nigeria which did not need to be comparable to education that they would receive in the United Kingdom. The grounds contended that the judge had placed undue weight on the apparent lack of support in Nigeria and that the judge had found that if it were not for the children the first and second Appellant would be able to reasonably return to Nigeria. On the basis of this finding the Secretary of State contended that the children would have clear support for their parents to help them assimilate to life in Nigeria and that the judge has erred in placing weight on the lack of further support. The grounds stipulate that the Appellants would be able to establish their lives together in Nigeria in the same manner as they did in the United Kingdom and that it was respectfully

submitted that the judge had materially misdirected himself in finding that it would not be reasonable to expect the children to leave the United Kingdom and that the decision to allow the appeal under the Immigration Rules was not in accordance with the law.

4. On 19th August 2014 Upper Tribunal Judge Renton granted permission to appeal finding that it was arguable that the judge had given insufficient reasons for his decision to find that it would not be reasonable for the third Appellant to leave the UK. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. This is an appeal by the Secretary of State but for the purpose of continuity throughout the appeal process Mr Igwebueze and his family are referred to as the Appellants and the Secretary of State as the Respondent. The Appellants appear by their instructed legal representative Mr Ojo. Mr Ojo is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Shilliday.

Submissions/Discussions

5. Mr Shilliday starts by pointing out that the approach adopted by the judge to best interests is wrong and refers me to paragraph 24 of *Zoumbas v Secretary of State for the Home Department [2013] UKSC 74*.

> *"24. There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit."*

6. He further refers me to paragraphs 58 and 61 of the Court of Appeal decision in *EV (Philippines) & Others v Secretary of State for the Home Department [2014] EWCA Civ 874* pointing out that the assessment of the best interests of children must be made on the basis that the facts are as they are in the real world and that if neither parent has the right to remain then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin.

7. Mr Shilliday submits that the First-tier Tribunal Judge has not made an assessment in this particular appeal of the facts in the real world as set out in *EV (Philippines)* and that he has consequently erred in law. He submits that this is a very different case from *ZH (Tanzania)* and that this would be a Nigerian family being returned to Nigeria together and consequently it would be an artificial exercise to hive off the interests of the children and that the approach adopted by the judge is the wrong approach.

8. He takes me to paragraphs 32 to 34 of the First-tier Tribunal Judge's determination. He submits that there is no reason for these findings to appear in the determination and that the entire approach adopted by the First-tier Tribunal Judge is wrong to concentrate on the position of one of the children and thereafter to expect the family to follow the outcome for that child. He asks me to find that there is a substantial material error of law in the determination of the First-tier Tribunal and to remit the matter back for rehearing.

9. Mr Ojo in response points out that the judge has made findings of fact which he was entitled to and that there was no support for the family available in Nigeria and that it was accepted by the Secretary of State that they were ostracised and would become destitute. He contends as the findings of fact are not challenged and this appeal has been allowed on the best interests of the children that there is no material error of law. He submits that Rule 276 is a stand alone Rule and that the best interests of the children have been properly considered by the judge and that he used this as a central factor. Consequently there is no material error of law and that the Secretary of State's appeal should be dismissed.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion

is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings of Error of Law

12. The First-tier Tribunal Judge has started by making a finding at paragraph 27 that there is no reason whatsoever why the first and second Appellants if they were on their own would not be able to reasonably return to Nigeria. The judge has then gone on to consider the position of the third Appellant and that other children need to be considered under the same Rule. He has taken the view the children are being educated in the United Kingdom and have received their education here, that the third Appellant has been in the UK for over seven years and that whilst accepting that all the family constitute a family unit that the third Appellant along with Melodey would qualify under Rule 276ADE(vi) and that it would not be reasonable to expect them to return.

13. I agree with the Secretary of State that the judge has adopted the wrong approach. Whether ultimately any other Tribunal would make the same decision is a matter for rehearing. I emphasise that I do not within this determination make any finding one way or the other as to whether the ultimate decision should or should not be to allow the appeal. The correct approach to be adopted in cases of this nature is to follow the approach firstly set out in *Zoumbas* at paragraph 24 as set out above and indeed within the Grounds of Appeal. I acknowledge that a Tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer a child has been here and the more advanced the stage of his or her education the looser his or her ties with the country in question will be and the more deleterious the consequences of his return the greater that weight that falls into one side of the scales. However it has to be balanced against strong weight to be given to the need to maintain immigration control in pursuit of the economic wellbeing of the country and the fact that the Appellants have no entitlement to remain. It is necessary to consider paragraph 117B of the Immigration Act 2014 and also to bear in mind the approach adopted by the Court of Appeal in *EV (Philippines)* in particular the approach set out at paragraphs 58, 60 and 61. These are key facts. The Appellants are not British citizens and the judge has not addressed this issue. The emphasis placed on cases of this nature by the Court of Appeal at paragraphs 60 and 61 have not been considered by the First-tier Tribunal Judge. It is important that they should be considered and to that extent there is a material error of law in the approach that the judge has made to this particular case. The correct approach in such circumstances it to remit the matter back to the First-tier Tribunal to be heard at Hatton Cross

before any Immigration Judge other than Immigration Judge Oakley. The decision paragraph herein sets out the directions for the rehearing of this matter.

Notice of Decision

14. The decision of the First-tier Tribunal Judge contains a material error of law and is set aside.

15. The matter is remitted to the First-tier Tribunal to be heard at Hatton Cross on the first available date 42 days hence with an estimated length of hearing of two hours. The hearing is to be before any Immigration Judge other than Immigration Judge Oakley. Leave is given to either party to file additional evidence upon which they seek to rely at least seven days prehearing copies of which evidence is to be served upon the other party and lodged at the Tribunal. None of the findings of fact are to stand. Should the Appellants require an interpreter then their instructed solicitors should notify the Tribunal at least fourteen days prior to the restored hearing date.

No anonymity direction is made.

Signed Date 3rd November 2014

Deputy Upper Tribunal Judge D N Harris