IAC-AH-KEW-V1

First-tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/53282/2013
IA/53285/2013
IA/53290/2013
IA/53298/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 29th September 2014	**On 6th November 2014**
Prepared	

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

MRS OLUBUNMI TEMILADE ADENUGA (FIRST APPELLANT)
MR OLUKOYA ADENYINKA ADENUGA (SECOND APPELLANT)
MISS KIKELOMO SINMILOLUWA ADENUGA (THIRD APPELLANT)
MISS JADESOLA OLUWANIFEMI ADENUGA (FOURTH APPELLANT)

Respondent

Representation:

For the Appellants: Mr P Corben, Counsel instructed by Chipatiso Associates
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. Application for permission to appeal was made by the Secretary of State but nonetheless for the purposes of this appeal I shall refer to the parties as they were described before the First Tier Tribunal.

2. The appellants are citizens of Nigeria born on 27th September 1972, 28th December 1971, 11th September 2003 and 17th October 2007. The first appellant entered the United Kingdom as a visitor on 16th September 2006 with the third appellant Kikelomo Adenuga and in 2007 her husband entered the UK. The fourth appellant was born in the United Kingdom. On 8th October 2013 the appellants made an application for leave to remain in the UK based on their private and family life and the applications were refused on the basis that the spouses did not have any legal basis for remaining in the UK. Kikelomo was 10 years old and had lived in the UK for seven years but as the first and second appellant lived together in a family unit with the younger child it was reasonable to expect them to be able to return to Nigeria as a family.

3. First-tier Tribunal Judge Sullivan heard the appeal of the appellants on 17th June 2014 and allowed the appeal on 4th July 2014.

4. An application for permission to appeal was made by the respondent because the judge at paragraph 25 stated that "the best interests of the children are a primary consideration and should be determinative unless other factors point to a need to remove. As the family have a good immigration record there are no countervailing considerations."

5. The application for permission to appeal submitted the judge had erred in law. The line of authority on the best interests of the children is extensive beginning with **ZH Tanzania [2011] UKSC 4** and **SS Nigeria [2013] EWCA Civ 550** and following with **EV Philippines [2014] EWCA Civ 874**. It was submitted that the test is "treating the best interests of the child as a primary consideration which could be outweighed by others provided that no other consideration was treated as inherently more significant" (**EV** (33)).

6. The respondent asserted that IJ Sullivan suggested that the burden had shifted to the Secretary of State to show countervailing factors which weighed against the interests of the child to stay in the UK and there was no authority which supported that proposition.

7. It was submitted that the determination displayed irrationality when suggesting that there were no countervailing factors at all in this case due to the good immigration history.

8. Further in paragraph 36 to 38 the judge found that the third and fourth appellants met the provisions of paragraph 276ADE because there was no history of criminality. **Nasim and Others (Article 8) Pakistan [2014] UKUT 25** that was an irrelevant factor and not a test for the purposes of Article 8. Following **EV** it was held that a similar set of facts were not sufficient to meet the test of reasonableness on removal.

9. The judge erred in law by failing to have regard to the parents' immigration status. The parents had no right to remain in the UK independently of their children. The most important consideration in the

assessment of the child's best interests was allowing the child to be brought up by their parents. In **EA (Article 8 Best Interests of the Child) Nigeria [2011] UKUT 00315** it was stated

> "*It is important to recall that although the appellants may have been here lawfully they came to the UK for a temporary purpose with no expectation of being able to remain in the UK. The third appellant happened to be born in the UK whilst her parents were here for a temporary purpose. The expectation was that they would all return to Nigeria once the first appellant's studies were completed*."

10. At the hearing before me Mr Corben submitted that the application for permission to appeal was made out of time by the Secretary of State and that in the absence of any explanation for the late filing it was difficult to see on what material the First-tier Tribunal Judge exercised his discretion in favour of extending time. It was not apparent that the Secretary of State had made an application for extending time. It was submitted that the fact that the case involved a claim from four family members for further leave to remain in the UK could hardly amount to a special circumstance and nothing else was apparent from the judge's reasoning as having been considered.

11. Further to the Asylum and Immigration Tribunal (Procedure) Rules 2005 an application for permission to appeal to the Upper Tribunal states that an application must be sent or delivered to the Tribunal so it is received no later than five days after the date on which the party making the application is deemed to have been served. The determination was dated 4th July 2014, received by the Secretary of State on 7th July 2014 and therefore the last day for an in time application was 14th July. The Secretary of State submitted an application dated 21st July 2014 and it was received by Leicester on that date. Further to paragraph 24 the Tribunal may extend time for appealing if satisfied that by reason of special circumstances it would be unjust not to do so.

12. Further to **BO and Others** (**Extension of Time for Appealing) Nigeria [2006] UKAIT 00035** this states that

> "*The strength of the grounds is a factor to be considered if there is some explanation or excuse for the lateness. But it does not seem to us that strong grounds could by themselves be the reason for extending time. If it was so a person who had strong grounds would in essence be exempt from the requirements as to time*."

All that was stated by the judge in the grant of permission to appeal was that at paragraph 2 stating

> "*The application for permission to appeal is out of time (by about seven days). But having regard to the nature of the case, I have decided to admit this application*."

12. As indicated in **BO and Others**

> "*Good grounds of appeal cannot be a substitute for timeliness. If there is an explanation for the delay, however, the strength of the grounds of appeal may help to compensate for a bad excuse ... the stronger the grounds are the more likely it is that justice will demand that they be heard*."

13. However a further factor is the consequences of the decision and as Mr Corben pointed out the factors of certainty for the appellants is important but the fact is it is not the case that the appellants would for example be refused an in-country right of appeal. There was no suggestion that there was an error by Mr and Mrs Adenuga.

14. It was not clear on the face of the decision that the judge had indeed explored the factors and **Huang and Chin (Extension of Time for Appealing) [2013] UKUT 00343 (IAC)** confirmed that a judge must consider all available material and consider the extent of the delay and whether any explanation covers the whole of that period.

16. It was submitted that the First-tier Tribunal Judge Carruthers' grant of permission to appeal was defective in that no reasons were given or reasons were inadequate as to why this application was admitted. The Secretary of State in the application for permission to appeal merely stated

> "*The reason this application was not made in time is due to a shortage of resources within the Secretary of State's Specialist Appeals Team, it was not possible to have the determination reviewed within the time limit for appeal*."

18. No evidence was produced in relation to sickness or otherwise within the Special Appeals Team and to merely argue shortage of resources would not explain the routine permission to appeal applications which had been submitted throughout the period and if this is considered to be a special circumstance to be accepted this could justify all late applications or certainly a departure from the Rules as they are set out.

20. However I find that it is clear that permission was granted and it is not for me to go behind that grant of permission. I note that the delay on the par of the Secretary of State was for a relatively short time and Judge Carruthers clearly addressed his mind to the fact that the application for permission to appeal was made out of time. Should the appellants have an issue with this they must institute judicial review proceedings. In respect of the application for permission to appeal itself I found that ground 1 which suggests that the judge has misdirected herself in law has

no substance to it because in fact paragraphs 22 to 31 are a record of the submissions made by the appellant and not a direction in law by the judge.

21. Nonetheless ground 3 that the judge failed to take into account a relevant consideration has greater weight. As recorded at paragraph 58 of **EV Philippines [2014] EWCA Civ 874**, there was an assessment of what should be recorded in the assessment of the best interests of the children and this should be made on the facts as they are 'in the real world'. It was stated that the parental rights to remain were the background against which the assessment should be conducted and the ultimate question would be is whether it was reasonable to expect the child to follow the parent with no right to remain to the country of origin. The case states that if the mother was removed the father had no independent right to remain and if the parents were removed then it was entirely reasonable to expect the children to go with them.

22. The judge at paragraph 34 took into account that the third appellant had been here for seven years since her 4th birthday and would leave the UK with her parents and would continue to enjoy their love and support but the judge failed to take into account the background of the parents into her assessment of the reasonableness of whether the child should be expected to be able to stay or not. A further error in the judge's determination is the failure to assess the factors in relation to the first and second appellant, that is the parents, and there appeared to be almost an entire absence of reasoning in that respect.

23. I therefore find there is an error of law and the determination is set aside. In view of the nature and extent of the findings to be made particularly in respect of the first and second appellants the matter should be returned to the First-tier Tribunal as this determination cannot stand and the matter is remitted further to paragraph 7.2 of the Presidential Practice Statement.

Signed Date 5TH November 2014

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON