IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10477/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 June 2015	**On 10 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

MR FEHINTOLA BAMIDELE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Celia Record (Counsel)
For the Respondent: Mr N Bramble (Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal by Mr Fehintola Bamidele, whose date of birth is 12 February 1960, a citizen of Nigeria, against a decision made by the First-tier Tribunal (Judge Wellesley-Cole) (FTT) promulgated on 29 October 2014 in which she dismissed the appeal on human rights grounds.

2. The appellant is the father of two children who [are] living in the UK. Their mother is the extended family member of an EEA national, her uncle, and is dependent on him and lives together with her children at the uncle's house in London. The appellant's claim is that [he] has resided in the UK

for over twenty years, is settled here and has established a private life. The decision is contrary his Article 8 rights and his children would be significantly effected if he were required to leave the UK (**ZH (Tanzania) v SSHD [2011] UKSC 4** and **MK (best interests of child) India [2011] UKUT 00475 (IAC)**).

Reasons for refusal

3. In a letter dated 10 February 2014 the respondent refused the appellant's application under Appendix FM and paragraph 276ADE of the Immigration Rules. It was accepted that the appellant met the suitability requirements. However it was not accepted that the appellant and Ms Oduyebo were in a relationship as partners. The respondent was not satisfied that the eligibility requirements were met. Consideration was given to EX.1 but the appellant failed to show an eligible relationship under the Rules and he failed to meet EX.1(a) and (b) of Appendix FM.

4. Even if it was accepted that there was a relationship between the parties and that the appellant enjoyed a parental relationship with the children, it was not established that it was not possible for the relationship to continue elsewhere such as Nigeria. The appellant was fully aware he no valid leave to remain in the UK and should have returned to Nigeria but chose not to.

5. The respondent took into account that both children were under the age of 3 years, not settled in the UK and could move to Nigeria. The children's mother was neither a British citizen nor settled in the UK.

6. Paragraph 276ADE was not established on length of residence nor had the appellant established that he had no social, cultural or family ties in Nigeria.

7. The respondent found no exceptional circumstances outside of the Rules to warrant discretionary leave being granted under Article 8 ECHR. The respondent took into account that the appellant remained in the UK without lawful authority since his arrival and failed to obtain leave in any category. He failed to show how he was financially supporting himself and he failed to provide documentary evidence of his length of residence in the UK.

First-tier Decision

8. The FTT took as its starting point the previous determination before Judge Mitchell in 2009. That Tribunal accepted that there was a possibility that the appellant had resided in the UK since 2006. It was accepted that he had a private life but at that time he had no children and worked illegally and led an unstable life.

9. The FTT considered only Article 8 outside of the rules, it being conceded that the appellant could not meet the Rules. The FTT found that the appellant was now the unmarried father of two children born in the UK and

his partner (the children's mother) was dependent on her EU uncle exercising Treaty rights in the UK. The FTT considered freestanding Article 8 and followed the five stages established in **Razgar [2004] UKHL 27**. It accepted that the appellant had established a private life as the result of the length of residence and found some measure of family life [16]. It accepted that he was close to his partner and saw his children on a daily basis and taking them to nursery. The FTT considered that the main issue was proportionality. It placed weight on the fact that the appellant's private and family life had been built up at a time when he had no lawful status in the UK. Section 117B Immigration Act 2014 was taken into account with regard to the public interest. The appellant was not contributing to society by paying tax. Little weight should be given to private life established when a person's immigration status was precarious. The FTT had regard to the fact that his partner had a residence card expiring in 2016 and the children as yet had no settled immigration status. The FTT took into account that the appellant was integrated into Nigerian society where he lived for over 30 years and spent his formative life. It considered that he would be able to maintain relationships with his family from Nigeria where they could visit him. There were no obstacles to his returning to Nigeria.

Grounds of Application

10. The appellant argued that the decision disclosed a material error of law. The FTT failed to consider where the best interest of the children lie having regard to the fact that they were born in the UK and the appellant sees them every day. The Tribunal failed to take into account **ZH (Tanzania)** and **Zoumbas v SSHD [2013] UKSC 74** which made clear that children must not be blamed for matters for which their parents are responsible.

Permission to Appeal

11. Permission to appeal was refused by First-tier Tribunal Judge Frankish on 21 January 2015 who concluded that no arguable error arose as asserted through omitting to have regard to the best interests of the children. The FTT had due regard to the interests of the children as per **ZH (Tanzania)** which formed the prime substance of the case together with the application of **Devaseelan [2003] Imm AR** and Section 117 Immigration Act 2014.

Renewed Application to the Upper Tribunal

12. In grounds dated 3 February 2014 it was argued that the FTT failed to consider the impact of the appellant's removal on the children at [14 - 21]. This was the subject of submissions made at the hearing and recorded at [13]. There was family life between the appellant and his children.

Upper Tribunal's Grant of Permission

13. Upper Tribunal Judge Finch granted permission on 30 April 2015 on the grounds that it was arguable that the FTTJ failed to consider the children's best interests in conducting the proportionality exercise or treating their best interests as a primary consideration. At best the FTTJ concluded that the children were small and could live with him in Nigeria. This was when they were not presently living with him and their mother had a right to reside here. It is arguable that the Tribunal did not follow the guidance provided in **ZH (Tanzania) v SSHD [2011] UKSC 4** or **MK (best interests of child) India [2011] UKUT 00475 (IAC).**

Rule 24 Response

14. The respondent opposed the appeal in a letter dated 12 May 2015. The Tribunal did consider the best interests of the children. The FTT considered **ZH (Tanzania)** with reference to the children from [2] onwards and conducted a thorough balancing exercise taking into account the partner's temporary status, lack of status for the children and lack of residence with the appellant.

Hearing

15. At the start of the hearing Mr Bramble for the respondent conceded that the FTT failed to specifically consider where the best interests of the children lie, however this error was not material given the FTT's findings and conclusions. He also acknowledged that the Secretary of State failed to address its obligations under section 55 2009 Act.

16. Ms Record submitted that the two children were UK born aged 4 and 3 years. The appellant saw them daily. The children were supported by his girlfriend's uncle in the UK. Ms Record argued that the children were settled and their interests ought to have been considered more closely and separately from those of the appellant and his partner. The FTT should have taken into account that the appellant's partner stated that she would not go to Nigeria.

17. Mr Bramble submitted that whilst no specific consideration was given to Section 55 of 2009 Act the FTT took into account the children in considering the position as a whole. The children have no status in the UK and given their ages it was hard to see what more could go in their favour. Even if the FTT had specifically considered the best interests of the children, the FTT's decision to dismiss the appeal would not have altered.

18. Ms Record submitted that the children's considerations are a primary matter which should have been given more attention. They are supported and accommodated by an EEA national. There was no burden on the public purse.

19. At the end of the hearing I reserved my decision, which I now give with my reasons.

Findings of Fact and Conclusions

20. I find that there was an error of law by the FTT to the extent that there was no direct reference to the issue of where the best interests of the two children (aged 3 and 4 years) lie. However, it cannot be said that there was no consideration of the interests of the children at all [18]. I am satisfied that the FTT was fully aware that there were two young children who were born in the UK and who the appellant saw on a daily basis. The FTT found that he clearly had a role and family life existed to an extent. The FTT qualified this having regard to the fact that the family did not live as a unit and that it was built up in the knowledge that the appellant had no lawful status in the UK and his position was precarious.

21. Ms Record has submitted that the children would suffer in the event that the appellant left for Nigeria. There was no evidence adduced of any detrimental effect. There was no evidence to show that it would be unduly harsh in the event that the appellant, his partner and the two children lived in Nigeria. The FTT took into account that the children had no settled status in the UK and that his partner who was a national of Nigeria had a right of residence until 2016 as a dependant on her EEA national uncle. There was no evidence of any independent life for the children nor in respect of their nursery education. There was no evidence to show why it was not reasonable for the appellant's partner and children to return to Nigeria with him. The FTT found that the relationships could be continued with visits to Nigeria. There was no evidence to show that the partner's uncle would not be able to continue to provide financial support for the family in Nigeria. There were other relatives of the appellant's partner in Nigeria including her mother and sister.

22. I am satisfied that the FTT considered the relevant evidence and which amounted to an assessment of the best interests of the children. I find that this formed a part the FTT's overall consideration [18]. The FTT considered, as it must, the public interest factors and the statutory provisions and found no exceptional circumstances that outweighed the public interest [19]. I am satisfied that there is no evidence in relation to the children, that was not considered by the FTT, that would have resulted in any different outcome.

Notice of Decision

I find no material error of law in the decision which shall stand.

No anonymity direction is made.

Signed Dated 8.7.2015

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Dated 8.7.2015

Deputy Upper Tribunal Judge G A Black