IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/46239/2013
IA/46238/2013
IA/46244/2013

THE IMMIGRATION ACTS

Heard at Field House
On 13 May 2015

Decision & Reasons Promulgated
On 04 June 2015

Before

THE HONOURABLE MR JUSTICE EDIS
UPPER TRIBUNAL JUDGE SOUTHERN

Between

THE SECRETARY OF STATE OF THE HOME DEPARTMENT

Appellant

and

ANUOLUWAPO BANIRE
AKEEM OLANREWAJU BANIRE
AMITH BABJIDE ADIGUN BANIRE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr. P. Duffy, Home Office Presenting Officer
For the Respondent: Mr. J. Plowright, Counsel instructed by Perera & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State (SoS) against a decision of the First-tier Tribunal (FTT), Judge Moore of the First-tier Tribunal, which was promulgated on the 29th January 2015. The hearing had taken place on 8th July 2014, but the delay in promulgation was not because the FTT Judge delayed in preparing his written Decision. That decision, which was dated 14th July 2014 was first promulgated on 25th July 2014 but said in the Notice of Decision that the appeal by the three respondents to the present appeal (the claimants), had been dismissed. The written reasons made it quite clear that the judge had intended to allow the appeals. They all applied for permission to appeal on this basis and the FTT Judge who considered those applications for permission to appeal directed an amendment of the Decision on 14th August 2014 under the "slip rule", paragraph 60 of the Asylum and Immigration Tribunal (Procedure) Rules 2005. This is what caused the Decision to be promulgated again, although we do not know why this did not happen until January 2015. It is important to set out this history because of an issue about whether sections 117A-117D of the Nationality, Immigration and Asylum Act 2002 which came into force very soon after the 14th July 2014 applied to the Decision or not. We will return to that below.

2. The claimants are Nigerian nationals. Anuoluwapo Banire was born on 18th September 1974 and is the wife of Akeem Olanrewaju Banire who was born on 24th January 1968. Their son, Amith Babdije Adigun Banire, was born on the 17th March 2005 in the United Kingdom. He was, therefore, 8 years old at the date of the FTT hearing, and had lived in the United Kingdom all his life. For clarity, we will call them "the mother", "the father" and "the son" respectively.

The decision of the SSHD

3. On 28th October 2013 notices dated 23rd October 2013 were served on all three claimants informing them that an asylum and/or human rights claim had been refused and that they were now liable to detention and removal. They claimed to be entitled to the grant of Leave to Remain (LTR) in the United Kingdom on the basis of rights protected by Article 8 of the ECHR, claiming also to have met the requirements of paragraph 276ADE of the Immigration Rules (the Rules), and EX.1(a). This had been refused on 3rd May 2013, but that decision was reconsidered following correspondence threatening judicial review and refused again in letters dated the 23rd October 2013 which accompanied the Notices. They were informed that they had a right of appeal against that decision under section 82(1) of the Nationality, Immigration and Asylum Act 2002. Each claimant did appeal to the FTT in time.

4. The decision of the 23rd October was taken on the basis that it was accepted that the relationship between the mother and the father was genuine and subsisting. They lived as a family unit with the son. However, the respondent concluded that the requirements of paragraph 276ADE and Appendix FM of the Rules had not been met, and the decision to refuse further LTR would not infringe their Article 8 rights if they were returned to Nigeria as a family unit.

The Facts as Found by the FTT

5. It was accepted on behalf of the mother and the father that they could not succeed in a claim for LTR under the Rules. The essence of the claim therefore related to the status of the son, and any Article 8 claim he might have, either under the immigration rules or on the basis of the exercise of the respondent's discretion outside the rules and how that might impact of the position of his parents.

6. The parents had a relationship in Nigeria before either of them came to the United Kingdom. As a result of that relationship, they had two children, now aged 16 and 14, whom they have left to the care of the father's mother. The father came to the United Kingdom in 1999, leaving the mother pregnant with the second of these children. Being present without leave, in 2000 he made an unsuccessful application for a residence card on the basis of an asserted relationship with another person, who was said to be an EEA national exercising Treaty rights in the United Kingdom. The mother came to the United Kingdom in 2003. Although she has asserted in the past that she arrived in 2005 and was admitted as a visitor, in fact, as has been confirmed by her solicitors in their letter of 3 April 2013, she made a clandestine and unlawful entrance to the United Kingdom in 2003, that being arranged by an agent. The Judge found that they both have poor immigration histories, and have been living in the United Kingdom unlawfully for some years. He considered that their claims under the Rules were doomed to fail and, but for their son, so would their Article 8 claims. Accordingly, leaving his position aside, they should be removed to Nigeria.

The Decision of the FTT

7. The FTT Judge proceeded on the basis that the son was nearly 9 ½ years old at the date of the hearing, which was an arithmetical error. He was in fact nearly 8½ years old then, and is a little over 9 years old now. He has never met his siblings in Nigeria and has spoken to them occasionally by telephone. He has other members of his family in this country to whom he is close and who live as part of a close extended family. He has spent 5 years in education here and is doing very well at school. He has glowing school reports and appears well settled and is a popular member of his class. The FTT Judge made these findings about the effect on the son of removal to Nigeria:-

> "I am satisfied that if he had to go to live in Nigeria with his parents his education would be disrupted, as would his progress academically and that in this regard it would not be in his best interests to go to Nigeria.
>
> "I am further satisfied that [the son] has fully integrated into society in the United Kingdom. He has never lived anywhere else. He has made many school friends and is a member of a local football club that he attends regularly. He has made friends at the football club, as well as at school and regularly talks with and stays with extended family members in the United Kingdom with whom he goes on occasional holidays. Taking into account that [the son] has never left the United Kingdom, as well as his age and his educational progress, and his relationships in the United Kingdom, and his integration into society here, I am not satisfied that it would be in the best interest of [the son] to go to live in Nigeria."

8. In considering the outcome of the son's claim, the Judge first said this

> "The appeal in respect of [the son] would not…be allowed taking into account that he had resided in the United Kingdom for a period in excess of 7 years and by reference to paragraph 276ADE of the Rules."

It is not entirely clear what this means, in view of the ultimate reason for the decision. Rule 276ADE(iv) provides the following requirement for applicants for leave to remain on the grounds of private life in the UK:-

> "(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years …..and it would not be reasonable to expect the applicant to leave the UK"

It may be that this followed from the acceptance of a submission that the son was not an applicant because he had not, himself, submitted an application. We do not think it necessary to delve further into this question, but we note, in passing, the test which applies: whether it was reasonable to expect the son to leave the UK.

9. The Judge then addressed two observations of Baroness Hale in two different cases. First, in *ZH (Tanzania) v. SSHD* [2011] UKSC 4 at paragraph 34, she said

> "Acknowledging that the best interest of the child must be a primary consideration in these cases immediately raises the question of how these are to be discovered. An important part of this is discovering the child's own views…"

It appears to us that this citation is of little direct relevance to the exercise in which the Judge was engaged, as it simply records the importance of ascertaining the views of the child where possible when assessing her best interests. This was achieved without need of authority in the present case because the child was himself an appellant before the First-tier Tribunal and was represented by counsel who was of course well placed to ensure that the views of each of his clients were put before the Tribunal. In any event, there was a letter from the son expressing his opinions. More pertinent altogether is the earlier passage at paragraph 25 where Baroness Hale said this:-

> "Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as "a primary consideration". Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration".

10. The Judge also cited *EM (Lebanon)* [2008] UKHL 64 at paragraph 49, where Lady Hale said

> "In particular, a child is not to be held responsible for the moral failures of either of his parents."

11. The Judge then said that he paid regard to the Borders, Citizenship and Immigration Act 2009, section 55 which required the Secretary of State to have regard to the need to safeguard and promote the welfare of children in the United Kingdom.

12. Later, the Judge gave his conclusion. He said

> "24. Paying regard to the case of *Razgar* [2004] UKHL 27 I am satisfied that any proposed removal in respect of [the son] would be an interference with the exercise of his right to respect for his private life in the United Kingdom and that such an interference would engage the operation of Article 8. I am not satisfied that it would be in his best interest to live in Nigeria with his parents as a family unit, since he is fully integrated into UK society and for reasons previously stated would infringe his protected rights in relation to his private life. In all the circumstances, I am not satisfied that such an interference was necessary on the grounds of effective immigration control and I do not find the decision in relation to [the son] to be proportionate.
>
> "I am also satisfied that it would be in the best interest of [the son] to continue living with both his parents in the United Kingdom as a family unit. Clearly that is the wish of [the son] as expressed in his letter."

Submissions to the Upper Tribunal

13. The SoS submits

    a. That the FTT failed to have regard to the public interest factors as required by section 117A(2) of the Nationality, Immigration and Asylum Act 2002.

    b. The Judge failed to refer to and to take account of the decision of the Court of Appeal in *EV Philippines and ors v SSHD* [2014] EWCA Civ 874 paragraphs 55-60, and of the Supreme Court in *Zoumbas v. SSHD* [2013] UKSC 74 paragraph 24.

14. Mr. Plowright, who appeared for the claimants, argued that the Judge was fully aware of all relevant factors and gave a carefully reasoned decision that was properly open to him. He attempted to assist us with the reason why the son's claim would not have succeeded under Rule 276ADE which we discuss briefly above and it was Mr. Plowright properly who pointed out the error as to the age of the son. The issue of the application of section 117A-D also benefited from his assistance, and it became clear that the decision was promulgated on 25th July 2014 and changed only by the slip rule. The provisions were not in force on that date and did not apply.

Discussion and Conclusion on the Appeal

15. We set out first paragraph 24 of *Zoumbas*:-

> "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. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit.

> Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being…"

16. There is no finding of any serious detriment to the well-being of the son should he be removed with his parents to Nigeria.

17. In paragraphs 55-60 of *EV Philippines v SSHD* Lewison LJ said this:-

> "55 Underlying these statements of principle is the real world fact that the parent has no right to remain in the UK. So no counter-factual assumption is being made, and the interests of the other family members are to be considered in the light of the real world facts. This is not an approach which is confined to domestic law. In *Üner v The Netherlands (2007) 45 EHRR 14* , as Lady Hale pointed out, the Grand Chamber said that one of the factors to be considered was:
>
> > "the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled."
>
> 56 This, too, takes as the starting point the real world fact that the applicant has no right to be in the host country. Likewise in *Rodrigues da Silva, Hoogkamer v Netherlands (2007) 44 EHRR 34* the court said that:
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> > "Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the contracting state, **whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them**, whether there are factors of immigration control (eg a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion." (Emphasis added)
>
> 57 Finally, at [29] Lady Hale returned to the test. She said that:
>
> > "Specifically, as Lord Bingham indicated in EB (Kosovo), it will involve asking whether it is reasonable to expect the child to live in another country."
>
> 58 In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. 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?
>
> 59 On the facts of *ZH* it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.
>
> 60 That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of

remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

18. The above statements of principle are binding on us, and they were binding on the FTT Judge. It is to be recalled that the relevant issue under Rule 276ADE is, in the case of the son, whether it is "reasonable to expect the applicant to leave the UK". This question, according to these decisions, is also relevant in deciding how the best interests of the child are to be a primary consideration in the Article 8 decision without elevating them to the primary consideration, still less the paramount consideration. In this respect, they anticipate the effect of section 117B(6) of the 2002 Act where, as here, the child concerned is a "qualifying child" as defined in the Act.

19. The Judge in this case made a finding as to the best interest of the child and concluded directly from that finding that his removal was disproportionate. This was an error. He ought to have ascertained the best interests of the child in the light of the position of the family as a whole, in particular in the light of the position of his parents, and then asked himself whether it was reasonable to expect the child to go with his parents to live in Nigeria. If it was not, then that might be a factor which was capable of displacing the public interest in effective immigration control which, as is not in dispute, required the removal of his parents. That is not to punish the child for the moral wrong doing of his parents. It is to assess the Article 8 balance in the "real world". The reason why the parents have no right to remain in the UK is not material to this exercise. The fact is that they have none. The way in which the Judge might have approached the exercise had he approached the case by asking the question posed above is illustrated by our findings when we answer it in re-making the decision below.

20. For this reason, the Decision of the Judge must be set aside. There being no real dispute as to any factual issue, we can move to re-make the decision ourselves.

The Decision remade

21. Sections 117A-D of the 2002 Act do now apply to our decision. These provide, so far as relevant:-

> **'117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the

considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) ……..

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(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.'

22. Section 117B(6) may therefore operate to assist the mother and father if it would not be reasonable to expect the son to leave the United Kingdom. This question has now, therefore, assumed an importance by statute. Parliament has directed the attention of tribunals to it, following the case law referred to above, and other similar decisions. It has given its weight also to the test used by the Secretary of State in drafting paragraph 276ADE(1)(iv) of the Rules.

23. S117B(1) provides statutory confirmation of the fact that maintenance of effective immigration control is to be regarded as in the public interest. Both parents are unlawfully present in the United Kingdom and it is not suggested that they have themselves any basis for remaining in the United Kingdom. The question is whether it is reasonable to expect the child to go with them. The answer is that it is. He is not thereby surrendering any rights he may have as a British citizen to health care and education because he is not a British citizen. It is obviously in his best interests to be with both his parents who have cared for him from birth, and he has family in Nigeria with whom he can become acquainted. He is still young, and we bear in mind the decision of the UTT in *Azimi-Moayed and Others (Decisions Affecting Children; Onward Appeals); Azimi-Moayed v Secretary of State for the Home Department* [2013] I.N.L.R. 693

> "As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the UK then so should dependent children

> who form part of their household unless there are reasons to the contrary. However, lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified 7 years as a relevant period. Seven years from age 4 is likely to be more significant to a child than the first 7 years of life."

24. Essentially, this is a private life case. The family life in play is principally that enjoyed between the father, mother and son. That will continue undisturbed after the family return together to Nigeria. Indeed, the family will be reunited in that the siblings will, for the first time, all be living in the country of which they are citizens. It has not been established that there is any aspect of private life that cannot be replicated by the claimants in Nigeria. We recognise that there will be some disruption to be overcome, especially for the son who will have to continue his education in Nigeria. But there is no issue as to language and he will have the support of relatives as well as his parents. With the support of his parents and, it is to be hoped, of his wider family, there is no reason to suppose that he will not integrate quickly and successfully into that society.

25. Drawing all this together we have concluded that it would not be unreasonable to expect the son to return to Nigeria with his parents. Therefore, although the son is a qualifying child, as defined by section 117D, because he has lived in the United Kingdom continuously for more than seven years, he does not fall within paragraph 276ADE(1)(iv) of the immigration rules and nor can he derive any benefit from the application of section 117B(6) such as to displace the public interest in the maintenance of effective immigration control. It is plain that the maintenance of effective immigration control requires the removal of the father and mother, little weight being given to any private life established while unlawfully present.

26. For the avoidance of any possible doubt, we have not restricted our assessment of the claim under Article 8 of the ECHR to an application of the Immigration Rules and section 117 of the 2002 Act. We have also considered whether, taken as a whole, the case advanced on behalf of the claimants discloses any compelling reason for the grant of leave outside the statutory framework in order to secure an outcome compliant with Article 8 of the ECHR but we have concluded that it does not.

27. For these reasons we substitute a fresh decision to dismiss each of the appeals against the decision of the respondent under challenge in these proceedings.

Notice of Decision

The Secretary of State's appeal to the Upper Tribunal is allowed.

The decision of First-tier Tribunal Judge Moore, promulgated on 29 January 2015, is set aside.

We substitute a fresh decision to dismiss each of these appeals both under the immigration rules and on human rights grounds.

No anonymity direction is made.

Signed Date

Mr Justice Edis