Upper Tribunal
(Immigration and Asylum Chamber) Appeal
Numbers: IA/51715/2013

IA/51730/2013
IA/51733/2013
IA/51735/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 28th January 2015	**On 9th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MRS L O I
MISS A O I
MASTER A O I
MASTER A O I
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr S Kandola, Home Office Presenting Officer
For the Respondents: Ms E L Cantor

DECISION AND REASONS

Details of the Parties

1. The Secretary of State is the appellant in the Upper Tribunal. The respondents are referred to hereafter as the claimants. Their details are

as follows. The first listed claimant, Mrs I, is the mother of the remaining three claimants; she was born on 1st June 1972; her daughter was born on 5th July 2007; her older son A O was born on 24th August 1998, and her second son A O on 26th March 2001. They are all citizens of Nigeria. They applied to the Secretary of State for further leave to remain in the United Kingdom on Article 8 ECHR grounds.

2. In a determination promulgated on 28th October 2014 First-tier Tribunal Judge Camp (the Judge) allowed the appeals of the claimants on Article 8 ECHR private life grounds having found that there were exceptional circumstances to warrant consideration outside the Immigration Rules. Permission to appeal to the Upper Tribunal against that decision was granted to the Secretary of State on 17th December 2014 on the arguable grounds that the Judge erred in his assessment of proportionality by failing to give proper consideration to the public interest and by failing to have proper regard to section 117 of the Nationality, Immigration and Asylum Act 2002. The matter accordingly came before me to determine whether the making of the decision by the judge involved the making of a material error of law.

Background Information

3. The background facts are as follows. The first claimant was married to Mr A A I, a citizen of Nigeria, present in the United Kingdom with Tier 1 leave as a Migrant; he was the father of all the children. Mrs I was first granted entry clearance to the United Kingdom as a visitor from 10th July 2000 until 10th January 2001. She then entered the United Kingdom on 22nd August 2002 with entry clearance as a visitor valid from 13th March 2002 until 13th September 2002. She was then granted entry clearance as a visitor from 25th April 2003 until 25th April 2005. She entered again on 11th August 2008 with valid entry clearance as a visitor until 17th July 2010.

4. On 4th April 2010 Mrs I entered the United Kingdom with entry clearance as a Tier 1 partner from 1st February 2010 until 1st February 2013. The claimant children were variously granted entry clearance as visitors with their mother until they were granted leave entry clearance as Tier I dependants from 4th April 2010 until 13th February 2013. The claimants have remained in the United Kingdom since then, but on 26th December 2012 Mr A A I died. The claimants applied on 1st February 2013 for leave to remain in the United Kingdom on Article 8 grounds. The applications were refused by the Secretary of State on 20th November 2013. This was the decision appealed against by the claimants in the First-tier Tribunal before the Judge at a hearing on 3rd October 2014.

My Consideration of the Submissions

5. Mr Kandola made submissions to me on behalf of the Secretary of State in accordance with the grounds of appeal as follows. Having found reasons to consider the appeal on a free standing Article 8 basis under the ECHR

on private life grounds the Judge erred in paragraph of his determination by finding that there was "no evidence that the first appellant would be able to support herself and her children" on return to Nigeria. In doing so the Judge has misapplied the burden of proof because it was for the claimant to show that to be the case; if she asserts that the family would find life difficult in Nigeria the onus is upon her to corroborate the assertion.

6. The Secretary of State submits that there was no evidence that the claimant could not support herself and her children in Nigeria. On the contrary, the evidence showed that she could because at paragraph 11 of the determination it was evident that the claimant has a mother and sister in Nigeria and that she has a house in the United Kingdom which is mortgage-free and could be sold. This evidence is submitted by Mr Kandola to undermine the findings of the Judge which led him in error to allow the appeal.

7. Mr Kandola submitted that the Judge further erred in the proportionality assessment which is fundamentally flawed. The Judge took account of disruption to the education of the children but he failed to take into account that they are not qualifying children under the Immigration Rules or under section 117B of the Nationality, Immigration and Asylum Act 2002. Their 4-year length of residence in the United Kingdom is insufficient to engage the Immigration Rules and this must be a weighty public interest matter in favour of removal. The Judge did not weigh this properly in the balance against the best interests of the children.

8. I do not accept the submission that the Judge erred in this aspect of his decision-making. The Judge did not make a specific finding that the children were not qualifying children under the Rules because he reached an overall conclusion that the Immigration Rules did not adequately address the exceptional circumstances of any of the claimants. The exceptional circumstances identified by the Judge are clearly set out in paragraph 28 of the determination as the terminal illness and death in the United Kingdom of Mr A A I. The minor claimants' 4-year length of residence in the United Kingdom was specifically considered by the Judge at paragraph 40 of the determination before he found that their education would be disrupted by their removal, particularly in relation to the older two children.

9. The Judge did not move to an Article 8 consideration before considering the relevant case law and finding that the decision of the respondent represented an interference with the moral integrity of the claimants. The Judge directed himself properly in accordance with section 117B at paragraph 36 of his determination and I find no error in the absence of a finding that the children were not qualifying children under section 117B(6). That provision is that the public interest does not require a person's removal where there is a genuine and subsisting parental relationship with a qualifying child. It does not necessarily follow that that

the public interest is served by removal because the child is not a qualifying child. It was still incumbent upon the Judge to assess the best interests of the children and to weigh in the balance whether the decision of the respondent ran counter to those interests; he was satisfied that it did.

10. Mr Kandola further submitted that the Judge erred in his failure properly to apply section 117B(5) of the 2002 Act, namely that little weight should be given to a private life established at a time when that person's immigration status is precarious. He submitted that the immigration status of the claimants was precarious at the relevant time because it was in effect finite and dependent upon the position of the Tier I Migrant; the leave of the claimants would always have ceased at the end of Mr A A I's leave and their private life must accordingly be given little weight.

11. I find no error in the Judge's approach to this issue in the balancing exercise. He properly directed himself in law and thereafter it was a matter for him to determine the weight to be attributed to competing factors. The weight to be attached to the claimants' private lives was in his view sufficient to outweigh the public interest. It is not suggested that the Judge reached a decision which was perverse and I am satisfied that he was entitled to reach the conclusion he did. He found exceptional compassionate elements in the private lives of the claimants, including their sudden bereavement, the consequent absence of an adult male family member in their lives and their potentially vulnerable situation on return to Nigeria, over and above the disruption to the education of the children.

12. The Judge did not reach his favourable conclusions to the claimants without first specifically weighing in the balance, at paragraph 36 of his determination, that section 117B specifies the weight to be given to private life when immigration status is unlawful or precarious and the Judge quite properly directed himself that "precarious" is not defined for these purposes. The Judge took proper account in paragraph 41 of the weight to be accorded to the public interest but he found that under section 55 the welfare of the children would not be adequately safeguarded by their removal to Nigeria in their particular circumstances. The evidence before the Judge on behalf of the children included their inability to visit their father's grave if they were removed to Nigeria.

13. Having taken account of the claimants' circumstances the Judge moved to a free-standing Article 8 consideration in respect of which I am satisfied that he correctly directed himself in law. The Judge was in my finding entitled to move to such a consideration having determined that there were factors which could not be adequately considered in the context of the Rules which could lead to a successful Article 8 claim, as indeed they did.

14. Having taken account of all the grounds of appeal and submissions I am satisfied that the decision of the Judge does not contain any error of law.

Ms Cantor drew my attention at the outset of her submission to the Judge's central finding at paragraph 38 that he found all the witnesses to be credible. The Judge was in my view entitled to reach these credibility findings from which his favourable findings to the claimants under Article 8 flowed. He gave clear reasons to explain why the particular circumstances of the claimants amounted to exceptional compelling circumstances in the context of Article 8 and I am satisfied that the proportionality balance as drawn has paid due regard both to the individual circumstances of the claimants' rights in the context of the public interest and to that public interest as set out in paragraph 34 of the determination. The Judge identified the public interest as including the enforcement and maintenance of immigration control and the protection of the economic interests of the United Kingdom.

15. Following correct self-direction, where the balance falls is a finding of fact to be made by the Judge hearing the evidence absent perversity. I have found correct self-direction and the Secretary of State does not rely on grounds of perversity; I find no perversity. I take account of the submission for the Secretary of State that there could be no legitimate expectation on the part of the claimants to remain in the United Kingdom or to avail themselves of services here. However, at paragraph 40 the Judge took account in considering the public interest the fact that had Mr A A I not died it would have been his expectation to return with his family to Nigeria.

16. The appeal of the Secretary of State cannot in my finding succeed on the ground asserting that the Judge has misapplied the burden of proof in relation to his finding that there was no evidence that the first claimant would be able to support herself and her children on return to Nigeria. The submission by the Secretary of State that the claimant had a house she could sell enters the realms of disagreement with the factual findings in the case and is in any event a factor taken into account by the Judge at paragraph 11 of the determination.

17. The Judge in my view reached a sustainable conclusion about the likely financial situation of the claimants on return to Nigeria. The evidence before him was, in paragraph 10 of the determination, that the first claimant received moral and financial support for the children whilst on holiday; in paragraph 13 Pastor E gave evidence of financial support provided by the church members to the claimants in the United Kingdom and of the difficulty in continuing such support beyond the claimants' possible return to Nigeria. The witness Mr P gave evidence of his financial support to the claimants.

18. If there was error, although I find there was not, in the Judge's approach to the issue of the claimants' financial situation on return to Nigeria I find that it was not material. The Judge took a wide range of other factors into account in making his decision to which he attached weight. He found the claimants' overall circumstances to be tragic, as stated in paragraph 24 of

the determination; in paragraph 28 he set out the exceptional circumstance of terminal illness and in paragraph 38 he found that the children would be vulnerable with no adult male in Nigeria; in paragraph 39, having considered section 55, the Judge found that the children's welfare would not be adequately protected if returned to Nigeria. The Judge further took into account the good intentions and behaviour of the claimants in making their claim and their good immigration history. The Judge found the compassionate circumstances to be persuasive and found the balance to fall in the claimants' favour for all the reasons set out in paragraph 43 of the determination.

19. The Judge is submitted to have failed to have sufficient regard to the cost to the taxpayer of an education for the children and to the public interest in the economic well being of the United Kingdom. In this regard I find that the Judge took proper account, in paragraph 43 of his determination, of the public interest in relation to immigration control and the economic wellbeing of the United Kingdom. At paragraph 42 of his determination the Judge stated: "I bear firmly in mind the need to protect the United Kingdom's economic interests. Access to free education comes at a cost to the taxpayer."

20. I find that the making of the previous decision did not involve the making of a material error on a point of law and it follows that the Judge's decision stands and this appeal in the Upper Tribunal is dismissed.

Decision

21. I find that the making of the previous decision did not involve the making of a material error on a point of law and it follows that the Judge's decision stands and this appeal by the Secretary of State in the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal made no direction regarding anonymity under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. However, in the light of the status of three of the respondents as minors I make an anonymity order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269). 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 respondents (the original appellants). This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed: J Harries

Deputy Upper Tribunal Judge
Date: 8th February 2014

Fee Award

The position remains that the First-tier tribunal made no fee award in the absence of any record of payment of fees.

Signed: J Harries

Deputy Upper Tribunal Judge
Date: 8th February 2014