Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/05364/2015**
IA/05371/2015

THE IMMIGRATION ACTS

Heard at Field House
On 14 March 2016

Decision Promulgated
On 6 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) C O
(2) D O
(Anonymity Direction made)

Respondents

Representation:

For the Appellant: Mr S Staunton, Senior Home Office Presenting Officer
For the Respondent: Mr A Jafar (counsel) Instructed by Graceland solicitors

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellants, on the basis of the minority of the second appellant, and to preserve the anonymity direction made by the First-tier Tribunal.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Higgins, promulgated on 14 September 2015, which allowed the Appellants' appeals.

Background

3. The second appellant is the first appellant's daughter. The first Appellant was born on [ ] 1975. The second appellant was born on [ ] 2006. The appellants are citizens of Nigeria.

4. On 20 January 2015 the Secretary of State refused the Appellants' applications for further leave to remain in the UK (made on the basis that removal would breach article 8 ECHR).

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Higgins ("the Judge") allowed the appeals against the Respondent's decisions.

6. Grounds of appeal were lodged and on 26 January 2016 Judge Colyer gave permission to appeal stating inter alia

> *"The respondent submits that there was the making of a material misdirection of law on a material matter. It is arguable that the judge erred in law for the following reasons:*
>
> *a. At paragraph 39 the judge finds that despite the fact that the second appellant is not due to take any exams in the immediate future "the progress she has made so far might be jeopardised". It is not clear what evidence this was based upon and it appears to be speculation on the part of the judge.*
>
> *b. At paragraph 40 the judge states "it is unclear to me or support networks, if any, she might be able to draw on". The burden of proof is on the appellant to satisfy the tribunal of the facts. It is submitted that the judge found my findings on material matter.*
>
> *c. At paragraph 41 the judge finds that the second appellant's sickle cell is a factor which weighs particularly heavily in his considerations, this is despite the fact he acknowledges that in 2010 it was felt that her sickle cell would cause her few problems in the future. It is not adequately explain why this is such a weighting factor given that diagnosis.*
>
> *d. At paragraph 42 the judge finds that it would be beneficial to have contact with the second appellant's father, but the evidence is that she does not have regular contact and has not, in fact, had any contact since 2014. This is a perverse finding.*

e. At paragraph 43 the judge states that the factor which weighs the heaviest is the length of time the second appellant has been in the UK. It is submitted that the judge fails to engage with any of the case law on best interest and does not carry out an adequate assessment. There is no suggestion in the determination that any evidence of a private life beyond school and the home was advanced on behalf of the second appellant. There is also no suggestion that the views of the second appellant was sought, nor were any reports or assessments before the tribunal. The fact that the second appellant has more than seven years residence is not enough to gainsay the presumption that the best interests of the child are to remain with the parent in her home country.

4. It is arguable that the judge has misdirected himself for the above reasons and the grounds submitted by the respondent on all points are arguable. Permission to appeal to the Upper Tribunal is granted."

The Hearing

7. (a) Mr Staunton, for the respondent, adopted the terms of the grounds of appeal. He told me that at [39] of the decision, the Judge's comments about the second appellant amount to speculation rather than findings of fact based on evidence placed before the Judge.

(b) Mr Staunton took me to [40] of the decision, where the Judge prefaces his comments by saying *"... It is unclear to me ..."* before making findings of fact. Mr Staunton told me that the Judge failed to make findings of fact on a material matter and, in effect, reversed the burden of proof.

(c) Mr Staunton was critical of the Judge's findings at [40] to [42] and argued that the Judge makes contradictory findings. At [41] the Judge finds that the second appellant's sickle cell disease weighs heavily in her favour, despite earlier acknowledging that since 2010 the disease has been brought under control & the second appellant has a good prognosis. At [42] the Judge finds that it would be beneficial for the second appellant have contact with her father despite finding that there has been no contact since 2014.

(d) At [43] the Judge makes findings based on the length of time the second appellant has been in the UK. Mr Staunton argued that in making those findings the Judge turned a blind eye to the cases of MK (bests interests of child) India [2011] UKUT 00475 (IAC); E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 315 (IAC); Azimi- Moayad and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC); & EV (Philippines) & Ors v SSHD [2014] EWCA Civ 874

(e) Mr Staunton asked me to allow the appeal and set the decision aside.

8. Mr Jafar, counsel for the appellants, told me that the decision does not contain any errors material or otherwise, and that the respondent's submissions amounted to

little more than a disagreement with findings of fact and conclusions which were open to the Judge to make. Mr Jafar referred to the documentary evidence produced to the First-tier and suggested that the Secretary of State's criticism had their foundation in "*cherry picking sentences*" and taking them out of context. He explained to me that the second appellant's father was present in court today and that the contact between the second appellant and her father was one of the crucial factors to be considered. He reminded me that the second appellant is approaching her 10th birthday and has been in the UK for more than seven years. He relied on section 117 of the 2002 Act and the cases of EA and Azimi Moayad. He urged me to dismiss the appeal and allow the decision to stand.

Analysis

9. The focus in this appeal is on second appellant. At [27] of the decision, the Judge records that it is conceded that neither of the appellants could succeed under appendix FM of the immigration rules. It is common ground (and accurately recorded by the Judge at [28]) that the appellants' cases were plead on the basis that the appellants fulfil the requirements of paragraph 276 ADE1(iv) of the rules.

10. Between [29] and [37] the Judge sets out the submissions made by counsel for the appellant. Between [38] & [42] the Judge sets out the factors which he weigh in the second appellant's favour before concluding, at [43], that the second appellant fulfils the requirements of the immigration rules because it would not be reasonable to expect her to leave the UK "*.. at this juncture*"

11. The factors that the Judge found weighed in the second appellant's favour were

(i) the length of time she has been in the UK;
(ii) her participation in education in the UK;
(iii) that her sickle cell disease is monitored in this country;
(iv) that she now has contact with her British citizen father.

The Judge placed particular emphasis on the length of time the second appellant has been in the UK.

12. In EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 the Upper Tribunal stated:

> *"2. Guidance is also given on the assessment of the private and family life of a Zimbabwean national present in the United Kingdom for over 11 years with children born and/or resident most of their lives in the United Kingdom.*
>
> *"3. In the absence of countervailing factors, residence of over seven years with children well-integrated into the educational system in the United Kingdom, is an indicator that the welfare of the child favours regularisation of the status of mother and children".*

13. Paragraph 276 ADE(1) (iv) of the Rules says:-

> *"(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant …*
>
> *(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK".*

14. Section 117B of the 2002 Act provides:

> *"117B Article 8: public interest considerations applicable in all cases*
>
> *(1) The maintenance of effective immigration controls is in the public interest.*
>
> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –*
>
> *(a) are less of a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –*
>
> *(a) are not a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(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."*

The second Appellant has lived in the United Kingdom for nearly ten years, so she has the status of "qualifying child" within the Part 5A regime.

15. In Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC), section 117B(6) was analysed and construed in [12] – [23]. This Tribunal expressed its conclusions in the following terms, at [20] – [21]:

> *"20. In section 117B(6), Parliament has prescribed three conditions, namely:*
>
> *(a) the person concerned is not liable to deportation;*
>
> *(b) such person has a genuine and subsisting parental relationship with a qualifying child, namely a person who is under the age of 18 and is a British citizen or has lived in the United Kingdom for a continuous period of seven years or more; and*
>
> *(c) it would not be reasonable to expect the qualifying child to leave the United Kingdom.*
>
> *Within this discrete regime, the statute proclaims unequivocally that where these three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none.*
>
> *21. Giving effect to the analysis above, in our judgment the underlying Parliamentary intention is that where the three aforementioned conditions are satisfied the public interests identified in section 117B(1) – (3) do not apply."*

16. For the purposes of these appeals, the test in terms of paragraph 276 ADE(i)(iv) & (vi) and the test for consideration of article 8 ECHR outside the rules amounts to the same question. Is it reasonable to expect the second appellant to leave the UK? The answer to that question is determinative of the appeals of both appellants.

17. In PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC) it was held that when considering the conjoined Article 8 ECHR claims of multiple family members, decision-makers should first apply the Immigration Rules to each individual applicant and, if appropriate, then consider Article 8 outside the Rules. This exercise will typically entail the consideration and determination of all claims jointly, so as to ensure that all material facts and considerations are taken into account in each case.

18. The second appellant was born in the UK and has lived in the UK all her life. She will soon celebrate her 10th birthday. Her father is a British citizen. The evidence indicates that there is some contact between the second appellant and her father.

19. The second appellant is a qualifying child in terms of s.117 of the 2002 Act. The first appellant is not liable to deportation and has a genuine parental relationship with the second appellant. These appeals turn entirely on the question of whether or not it is reasonable to expect the second appellant to leave the UK.

20. Between [38] and [44] of the decision, the Judge makes findings of fact which relate directly to the private life established by the first and second appellants in the UK. The Judge takes account of the impact that removal is likely to have on the second appellant. The Judge's fact finding exercise is not flawless, however, as I have already indicated, he clearly identifies the crucial aspects of the established family and private life enjoyed by the appellants.

21. At [44] the Judge draws those findings of fact to a conclusion by applying the correct test in law. The Judge has regard to part 5A of the Nationality, Immigration and Asylum Act 2002. In the final sentence of [44] the Judge draws the conclusion that it would not be reasonable to expect the second appellant to leave the UK. That is the correct test in law. Although the fact finding exercise is not flawless it does not contain an error. The only flaw in the fact-finding exercise is that it may have been possible for the Judge to make more comprehensive findings of fact. The decision however contains sufficient findings of fact to support the conclusion that the Judge comes to. The correct test in law has manifestly been applied.

22. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

23. In this case, there is no misdirection in law & the fact finding exercise is beyond criticism. The decision is not tainted by a material error of law.

24. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

25. No errors of law have been established. The Judge's decision stands.

DECISION

26. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Date 23 March 2016

Deputy Upper Tribunal Judge Doyle