IAC-TH-WYL-V2

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/26537/2014
IA/26544/2014
IA/26546/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 February 2016	**On 25 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MRS UFUOMA OGBUROGHO – FIRST APPELLANT
MR WILSON OGBUROGHO – SECOND APPELLANT
[D O] – THIRD APPELLANT
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Ikie, Solicitor
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The first and second appellants are husband and wife and the third appellant is their son born on 5 June 2006. They appealed against decisions made by the respondent on 30 June 2014 to refuse to grant leave to remain on Article 8 human rights grounds and to give directions for removal.

2. Their immigration history was that the first appellant entered the United Kingdom in December 2004 as a visitor and overstayed. The second appellant entered the United Kingdom in January 2003. Their child, the third appellant, was born in the United Kingdom on 5 June 2006. The application to remain on human rights grounds was made on 5 June 2013 and initially refused on 14 August 2013. However, following a consent order within judicial review proceedings the application was reconsidered by the respondent and refused on 30 June 2014.

3. The appellants appealed those decisions and following a hearing at Taylor House, and in a decision promulgated on 26 March 2015, Judge of the First-tier Tribunal Colvin dismissed their appeals.

4. The appellants sought permission to appeal which was granted by Judge of the First-tier Tribunal Grant-Hutchinson on 18 December 2015. Her reasons for so granting were:-

> "1. The Appellants seek permission in time to appeal against a decision of the First-tier Tribunal (Judge Colvin) promulgated on 26 March, 2015 whereby it dismissed the Appellants' appeal against the Secretary of State's decision to refuse the Appellants leave to remain on the basis of their private and family lives inside and outside the Immigration Rules in terms of paragraph 276ADE, Appendix FM or under Article 8 of ECHR.
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> 2. It is arguable that the Judge erred in law by misdirecting himself in not considering the relevant test of reasonableness in relation to the third Appellant under paragraph 276ADE(iv) of the Immigration Rules separately from Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 which only come into play when considering the Appellants' appeals outside the Immigration Rules in relation to Article 8 of ECHR"

5. Thus the appeal came before me today.

6. Mr Ikie argued that the judge misdirected herself in law at paragraph 24 of her decision in treating "the test of reasonableness" included in paragraph 276ADE(iv) as the same as that in Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. Secondly that the judge "would have allowed the appeal had she appreciated the true scope of Section 117B(6) of the 2002 Act having concluded at paragraph 22 of her decision "that in principle it would be in Donald's best interests to remain in the UK on the grounds that he is socially and educationally integrated … where he has a significant chance of pursuing his skills as a young professionally trained footballer in the future". Thirdly the judge fell into error by failing to appreciate and direct herself that the cases she cited and relied upon to guide herself never had the benefit "of the impact of the provisions of the said Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. Had the judge appreciated the scope of the said Section, she would have approached her task differently". Fourthly she failed to resolve a material fact in issue and but for this she would have been "bound to allow the appellants' appeal". It was part of the appellants' appeal that they were

being discriminated against on Article 14 ECHR grounds as contended within the skeleton argument placed before the judge. Finally the judge erred by failing to accept all the reasons put forward within the appellants' representative's skeleton argument for allowing the appeal.

7. Mr Duffy argued that contrary to the appellants' representative's submissions the judge directed herself appropriately and no material error has been identified within her decision. The judge properly considered whether it was reasonable in terms of paragraph 276ADE to expect the third appellant to leave the United Kingdom. She concluded that it would not be unreasonable to expect him to do so in the company of his parents, the first and second appellants. In so doing the judge took into account "the relevant factors and relevant case law". This is a well reasoned decision and if there is any error within it it cannot be said to be material.

8. In coming to my decision regarding this appeal I have taken into account the appellants' further case law bundle which was handed up to me at the hearing. It comprises of **Bossade (Section 117A-D - Inter-relationship with Rules) UKUT 00415**, **Treebhawon and Others (Section 117B(6) [2015] UKUT 00674 (IAC)** and **Amin, R (on the application of) v Secretary of State for the Home Department) [2014] EWHC 2322**.

9. The nub of the respondent's case in the appeal heard by Judge Colvin was that whilst it was accepted that the first and second appellants were in a genuine and subsisting relationship their applications failed under the partner route under Appendix FM as they do not fulfil the eligibility requirements under E-LTRP.1.2. Further they failed to meet the requirements for leave to remain as a parent under the eligibility routes E-LTRPT.2.2 and 2.3. The first and second appellants did not meet the requirements of paragraph 276ADE of the Immigration Rules as they have not been in the United Kingdom for twenty years and it was not accepted that they had lost ties to their home country of Nigeria. The third appellant does not meet the requirements for leave to remain as a child under Appendix FM as both his parents have been refused leave to remain in the United Kingdom. Even though the third appellant has lived continuously in the United Kingdom for at least seven years and is under the age of 18, it is reasonable to expect him to return to Nigeria with both of his parents and as a family unit they can help him adjust to that change and provide him with maintenance and accommodation. Having lived with his parents who are both Nigerian citizens and having lived in the United Kingdom which is a multi-cultural society with a Nigerian diaspora, it was not accepted that he had lost ties to his home country. As to Section 55 of the Borders, Citizenship and Immigration Act 2009 the respondent considered that the third appellant had lived all his life in the United Kingdom and was at the time of hearing 8 years of age. However, he would be returning to Nigeria with his parents to support him and where there is a functioning education system. There was no evidence to indicate that his parents would be unable to maintain him in Nigeria or that they would be unable to provide for his safety and welfare.

10. The nub of the appellants' case was that the first appellant overstayed a visitor's visa after arriving in December 2004 and the second appellant, her husband was already in the United Kingdom having entered in January of 2003. The third appellant was born in the United Kingdom and has attended both nursery and primary school. By February 2015 he would have lived continuously in the United Kingdom for eight years and eight months. He is a talented footballer and has been part of his school's team since Year 2. He was also chosen to compete at the Millwall Football Club and more recently at the Crystal Palace Football Club. He is very good at mathematics and has been selected for a group of talented pupils. His life is in the United Kingdom.

11. It was agreed at the hearing before Judge Colvin that the first and second appellants could not qualify to come within paragraph 276ADE or Appendix FM in terms of their private or family life. Therefore the issue in the case centred principally upon the circumstances of the third appellant who had been born in the United Kingdom. The judge states at paragraph 17 of her decision:-

> "17. … The consideration of Donald's case is under paragraph 276ADE as to his private life: he is under the age of 18 years and has lived in the UK for at least 7 years and it would not be reasonable to expect him to leave the UK. The same test is whether it would be reasonable to expect Donald to leave the UK as a 'qualifying child' is set out in s.117B(6). It is inherent in assessing this test of reasonableness to consider the best interests of the child as a primary consideration although not paramount."

12. The judge then analysed the factual matrix within the context of not just the Immigration Rules and Section 117 of the 2002 Act but also relevant case law including **EV (Philippines) v SSHD [2014] EWCA Civ 874** and **Azimi-Moayed (decisions affecting children; onward appeals) [2013] UKUT 001**. The judge made factual findings in relation to all three appellants and under the Immigration Rules carried out a balancing exercise in relation to Article 8. She concluded that the appellants' appeals could not succeed and having reached such a decision under the Immigration Rules stated at paragraph 26 of her decision that:-

> "26. In line with a series of recent case decisions, it is not necessary to conduct a separate examination of Article 8 of the Rules when all the considerations have been addressed within the Rules. I consider that this is the situation in this appeal and therefore have not undertaken a separate Article 8 assessment more generally."

13. I appreciate that the Immigration Rules in relation to Article 8 are not, unlike those relating to deportation, a complete code. It does not follow, as Mr Ikie argued, that Section 117B(6)(b) is an issue that has to be considered as distinct from a consideration of the same claim under the Immigration Rules themselves. The test within each very much overlap. The provisions of Section 117 of the 2002 Act apply where the Tribunal is required to consider whether a decision breaches Article 8 rights. In this appeal the question posed by Section 117B(6) is the same question posed

in relation to the third appellant by paragraph 276ADE(1)(iv). What the judge has done is, quite rightly, answered it in the proper context of whether it was reasonable to expect the third appellant to follow his parents to their country of origin. She has properly applied **EV (Philippines)**. There was no necessity for her to deal with the question or indeed answer it more than once. The judge here was weighing all factors for and against the third appellant's removal and in so doing she has taken into account not just the Immigration Rules themselves but also the provisions of Section 117 of the 2002 Act. As such she cannot be criticised.

14. Ground 2 amounts to no more than a misconceived argument with the ultimate findings of the judge who has taken proper account of relevant case law in coming to her decision.

15. She did not fall into error in terms of her assessment of the importance and weight of the period of time in excess of seven years that the third appellant has spent in the United Kingdom. She has properly applied the authority of **Azimi-Moayed**.

16. As to ground 4 and the Article 14 issue this is dealt with in the skeleton argument that was put before the judge at paragraph 23 which states:-

> "23. In any event, it would be inimical to justice and discriminatory in Article 14 sense to grant leave to remain to family units on account of the presence of qualifying children in their family units and decline to do the same for these appellants."

The skeleton argument then goes on to cite other families who have benefitted from a qualifying child/children. It is totally unclear where the names and Home Office references have come from and I can only assume that they are cases in which those representing the appellants have also been involved. The outcome of those appeals has no bearing whatsoever on this case. It is a flawed argument put forward by those representing the appellants. Even if the judge has not directly dealt with this issue within her decision it would certainly not amount to a material error and would have no effect on the outcome at all.

17. This is a decision where the judge has given sustainable reasons which were open to her on the evidence for coming to the conclusions that she did. The grounds are no more than a dispute with the decision of the judge who was entitled to come to the conclusion that she has.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

No anonymity direction is made.

Signed Date 22 February 2016.

Deputy Upper Tribunal Judge Appleyard