IAC-TH-CP-V2

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/36813/2014
IA/36819/2014
IA/36822/2014
IA/36826/2014
IA/36830/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 January 2016	**On 28 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DEBORAH IDOWU ODUBANJO (1ST RESPONDENT)
ADEYEMI OLU ODUBANJO (2ND RESPONDENT)
EO (3RD RESPONDENT)
GO (4TH RESPONDENT)
MO (5TH RESPONDENT)
(ANONYMITY ORDER NOT MADE)

Respondents

Representation:
For the Appellant: Mr. K. Norton, Home Office Presenting Officer.
For the Respondents: Mr. M. Sihwa, Solicitor.

DECISION AND REASONS

1. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as "the respondent" and Deborah Idowu Odubanjo as "the first appellant", Adeyemi Olu Odubanjo as "the second appellant", EO as "the third appellant", GO as "the fourth appellant" and MO as "the fifth appellant".

2. The appellants are citizens of Nigeria. The first and second appellants are husband and wife and the third, fourth and fifth appellants are their children. They appealed against a respondent's refusal decision of 1 September 2014 in relation to an application made for indefinite leave to remain on the basis of family and private life in the United Kingdom. The basis of the refusal was that the appellants had not shown the decision was in breach of the respondent's obligations under Article 8 of the European Convention on Human Rights (ECHR) as set out within the Immigration Rules HC 395 (as amended) ("the Rules") with particular reference to paragraphs 276ADE or Appendix FM and Article 8. A decision to remove the appellants under Section 10 of the Immigration and Asylum Act 1999 was made on 4 September 2014.

3. The appellants appealed and following a hearing at Hatton Cross, Judge of the First-tier Tribunal Telford dismissed their appeals under "the Rules" but allowed them on human rights grounds.

4. The respondent sought permission to appeal which was initially refused by Judge of the First-tier Tribunal P J M Hollingworth on 3 June 2015. A renewed application was made and granted by Upper Tribunal Judge Canavan on 12 August 2015. Her reasons for so doing were:-

> "1. The appellants appealed against the respondent's decision to refuse to grant them leave to remain on human rights grounds. The respondent applies for permission to appeal against First-tier Tribunal Judge Telford's decision to allow the appeal, which was promulgated on 30 March 2015.
>
> 2. It is at least arguable that there is a contradiction between the First-tier Tribunal Judge's finding that it would be reasonable to expect the children to return to Nigeria as part of a family unit [10] and his finding that it was likely that the children would now meet the requirements of the immigration rules [17] given that the 'reasonableness' test contained in paragraph EX.1 of Appendix FM and paragraph 276ADE are a similar test. It is arguable that the First-tier Tribunal Judge's findings in relation to the immigration rules and Article 8 outside the rules conflict with one another. Whether a potential error would have been material to the overall outcome of the appeal is a matter that will need to be considered further in light of the findings that were made in the appellants' favour in relation to Article 8. Whilst the other points relating to the public interest question are perhaps less strong permission is granted on all grounds.
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> 3. Permission to appeal is granted."

5. Thus the appeal came before me today.

6. Mr Norton emphasised the inability of the appellants to meet the requirements of "the Rules". He acknowledged that the two minor appellants have separate applications pending and are awaiting a decision by the respondent. Further that another child of the first and second appellants, Elijah, has discretionary leave which is consequently precarious. The Immigration Rules themselves are not diluted by any contribution made by the appellants to the economic wellbeing of the country. The public interest prevails. The agreed facts are firmly within the ambit of "the Rules" and do not disclose a basis for departure therefrom. The relationship between the minor appellants and their brother Elijah, and the need to promote a single family unit can be realised in Nigeria itself. Even if the two minor appellants succeeded in their own individual applications it would not make it "inherently unreasonable to remove the family as a unit, were the public interest and other factors to be considered". The judge in this instant appeal has had "little regard for the public interest".

7. Mr Sihwa responded by submitting there were factors within the instant appeal which required consideration outside of "the Rules" including the lengthy residence the appellants had in the United Kingdom, the absence of ties in Nigeria and the fact that the minor children had spent the majority of their lives in the United Kingdom albeit that they were not British citizens. Further the judge has properly taken into account circumstances in relation to the adult child Elijah (not an appellant) who lives with the family. The judge acknowledges that his presence in the "family unit cannot be discounted or ignored". When the respondent undertook consideration of the appellants' application she did not consider Elijah's position. Beyond that this is a case where the two minor children (appellants 4 and 5) have now been in the United Kingdom in excess of seven years. In due course they will secure some form of "leave". The respondent, having failed to attend the first hearing, is now seeking to do no more than reargue her case where the appeal has been properly considered by the First-tier Tribunal and there is within its decision no material error of law.

8. The judge found here that the appellants could not meet the requirements of the Immigration Rules. Like the factual matrix this is not in dispute. The issue here is whether the judge's approach in allowing the appellants' appeals under Article 8 is a correct one or contains a material error of law.

9. I find the judge has properly applied the required two stage approach. In deciding an application or an appeal based upon private or family life a "two stage test" must be gone through. The Immigration Rules must firstly be applied. If the appeal fails under "the Rules" it is incumbent upon the judge to carry out a balancing exercise outside those Rules guided by Section 117A to D of the Nationality, Immigration and Asylum Act 2002 (where applicable) and Article 8.

10. In **SS Congo [2015] EWCA Civ 387** it was said that there must be something "compelling" about a claim for it to succeed on Article 8 grounds outside "the Rules" whereas if the Article 8 claim is made by a foreign criminal (not the case here) then there will have to be something "exceptional" about it.

11. Here it was incumbent upon the judge to consider whether there was a "gap" between the Immigration Rules and Article 8 and whether there are circumstances in the appeal which take it outside the class of cases which the Immigration Rules properly provide for. If the gap is wide, the practical guidance to be derived from the content of the Immigration Rules as to the relevant public policy considerations for the purposes of the balance to be struck under Article 8 is also likely to be reduced – in other words the proportionality balancing exercise "will be at large" – see **SS Congo [2015] EWCA Civ 387**. Whether the circumstances are described as "compelling" or "exceptional" is not a matter of substance. They must be relevant, weighty and not fully provided for within the Immigration Rules.

12. Here I find the judge has properly reasoned why, in following the two stage approach, there are identifiable reasons why it was necessary to proceed to look at Article 8 in its own right. Circumstances have been identified that are relevant, weighty and not fully provided for within the Immigration Rules. For example see the findings at paragraph 14 of his decision in relation to the child Elijah (not an appellant) and his relationship to the rest of his family, the length of time (in excess of seven years) the fourth and fifth appellants have been in the United Kingdom (paragraph 17 of the decision) and his findings in relation to their pending applications.

13. This is an appeal where the respondent having chosen not to be represented at the First-tier hearing now seeks to reargue the case by submitting that there has been a material error of law by this judge in assessing the appellants' Article 8 claims. There is no such error. On the evidence that was before him the judge was entitled to come to the conclusions that he did having followed the two stage approach and carried out the requisite balancing exercise.

14. It was conceded by Mr Norton that if the first ground of appeal fell then so did the second. That is the position.

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 but order that it shall stand.

No anonymity direction is made.

Signed Date 26 January 2016

Deputy Upper Tribunal Judge Appleyard