Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/41451/2014
IA/41454/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 8 December 2015	**On 19 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

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NDO
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Benfield counsel instructed by Fursdon Knapper Solicitors
For the Respondent: Mr T Melvin Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. An order was previously made and as the case relates to the rights and interests of children I am satisfied that it should continue.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Monaghan promulgated on 8 May 2015 which allowed the Appellants appeal against a refusal of a variation of leave to remain on the basis of the Appellants family and private life and to remove them from the UK.

Background

3. The Appellants are a mother and her son born on 13 July 1973 and 22 March 2008 respectively who are nationals of Nigeria.

4. The first Appellant entered the UK in 2004 with entry clearance as a student from 22.9.2004 until 31.1.2006. That leave as a student was extended on a number of occasions and was due to expire on 9 August 2014.

5. The second Appellant was born 22 March 2008 in the UK.

6. On 2 August 2014 they applied for a variation of their leave to remain on the basis of family and private life.

7. On 1 October 2014 the Secretary of State refused the applications: in relation to the first Appellant by reference to Appendix FM with reference to the parent route and EX.1 and paragraph 276 ADE and no exceptional circumstances to warrant a grant of leave outside the Rules and in respect of the second Appellant he could not meet Appendix FM by reference to the child route and he did not meet the requirements of paragraph 276 ADE at the date of application.

The Judge's Decision

8. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Monaghan ("the Judge") allowed the appeal against the Respondent's decision in respect of the first Appellant under Article 8 and in respect of the second Appellant under the Rules specifically under paragraph 276ADE(1)(iv). The Judge found :

   (a) She should first consider the position of the second (child) Appellant.

   (b) She found that the second Appellant met the requirements of paragraph 276ADE(1) (iv) as he had lived continuously in the UK for 7 years and the only issue for her to determine was whether it was reasonable to expect the second Appellant to leave the UK with his mother.

   (c) She found that it would not be reasonable for the second Appellant to leave the UK with his mother. She found that the Appellants had no contact with the childs father and there was no evidence of contact with maternal relatives. She found that the child was well settled and integrated in the UK. She found that removal would lead to inappropriate disruption of social cultural and educational ties he had formed in the UK.

   (d) The Judge found that the first Appellant could not meet the requirements of the Rules.

   (e) She found that removal would interfere with the first Appellant's family and private life.

   (f) She answered the remaining questions in Razgar affirmatively and said the issue was one of proportionality.

(g) The Judge considered s117B of the Nationality, Immigration and Asylum Act 2002 and found that there was no public interest in removing the Appellant. The Judge found that the first Appellant spoke English and was financially independent. The Judge found that her private life had not been established when she was in the UK unlawfully. She found that s117(6) applied in that the Appellant was in a relationship with a qualifying child and it was unreasonable to expect the second Appellant to leave the UK.

(h) The Judge found the decision was therefore disproportionate.

9. Grounds of appeal were lodged arguing that :

(a) The Judge erred in his application of the facts to the Rules in that he applied the facts of the second Appellant's case at the date of hearing to paragraph 276ADE(1)(iv) when the Rule in issue opens by stating the requirements are to be met 'at the date of application'

(b) The Judge also failed to properly assess whether it was reasonable to expect the child Appellant to leave the UK with his mother. He looked only at the circumstances of the child and not whether it was reasonable taking into account all of the facts including the first Appellant's circumstances.

(c) As a result of this error the consideration of the first Appellant's case under Article 8 was purely procedural and he treated the outcome as inevitable.

10. On 7 July 2015 First-tier Tribunal Judge Frankish gave permission to appeal on all grounds.

Preliminary Issue

11. Ms Benfield on behalf of the Appellant's drew my attention to a document headed 'Rule 24 Response on behalf of the Appellants Grounds of Cross Appeal.'

12. I enquired of Ms Benfield as to what authority either case law, statue or the Rules allowed me to consider a Cross Appeal. Mr Melvin's view was that there had been no application for permission to appeal and he noted that the cross appeal had been advanced 6 months after the case had been promulgated with no application to extend time.

13. Ms Benfield was not immediately able to assist me with any legal principles and I retired to allow her the opportunity to consider the point.

14. On her return Ms Benfield was only able to refer to Rule 24(3) of the the Tribunal Procedure (Upper Tribunal) Rules 2008.

15. I indicated that my preliminary view was that that even if the power were available the application was made well outside the time limits and I could find no good reason for that delay. I indicated I would consider the matter further when I reserved my decision and I would give full reasons.

16. Having considered the matter and looked at the case of EG and NG (UT rule 17: withdrawal; rule 24: scope) Ethiopia [2013] UKUT 00143(IAC) I am satisfied that the Upper Tribunal cannot entertain an application purporting to be made under rule 24 for permission to appeal until the First-tier Tribunal has been asked in writing for

permission to appeal and has either refused it or declined to admit the application. No such application was made in this case and therefore I am satisfied that I need make no findings in respect of the Appellant's 'cross appeal.'

Submissions

17. At the hearing I heard submissions from Mr Melvin on behalf of the Respondent that :

    (a) Ms Benfield conceded that the Judge had erred in his application of the Rules as the operative date was the date of application.

    (b) He submitted that the only issue was whether both Appellants could succeed under Article 8 and the starting point of that would be the mother's application: the Judge had wrongly used the child's success under the Rules as the starting point.

    (c) He suggested that there were no compelling circumstances in this case.

    (d) The Appellants status was precarious in that they were here as a student and dependent.

    (e) The Judge's assessment of the public interest factors under s117B was inadequate and therefore the Judge had failed to consider the public interest.

    (f) The Judge did not carry out a balancing exercise but simply focused on the circumstances of the child and the fact that the Judge believed she met the requirements of the Rules.

18. On behalf of the Appellants Ms Benfield submitted that :

    (a) She conceded that the Judge had made an error in her application of the Rules to the second Appellant.

    (b) She did not accept that this error was material or permeated all the findings made.

    (c) The second Appellant had been living in the UK for seven years at the date of hearing and therefore the error fell away.

    (d) In relation to the mother's case she had been in the UK lawfully for over 10 years.

    (e) The best interests of the child were still a primary consideration.

    (f) The analysis at paragraph 23 of the decision was well reasoned and thorough and was not impugned by the error in relation to the Rules.

    (g) In relation to the criticism of the finding that the Judge had allowed the first Appellant to piggyback on the result of the second Appellant's appeal this overlooked a numbers of facts in the first Appellant's case: that she had lived in the UK lawfully for over 10 years, had been in employment, attending the same Church since 2007 but had limited contacts in Nigeria.

    (h) She suggested that the Judge had taken into account the public interest in paragraph 28.

19. In reply Mr Melvin on behalf of the Respondent submitted:

(a) There was no identification of compelling circumstances to warrant a grant of leave outside the Rules.

(b) The Judge's analysis of Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) was flawed in respect of the age and length of residence in the UK.

(c) There were no findings in respect of Nigeria and what was available for the child in respect of education and language.

(d) The Article 8 analysis was flawed.

Finding on Material Error

20. Having heard those submissions, I reached the conclusion that the Tribunal made material errors of law.

21. I am satisfied that the Judge made an error of law in how she applied the facts of the case to the Rules in respect of the second Appellant's case and Ms Benfield quite properly conceded this.

22. The operative date for the determination of whether an applicant meets the requirements of paragraph 276ADE(1)(iv) is the date of the application and this is stated in the Rule. The second Appellant was born in the UK on 22 March 2008 and therefore at the date of application, 29 July 2014, he had been in the UK for 6 years and did not meet the requirements of the Rule and the Judge was in error in allowing his case under that Rule.

23. I am satisfied that this erroneous approach infected the Judge's findings thereafter. The Judge treated the best interests of the child Appellant and his success under the Rules as determinative of the appeal of the first Appellant under Article 8 .The assessment was largely an enumeration of those factors in the Appellants side of the scales with no adequate and reasoned analysis of the public interest factors identified in s 117B;no recognition of the fact that the Appellants did not meet the requirements of the Rules which underpinned immigration control; no recognition of the fact that the Appellants' private life, which largely made up the findings at paragraph 24, was established at a time when the status was precarious and therefore should be accorded little weight . In accepting that s117B(6) applied and finding it was not reasonable for the second Appellant to leave the UK there was no engagement with the fact that the mother had no right to remain. There was no identification of any compelling circumstances that warranted a grant of leave outside the Rules. These errors I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.

24. I therefore found that errors of law have been established and that the Judge's decision in allowing the first Appellant's appeal under Article 8 and the second Appellant's appeal under the Rules should be set aside to be remade on the basis that neither Appellant can meet the requirements of the Rules and the decision is remade only in relation to Article 8 for both of the Appellants.

Remaking the Decision

25. The first Appellant arrived in the UK as an adult aged 31 as a student. She therefore had no legitimate expectation to be able to remain thereafter other than by complying with the requirements of the Rules. The second Appellant was born on 22 March 2008 and therefore turned 7 on 22 March 2015.

26. In making my assessment in this case I have reminded myself of what was said in the Court of Appeal in SS Congo [2015] EWCA Civ 387 in paragraph 33:

> "In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ. "

27. In determining whether there are compelling circumstances that would warrant a grant of leave outside the Rules I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27.

Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?

28. I accept that the Appellants have a family and private life in the United Kingdom. However I am also satisfied that this case is principally a private life appeal as the Appellants would be returned to Nigeria together and given that there is no family life beyond their relationship in the UK there will be no interference.

If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

29. I am satisfied that removal would have consequences of such gravity as potentially to engage the operation of Article 8.

If so, is such interference in accordance with the law?

30. I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellants to regulate their conduct by reference to it.

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

31. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of immigration control. The state has the right to control the entry of non nationals into its territory

and Article 8 does not mean that an individual can choose where she wishes to enjoy their private and family life.

If so, is such interference proportionate to the legitimate public end sought to be achieved?

32. I have considered the best interests of the second Appellant but reminded myself that while they are a primary consideration they are not determinative of the appeal and may be outweighed by other factors.

33. In making the assessment I have also taken into account ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 where Lady Hale noted Article 3(1) of the UNCRC which states that *"in all actions concerning children, whether undertaken by … courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

34. Article 3 is now reflected in section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions *"are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".* Lady Hale stated that *"any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2)".* Although she noted that national authorities were expected to treat the best interests of a child as "*a primary consideration",* she added *"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".*

35. As a starting point it is in the best interests of children to be with both their parents and if the parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary. In this case the second Appellant's mother is being removed as the father, who is estranged, has already returned to Nigeria . The second Appellant is 7 years old (8 in March) and entered Primary School on 11 September 2013 when he was 5. I remind myself of what was said in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable. Thus in this case it is only in the last two years that the second Appellants focus will have moved beyond his mother into the wider community. I have no doubt he has friends and enjoys primary school but he has not been there in reality for very long and there is nothing to suggest that he is anything other than a normal child who could attend school and make friends in Nigeria given the support of his mother. There is certainly nothing in the bundle before me to suggest that he would not have access to free education and indeed health care in Nigeria. There is no evidence that there would be language difficulties. There is no evidence before me to suggest that the second Appellant is at a key stage in his education, SATS and GCSEs are for him a number of years away. I remind myself of what was said in paragraph 39 of AM (s117B) Malawi [2015] UKUT 0260 (IAC) that

the difficulties of moving a child from one school to another particularly at such an early stage of school should not be exaggerated.

36. I now turn to the wider proportionality assessment. Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that 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).

37. I therefore find that the maintenance of immigration control is in the public interest. I accept that the first Appellant has been in the UK at all times lawfully. However I also note that neither of the Appellants met the requirements of the Rules at the time of their application for leave to remain on the basis of family and private life. I take into account that at the time of the applications the First Appellant had been in the UK for nearly 10 years and had a full 10 years been completed she could have applied under paragraph 276B and that the second Appellant had been in the UK for nearly 7 years. I am satisfied however that this amounts to no more than a 'near miss' argument. In SS(Congo) and Others [2015] EWCA Civ 387 it was held that the fact that a case was a 'near miss' in relation to satisfying the requirements of the rules would not show that compelling reasons existed requiring the grant of the LTE outside the rules. If a claimant could show however that there were individual interests at stake covered by Article 8, which gave rise to a claim that compelling circumstances existed to justify the grant of leave outside the rules, the fact that the case was a 'near-miss' might be a relevant consideration, which tipped the balance in his or her favour. No such individual interests or compelling circumstances were identified to me.

38. I accept that the Appellants speak English and that the first Appellant has worked in the UK.

39. I am satisfied that at all times while they have been in the UK lawfully the Appellants immigration status has been precarious, always dependent on a further grant of leave. I therefore find that llittle weight should be given to the private life established by the Appellants whether that be work, education or church contacts as their immigration status was precarious.

40. I accept that the second Appellant now meets the definition of a qualifying child for the purpose of paragraph 117B(6) given the length of time he has lived in the UK but the law is clear that passage of time alone is not determinative of the issue. In determining whether the public interest requires the Appellants removal I have therefore considered whether it would be reasonable to expect the second Appellant to leave the UK.

41. I take into account in relation to that my finding that there is no evidence before me that the second Appellant would suffer any hardship or ill effect from moving to Nigeria with his mother. Neither of the Appellants are British citizens, they are Nigerian citizens and entitled to all the benefits that their nationality brings and they are not entitled as of right to the benefits of being educated or working in the UK with

all of the expense that this imposes on the UK. The first Appellant was 31 when she came to the UK to study. She is now very well educated and there was no evidence before me to suggest that the nature of her qualifications in health and social care were such that she would be unable to find work in Nigeria. Given her age when she came to the UK and the fact that she could not have had any legitimate expectation of being permitted to remain I do not find it credible that she would have lost all ties to her home country. Indeed she gave evidence before the First-tier that she was not in 'regular' contact with family members: if it has been sporadic then this is something that could be resumed and provide her with some support on her return. I note that her attendance at Church was advanced as an argument in her favour but there is nothing to suggest that she could not continue to attend Church on her return. Taking all of my findings into account there was no evidence before me that it was unreasonable to expect the second Appellant to return to Nigeria, the country of his nationality with his mother.

42. I am also satisfied that no compelling circumstances were identified why the Rules should not be applied in this case in the usual way. In determining whether the removal would be proportionate to the legitimate aim of immigration control I find that none of the facts underpinning the Appellants life in the United Kingdom including the best interests of the child Appellant taken either singularly or cumulatively outweigh the legitimate purpose of the Appellants removal.

Decision

43. **The making of the decision of the First-tier tribunal did involve the making of an error on a point of law as regards the Immigration Rules in respect of the second Appellant and the first Appellant in respect of Article 8.**

44. **I set aside the decision. I substitute the following decision:**

45. **The appeal is dismissed under the Immigration Rules.**

46. **This appeal is also dismissed on human rights grounds (Article 8)**

47. **Under Rule 14(1) the Tribunal Procedure (Upper Tribunal) rules 2008 9as amended) the Appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order for anonymity was made in the First-tier and shall continue.**

Signed Date 17.1.2016

Deputy Upper Tribunal Judge Birrell