



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Numbers: IA/33926/2015

IA/33930/2015

IA/33933/2015

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly

On 14th September 2017

September 2017

Decision & Reasons Promulgated

On 19th

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MRS O.F.

MISS O.J.F.

MASTER F.N.O.F.

(Anonymity direction made)

Claimants in the First-tier Tribunal

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:

For the Claimants: Mrs O.F. (in person)

For the Secretary of State: Mr McVeety (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Cohen promulgated on the 5th January 2017, in which he allowed the Claimants' appeals under the Immigration Rules and on Human Rights grounds.

2. Within the Grounds of Appeal it is argued that in allowing the Claimants' appeals under Article 8 the First-tier Tribunal Judge has misdirected himself in law by not properly considering the public interest factors when looking at Section 117B of the Nationality, Immigration and Asylum Act 2002. It is argued that the Judge found at [11] the First Claimant did not meet the suitability requirements of the Immigration Rules, yet found favourably when considering the public interest at [21,] without referring to the issues raised at [11]. It is said the Judge noted the documentation regarding the First Claimant's criminal history, but it is said that at [21] the Judge only considered the public interest factors in favour of the Claimants. It was further argued that the Judge had stated that the Claimants had no links to Nigeria, but that the Presenting Officer's notes said that the First Claimant had a mother and siblings in Nigeria and that the Judge had therefore made an error in what links and support there was available to the Claimants in Nigeria which should have been included in the proportionality assessment.
3. Permission to appeal was granted by First-tier Tribunal Judge Saffer on the 13th July 2017, who found that it was arguable that Section 117 of the Nationality, Immigration and Asylum Act 2002 may have been misapplied and that all the grounds were arguable.
4. It was on that basis the case came before me in the Upper Tribunal.
5. In making his oral submissions, I asked Mr McVeety to slowly and clearly explain what his submissions were, in order that Mrs O.F., who was unrepresented, could understand the submissions being made. A full note of his submissions are recorded within the record of proceedings. However, in summary, he submitted that the First Claimant had a history of serious immigration offences including use of false passports, utilising false passports and having worked illegally and the Judge accepted that there were serious breaches by her such that she could not meet the suitability requirements of the Immigration Rules. But he submitted that when considering whether or not it was unreasonable to expect the Second and Third Claimants to leave the UK, that the Judge failed to take account of the wider public interest under Section 117B of the Nationality, Immigration and Asylum Act 2002, as

he argued the Judge was required to do, following the Court of Appeal case of MA (Pakistan) and Others v The Secretary of State for the Home Department [2016] EWCA Civ 705.

6. He further argued that the Home Office Presenting Officer's note was that the First Claimant still had family in Nigeria in terms of a mother, 2 sisters and a brother and that the Judge was therefore wrong to find that the Second and Third Claimants had no links with Nigeria at [12] and that they had no connections with Nigeria at [21].
7. Mrs O.F. in reply, said that she had got a mother, 2 sisters and a brother in Nigeria, but her mother was aged 85 and her sister was aged 65 and her brother was aged 42 or 41. She argued that all of the children are in the UK and they do not have any siblings in Nigeria and they have never lived there. She said that she had a 14-year-old child who was very upset about the appeal hearing and had run out to school that morning, and one child who was very asthmatic. I pointed out to Mrs O.F. that my job initially was simply to determine whether or not the First-tier Tribunal Judge made a material error of law, and that I was not at that stage, seeking to re-make any findings of fact, and invited her to make any submissions in terms of the submissions made regarding whether or not the Judge should have taken account of the wider public interest when considering whether it was reasonable to expect the Second and Third Claimants to leave the UK. She did not wish to address me on that point.
8. I reserved my decision.

My Findings on Error of Law and Materiality

9. At [6] of his decision, Judge Cohen noted that amongst the documentation submitted in support of the appeal was a criminal record check in respect of the First Claimant indicating that she had been convicted of shoplifting and credit card fraud offences in 1996 and 2000. He further went on to find at [11] that the First Claimant had adopted assumed identities in the UK, been convicted of criminal offences, albeit not for 16 years, and worked illegally

and that therefore she did not meet the eligibility criteria of the Immigration Rules. Therefore he found that her appeal under the Immigration Rules could not succeed.

10. However, when considering the position of the Second and Third Claimants at [12], the Judge stated *"I find that Section 117B of the Immigration Rules applies. I find that it was unreasonable to expect the Second and Third Appellants to leave the UK and there is no public interest in their removal. I note that the Secretary of State conceded that the Appellant's pre-action protocol application on the basis that there were children involved and it is the Respondent's policy guidance to give a right of appeal in those circumstances. I find the Respondent has failed to apply her own policy. I allow the appeals of the Second and Third Appellants on Human Rights grounds as incorporated into the Immigration Rules"*.

11. However, the Court of Appeal in the case of MA (Pakistan) and Others v The Secretary of State for the Home Department [2016] EWCA Civ 705, made it clear that although when looking at what is in the best interests of the children, that is concern simply with the children themselves, when the Tribunal goes on to consider Section 117B(6) and whether or not it is reasonable to expect a child to leave the UK, that the wider public interest has to be considered, and that the Tribunal cannot simply look at the child in isolation, but also has to take into account the conduct and immigration history of the parents as part of an overall analysis of the public interest. Regrettably, it is clear that Judge Cohen has failed to follow the Court of Appeal authority in that regard, when considering whether or not it was reasonable to expect the Second and Third Claimants to leave the UK and in finding that there was no public interest in their removal. He has not taken account of the immigration history and conduct of the First Claimant, when considering whether it is reasonable to expect the Second and Third Claimants to leave the UK and has thereby failed to take account of the wider public interest required to be taken into account when considering Section 117B(6). This is clearly an error of law. Further, I cannot say that the decision would necessarily have been the same, had the Judge properly taken

account of the wider public interest under Section 117B(6). I therefore do find that this error is material.

12. Further, at [12] the Judge did state that the Second and Third Claimants had no links with Nigeria and at [21] I found that the children did not have connections with Nigeria. However, it appears in that regard, the Judge has not taken account of the evidence before him, that the First Claimant appeared to have a mother, 2 sisters and a brother in Nigeria, such that although the children had never seemingly lived in Nigeria, the fact that they had family there, was a link with Nigeria. The Judge did not adequately and sufficiently explain why having family in Nigeria would not amount to a link and that also is a factor which should have been taken into account by the Judge when considering reasonableness under Section 117B(6).

13. I therefore do find that the decision of Judge Cohen does contain material errors of law and I set aside that decision. Given that the decision will have to be re-made in its entirety, and the extent of the fact finding that is therefore required, I do find that it is appropriate to remit the case back to the First-tier Tribunal to be re-heard before any First-tier Tribunal Judge other than First-tier Tribunal Judge Cohen.

Notice of Decision

- 1) The decision of First-tier Tribunal Judge Cohen does contain material errors of law and is set aside in its entirety.
- 2) The appeal is remitted back to the First-tier Tribunal for re-hearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Cohen.
- 3) As the case does involve children, I do make an anonymity Order. I direct that the Claimants are entitled to anonymity. No record or transcript or summary of this case should identify the Claimants or any members of their family either directly or indirectly. This direction applies both to the Claimants and to the Secretary of State. Any failure to comply with this direction can lead to contempt of Court proceedings.

Signed

RFMcGinty

Deputy Upper Tribunal Judge McGinty

Dated 14th September 2017