Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02026/2018

THE IMMIGRATION ACTS

Heard at Leeds Combined Court Centre
On 17 July 2019
Decision given orally at hearing

Decision & Reasons Promulgated
On 15 August 2019

Before

THE HON. MR JUSTICE LANE, PRESIDENT

Between

JERRY [I]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Akindele, Solicitor
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of a First-tier Tribunal judge who, following a hearing in Bradford on 18 December 2018, dismissed the appellant's appeal against the refusal by the respondent to give the appellant entry clearance and thereby refuse his human rights claim.

2. The appellant is a citizen of Nigeria who currently resides in that country. He wished to secure entry clearance so that he could come to the United Kingdom to live

with his wife and children. There are six children. The judge heard evidence from the sponsor, who is the wife of the appellant and the mother of the children. I have noted the judge's record of proceedings. I have also observed how he dealt with the evidence on all of the relevant matters in his decision.

3. There is in the grant of permission by the First-tier Tribunal for permission to appeal to the Upper Tribunal some suggestion that the sponsor, and by extension the appellant, may not have received a fair hearing from the judge. I find that there is no merit in that suggestion, if such it be. The grounds of permission from the First-tier Tribunal are extremely discursive and, I have to say, in several places very difficult to comprehend.

4. Be that as it may, as well as the issue of unfairness to which I have just made reference, the challenge to the judge's decision as advanced before me by Mr Akindele on behalf of the appellant concerns the following matters. First, it is submitted that there is no mention in the judge's decision of the duty under section 25 of the Borders, Citizenship and Immigration Act 2009 to make the best interests of the children a primary consideration in determining matters of the kind with which we are concerned. That is true. There is no express reference to section 55. The decision is, however, the work of an experienced judge and I agree with Mr Diwnycz, on behalf of the respondent, that it is in all the circumstances implicit that the judge would have had regard to the best interests of the children.

5. The duty under section 55 is, of course, dependent upon the evidence that is put forward before the decision-maker. In the present case, the evidence before the judge regarding the children was extremely sparse. Although the judge accepted that there are six children, there appears, as far as I can see, to have been no evidence as to their precise ages. There was some evidence in the bundle of documents, which appears to have been handed to the judge at the hearing, that one of the children, C, was receiving extra support in school and, because of a change in the working pattern of the sponsor, was struggling to arrive at school, which was of concern. The letter said that C had some emotional difficulties and that the school was worried about him. He was somewhat withdrawn. When the children were spoken to about their father, the appellant, they became upset, in particular C, who was said to feel the absence of his father the hardest. That evidence, however, fell far short of any clinical or other proper professional finding that there were particular difficulties with the children.

6. The judge did note that none of the children are said by the sponsor to be British. They had Nigerian citizenship and, although their mother was British, she was British by descent and therefore unable to convey her British citizenship to them. The children have all, according to the judge's notes, been born in Nigeria and, some six years ago or so, a decision was made by the appellant and his wife that she and the children should go and live in the United Kingdom, with the appellant remaining in Nigeria.

7. On the basis of that evidence, I do not consider that the judge's decision should be set aside because he has failed to refer expressly to section 55. There was in general a

paucity of evidence to show that the best interests of the children necessarily lay with living with their father, the appellant, in the United Kingdom, as opposed to returning to Nigeria. I am emphatically not saying a fresh application that addressed those matters directly might not produce a different result, either by the grant of entry clearance or by succeeding on an appeal. However, the judge's decision has to be judged by reference to the material that was before the judge at the time.

8. The second challenge advanced against the decision is that the judge is said by Mr Akindele to have failed to have proper regard to paragraph 21A of Appendix FM-SE of the Immigration Rules. As far as I understand this submission, he says that the judge should have taken into account the savings of the appellant of some £13,000. I do not, with respect, accept that submission. The judge was aware of the level of savings and set out the relevant requirements as to savings in the rules at paragraph 25 of his decision.

9. Applying those rules, it is plain that savings of only some £13,000, when taken together with the total income of the sponsor of £22,671, did not meet the requirements of the Rules. On that basis, paragraph 21A has nothing further to say on the matter. Paragraph 21A enables consideration to be given to other sources of income than savings in the hands a particular person or income being earned by that person, or by the sponsor of that person. So, for example, money that might be provided by the kindness of a third party could be taken into account under paragraph 21A. That paragraph is not, however, a mechanism for side-stepping the requirements of the Rules relating to income and savings.

10. Thirdly, Mr Akindele submits that the judge fell into error in not dealing with what are said to exceptional circumstances outside the requirements of the Immigration Rules. I again must disagree. The judge begins an Article 8 analysis of the position of the appellant and his family at paragraph 34 of his decision. That analysis continues through to the end of paragraph 48. The judge had regard in particular to the provisions of section 117B of the nationality, Immigration and Asylum Act 2002 in deciding whether the refusal of the claim would be disproportionate in terms of Article 8. These paragraphs of his decision in particular are, I find, relevant:-

> "44. It is argued by the respondent that the family chose to separate six years ago and it has been the choice of the appellant and sponsor not to reunite the family in Nigeria. I find that this argument carries weight.
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> 45. Although Article 8 protects family life it does not give a family the choice of where that family life takes place. The United Kingdom has a right to impose rules on those who are not British citizens before they are allowed to settle in the UK. Those rules are contained in the Immigration Rules and reflect the public interest in maintaining immigration control and the economic well-being of the UK.
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> 46. If the appellant still wishes to settle in the UK it is open to him to reapply under those Immigration Rules but he should carefully consider beforehand whether his circumstances meet the Rules and he should

ensure that the application is accompanied by all the specifically required documentation.

47. Balancing all the competing factors I find that family life is outweighed by the public interest. In all the circumstances the decision appealed against is proportionate and reasonable and be (sic) justified in the interests of immigration control and the economic well-being of the UK."

11. I find nothing materially problematic in those conclusions. In referring to Article 8 as not giving a family the choice of where family life is to take place, the judge was reflecting the relevant Strasbourg jurisprudence.

12. In this case, as can be seen from the history that I have recounted, it was the choice of the appellant and his wife some six years ago that she should come with the children to the United Kingdom while he remained in Nigeria, notwithstanding that the children had all been born in that country. For a period of time, that was the choice that suited the appellant and his wife. The fact that the appellant would now like to change these arrangements and come to live with the family in the United Kingdom, as opposed to living together in Nigeria, is not a matter that compels the respondent to give effect to that wish through the prism of Article 8. Therefore, for the reasons I have given and having regard to the evidence as it was before the First-tier Tribunal Judge, I find no error in his decision, and therefore dismiss this appeal.

13. I do however reiterate what has been said by the judge in respect of the appellant's ability to put in a fresh application. I also note that the appellant and the sponsor will learn from the experience of these proceedings what they need to do in order to maximise the chances of success an any future application. In particular, there are issues relating to the children which, it is said, lead to their best interests being to have the appellant with them in the United Kingdom. Those issues should be expressly articulated and supported by evidence.

Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date: 05/08/19

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber