Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07741/2018
HU/07745/2018, HU/07747/2018
HU/07748/2018, HU/07754/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 29th May 2019	**On 10th June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

OO (FIRST APPELLANT)
JO (SECOND APPELLANT)
LO (THIRD APPELLANT)
SO (FOURTH APPELLANT)
AO (FIFTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr H Dieu of Counsel, instructed by Chetna & Co Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appeal against the decision of Judge Page (the judge) of the First-tier Tribunal (the FtT) promulgated on 30th August 2018.

2. The Appellants are citizens of Nigeria. The first and second Appellants are the parents of the three minor Appellants who were born on 19th April 2010, 22nd July 2013, and 18th September 2014 respectively. The minor Appellants were all born in the UK.

3. On 23rd June 2017 the Appellants applied for leave to remain in the UK. The main basis of the application was that the third Appellant had accrued more than seven years' continuous residence and it was contended that he satisfied paragraph 276ADE(1)(iv) of the Immigration Rules, as it would not be reasonable to expect him to leave the UK.

4. The applications were refused on 13th March 2018, and the appeals heard together on 21st August 2018. The appeals were dismissed.

5. The Appellants, through their solicitors, applied for permission to appeal to the Upper Tribunal. The grounds are briefly summarised below.

6. It was claimed that the judge had failed to properly consider "reasonableness" as required by paragraph 276ADE(1)(iv). It was submitted that the judge had applied an incorrect test, simply considering whether removal from the UK would deprive the third Appellant of all possible treatment for autism.

7. It was contended that the judge had described "a paucity of evidence" when assessing reasonableness, but had failed to consider the best interests of the children and had failed to make a finding as to their best interests. It was further submitted that the judge had erred by failing to consider Article 8 outside the Immigration Rules.

8. Permission to appeal was granted by Judge Haria who found it arguable that the judge had focused on the medical issues as opposed to considering whether in all the circumstances it would not be reasonable to expect the third Appellant to leave the UK. It was found that the judge had arguably erred on that point and arguably erred by failing to undertake a full consideration of Article 8 outside the Immigration Rules.

9. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of the 2008 Procedure Rules arguing that the judge had directed himself appropriately. It was claimed that the evidence produced at the hearing was almost solely in respect of the autism suffered by the third and fourth Appellants, and the judge could not be criticised for focusing to a large extent on the issue of the children's medical conditions.

Error of Law

10. On 24th January 2019 I heard submissions as to error of law. On behalf of the Appellants, reliance was placed upon the grounds upon which permission to appeal had been granted. On behalf of the Respondent, reliance was placed upon the rule 24 response. It was accepted that the judge had not made a specific finding in relation to the best interests of the children, but it was submitted that this was not a material error as it could be implied from reading the decision that the judge had decided that the best interests of the children would be to remain with their parents whether that be in the UK or in Nigeria. It was submitted that the judge had not erred when considering reasonableness, and was entitled to find that it would be reasonable for the third Appellant to return to Nigeria notwithstanding that he had accrued more than eight years' continuous residence in the UK, as there would be treatment for his autism in Nigeria.

11. I set out below paragraphs 11–18 of my decision dated 4th February 2019, which contain my reasons for concluding that the FtT erred in law and the decision must be set aside and remade;

> "11. Although the decision of the FtT has been prepared with great care, and the judge was not assisted in considering the extensive documentary evidence as a skeleton argument had not been prepared, I am persuaded that the judge materially erred in law for the following reasons.
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> 12. The best interests of the children should have been considered as a primary consideration. That is not to say their best interests are a paramount consideration, and it is the case that the best interests of children can be outweighed by other considerations. There should however be a comprehensive assessment and a specific finding in relation to the best interests of children, and as accepted on behalf of the Respondent at the hearing, in this case there was no specific finding in relation to the best interests of the children.
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> 13. The judge recognised that the crucial issue in the appeal was the fact that the third Appellant is a qualifying child by reason of having accrued more than seven continuous years' residence in the UK. At the date of hearing the third Appellant had resided in the UK for approximately eight years four months continuously, having been born in this country. It was accepted that the third Appellant suffered with autism as did one of his siblings.
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> 14. I do not find that the judge adopted the correct approach when considering whether it would be reasonable to remove a child with more than seven years' continuous residence from the UK. The Respondent's own guidance which was in force at the date of the FtT hearing (the guidance having been published on 22nd February 2018) confirms that significant weight must be given to such a period of continuous residence. Strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more.
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> 15. This guidance was prepared following cases such as MA (Pakistan) [2016] EWCA Civ 705 in which it was decided that the fact that a child had been in the UK for seven years would need to be given

significant weight in the proportionality exercise for two related reasons, one being the relevance to determining the nature and strength of the child's best interests, and the other being that it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.

16. The judge was referred to MT and ET Nigeria [2018] UKUT 00088 (IAC) which at paragraph 33 makes reference to MA (Pakistan) and refers to the need for powerful reasons why a child who has been in the UK for over ten years should be removed, notwithstanding that her best interests lie in remaining. The reference to ten years was made because the child in that case had over ten years' continuous residence.

17. I conclude that the judge materially erred by failing firstly to consider and make a finding as to the best interests of the children, and thereafter failing to adopt the correct approach when considering whether it would be reasonable to expect the third Appellant to leave the UK. The judge does extensively examine the documentary evidence and comments upon the medical evidence, and finds that there is some treatment for autism in Nigeria and on that basis concludes that it would be reasonable for the Appellants to leave the UK. In my view that it is an incomplete analysis.

18. I must set aside the decision of the FtT as in my view it is unsafe. It is not appropriate to remit this appeal back to the FtT. I do not find it is appropriate to remake the decision without a further hearing. In my view it is appropriate to have a further hearing before the Upper Tribunal to consider the best interests of the children and whether it is reasonable to expect the third Appellant to leave the UK. Medical facilities in Nigeria will be a relevant consideration but not the only consideration."

Remaking the Decision – My Conclusions and Reasons

12. At the commencement of the hearing I indicated to the representatives that I had considered the documentation that was before the FtT, and further evidence, including the medical evidence contained in a bundle of documents submitted on behalf of the Appellants, containing 92 pages.

13. Mr Howells indicated that the Respondent conceded that the appeals should be allowed with reference to Article 8 of the 1950 European Convention. Mr Howells confirmed that it was accepted that the best interests of the children would be to remain in the UK, taking into account that the third and fourth Appellants have a diagnosis of Autistic Spectrum Disorder. Mr Howells confirmed that the Respondent accepted that the third Appellant is a qualifying child having accrued more than eight years' continuous residence, and it would not be reasonable to expect him to leave the UK.

14. In view of the concession, which I found to be rightly made, I indicated to Mr Dieu that I did not think I needed to hear submissions from him. Mr Dieu indicated that he had nothing to add.

15. I therefore indicated that the appeals were allowed and a written decision confirming this would be produced.

16. My reasons for allowing the appeals are that I find it is in the best interests of the three children, to remain in the UK with their parents. This is because two of the children, the third and fourth Appellants, have a diagnosis of Autistic Spectrum Disorder and have special educational needs and are receiving appropriate treatment in the UK. The bundle containing 92 pages contains ample evidence of their needs and the treatment they are receiving.

17. The appeals are allowed not simply because it is in the best interests of the children to remain in the UK. I find that only one of the children is a qualifying child, that being the third Appellant who was born on 19th April 2010. He had accrued seven years' continuous residence by the time the applications for leave to remain were made on 23rd June 2017. I agree with the concession made by the Respondent that it would not be reasonable, in the circumstances, to expect the third Appellant to leave the UK. When assessing reasonableness I take into account KO (Nigeria) [2018] UKSC 53 in which it was decided that the assessment of reasonableness in paragraph 276ADE(1)(iv) is directed solely to the position of the child. The conduct of parents is not relevant to the assessment of the impact on the child.

18. Reference has already been made to the diagnosis of Autistic Spectrum Disorder that the third Appellant has, and the special educational needs provided to him, and the medical treatment in this country.

19. At paragraph 49 of MA (Pakistan) it was stated that where a child has accrued seven years' residence, the starting point is that leave to remain should be granted unless there are powerful reasons to the contrary. In this case the Respondent concedes that there are no such powerful reasons. Therefore I conclude that it would not be reasonable for the third Appellant to leave the UK and he satisfies paragraph 276ADE(1)(iv).

20. I also consider section 117B of the Nationality, Immigration and Asylum Act 2002. Section 117B(6) is set out below;

    '(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

    (a) the person has a genuine and subsisting parental relationship with a qualifying child, and

    (b) it would not be reasonable to expect the child to leave the United Kingdom.'

21. It is accepted by the Respondent that the first and second Appellants are the parents of the third Appellant. It is accepted that they have a genuine and subsisting parental relationship, and the third Appellant is a qualifying child by reason of in excess of seven years' continuous residence. I have already found that it would not be reasonable to expect the third Appellant

to leave the UK, and therefore I conclude that the public interest does not require the removal of the first and second Appellants.

22. It is clear that the appeals of the fourth and fifth Appellants should also be allowed, so that the family unit can remain together. The appeals therefore are allowed with reference to Article 8 of the 1950 European Convention.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeals are allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made because the third, fourth and fifth Appellants are minors.

Signed Date 29th May 2019

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeals, I have considered whether to make a fee award. I make no fee award. The appeals have been allowed because of evidence considered by the Tribunal that was not before the initial decision maker.

Signed Date 29th May 2019

Deputy Upper Tribunal Judge M A Hall