



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08381/2017
HU/08383/2017
HU/08386/2017

THE IMMIGRATION ACTS

Heard at Glasgow
On 7th February 2019

Decision Promulgated
On 4 March 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

V I D

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A A D

(ANONYMITY DIRECTION MADE)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellants: The first appellant.

For the respondent: Mr Govan, Presenting Officer

DECISION AND REASONS

Introduction

1. The 1st named appellant has asked for anonymity. Given that there are children involved I would be agreeable to the proceedings being so anonymized.
2. The first appellant is a national of Nigeria who came to the United Kingdom on 28 September 2005 as a student. He was then granted leave under the fresh talent scheme until 19 January 2009. Thereafter he overstayed. In February and April 2013 he made applications based upon human rights which were invalid. On 7 August 2014 he made a valid application which was refused no right of appeal. He continued to remain in the country and on 23 February 2017 made further representations which were treated as an application for leave to remain on the basis of his human rights.
3. He was joined by his wife who is also from Nigeria. The second appellant is their child who was born in the United Kingdom on 17 September 2011. The 3rd named appellant is her brother who was also born in the United Kingdom on 15 November 2008. Since the proceedings were launched the appellant and his wife had another child. The children have a blood disorder and at the time of application had check-ups annually.
4. The applications for leave to remain was refused on 30 May 2017.

The First tier Tribunal

5. The appeals were heard by Judge of the First-tier Tribunal PA Grant Hutchison in Glasgow on 11 June 2018. In a decision promulgated on 4 September 2018 they were dismissed. The judge did not find very significant obstacles to the 1st appellant's reintegration into Nigeria. The judge saw no reason why the appellant's wife and children could not return with him.
6. The judge found that the immigration rules did not assist them when considered Article 8 freestanding basis. There is accepted that removal would engage Article 8. Progressing through the Razgar sequential approach the determinative issue was the proportionality of the decision. At paragraph 20 the judge referred to the need to have regard to the best interests of the children affected as a primary consideration. The judge accepted they were well integrated into life here. However, the judge felt all of the children would be primarily focused upon their parents and saw no reason why they could not return as a family unit.
7. The judge referred to the public interest consideration set out in section 117 A and B of the 2002 Act. The judge pointed out that the 1st appellant had no extant leave to be here and his private life was largely established when his immigration status was precarious.

The Upper Tribunal

8. Permission to appeal was granted the basis that the judge did not specifically consider section 117 B(6). It was also arguable that the judge had not made clear findings on the best interests of the children or if it would be reasonable for them to leave the United Kingdom.
9. At hearing, the presenting officer accepted the decision of First-tier Tribunal PA Grant Hutchison materially errs in law because of his failure to consider section 117 B6. There was a need to identify precisely the best interests of the children and this was not done.
10. The Supreme Court has now given its decision in KO (Nigeria) and Others (Appellants) v Secretary of State for the Home Department (Respondent) [2018] UKSC 53. The Supreme Court referred to the immigration rules referring to children and concluded they are intended to be consistent with the general principles relating to the “best interests” of children. This includes the principle that a child must not be blamed for matters for which they are not responsible, such as the conduct of a parent.
11. Following this decision the respondent amended its instructions to caseworkers. The latest guide was issued on 29 January 2019. The presenting officer has referred to this guidance and the fact that the appeal involves qualifying children.
12. In light of the above the presenting officer asked that I find a material error of law and remake the decision, allowing the appeals. Given the agreed facts I would be agreeable to this course. First-tier Tribunal PA Grant Hutchison did not have the benefit of the Supreme Court decision. However I am required to apply the law as it is now understood. Consequently, the decision dismissing the appeals is set aside and remade, allowing the appeal is on the basis of Article 8.

Decision

The decision of First-tier Tribunal Judge PA Grant Hutchison dismissing the appeals is set aside and remade. I allow the appeals on the basis of Article 8.

Deputy Upper Tribunal Judge Farrelly.