Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16361/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 January 2019	**On 25 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR EMMANUEL [E]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mrs H Ephraim-Adejumo, Counsel, instructed by Global Solicitors & Advocates
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

This is the appeal of Mr Emmanuel [E], who is a national of Nigeria born in 1970. He applied along with his daughter for leave to remain on the basis of his private and family life. This application was refused in a decision dated 6 November 2017 and the Appellant and his daughter appealed against this decision.

In a Decision and Reasons promulgated on 7 September 2018 Judge of the First-tier Tribunal Wilson allowed the appeal of the Appellant's daughter (formerly the second Appellant) and dismissed the Appellant's appeal.

Permission to appeal was sought in time on the basis that the judge had erred materially in law: firstly, in failing to give proper or adequate reasons; secondly, in failing to have regard to the fact that the first Appellant is the parent of the second Appellant, who qualified under the Rules due to her almost ten years' residence, i.e. having exceeded seven years.

Permission to appeal was granted in a decision dated 28 November 2018 by Judge of the First-tier Tribunal P J M Hollingworth on the basis that it was arguable: firstly, that the judge had not delineated with sufficient particularity the application of section 117B(6) of the NIAA 2002 in relation to the public interest not requiring the removal of the first Appellant, given that the second Appellant had been in the UK for seven years; secondly, in attaching insufficient weight to the fact that the second Appellant met the Immigration Rules due to being in the UK for seven years and at the date of decision, i.e. 8 November 2017, the second Appellant was 17 years of age, it was arguable that an insufficient analysis had been set out of the application of the criterion of reasonableness in the context of the child and that insufficient weight had been attributed to the argument that the public interest was outweighed on the basis that the Immigration Rules were met at the date of decision.

Hearing

The appeal came before the Upper Tribunal for hearing on 31 January 2019, where the Appellant was represented by Mrs Ephraim-Adejumo, who sought to rely on the grounds of appeal. Mr Bramble clarified, prior to submissions, that the Respondent had not sought to cross-appeal the decision to allow the appeal of the Appellant's daughter and had in fact granted her leave to remain. Mrs Ephraim-Adejumo submitted that the issue that was live before the Upper Tribunal related to the seven year Rule. The Appellant's daughter was a minor when the application was made and the Appellant's application for leave to remain was made on the back of that.

Mrs Ephraim-Adejumo stated she had no instructions as to the whereabouts of the Appellant's wife and mother of his daughter and that she was unable to assist with evidence to show dependency by the Appellant's daughter on him, over and above normal emotional ties, apart from the fact that the Appellant's daughter suffers from asthma and thus has health issues. She submitted that the Appellant's daughter remained dependent on her father and if he were to be removed this would impact very badly on her.

In his submissions, Mr Bramble submitted that the grant of permission to appeal was on a specific point and that is whether section 117B(6) of the NIAA 2002 bites. He submitted that it did not because the Appellant's daughter had turned 18 by the time of the hearing. In respect of whether there had been a failure by the judge to properly consider all the relevant factors in terms of the Appellant's human rights appeal, he submitted that this was not the case. The judge had clearly looked at the situation for the Appellant from [7] onwards in the context of paragraph 276ADE(vi) of the Rules and whether there would be very significant obstacles to his integration in Nigeria.

The judge also went on to conduct a freestanding assessment of Article 8. Despite the paucity of evidence, he was at [10] prepared to find that there was private and family life between father and daughter. The judge made reference to the Appellant's use of deception at [6], [8] and [11] and in respect of the section 117B consideration he weighed up the competing factors against the public interest, at [12] noting that the Appellant's leave has been almost entirely unlawful. He submitted that it was a properly and thoroughly reasoned determination and there was no material error in the decision of First-tier Tribunal Judge Wilson.

Findings and Reasons

It would appear that, despite the fact that the Secretary of State did not seek to cross-appeal and in fact has granted the Appellant's daughter leave to remain, that in fact the judge erred in finding that it was appropriate to allow her appeal on the basis of 276ADE(v) of the Rules, i.e. that she had spent at least half of her life living continuously in the UK. This is because the Appellant's daughter entered the United Kingdom in May 2009, having been born on 8 June 1999, thus, she entered a month before her 10th birthday. That being the case, in order to qualify at the date of application pursuant to paragraph 276ADE(v) she would need to be 19 years and 10 months old, which means that she would qualify in April 2019. However, the Secretary of State has not sought to challenge the judge's decision in this respect and has granted her leave to remain which, according to my calculations, she would in any event have been entitled to in April 2019 ie. in two months' time.

The issue is where that leaves the appeal of this Appellant. The grounds of appeal do not really raise anything of any particular substance as they are focused on the fact that the Appellant's daughter was at the material time, i.e. the date of application and the date of decision, a minor. Given that the appeal is a human rights appeal, that does not, however, avail the Appellant because the relevant date for assessment is the date of hearing.

However, whilst the Judge accepted that the Appellant's daughter had resided continuously in the UK for more than seven years, see [3], the Judge, due to his misdirection as to the applicable Rule in light of the fact that the Appellant's daughter had not applied for leave to remain under 276ADE(v), failed to give any consideration to whether it was reasonable for her to be expected to leave the United Kingdom, albeit she was no longer a qualifying child by the date of hearing.

Mr Bramble submitted that given that the Appellant's daughter was no longer a child at the date of hearing section 117B(6) did not come into play. However, this was clearly the material issue at the date of application and decision and it is the case that at [11] the judge failed to address adequately the statutory requirements, finding: "*I have had first of all regard to the statutory requirements set out in the 2002 Nationality Immigration Asylum Act in section 117(B), I am satisfied there is a clear public interest in maintaining immigration control; the appellant has remained in the United Kingdom without leave for 13 years. Moreover he was clearly complicit/failed to take appropriate action when*

his wife and daughter used of deception, with the assistance of an agent, to enter the United Kingdom." The question is whether that is a material error when considered as part of the reasoning and decision as a whole.

I further find that the Judge's reasoning at [9] as to why he concluded that the Appellant does not satisfy the requirements of 276ADE(vi) of the Rules is unclear. Whilst there is reference in [9] to the Appellant's assertion that he has no one, no financial resources or accommodation to return to in Nigeria and that he came to the UK because of "economic reasons" the Judge does not make clear findings on these issues but addresses only the issue of economic difficulties, finding that he was satisfied that the Appellant "*could be economically active*." There are no findings as to the presence or absence of family members or a former family home. Further, the use of the term "*there is no reason to suppose*" in respect of the Appellant's ability to continue to practise his Christianity and his health does not make for a clear findings on these issues.

Further, whilst at [10] the Judge accepted that there is both family and private life between the Appellant and his daughter, at [13] the Judge appeared to find that whilst family life can still continue beyond the age of 18 years e was not persuaded that there is anything other than the normal situation of an intelligent alert 18 year old rapidly establishing her own life independently of the parents whilst still clearly maintaining love and affection for them, which would appear to be inconsistent with the finding at [10].

It is of concern that neither before the First-tier Tribunal nor before the Upper Tribunal was any light shed on the position and immigration status of the Appellant's wife, who entered the United Kingdom with his daughter, in May 2009. That is, in my view, clearly material to an assessment of the proportionality of removal of the Appellant on the basis that if the Appellant's wife does have leave to remain then it may be that she can remain lawfully with her daughter and if she does not she could return to Nigeria with her husband. It is indicative of a concerning lack of transparency on behalf of the Appellants' representatives that this has not been clarified and this is likely to impact adversely on any re-hearing of the appeal unless such clarification is provided.

I have concluded that the errors that I have indicated at [10]-[12] above amount to material errors of law, through a failure to provide proper and adequate reasons for his decision.

What is now required is a consideration of the Appellant's appeal, bearing in mind the preserved material facts that he entered the UK in April 2005, has remained without leave since April 2007, that he has an adult daughter aged 19 who has 30 months' leave to remain and the issue is whether his removal would be proportionate in light of the section 117B statutory public interest requirements. It will be necessary, as part of this consideration, to determine whether or not he shares family life with his daughter and whether there are very significant obstacles to his integration in Nigeria.

Notice of Decision

17. The appeal is allowed to the extent of being remitted to the First tier Tribunal for re- hearing in light of the matters set out at [16] above.

No anonymity direction is made.

Signed Rebecca Chapman Date 19 February 2019

Deputy Upper Tribunal Judge Chapman

TO THE RESPONDENT
FEE AWARD

There is no fee award.