



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/13584/2014
IA/14937/2014
IA/14944/2014
IA/14950/2014
IA/14956/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7 December 2015**

**Determination Promulgated
On 25 January 2016**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

MR KEHINDE DARAMOLE OLAOYE + 4

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel, instructed by A Vincent Solicitors
For the Respondent: Ms N Willcocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant appeals against the decision of the First-tier Tribunal (Judge Henderson) dismissing the appellants' appeal against a decision taken on 22 November 2013 to refuse to grant further leave to remain and a further decision taken on 6 March 2014 to remove the appellants from the UK.

Introduction

3. The first appellant is a citizen of Nigeria born on 15 September 1968. The remaining appellants are his wife and three children (born in 2002 in Nigeria, 2006 in the UK and 2012 in the UK). The first appellant came to the UK in 2003 on a visit visa valid until July 2003 and has overstayed. The second and third appellants came to the UK in 2005 on visit visas and also overstayed. The appellants applied for leave to remain on 28 August 2013.
4. The Secretary of State concluded that the appellants did not meet the requirements of the Immigration Rules and that there were no exceptional circumstances such as to justify a grant of leave outside the Rules. The family would return to Nigeria as a family unit and could be educated there. Removal was a lawful and proportionate response.

The Appeal

5. The appellants appealed to the First-tier Tribunal and attended an oral hearing at Taylor House on 19 February 2013. They were represented by Mr Waithe, Counsel. The First-tier Tribunal found that the adult appellants had not given any evidence as to why it was not reasonable for the children to leave the UK but did say that their lives in the UK were much better than they were likely to be upon return to Nigeria. Life in Nigeria would be hard. The judge therefore heard no evidence to establish that it would not be reasonable to expect the children to leave the UK, as required under paragraph 276ADE of the Rules. The appellants did not meet the requirements of the Rules. The judge then applied Razgar and found that Article 8 was engaged. The judge applied section 117B of the 2002 Act but once again considered that no evidence had been heard to establish that it would not be reasonable to require the children to leave the UK. The children would be able to integrate into the educational system in Nigeria. There were not yet such significant links established by the third and fourth appellants in the UK so as to move from the starting point that their best interests were to remain with their parents. The children currently lived and thrived in a multi-racial environment.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law. The judge ignored written evidence in relation to reasonableness, failed to consider that the oldest child was just months away from attaining the age when she could register as a British citizen, failed to properly consider Azimi-Moayed

[2013] UKUT 00197 (IAC), failed to consider that section 117B(6) of the 2002 Act specifically states that it is not in the public interest to remove the parents of qualifying children and failed to consider the hand written evidence from the third and fourth appellants.

7. Permission to appeal was granted by Upper Tribunal Judge Grubb on 21 July 2015. It was arguable that the judge erred in law by finding that she had heard no evidence about reasonableness; that was a misconstruction of the requirement that would exclude consideration of the children's circumstances in Nigeria. There was arguably no proper finding on reasonableness of leaving the UK.
8. In a rule 24 response dated 12 August 2015 the respondent submitted that it was for the appellants to demonstrate that it was unreasonable to expect the children to return to Nigeria.
9. Thus, the appeal came before me

Discussion

10. Mr Karim submitted that the judge made reference in paragraphs 41, 45 and 53 of the decision to the absence of evidence regarding reasonableness but overlooked pages 308-310 of the appellant's bundle which contain evidence from the two oldest children and set out the children's circumstances in the UK. That was crucial evidence. The eldest child has been in the UK from ages 3-13 but the judge simply said at paragraph 62 that because the parents are returning the children must also return. The conclusions are inadequate and contrary to the evidence that was before the judge who should have considered the reasonableness of the children returning. Looking at the parents first put the cart before the horse. The decision should be set aside.
11. Ms Willcocks-Briscoe submitted that the judge may not have expressly referred to the letters but clearly was apprised of the facts and the circumstances. The judge dealt with credibility and considered the children at paragraphs 30-35 of the decision. The judge addressed the evidence and support that the children could be given in Nigeria. At paragraph 41, there was no reason why it was not reasonable for the children to leave the UK. The letters from the children express a preference but there is no background evidence to support that preference. The findings were open to the judge and the full context from paragraph 27 onwards should be considered. The judge did properly assess the claim through the lens of reasonableness. The judge did not miss any relevant background information and all relevant information was taken into account.
12. I find that paragraph 60 of the decision is critical. The judge stated that the Tribunal did not have the benefit of hearing evidence from the third and fourth appellants. There is no reference to the written evidence from

the third and fourth appellants which appears at pages 308-310 of the appellants' bundle. I am satisfied that the judge failed to consider the direct evidence from the children when assessing reasonableness and best interests and that is a material error of law.

13. I find that it was a further material error of law to determine reasonableness solely on the basis that the judge had heard no evidence as to whether it was reasonable to expect the children to leave the UK. The judge was required to assess reasonableness on the basis of all of the available evidence. That was not done and there is effectively no proper finding on reasonableness either for the purpose of paragraph 276ADE of the Rules or section 117B of the 2002 Act.
14. I am also satisfied that the best interests consideration was inadequate. It was not sufficient for the judge to find at paragraph 62 of the decision that it was in the best interests of the children to remain within the family unit, wherever that unit was based. A careful examination of all relevant factors relating to the best interests of the children was required in the context of the proportionality assessment. The judge's approach excluded the possibility of finding that it was in the children's best interests to remain with their parents in the UK. Section 117B(6) of the 2002 Act states that the public interest does not require removal of the parents where it is not reasonable to expect the children to leave the UK. The failure to properly consider the best interests of the children is a further material error of law.
15. Thus, the First-tier Tribunal's decision to dismiss the appellants' appeals involved the making of an error of law and its decision cannot stand.

Decision

16. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be *de novo* with all issues to be considered again by the First-tier Tribunal.
17. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined *de novo* by a judge other than the previous First-tier judge.

Signed



Date 22 January 2016

Judge Archer
Deputy Judge of the Upper Tribunal