Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/43258/2013
IA/43259/2013
IA/43260/2013
IA/43262/2013
IA/43263/2013
IA/43264/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 5 January 2016	**On : 3 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR JAMES OSBORN NANJO
MRS ANTONINA MARIE NANJO
H N
J N
J E N
J J N
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Olanwanle, Del & Co Solicitors
For the Respondents: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are a family unit. The first appellant was born on 21 February 1973 and is a citizen of Ghana. The second appellant is his wife. She is a citizen of the United States of America (USA) and was born on 25 June 1979. The third to six appellants are the minor children of the first and second appellants who were all born in the UK and they too have citizenship of the USA.

2. The respondent in decisions dated 1 October refused the appellants' applications for leave to remain (which had been made on the grounds that refusal would breach the UK's obligations under Article 8 of the European Convention on Human Rights) and indicated that directions would be given for the appellants' removal from the UK under Section 10 of the Immigration and Asylum Act 1999.

3. Judge of the First-tier Tribunal Abebrese allowed the appellants' appeals on human rights grounds in a decision promulgated on 13 June 2014. That decision was set aside by the Upper Tribunal on 3 November 2014. The appeals were again considered by the First-tier Tribunal on 9 June 2015. Judge of the First-tier Tribunal K W Brown dismissed the appellants' appeals under the Immigration Rules and on human rights grounds.

4. Judge Brown found that the appellants could not succeed under the Immigration Rules and that although the eldest child, [HN] had resided in the UK in excess of 7 years at the date of the application, the judge was satisfied that it would be reasonable to expect her to leave the UK with her family in respect of paragraph 276ADE (1)(iv). In relation to Article 8 outside of the Immigration Rules, the judge noted that both [HN] and [JN] are now over the age of 7 and in considering section 117B of the Nationality, Immigration and Asylum Act 2002, the judge was satisfied that it would not be unreasonable to expect the family to be removed together to the USA and for the appellant to be removed to Ghana.

5. The appellants applied for permission to appeal to the Upper Tribunal on the grounds that: the judge erred in his consideration of reasonableness as it was submitted it did not apply as the application was made in June 2012 and the transitional provisions of the Immigration Rules meant that an earlier version of paragraph 276ADE, which did not contain a reasonableness test in respect of paragraph 276ADE (1)(iv) applied; it was also argued that the judge failed to properly apply Huang v Secretary of State for the Home Department [2007] UKHL 11 and ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 WLR 148; the judge's reasoning in respect of section 117B of the Immigration and Asylum Act 2002 was flawed; that the balance struck between the public interest and other relevant circumstances was incorrect. Permission was granted on the grounds that it was possible that the judge had applied the wrong version of paragraph 276ADE.

Ground 1

6. Mr Olawanle raised the issue of what version of paragraph 276ADE applied at the date of the application, at the appeal before Judge Brown. Judge Brown, at [49] did not accept that reasoning as he was of the view that Singh & Khalid [2015] EWCA Civ 74 was authority for the proposition that by 'reason of the date of decision in this the respondent was entitled to consider the appeal under the newly published rules. Singh & Khalid is authority for the proposition that the Secretary of State is entitled to apply the new immigration rules (Appendix FM and paragraph 276ADE-276DH in relation to private and family life applications) other than in respect of decisions taken in the two month window between 9 July and 6 September 2012.

7. However, Mr Whitwell accepted that the point being made by Mr Olawanle was not whether the new immigration rules applied, but rather what version applied. Mr Olawanle, as directed, had provided a copy of the relevant Statement of Changes in Immigration Rules. Statement of Changes in Immigration Rules HC 760, dated 22 November 2012 indicated that all changes (other than exceptions set out) take effect on 13 December 2012; the Statement of Changes includes the following implementation provisions:

> 'The changes in paragraph 316 to 326 and 442 set out in this Statement shall take effect on 1 January 2013. In respect of these changes, if an applicant has made an application for leave before 1 January 2013 and the application has not been decided before that date, it will be decided in accordance with the rules in force on 31 December 2012.
>
> The changes set out in paragraph 334 shall take effect from 28 February 2013. In respect of these changes, if an applicant has made an application for leave before 28 February 2013 and the application has not been decided before that date, it will be decided in accordance with the Rules in force on 27 February 2013.
>
> In respect of the other changes set out in this Statement, if an applicant has made an application for entry clearance or leave before 13 December 2012 and the application has not been decided before that date, it will be decided in accordance with the Rules in force on 12 December 2012'

8. The consolidated immigration rules indicates that paragraph 276ADE(1)(iv) reads as follows:

> '(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) [and it would not be reasonable to expect the applicant to leave the UK]

The Note indicates that 'words inserted in subparagraph(1)(iv) from 13 December 2012 subject to savings for applications made before that (HC 760)'.

9. I therefore accept, and Mr Whitwell conceded he was in some difficulties arguing otherwise, that applications made before 13 December 2012 and not decided were to be decided in accordance with the immigration rules in force on 12 December 2012.

10. The October 2012 immigration rules were provided. These show that paragraph 276ADE(1)(iv) read as follows:

> '(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment)'.

11. It was not disputed that the appellants' application was made in June 2012 and was refused on 1 October 2013. I accept that the applicable version of paragraph 276ADE(1)(iv) did not contain a reasonableness requirement. Mr Whitwell conceded therefore that [49] of the judge's decision, where he indicated that Singh & Khalid applied, appeared to be incorrect.

12. I am satisfied that given the applicable immigration rules at the time, the appeal of [HN] succeeds under paragraph 276ADE.

13. However in respect of the remaining appellants Mr Olanwanle conceded that none of these appellants could succeed under the immigration rules. In addition, although the judge had considered Appendix FM EX.1 (and Mr Olanwanle accepted that the applicable version of Appendix FM EX.1 did properly contain a 'reasonableness' requirement) and was satisfied that it was reasonable to expect the family to leave, as set out by the respondent in the reasons for refusal letter dated 1 October 2013, the appellants failed the mandatory eligibility requirements of E-LTRPT.2.3 and therefore the appellants could not meet R-LTRPT.1.1(d). Mr Olanwanle did not dispute this and therefore there is no route for the remaining appellants to be considered under Appendix FM. This remains the case notwithstanding that [HN] succeeds under the immigration rules and would have been the case when the respondent made the 1 October 2013 decisions. The judge therefore made no material error in deciding as he did at [57] that 'the exception within the rules does not apply'.

14. The judge nonetheless considered Section EX.1 in some detail and was satisfied that it would be reasonable to require [HN] as a qualifying child to leave the UK with her family. The fact that the family cannot meet the requirements of Appendix FM EX.1, as set out in Judge Brown's findings, whilst not necessary given that the family cannot meet the eligibility requirements and therefore no EX.1 assessment follows, is nevertheless relevant to the wider proportionality assessment which was carried out by Judge Brown, outside of the immigration rules.

15. I am satisfied that [HN] herself qualifying for leave to remain could not have made any material difference to the substance of those findings which

considered, in their entirety. Mr Olanwanle was unable to point to any specific advantage that [HN] might have from so qualifying, or any additional consideration that was not taken into account by the judge.

16. The judge, in considering whether it was reasonable for the children (and specifically [HN]) to leave the UK, considered their best interests and took into account a number of factors including (at [56]) the age of the children, that they are supported by their parents, that their marriage is likely to survive, that it was a matter of parental choice that they receive their education in the UK, that they will lose friendships they have formed in the UK and will find the change of environment difficult/challenging for a period of time, that there was no evidence that they will have any specific mental or physical problems to which the judge should give any weight, by reason of a change in environment, that children are often stronger for having to adapt and change including through moving internationally, that there are no language difficulties by virtue of removal to the USA.

17. The judge also, properly, considered that the children were born and brought up in the UK and considered relevant case law including Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197. The judge also considered (at 51 and 52) that the first appellant would be removed to Ghana and considered that he would have to apply to join the family in the USA (although he noted that there was no reason why the entire family could not live in Ghana). The judge considered that although the second appellant stated that she had no contacts in the USA, the US government has some responsibility to protect and assist its citizens, especially minor citizens. The judge considered that any difficulties would be short term and took into account the qualifications and resourcefulness of the adult appellants in that careful assessment.

18. Mr Olanwanle whilst accepting that the remaining appellants could only be considered under Article 8 outside of the immigration rules was of the view that the findings of the judge in this respect were materially flawed as the judge had not been aware that [HN] succeeded under the immigration rules.

19. However, it was accepted by Mr Olanwanle that ultimately the test to be applied was still one of whether it is reasonable for [HN] (and indeed [JN]) to leave the UK. Although [HN] succeeds under the immigration rules, in considering the remainder of the family outside of the immigration rules, Section 117B of the Nationality, Immigration and Asylum Act 2002 Act (as considered by Judge Brown from [54] onwards) imports a reasonableness test as follows:

> ‘117B Article 8: public interest considerations applicable in all cases
>
> …

(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 UK'.

20. Therefore the judge's reasoning in respect of [HN] (which was not in fact required given the version of the immigration rules applicable) nevertheless applies equally to the judge's assessment of the remainder of the family outside of the immigration rules including the statutory assessment required under Section 117B. Any error therefore in respect of [HN] qualifying for leave, is not material in the overall consideration of the remainder of the family.

21. The judge stated at [57] that for the reasons already set out (and summarised above) he considered it reasonable to expect the qualifying children (and it was accepted that this is both [HN] and [JN] who at the date of the appeal were both over the age of 7) to leave the United Kingdom. The judge at paragraph 43 considered the one family unit and ultimately found that it would not be unreasonable for the family to be removed.

22. The judge was also required to give little weight, as recorded in his findings at [55] to a private life established at a time when the person is in the UK unlawfully and at a time when the person's immigration status is precarious. The judge noted that the first appellant 'has flouted UK immigration laws and continued to work despite being illegally in the UK.

23. Although therefore the appeal of the third appellant must succeed and there is an error of law to that extent, any error made by the judge in his assessment of the remaining family outside of the immigration rules cannot be material.

Remaining Grounds

24. Mr Olanwanle did not specifically pursue any of the remaining grounds before me. I have nevertheless considered all the grounds. In relation to the claim that the judge misapplied the relevant case law in respect of Article 8, there is no merit in this argument which is simply a disagreement with the weight that the judge has placed on the various factors before him.

25. The one issue raised by Mr Olanwanle was the fact that [HN] had applied to be registered as a British Citizen and there was nothing to say that she would not succeed. However, the judge was clearly aware of this, noting as he did at [28] that the application had been submitted but there was no decision as at the date of the hearing. The judge is not to be faulted for not giving more weight to the possibility of British Citizenship, given that he was required to consider the circumstances as at the date of the appeal before him.

26. In relation to the judge's consideration of paragraph 117B, the grounds argued that the reasonableness test was incorrectly applied correctly, again this amounts to a disagreement with the Judge Brown's findings which are clear and well-reasoned and took into account (at [56]) the jurisprudence of Azimi-Moayed including in relation to the age of the children, the eldest of whom was 10 at the date of the appeal.

27. The judge was entitled to give the weight that he did to the evidence before him and in concluding that the weight in favour of the public interest outweighed the factors in the appellants' favour. There is no merit in the arguments made.

DECISION

28. The making of the decision of the First-tier Tribunal in respect of the third appellant involved an error of law and is set aside. I remake that decision allowing [HN]'s appeal under paragraph 276ADE(1)(iv). However, the making of the decision of the First-tier Tribunal in respect of the remaining five appellants did not involve an error on a point of law and shall stand.

Signed: Dated: 12 January 2016

Deputy Judge of the Upper Tribunal Judge Hutchinson