Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/15375/2015**
IA/15376/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 October 2017	**On 9 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

AYODELE [D]
(ANONYMITY DIRECTION NOT MADE)

First Appellant

GRACE [D]
(ANONYMITY DIRECTION NOT MADE)

Second Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Kannangara (counsel) instructed by Malik Law Chambers
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of the Appellants. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is a resumed hearing in an appeal by the Appellants against the decision of First-tier Tribunal Judge Hussain promulgated on 7 December 2016, which dismissed the Appellant's appeal. The First-tier Judge's decision was set aside by a decision of the Upper Tribunal dated 16 August 2017

Background

3. The first appellant was born on 8 March 1983. The second appellant was born on 4 August 1983. Both appellants are Nigerian nationals. The first appellant entered the UK on 22 April 2005 as a student. He was granted variations of leave to remain which expired on 18 December 2011. The second appellant arrived in the UK on 12 August 2007 as a dependent of the first appellant. The appellants have two children. Their first child was born on [ ] 2008. Their second child was born on [ ] 2010.

4. The appellants applied for variation of leave to remain before their existing leave expired on 18 December 2011. Parties agree that the first appellant meets the notional 10-year long residence rule because the appellants have enjoyed section 3C leave since the application was submitted in December 2011. The respondent argues that the appellants cannot meet the requirements of paragraph 276B(iv) of the immigration rules because the first appellant cannot comply with the life in the UK test.

5. The appellants argued that the respondent has refused to return their passports so that neither of them can sit the life in the UK test; they argue that the fact that the appellants have proved more than 10 years long residence is a material consideration relevant to the article 8 ECHR grounds of appeal.

6. In a decision promulgated on 16 August 2017 Upper Tribunal Judge Coker set the First-tier Tribunal's decision aside, and continued the case to this resumed hearing.

The hearing

7. Mr Kannangara, counsel for the appellants, asked me to adjourn the hearing. He told me that both appellants have now sat and passed the life in the UK test, but neither appellant has been able to sit the English language test required by paragraph 276B(iv) of the rules because their passports have not been released by the Secretary of State. He asked me to adjourn the case and ordain the respondent to release the appellant's passports so that they can take the English language test.

8. Ms Isherwood, for the respondent opposed the application to adjourn. She told me that the Secretary of State will not release the appellant's passports. She argued that the first appellant is in breach of his section 3C leave because he is now working full-time. She told me that she has only received a copy of the Upper Tribunal's decision dated 16 August 2017 this morning, and that directions had not been complied with because the respondent was unaware of the directions.

9. I refused the application to adjourn this case. This case relates to an application which was originally made in December 2011, and already has significant procedural history. The application to adjourn comes too late. It was made this morning, for the first time, no notice of the application was given to the respondent. Clear directions were given in the Upper Tribunal decision dated 16 August 2017 which both parties have ignored. This resumed hearing was transferred by interlocutor dated 13 September 2017 because of concerns about the passage of time. There is no good reason to delay the determination of this appeal any further. I am satisfied that I can justly determine this appeal and that parties' agents have had adequate time to prepare for today's hearing.

10. (a) Mr Kannagara moved the appeal. He relied on the directions made by the Upper Tribunal on 16 August 2017 and told me that he would lead no new oral evidence. He told me that at [5] of the Upper Tribunal decision (dated 16 August 2017) it is recorded that permission has already been granted to amend the grounds of appeal to rely on both paragraphs 276B and 276 ADE of the immigration rules. He reminded me that at [6] of the Upper Tribunal's decision of 16 August 2017 the respondent's concession that the first appellant met the notional 10-year lawful residents is recorded.

(b) Mr Kannagara reiterated that the Senior Home Office Presenting Officer clearly says that the appellants' passports will not be released. He told me that the respondents intransigence is the only thing that prevents the appellants from meeting all of the requirements of paragraph 276B of the rules. He told me that because it has already been accepted before the Upper Tribunal that the first appellant has accrued 10 years lawful residence, and because the second appellant has now accrued 10 years lawful residence, the appeals should be allowed under paragraph 276A1 of the rules, which would grant both appellants an extension of stay so that their passports can be released, and they can submit a fresh application for indefinite leave to remain under paragraph 276B of the immigration rules

11. For the respondent, Ms Isherwood told me that the first appellant is working full-time, and so breaches the terms of 3C leave because the grant of leave to remain that he had at the date of application was leave to remain as a student. She told me that there is inadequate evidence to show that the appellants meet the requirements of paragraph 276B(ii) of the immigration rules, so that the appeals cannot succeed under paragraph 276A1. She told me that the appellants will not meet the maintenance requirements of the immigration rules, and that the evidence that the appellants rely on indicates that the appellant still have ties to Nigeria; in particular, the first appellant's parents live in Nigeria. Ms Isherwood urged me to dismiss the appeals.

<u>My Findings of fact</u>

12. (a) The first appellant entered the UK on 22 April 2005 as a student. He was granted variations of leave to remain expiring on 18 December 2011. The second appellant arrived in the UK on 12 August 2007 as a dependent of the first appellant.

The appellants have two children. Their first child was born on [ ] 2008. Their second child was born on [ ] 2010.

(b) On 15 December 2011 the appellants applied for indefinite leave to remain in the UK. The respondent refused that application on 14 November 2012. The appellants appealed the decision of 14 November 2012, and the respondent withdrew her decision. The respondent made a fresh decision refusing the applications on 18 June 2013. The appellants appealed that decision. Their appeal was successful to the extent that their applications were remitted to the respondent to issue a fresh decision. The respondent issued fresh decisions on 31 March 2015. It is those decisions which are the subject of this appeal.

(c) The appellants have enjoyed s.3C leave since 18 December 2011. The first appellant has now accrued 12½ years lawful residence in the UK. The second appellant has now accrued 10 years and two months lawful residence in the UK.

(d) The appellants' children both attend primary school. They were born in the UK and have not lived anywhere other than the UK. They are happy and well settled at school, where they are making good progress. They each enjoy a circle of friends. Neither child has ever visited Nigeria. They are both qualifying children in terms of s.117B of the Nationality, Immigration and Asylum Act 2002.

(e) The appellants are both in employment. The first appellant earns £10,000 per annum. The second appellant works part time and earns approximately £800 per month.

(f) On 20 July 2017 the first appellant sat and passed the knowledge of life in the UK test. On 13 October 2017 the second appellant sat and passed the knowledge of life in the UK test.

Analysis

13. Paragraph 276B of the Immigration Rules says

> 276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> > (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
> >
> > (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
> >
> > > (a) age; and
> > >
> > > (b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –

(a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or

(b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.

14. Paragraph 276A1 of the Immigration Rules says

> 276A1.The requirement to be met by a person seeking an extension of stay on the ground of long residence in the United Kingdom is that the applicant meets each of the requirements in paragraph 276B(i)-(ii) and (v).

15. When the application which gives rise to this appeal was submitted neither appellant had been in the UK for 10 years. By the time this appeal called before the Upper Tribunal on 24 July 2017, the respondent accepted that the first appellant met the notional 10 year lawful residence. It is clear from [6] of the decision of the Upper Tribunal dated 16 August 2017 that the respondent's focus (in July 2017) was on 276B(iv) because the first appellant had not passed the life in the UK test. By the time the Upper Tribunal's decision of 16 August 2017 was promulgated, the second appellant had been in the UK for 10 years. By the time this case calls before me both appellants have sat and passed the knowledge of life in the UK test, but neither of the appellants has sat and passed English language test.

16. Because of the passage of time, the grounds of appeal were amended before the First-tier Tribunal, so that arguments could be presented under paragraph 276B and 276 ADE of the immigration rules. When the application to adjourn was made before me, parties agents could not agree whether or not it was possible for the appellant's passports to be released.

17. As a matter of fact, the appellants cannot meet the requirements of paragraph 276B(iv) solely because they have not sat and passed the English language test. They meet all of the remaining requirements of paragraph 276B.

18. On the facts as I find them to be, both appellants have now accrued 10 years continuous lawful residence in the UK. Although the respondent argues that the first appellant has breached section 3C leave because he works full time, that is not an argument which was taken before the Upper Tribunal in July 2017, when the respondent conceded that the first appellant met the notional 10 year lawful residence because he had been subject to 3C leave since his application made in December 2011. In July 2017 the respondent's position was solely that the first appellant had not sat and passed both components of the life in the UK test. Both appellants meet the requirements of paragraph 276B(i) of the rules.

19. The first appellant was born in 1983. He has lived in the UK since 2005. He left Nigeria when it was 22. He is now 34. He has spent approximately 36% of his life in the UK. He has spent most of his adult life in the UK. The second appellant was born in 1983 and arrived in the UK in 2007. She left Nigeria when she was 24 years old and is now 34 years old. She has spent most of her adult life in the UK.

20. Both appellants have developed friendships in the UK. Their home and their employment is in the UK. The documentary evidence indicates that they are both fluent in the English language and they have both past the knowledge of life in the UK test. There is insufficient evidence before me to find that either of the appellants had breached immigration laws. The weight of reliable evidence indicates that neither appellant has any criminal convictions. The weight of reliable evidence indicates that neither appellant has any pending prosecutions or outstanding charges. The weight of reliable evidence indicates that both of the appellants children were born in the UK, and are now in primary education in the UK; they are immersed in UK culture. Placing reliance on those factors I find that the appellants meet the requirements of paragraph 276B(ii) & (v) of the immigration rules.

21. Since July 2017 it has been the respondent's position that the first appellant meets all of the requirements of paragraph 276B other than paragraph 276B(iv). The respondent's position before the Upper Tribunal in July 2017 was that the first appellant met the requirements of paragraph 276B(i)(ii) & (v). On the facts as I find them to be both appellants meet those requirements today.

22. As I find that both appellants meet the requirements of paragraph 276B(i)(ii) & (v), by analogy I find that they meet the requirements of paragraph 276A1.

23. The passage of time created by the procedural history of this case has changed both the nature of the application and the arguments at appeal. I find that the appellants both meet the requirements of paragraph 276A1 of the rules. The effect of that decision is that the appellants are entitled to an extension of stay in the UK for up to two years. That extension of stay will enable both appellants to attempt both

components of the knowledge of life in the UK test and if they wanted to submit an application focusing on paragraph 276B of the immigration rules.

Article 8 ECHR

24 I am mindful of Section 55 of the Borders, Citizenship and Immigration Act 2009, and the case of ZH (Tanzania) v SSHD [2011] UKSC 4**.** I remind myself of the cases of Azimi-Moayed and others (decisions affecting children; onward appeals), [2013] UKUT 00197 and PW [2015] CSIH 36. It has long been established that it is in the interests of children to remain with their parents. I find that the appellants are entitled to an extension of stay on the grounds of long residence in accordance with paragraph 276A1 of the immigration rules. The appellants children should not be separated from their parents.

25. At the date of application neither of the appellants children had been in the UK for seven years. Because of the procedural history of this case both of the children are now more than seven years of age. I must consider section 117B of the Nationality Immigration and Asylum Act 2002, which says

> Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

> (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.

26. Both of the appellants children are qualifying children. Both appellants have a genuine and subsisting parental relationship with their qualifying children. The question becomes whether or not it is reasonable to expect either of the appellants children to leave the UK.

27. The appellants have prevented from meeting the requirements of paragraph 276B by the respondent's intransigence. The respondent resolutely refuses to release the appellant's passport. I am told by the Senior Home Office Presenting Officer that their passports will not be released, but that it might be possible to make certified copies available. I am told that the appellants have written to the respondent on more than three occasions asking for release of their passports so that they can sit the English language test. I am told that the appellants have not received a response to any of those requests.

28. The appellants' children know nothing of life in Nigeria. There were born in the UK and have been brought up in the UK. They are well settled in primary school, where they are making good progress. The only life that they know is life in the UK.

29. In Treebhawon and others (section 117B(6)) [2015] UKUT 674 (IAC) it was held that (i) Section 117B (6) is a reflection of the distinction which Parliament has chosen to make between persons who are, and who are not, liable to deportation. In any case where the conditions enshrined in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 are satisfied, the section 117B(6) public interest prevails over the public interests identified in section 117B (1)-(3); (ii) Section 117B (4) and (5) are not parliamentary prescriptions of the public interest. Rather, they operate as instructions to courts and tribunals to be applied in cases where the balancing exercise is being conducted in order to determine proportionality under Article 8 ECHR, in cases where either of the factors which they identify arises.

30. In R(on the application MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held that when assessing the best interests of the child, it was inappropriate to treat the child as having a precarious status merely because that was true of the parents. The observation that people arriving in the UK on a temporary basis could be expected to leave could not be true of a child. They were not to be blamed for the fact that their parents had overstayed illegally, and the starting point was that their status should be legitimised unless there was good reason not to do so.

31. On the facts as I find them to be, if the appellants were given their passports it is more than likely that there were no difficulties in passing the English language test, but having done so it is more likely that an application under paragraph 276B will be successful. The only obstacle in their way is the respondent's refusal to release their passports. The appellants' children are immersed in UK culture. They are now immersed in the UK education system. Having made those findings, I can only find that it is not reasonable to expect the appellants' children to leave the UK.

CONCLUSION

32. On 16 August 20 217 the Upper Tribunal set the Judge's decision (promulgated on 7 December 2016) aside.

33. I now substitute my own decision.

34. The appellants' appeals are allowed under paragraph 276A1 of the immigration rules.

35. The appellants' appeals are allowed on article 8 ECHR grounds

Signed Paul Doyle Date 30 October 2017
Deputy Upper Tribunal Judge Doyle