Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02235/2017
HU/01941/2017
HU/01943/2017
HU/01945/2017

THE IMMIGRATION ACTS

Heard at Field House
On 28 November 2018

Decision & Reasons Promulgated
On 13 December 2018

Before

HIS HON. LORD MATTHEWS
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE CANAVAN

Between

SJ & OTHERS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity should have been granted an earlier stage of the proceedings because the case involves child welfare issues. We find that it is appropriate to make a direction for anonymity. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

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Representation:
For the appellant: Mr K. Smyth of Kesar & Co.
For the respondent: Mr N. Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant is the father of the family, who appealed against the respondent's decision dated 24 January 2017 to refuse a human rights claim in the context of deportation proceedings. The second and third appellants are his wife and 16-year-old son ("A"), who appeal against the respondent's decision dated 16 January 2017 to refuse a human rights claim. We note that the decision dated 16 January 2017 also relates to the first appellant, but he must overcome the higher legal hurdles relating to the decision dated 24 January 2017, which was made in the context of deportation proceedings, to succeed. The appellants also have a 9-year-old daughter ("B") who was born in the UK and will be eligible to register as a British citizen in two months' time. It is unclear why she was not included on the application for leave to remain made on 02 March 2015. The respondent did not refuse a human rights claim so she had no valid appeal. However, it is accepted by both parties that her position must form part of the overall assessment of the family circumstances: see *Beoku-Betts v SSHD* [2008] UKHL 39.

2. First-tier Tribunal Judge Buckwell ("the judge") dismissed the appeals in a decision promulgated on 07 August 2018.

3. The appellants appeal the First-tier Tribunal decision on the following grounds:
   (i) The judge failed to apply the correct legal framework, in particular, he failed to consider whether the third appellant met the requirements of paragraph 276ADE(1)(iv) of the immigration rules or the second appellant met the requirements of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002") given that neither appellant was subject to a deportation decision.
   (ii) The judge failed to give adequate reasons, in particular, he failed to make any clear findings relating to the best interests of the children and failed to make findings on the independent social worker report.
   (iii) The judge mischaracterised the nature of the second child's medical condition as a "common ailment" without conducting any proper analysis of the severity of her condition. The medical evidence shows that she suffers from the most severe form of sickle cell disease (SCD).
   (iv) The judge failed to consider a large number of relevant factors in assessing whether it would be 'unduly harsh' for the children to return to Nigeria or to be separated from their father if they remained in the UK.

Decision and reasons

Error of law

4. It is not necessary to set out our reasons for finding an error of law in the First-tier Tribunal decision in any detail because Mr Bramble conceded that the reasoning was wholly inadequate. The judge failed to apply the correct legal framework. The judge failed to conduct an adequate assessment of the children's circumstances. He failed to take into account relevant considerations such as their length of residence, ties to the UK and compassionate circumstances surrounding the second child's undoubtedly serious medical condition. The judge failed to make any clear findings as to where the best interests of the children lay or to show that he had given appropriate weight to their interests as a primary consideration. The fact that the judge set out the background to the case over 14 pages of the decision is not a substitute for the core task required of a judicial decision maker, which is to make sufficiently detailed and reasoned findings on the evidence with reference to the relevant legal framework. The First-tier Tribunal decision failed on both fronts and is set aside.

Remaking

Public interest considerations

5. It is not necessary to set out the factual circumstances in detail because they are not disputed. The appellant and his wife have a very poor immigration history. The first appellant entered the UK in 2004 on a visit visa and claims that he returned to Nigeria a few months later. The first and second appellants claim that they entered the UK in March 2007 on a visit visa with their son, who was four years old. They knowingly remained in the UK without leave for 11 years and worked illegally; both immigration offences.

6. On 03 November 2015 the first appellant was convicted of two counts of using a false instrument and seven counts of dishonestly making false representations and one count of possession of an identity document with intent. He was sentenced to a concurrent term of 12 months' imprisonment. At first blush this appears to be a single court appearance, but the judge's sentencing remarks indicate a clear pattern of dishonest behaviour over a long period of time.

> "About ten years ago, as set out in the pre-sentence report, you came here on a six-month visa. You returned to your home in Nigeria and, because you were made redundant in Nigeria, you came back to this country, still within the operation period of that visa, bringing your wife with you. The six-month leave to remain ended, but you remained here, so you were an illegal immigrant. It meant that you could not lawfully work.
>
> You asked yourself the obvious question: How am I going to support myself and my wife? I will have to find work, you said to yourself, and in order to do that you had to prove to any potential employer that you were lawfully in this country and able to work."

7. The judge then set out a long list of indictments ranging from 2005 to 2015 including (i) obtaining a false leave to remain stamp in his passport; (ii) using a false National Insurance card; (iii) making false representations to gain employment; (iv) using false Nigerian passports and National Insurance cards to gain employment; and (v) using a false French passport and National Insurance card to gain employment. The judge concluded:

> "During the last ten years, you have been obtaining work by using any number of fraudulent documents. I simply cannot overlook the seriousness of these offences."

8. We note that the second appellant admits that she has also worked illegally in the UK although the details are unclear. There is nothing to indicate that she had been prosecuted for any immigration offences.

9. The evidence shows that the first and second appellants have a very poor immigration history aggravated by numerous document offences for which the first appellant was sentenced to 12 months' imprisonment. The Upper Tribunal gives significant weight to the public interest in maintaining a system of immigration control and the public interest in deporting foreign criminals in such circumstances.

Best interests of the children

10. In assessing the best interests of the children, we have considered the principles outlined in *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of children are a primary consideration.

11. The respondent must have regard to the need to safeguard the welfare of children who are "in the United Kingdom". We take into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55. In the guidance, the respondent acknowledges the importance of international human rights instruments including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies." The UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.

12. The appellants' son has resided in the UK for a period of 11 years from an early age. He has spent an important developmental period of his life in the UK during which time it is likely that he has forged close connections to this country. All his education,

thus far has been in the UK. He is now at an important stage of his GCSE studies. The respondent recognises that a child who has been resident in the UK for a continuous period of seven years will have established strong ties and this factor must be given significant weight: see *MA (Pakistan) v SSHD* [2016] EWCA Civ 705. In this case, A has been resident in the UK for a considerably longer period than seven years.

13. Although A is old enough to express his own views, and is aware of the family's precarious immigration status, it appears that no witness statement was prepared in support of the appeal. However, his views are outlined in the social work report of Ms Cynthia Kelchure-Cole. She outlines her qualifications and experience in the report, which is unchallenged. We accepted that she is a social worker of 30 years' experience who also has experience in therapeutic services. We give her opinions due weight. She interviewed the parents and spoke to A twice. She has had the opportunity to assess the children with their parents in the family home.

14. A said that he thought he was British and was confused when his parents told him that they were in the UK without papers. Before he found out about the family situation he had started to think about his future and life beyond school, which included taking A levels before going to university. Since he found out, he feels anxious and overcome with sadness sometimes. He tries to hide it from his parents because he does not want to worry them. He has no memories of Nigeria and considers himself British. He said that it would make him extremely unhappy if they had to return to Nigeria because he would feel that he was being rejected by the country that he considers his home. All the opportunities that he currently has would no longer be available to him and he may not achieve his ambition of attending university. Ms Kelchure-Cole says that she considered background evidence relating to the educational system in Nigeria. In her view there was no obvious transfer point for A between the education systems given the stage he is at in his education in the UK. His chances of being able to attend university in Nigeria would be greatly reduced. She says that A was unaware of his parents' first language (Yoruba). He thought people spoke English in Nigeria. She thinks it unlikely that A would be able to become fluent in a new language quickly enough to adjust to his new environment. Ms Kelchure-Cole concluded that A was suffering from situational anxiety. If he was forced to relocate to Nigeria, his emotional well-being would be impacted by the change in circumstances.

15. We have considered the evidence relating to the appellants' daughter. B was born in the UK and has known no other home. In two months' time she will be eligible to register as a British citizen. It is likely that she also considers herself to be British and is fully integrated into life in the UK. Again, she has lived in the UK for a considerably longer period than seven years. Her length of residence alone should be given significant weight.

16. A letter from Dr A. Leigh, Consultant Paediatrician, dated 01 May 2018 states:

> "I am the consultant looking after [B] at Whipps Cross Hospital. [B] has sickle cell disease (HbSS), which is the most severe form of sickle cell disease. Sickle cell disease carries a significant risk of painful episodes, chest problems, stroke and death in childhood if untreated. In the UK and from Whipps Cross Hospital, [B] has regular hospital appointments and hospital admissions to treat acute complications of sickle cell disease. She is also on a disease modifying drug called Hydroxycarbamide that has significant side effects, including bone marrow suppression which can render her at risk of serious invasive bacterial infections. It is essential that she has regular blood test monitoring and clinic appointments to ensure that she stays safe on these medications.
>
> Without these medications, follow up and hospital care there is a significant risk of death in childhood (approximately 10%) and a significant risk of stroke.
>
> I urge you to reconsider [B]'s application for the right to remain in the UK, as if she were to return to a low income resource poor country, she would be likely to suffer significant adversity, pain and significant risk of death or stroke. These risks with current treatment and following in the UK are significantly abated."

17. The medical records contained in the appellants' bundle shows that B has had a large number of hospital admissions as a result of SCD. Her mother says that B will suffer from the disease the rest of her life. She can become tired very quickly and cannot play as long as most children. She is prone to bacterial infections and often has to take penicillin. She must be taken to hospital regularly where she is prioritised and often has to be given morphine. She is at risk of stroke and must have regular brain scans. B's school provide her with support and they have received training from medical professionals to understand the disease. In 2014 B had to have an operation to remove her spleen because it was not working properly. The medicines she is given help but she is still admitted to hospital. She is closely monitored by doctors, teachers and school staff as well as her family. At the time she made the statement, she said that B might need to go to a specialist school because of the brain damage the disease has already caused. In future, B might also have issues with her kidneys due to the medication. Her mother acknowledges that some treatment is available in Nigeria but she does not think that they would be able to afford the high level of treatment that their daughter currently requires. She does not think that her daughter would have survived to this age if she had been born and raised in Nigeria.

18. Due to her young age the family have not told B about their precarious immigration status. For this reason, Ms Kelchure-Cole did not interview B about the prospect of returning to Nigeria. However, she was able to observe her in the family home and had a chance to talk to her parents and her older brother. Ms Kelchure-Cole did not seek to comment on matters outside her expertise relating to B's medical condition. However, she noted that the background evidence showed that treatment for SCD is available in Nigeria. The Sickle Cell Foundation based in Abuja said that Nigeria has the highest number of people living with sickle cell in the world, but with little or no funds to treat the disorder. Some of the treatments that are available in countries such as the UK and the USA are available in Nigeria, but people who need the treatment generally cannot afford it. She noted that the medical evidence indicates that a reduction in the level of treatment would be detrimental and potentially fatal.

She said that despite the seriousness of her condition B is doing well at school and is meeting her academic targets. However, her parents were worried that this may be affected by admissions to hospital. Ms Kelchure-Cole says that educational support is provided in hospital in the UK, but that was unlikely to be the case in Nigeria. She concluded that B's relocation to Nigeria clearly would be contrary to her best interests.

19. Ms Kelchure-Cole considered the impact of separating the first appellant from the children if they remained in the UK with their mother. We do not propose to set out her findings in any detail because it is self-evidently not in the children's best interests to be separated from a parent with whom they have a close relationship.

20. We bear in mind that the interests of the child must be assessed without reference to the conduct of their parents. In light of the above evidence, we conclude that the best interests of both children point strongly to them remaining in the UK with both parents.

21. In the case of B, it is very strongly in her interest to remain in the UK to maintain the continuity of treatment that she currently receives for the most severe form of SCD. Even with that treatment it is obvious that her health is severely affected, and that constant monitoring is required to prevent the more serious risks of the disease. A 'real world' assessment of her situation involves some consideration as to whether her parents could afford the high level of treatment she requires if the family returned to Nigeria. We note that her parents are not highly educated and undertook fairly low-income employment in Nigeria (her father as a driver and her mother as a market trader). The evidence shows that the employment they were able to find (illegally) in the UK was also low income. In the 'real world' it is highly unlikely that they would be able to afford even the most basic care for B let alone the high level of care she requires. Even with the level of care she is given in the UK she faces significant adversity and will face serious long-term health problems. The medical evidence indicates that if returned to Nigeria she is "likely to suffer significant adversity, pain and significant risk of death or stroke".

Findings in the context of the legal framework

22. Section 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way that it incompatible with a Convention right. This duty is placed on the Secretary of State as well as courts and tribunals. The requirements of the immigration rules and the statutory provisions are said to reflect the respondent's position on Article 8 of the European Convention. However, the complicated provisions relating to private and family life and the separate provisions relating to deportation bear little resemblance to the approach taken by the European Court of Human Rights when conducting a balancing exercise under Article 8. The Strasbourg court conducts a holistic assessment of all the relevant circumstances of a case weighing the individual's circumstances against the public interest considerations

without artificially separating different aspects of a claim. We are bound to assess the appeal with reference to the immigration rules and relevant statutory provisions, but it must always be remembered that those provisions are intended to give effect to, and are said to be compatible with, the underlying principles enshrined in Article 8 of the European Convention.

23. The highest hurdle in this case comes within the context of the legal framework relating to the deportation proceedings in the first appellant's case. The first appellant was sentenced to a period of imprisonment of at least 12 months and therefore comes within the category of cases that might engage the exceptions to deportation outlined in paragraph 399(a) and section 117C(5) of the NIAA 2002.

24. It is not disputed that the first appellant has a genuine and subsisting parental relationship with 'qualifying children'. Unhelpfully, the provisions are not the same. The immigration rules include a two-stage test considering whether it would be 'unduly harsh' on a child to live in the country to which the person is to be deported, and in the alternative, whether it would be 'unduly harsh' for a child to remain in the UK without the person who is to be deported. The statutory provision contained in section 117C(5) contains a single composite question of whether the effect of deportation would be 'unduly harsh' on a child.

25. We bear in mind that the threshold to show that the effect of deportation would be 'unduly harsh' is a stringent one. Something more than the usual negative effects of deportation on a child is needed. However, it is not such a high threshold that it cannot be overcome. The fact that the first appellant's offence attracted a lower sentence means that he is eligible to argue an exception to deportation. The test is less stringent than the 'very compelling circumstances' required to overcome deportation in cases involving sentences of four years' imprisonment or more.

26. Having considered the evidence set out above about the very serious nature of B's medical condition we have no hesitation in finding that it would be 'unduly harsh' for her to relocate to Nigeria. The 'real world' fact is that her parents would be unable to afford the level of medical treatment and support she requires. The consequences outlined by her consultant paediatrician are without doubt severe, bleak and potentially life threatening. Her medical condition alone would be sufficient to make a finding that it would be 'unduly harsh' to expect her to relocate to Nigeria, but when coupled with the fact that she was born in the UK and has never been to Nigeria, we are satisfied that it would be 'unduly harsh' for at least one of the children to return to Nigeria.

27. The first appellant should be able to succeed even if the effect of deportation is 'unduly harsh' on only one of his children. Although A's situation is less compelling, his length of residence is greater and the difficulties he would face in completing his secondary education are significant. He is fully integrated into life in the UK and would still find it extremely difficult to adjust to life in Nigeria. We are satisfied that

it would also be 'unduly harsh' for A to return to Nigeria, but even if we are wrong on that point, it matters not in light of our other findings relating to his human rights appeal set out below.

28. Having found that it would be 'unduly harsh' on the children to relocate to Nigeria it is not necessary to spend much time analysing whether it would be 'unduly harsh' to expect them to remain in the UK without their father. It is clearly not in their best interests to be separated from a parent, especially in light of B's serious medical condition, which requires the full support of both parents. The point can be circumvented by the fact that the respondent's decision letter dated 24 January 2017 accepts that it would be 'unduly harsh' for the children to be separated from their father in the long term. For these reasons we conclude that the first appellant meets the requirements of the exceptions to deportation outlined in paragraph 399(a) of the immigration rules and section 117C(5) of the NIAA 2002.

29. The appeals of the second and third appellants are determined by the finding that it would be 'unduly harsh' for the children to relocate to Nigeria. The Supreme Court in *KO (Nigeria) v SSHD* [2018] UKSC 53 recognised that the expression 'unduly harsh' is clearly intended to introduce a higher hurdle than that of 'reasonableness'.

30. A has been continuously resident in the UK for a period of 11 years and had been continuously resident for a period of 8 years at the date of the application. He engages the private life requirements of paragraph 276ADE(1)(iv) of the immigration rules. *KO (Nigeria)* makes clear that the assessment of 'reasonableness' is directed solely to the position of the child without reference to the misconduct of his parents. If there is any residual doubt as to whether it would be 'unduly harsh' to expect A to leave the UK we have no doubt whatsoever that his circumstances, if focussed directly on his position, show that it would be unreasonable to expect him to leave the UK. For these reasons, we find that he meets the private life requirements of the immigration rules.

31. Although we are conscious of the fact that B is not party to a formal appeal before us, on the findings we have made above, it is also patently clear that, in a hypothetical application for leave to remain, she would also meet the requirements of paragraph 276ADE(1)(iv) of the immigration rules.

32. The second appellant is not subject to deportation proceedings. It is not disputed that she is in a genuine and subsisting parental relationship with 'qualifying children' for the purpose of section 117B(6) of the NIAA 2002. The Supreme Court decision in *KO (Nigeria)* has left the position relating to, what is on the face of it the same test of 'reasonableness', somewhat unclear in so far as section 117B(6) might include a real world assessment of the circumstances of the children, including the position and perhaps the conduct of their parents. However, we are satisfied that on the facts of this case the circumstances of both children, and in particular the compassionate circumstances surrounding B's medical condition, are sufficiently compelling to

outweigh any public interest considerations raised by their parents' undoubtedly poor immigration history. If the circumstances are sufficiently bleak to show that the effect of deportation would be 'unduly harsh' on the children, they easily reach the lower threshold to show that it would be unreasonable to expect them to leave the UK.

33. For the reasons given above we conclude that the first appellant meets the requirements of paragraph 399(a) of the immigration rules and section 117C(5) of the NIAA 2002 because the effect of deportation would be 'unduly harsh' on his children. That finding alone leads to the conclusion that removal would be unlawful under section 6 of the Human Rights Act 1998 for the other members of the family.

34. The second appellant meets the requirements of section 117B(6) of the NIAA 2002, which is a self-contained provision stating that the public interest does not require removal in such circumstances.

35. Our findings relating to the deportation element are more than sufficient to show that the third appellant's removal would amount to a breach of Article 8, but in any event, he meets the private life requirements of paragraph 276ADE(1)(iv) in his own right.

36. At the crux of the assessment are the compassionate circumstances surrounding B's severe medical condition. Although she is not a formal party to these appeals it follows that she cannot be removed.

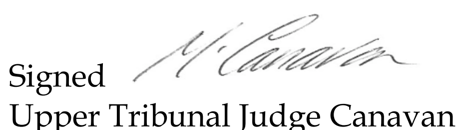
37. We conclude that the removal of the appellants from the UK would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside

The decision is remade and the appeals are ALLOWED on human rights grounds

Signed  Date 10 December 2018
Upper Tribunal Judge Canavan