Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/22201/2016
HU/22206/2016
HU/22214/2016
HU/22220/2016
HU/22224/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th December 2018	**On 7th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

DANIEL [O]
ESTHER [B]
[L O]
[R O]
[A O]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Jaisri (Counsel)
For the Respondent: Ms N Willocks-Briscoe (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellants appeal against decisions to refuse their human rights claims were dismissed by First-tier Tribunal Judge Lucas ("the Judge") in a decision promulgated on 19th February 2018. In a decision promulgated on 25th September 2018, that decision was set aside, as containing a material error of law. The appeals were then listed, for the purpose of remaking the decision, on 12th December 2018.

2. There is no dispute between the parties regarding the important facts. The first appellant, Mr [O], is a citizen of Ghana born on 4th April 1976. He entered the United Kingdom as a working holidaymaker in November 2004, with leave which was valid until 16th November 2006. The second appellant, his wife, entered the United Kingdom as a visitor earlier than her husband, as a visitor, in December 2003, with leave valid until June 2004. The third, fourth and fifth appellants, the couple's children, were born in the United Kingdom on 22nd March 2008, 23rd May 2011 and 3rd September 2014. It is apparent, therefore, that the two older children are qualifying children, within the meaning of section 117D(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

3. The Secretary of State refused the human rights claims made by the appellant, following applications for leave to remain made by the first appellant, on his own behalf and on behalf of his family members. In the decision letter, dated 12th September 2016, the Secretary of State found that although the oldest child, [LO], had lived in the United Kingdom continuously for at least the seven years immediately preceding the date of application for leave on 10th December 2015, the requirements of paragraph EX.1.(a) of the rules were not met because it would be reasonable to expect her to leave the United Kingdom. She would be able to adapt to life in Ghana with her siblings and parents as the family would be returned as a single unit. The other family and private life aspects of the application for leave were dealt with relatively briefly, the Secretary of State concluding that the requirements of the rules in relation to the partner route to settlement were not made out, in view of the immigration status of the first and second appellants, that the private life ties established by the two parents and the younger children were insufficient to meet the requirements of the rules and that there were no exceptional circumstances which might warrant a grant of leave to any of the family members.

4. As at the date of application, [RO], the fourth appellant, had lived in the United Kingdom for five years.

5. The judge took into account letters of support and school reports regarding all the children. Again, this evidence is not in issue between the parties. He recognised that the private lives of the children would be disrupted consequence of the family's return to Ghana but found that there would be no especially deleterious consequences for any of the children or their parents.

Submissions

6. Mr Jaisri, for the appellants, said that there were two qualifying children and that the correct approach was now to be found in the judgment of the Supreme Court in KO (Nigeria).

7. Paragraph 276ADE(1)(iv) was relevant to the third and fourth appellants, the children [LO] and [RO]. Each had lived continuously in the United Kingdom for at least seven years and so the critical question was whether it would not be reasonable to expect them to leave the United Kingdom. A similar test appeared in section 117B(6) of the 2002 Act, save that the statute identified two categories in relation to "qualifying child", one a British citizen and the other a child who had lived in the United Kingdom for a continuous period of seven years or more. The family in the present appeals had one in each category. [LO] was British and [RO] had now lived here continuously for some eight years. The judgment of the Supreme Court in KO (Nigeria) clearly had the distinction in mind, as was clear from paragraph 9 of the judgment, for example. The overall focus in the judgment, and the paragraphs in which the appeal in NS were considered, was on a non-British child. Paragraph 10 of the judgment considered guidance contained in an IDI, and in paragraph 11 also, where the versions published in August 2015 and February 2018 were considered. The most recent version of the IDI included an additional paragraph which more closely reflected the Secretary of State's submissions before the Supreme Court.

8. The third appellant, [LO], being a British child, was in a different position from her sister. The importance of the IDIs and guidance given to caseworkers was apparent. As in KO, paragraph 11.2.4 of the guidance was relevant in considering whether it was reasonable to expect a non-British child to leave. In KO and more particularly NS, the focus was on parents with no immigration status, or very poor immigration histories, and children who are qualifying by virtue of having lived here for seven or more years. The approach of the Court of Appeal in MA (Pakistan), which suggested that there was room for the wider public interest to feature, was rejected. The conduct of the parents did not bear directly on the critical question whether it would not be reasonable to expect the child to leave the United Kingdom.

9. Even if the Supreme Court judgment were properly to be read as suggesting that as the first and second appellants had no leave to remain, each being an overstayer for many years, it would follow that it would be reasonable to expect the fourth appellant, [RO] to go with them, the position of the third appellant, [LO] was different. There was no adverse criticism of the Secretary of State's guidance, which the Upper Tribunal held to be material in SF. Paragraph 11.2.3 of the guidance concerned

British citizen children. Where a parent with leave might remain, the other parent might be required to leave the United Kingdom but where neither had leave, the question remained whether it would not be reasonable to expect the child to go and the best interests of the child were plainly material in this context, in the light of ZH (Tanzania). So far as the third appellant was concerned, taking into account the Secretary of State's own guidance showing the need for strong reasons to justify removal of a British citizen child, the correct answer in relation to paragraph 276ADE(1)(iv) and section 117B(6) was that it would not be reasonable to expect [LO] to leave the United Kingdom and in an Article 8 assessment in which all the family members' circumstances fell to be considered together, it followed that the appeals should be allowed.

10. Ms Willocks-Briscoe accepted the summary of KO given by Mr Jaisri. It might reasonably be said that the correct approach to British citizen children was not expressly considered by the Supreme Court. Factors such as the age of the child, the length of residence here, the substance of the ties to the United Kingdom would all bear on the reasonableness of return. Nonetheless, the children of the family in the present appeals could continue with their education in Ghana and gain access to services there. On its face, the judgment in KO did not expressly address nationality of the child and ZH (Tanzania) did not suggest that nationality was remotely determinative. It was only in the context of deportation cases that the judgment in KO touched on British citizen children, in confirming the approach of the Court of Appeal on this point in VM (Jamaica). British children might be expected to relocate outside the United Kingdom, in some circumstances. In the "real world" assessment, if the parents were required to leave, the best interests of a child would be to remain with his or her parents. The children of the family could depart with their parents, subject to the question of reasonableness. Many families moved around the globe and British citizen children might accompany their parents, travelling for work or other reasons.

11. There was no issue between the parties regarding the finding by the First-tier Tribunal Judge, having heard evidence, that the parents of the family had benefitted from a sizeable inheritance and so they could make provision for the children in Ghana.

12. Ms Willocks-Briscoe submitted that the immigration history of the parents, being poor, suggested that they had no right to be here, that the best interests of [LO] and the other children were to remain with their parents and that, therefore, they should accompany their parents on return to Ghana. The private life elements of all family members could be replicated abroad. The strong reasons for finding that it would be reasonable for [LO] to leave were to be found in the immigration histories of the parents and their status as overstayers.

13. In a brief reply, Mr Jaisri said that there was no criminality in the family circumstances. These were not deportation cases. Paragraph 11.2.3 of the guidance considered the reasonableness question in relation to British citizen children. Factors such as criminality or a poor immigration history consisting of repeated breaches of the rules might amount to strong or powerful reasons but these were not present here. The evidence did not disclose powerful reasons for removing the third appellant.

Findings and Conclusions

14. In these appeals, the appellants must prove the facts and matters they rely upon and the standard of proof is that of a balance of probabilities. As noted above, there is no issue of any real substance between the parties regarding the evidence. The family includes two qualifying children, [LO], a British citizen child who has been living in the United Kingdom continuously for ten years and nine months and [RO], not a British citizen but present here for seven years and eight months.

15. The parents of the family, the first and second appellants, are overstayers and have been so for some fourteen years. Their immigration histories are manifestly poor. There is, however, no evidence showing any criminality or repeated breaches of the Immigration Rules, as was the case with the parents in NS, one of the appeals heard with KO. The first and second appellants are not liable to deportation.

16. The evidence before the Tribunal includes letters of support and school reports which show that all the children of the family are well settled here. A report from a social worker found that removal of the children to Ghana, a country they have not visited, would have a substantial adverse impact upon them. There is no reason to depart from the assessment made by the First-tier Tribunal Judge that all the appellants have well-established private life ties here and that the family members are close and well-integrated into the community. The evidence strongly suggests that the best interests of all the children are to remain here, with their parents. As is made clear in KO the proper context, however, is whether their parents will have to leave. As they are overstayers, it might be said that they have no right to remain here and so, as was the case in NS, on one view the natural expectation would be that the children would return to Ghana with them, as explained by Lord Carnwath in paragraph 51 of the judgment in KO. He observed that there was nothing in the evidence in NS reviewed by the judge in that case to suggest that leaving would be other than reasonable.

17. There are, however, several material differences between the present appeals and NS. First, and perhaps most important, the third appellant, [LO] is a British citizen child. The current version of the IDI, published in February 2018, distinguishes between the two categories of qualifying children.

18. As noted above, there is no criminality and nothing to suggest repeated breaches of the Immigration Rules on the part of the first and second appellants, in contrast to the circumstances of the parents in NS.

19. It is clear from KO that the test of "reasonableness" under section 117B of the 2002 Act is self-contained, with no requirement or room to consider criminality or misconduct of a parent as a balancing factor. This is also so in relation to paragraph 276ADE(1)(iv) of the rules. The parents' circumstances may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave.

20. Taking into account the respondent's guidance, a material factor in the light of SF, the evidence does not disclose any strong or powerful reasons requiring [LO]'s removal to Ghana, and, similarly, the evidence does not disclose such reasons in relation to the non-British qualifying child of the family, [RO]. The immigration history is poor but not unusual. The children are well-settled and the best interests of [LO] in particular (but also [RO]) are that they should remain here, in the country of their birth and development. The question whether the parents' status as overstayers leads to their having to leave, cannot be answered in isolation from the best interests assessment of the children, and [LO] and [RO] in particular. [LO]'s British nationality is, of course, not a trump card and it would be a mistake to proceed on the basis that there are no circumstances in which she might be expected to relocate abroad. Nonetheless, the clear answer in the light of the evidence is that it would not be reasonable to expect her to leave the United Kingdom, for the purposes of the private life rule under paragraph 276ADE(1)(iv) and the same answer applies in [RO]'s case. As section 117B(6) of the 2002 Act was intended to have the same effect (see paragraph 17 of the judgment in KO), it would not be reasonable to expect the British citizen child [LO] or her Ghanaian sister [RO] to leave, for the purposes of the statutory provision. Neither parent is liable to deportation and each has a genuine and subsisting parental relationship with all their children, including the two qualifying children. The public interest does not require either parent's removal, taking into account the guidance in the February 2018 IDI and the absence of any strong or powerful reasons showing that removal of the children is the proper course.

21. The evidence shows that the parents have established private life ties in the United Kingdom, albeit that as overstayers for many years, section 117B(5) of the 2002 Act provides that little weight should be given to these ties as their immigration status is precarious. Nonetheless, little weight is not the same as no weight and will be sufficient to tip the scales in the first and second appellant's favour where the State's case is reduced to the extent that the public interest does not require their removal, by virtue of section 117B(6).

22. Overall, therefore, in the light of the best interests assessment and the finding that it would not be reasonable to expect [LO] or [RO] to leave the United Kingdom, when striking the overall balance between the competing interests, the balance falls in favour of the appellants and their appeals are allowed.

Notice of Decision

The decision of the First-tier Tribunal having been set aside, it is remade as follows: the appeals are allowed.

Anonymity

There has been no application for anonymity and I make no order or direction on this occasion.

Signed Date: 18th January 2019

Deputy Upper Tribunal Judge R C Campbell

TO THE RESPONDENT
FEE AWARD

The appeals have been allowed in the light of guidance from the Supreme Court which emerged in the course of the proceedings. In these circumstances, I make a fee award of half of the amount of any fee which has been paid or is payable.

Signed Date: 18th January 2019

Deputy Upper Tribunal Judge RC Campbell