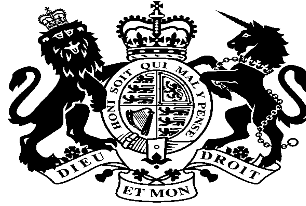

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/27077/2016
HU/27084/2016
HU/13499/2016
HU/13503/2016

THE IMMIGRATION ACTS

Heard at: Manchester CJC
On: 25 March 2019

Decision & Reasons Promulgated
On: 28 March 2019

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

A1
A2
A3
A4
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Mrs Sobande, Living Spring Solicitors
For the respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

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Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellants.

1. I have made an anonymity order because this decision refers to the circumstances of A1's three children - A2, A3 and A4.

Background

2. A1 is a citizen of Nigeria. She entered the United Kingdom ('UK') as a visitor in 2010 along with A2 (born in 2007), and they overstayed. A3 and A4 are twins and were born in the UK in 2010. All the appellants reside with A1's mother – B.

3. In decisions taken in 2016, the respondent refused to grant the appellants leave to remain on the basis of their human rights. In a decision sent on 26 October 2017, the First-tier Tribunal ('FTT') dismissed the appellants' appeals against these decisions, and found that it would be reasonable to expect the three "qualifying children" to live in Nigeria with A1.

4. In a decision dated 4 September 2018, Upper Tribunal ('UT') Judge Storey considered it arguable that there was an error of law in the application of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

Hearing

5. At the hearing Mrs Sobande relied upon three grounds of appeal set out in a written skeleton argument. She also made an application to submit further evidence in support of ground one. Mr Bates did not object to this evidence being submitted but invited me to find it made no material difference to the FTT's reasoning or ultimate decision.

6. After hearing from both representatives I reserved my decision, which I now give with reasons.

Error of law discussion

7. The majority of the submissions in the grounds of appeal simply disagree with the FTT's decision. There is a repeated assertion that the FTT failed to properly address the best interests of the children. That submission is hopeless. The FTT clearly treated the best interests of the children as a primary consideration at [16], [17] and [30] of its decision. When the decision is read as a whole, the FTT took all relevant matters concerning the children into account when making its assessment on best interests and reasonableness for the purposes of s.117B(6) of the 2002 Act.

8. I now turn to the more specific grounds of appeal.

(1) Residence order

9. Judge Storey regarded the FTT's approach to the reasons B obtained a residence order in respect of the children to be arguably "problematic".

10. On 1 July 2012 after hearing from A1 and B, HHJ Allweis granted a residence order in favour of B, in respect of all three children. In the grounds of appeal, it is asserted that the residence order was obtained in 2011 but child benefits did not begin to be paid to A1's mother until 2015. At the hearing before me Mrs Sobande accepted that the residence order is dated 1 July 2012. She also relied upon a letter from HM Revenue and Customs dated 17 April 2015, that was not before the FTT. This informs B that changes were being made to the amount of child benefit being paid to her and records the claim for child benefit having been allowed from 22 December 2014, with a total amount payable of £74.70 per week.

11. Mrs Sobande invited me to find that this demonstrated a period of more than two years between the residence order and the payment of child benefit. She submitted that the FTT was therefore mistaken to assume at [29] of the decision, that it was more likely that the residence order was obtained as a matter of convenience and to enable B to access state benefits as opposed to A1 not being able to look after her children.

12. Mr Bates submitted that the HMRC evidence did not name the children and was insufficient to support the submission being advanced but in any event did not materially impact the conclusion on reasonableness.

13. I do not accept that the FTT's reference to the residence order having been obtained as a matter of convenience rather than for the protection of the children constitutes an error of law to justify setting aside the decision for the reasons I set out below.

14. Firstly, the appellant has not been able to take me to any clear evidence regarding the timing of the applications made for state benefits in respect of the three appellant children. It is for the appellant to establish that the FTT made a mistake of fact that caused unfairness, and she has failed to do so.

15. Second, even if there was a mistake of fact regarding the reasoning for the residence order in 2012 I do not accept that this has caused unfairness. I acknowledge there was limited evidence before the FTT to the effect that A1 was experiencing moderate mental health difficulties in 2011, which was adversely impacting upon her parenting ability in 2011 and 2012 – see a letter dated 7 November 2011 from African and Caribbean Mental Health Services. This evidence is of limited utility as it predates a risk assessment dated 12 June

2012 (referred to in the FTT decision at [20]) in which it was concluded that A1 was not taking treatment and no action was required at time. I also note that the claim that A1 depended upon B in 2011 and 2012 is inconsistent with the evidence in the report dated 22 October 2010 prepared by an independent social worker, to the effect that B was in poor physical and mental health, and was therefore dependent upon A1.

16. However, by the time of the hearing before the FTT there was a significant change in circumstances. The FTT made it clear at [20] that although A1 had depression in the past, there was no up to date evidence this remained a concern. When the decision is read as a whole it is clear that the FTT did not accept A continued to suffer from any mental health concerns. The relevance of the reference to the residence order was simply to underline the point that there was an absence of cogent evidence to support any claim that A1 was incapacitated by a mental health condition in the past or at the date of the hearing. That finding remains apt notwithstanding the timing of any claim for child benefit.

(2) Funding to support the appellants in Nigeria.

17. This ground merely disagrees with the FTT's clear factual finding that the appellants could be financially assisted by B and A1's sister when they initially settle in Nigeria, and would not be without adequate maintenance and accommodation. This finding was open to the FTT given the following matters, inter alia: B was retired but worked two to three times a week and did not entirely depend on child benefits; A1 is a graduate in architecture and has demonstrated resourcefulness to equip her to find a job in Nigeria, having worked there in the past.

(3) Reasonableness test

18. Section 117B(6) of 2002 Act states as follows:

> "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."

19. In KO (Nigeria) v SSHD [2018] UKSC 53 the Supreme Court concluded that reasonableness was to be considered in the real world and as such it would normally be reasonable for the child to be where the parents were expected to be. To the extent that Elias LJ in MA (Pakistan) v SSHD [2016] EWCA Civ 705, suggested otherwise, the Supreme Court disagreed.

20. Mrs Sobande's grounds of appeal and skeleton argument omitted any reference to KO (Nigeria) and only relied upon MA (Pakistan). When I invited her to explain how the FTT had erred in law given the approach set out in KO (Nigeria), she was unable to do anything other than repeat disagreements with the FTT's findings of fact. I am satisfied that the FTT adopted the approach to section 117B(6) set out in KO (Nigeria): the only viable parent of the children has been in the UK unlawfully for many years; she (and therefore her children) are expected to be in Nigeria. The FTT essentially asked itself whether, notwithstanding that their best interests support them remaining in the UK, it would be reasonable for the children to reside in Nigeria with their mother. The FTT has therefore followed the approach recommended in KO (Nigeria), as applied in JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC). The FTT has not sought to attribute blame or punishment upon the children, but has carefully assessed their best interests in the real world. The FTT was mindful of the fact that the children would no longer be living with B and the impact this would have on their best interests. The FTT however found that they each had an ordinary grandchild / grandparent relationship at [19] of its decision. There was no attempt in the written grounds of appeal or the oral submissions before me to go behind this factual finding.

Decision

21. The FTT decision does not contain an error of law and is not set aside.

Signed: *UTJ Plimmer*

Ms Melanie Plimmer
Judge of the Upper Tribunal

Dated: 25 March 2019