Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/06073/2015
IA/06074/2015
IA/06075/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 5 April 2016	**On 11 April 2016**

Before

Upper Tribunal Judge Southern

Between

[A A]
[S A]
[D A]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not represented
For the Respondent: Mr T. Wilding, Senior Home Office Presenting Officer

DECISION

1. The first appellant is the mother of the second and third appellants. Each is a citizen of Nigeria. The first and second appellants arrived in the United Kingdom in November 2005 and were admitted as visitors. They overstayed that leave and have remained unlawfully since then. The third

appellant was born in the United Kingdom on [ ] 2007 and has not been the recipient of any leave to remain. An application for leave to remain on the basis of rights protected by article 8 of the ECHR was refused on 28 September 2010. This appeal is concerned with the respondent's decision of 28 January 2015 to refuse a subsequent application made on behalf of all three appellants.

2. The appellants have been granted permission to appeal against the decision of First-tier Tribunal Judge Bart-Stewart who, by a decision promulgated on 23 August 2015, dismissed their appeal. At the date of the hearing before the judge the first appellants' children were aged 12 and 7 years old respectively.

3. The grounds for seeking permission to appeal are drafted by Ms P Solanki, counsel who appeared before the judge, and are supported by written notes made by both her and Ms F. Clarke who was at that time undertaking a mini-pupillage with counsel's chambers at 1 Pump Court and who had accompanied Ms Solanki on this day to observe proceedings at Taylor House. Those grounds raise some serious complaints calling into question the fairness of the hearing and sustainability of the conclusions reached by the judge in dismissing the appeal. [AA] appears before the Upper Tribunal without the benefit of legal representation because she has been unable to fund representation. She was assisted in presenting her case by Mr Daniel, who is a Pastor at the church attended by [AA] and who gave oral evidence before the First-tier Tribunal.

4. In challenging the decision of the First-tier Tribunal, the appellant adopts the grounds settled by counsel. For present purposes those grounds, distilled to their essence, can be assembled under four main headings and summarised as follows.

<u>The appellants were denied a fair hearing</u>

a. The judge was "rude , dismissive and she simply failed to engage with the case and arguments advanced"
b. The judge "displayed anger" towards the first appellant's youngest child, saying that he should not be present;
c. The judge "appeared completely distracted; she looked out of window; she did not make notes and/or wrote notes very infrequently, she made no eye contact and spoke only to dismiss my arguments";
d. The judge failed to address material issues and submissions
e. The judge did not take time to consider large bundle submitted on the day of the hearing, it being important for her to have familiarised herself with that evidence as the respondent was not represented.

The judge refused an application for an adjournment but gave no reasons, contrary to Presidential Guidance Note No 2 of 2010

f. The purpose of seeking an adjournment was because the first appellant wished to instruct an independent social worker to consider best interests of the children;
g. The judge should also have considered an adjournment to allow the respondent to consider the new documentary evidence: see *MNM v SSHD* [2000] INLR 576 and to allow the respondent an opportunity to respond to submission that she failed to apply a relevant and applicable policy.

Policy issues:

h. The judge did not engage with the arguments and so missed the point being made and did not address it in her decision**.**
i. The judge was referred specifically (both in submissions and the skeleton) to the need for "strong reasons" (see paragraph 16 of the decision) but does not deal with this or consider that submission in the decision.

The approach taken by the judge to her assessment of the appellants' case under article 8 and 276ADE was fundamentally flawed:

j. This assessment should have been informed by issues of the policy above but was not;
k. The finding made by the judge at para 19 that employers would be "desperate" to retain mother's services on return was speculative and unsupported by any evidence;
l. At para 26 the judge wrongly imported a test that is absent from the immigration rule, that the appellants are required to show that they could not reasonably integrate on return to Nigeria. There is no such requirement in 276ADE

5. It can be seen from this that counsel who appeared before the judge has set out a comprehensive challenge to the way in which the hearing was managed and what is said to be a failure of the judge to engage with the case being advanced. Counsel said in her written note that her clients and their witnesses were "very unhappy and said they wished to make a formal complaint about the judge". In her written note, Ms Clarke said of the application being made for an adjournment:

> "… Mrs Solanki advanced two separate arguments in favour of an adjournment of the case. These arguments were dismissed very quickly, both times with Mrs Solanki mid-sentence when she was rebuked."

6. For the respondent, Mr Wilding submitted that when each of the complaints raised is examined in isolation it can be seen than none is, in

fact, made out to the extent of identifying an error of law that can properly be considered to be material to the outcome of this appeal. The complaint about the way in which the judge conducted herself is expressed in vague and particularised terms. The application for an adjournment was properly refused. He described the complaint at failure to have regard to an applicable policy, such that strong reasons were required to refuse the application, as a "non-point" because this simply reflected the fact that there was a sliding scale informed by the length of residence of the child, something that the respondent plainly had regard to in arriving at her decision. Finally, while it may be possible to detect an expression of what was required by para 276ADE that was not absolutely correct, read as a whole it can be seen that the judge applied the appropriate tests and was doing no more than to try to reach an assessment of the rights of the family unit as a whole rather than artificially considering as separate issues the claims of the children and their mother.

7. In respect of that last point, it might be observed that such an approach does not sit comfortably with the recent guidance provided by a presidential panel of the Upper Tribunal in *PD and Others (Article 8 - conjoined family claims) Sri* Lanka [2016] UKUT 108 (IAC).

8. There is some merit in Mr Wilding's submission in respect of each of the grounds considered individually, although difficulties do remain. I have looked carefully at the record of proceedings made by the judge. This is by any view a brief document but there is no obligation upon the judge to make a verbatim record of what has been said at the hearing. It can be seen that an application was indeed made for an adjournment, although the written decision of the judge is silent as to this. The record of proceedings opens with this note:

> "Application
>
> Solicitor has been unwell – Home Office not seen bundle
> Trying to gather funds for independent social worker's report. Whether in best interests of children. Supported by church.
> CBC- Not going to adjourn – has support of her church-had since January 2015."

9. It is hard to see how an adjournment could be justified for further time to secure a social workers report when the explanation for its absence was an inability to fund it. However, [AA] and Mr Daniels asserted that the judge had been told not that the appellant was trying to gather funds for the report but that the church had actually provided the funds required for it. The second reason advanced for an adjournment, which was that the respondent should have the opportunity to see the new bundle of documentary evidence, was entirely unpersuasive, given that it was open to counsel to draw to the attention of the judge anything upon which reliance in particular was being placed.

10. Similarly, it is clear that the respondent did not leave out of account the length of residence in the United Kingdom accumulated by the children and the judge was alert to the submission being made in that respect because she referred to it, specifically.

11. Despite that, the grounds must be considered as a whole. When counsel feels able to make a written assertion to the effect set out above of that which is said to have gone wrong at the hearing, one is left with an uncomfortable feeling that a reasonable and well informed observe may very well have been left with the impression that the appellant has not received a fair hearing. That concern is reinforced by a number of other matters.

12. The record of proceedings certainly does suggest that a reason was given for refusing the adjournment. But the note from the observer suggests that not only was counsel interrupted before completing that submission but that in refusing the application the judge was giving the appearance of delivering a “rebuke”.

13. Also, even accepting that which is recorded in the record of proceedings, it appears that no reason was given by the judge for refusing the second limb of that application. As the grounds point out, the Presidential Guidance Note anticipates something more than this in explanation of a decision to refuse an application for an adjournment:

> “If a judge receives an adjournment application at a hearing and refuses it, the judge should give reasons to the parties. The reasons should be noted in the record of proceedings with the expectation that the adjournment application and decision will be included in the decision and statement of reasons subsequently issued.”

14. Given what I have said about the fact that this was not a compelling or cogent application for an adjournment, it is unlikely to be a material error of law that the application was refused. However, it seems that no reason at all was given for rejecting the second limb of the application and the way in which the judge did so, taken together with the complaint of how the judge conducted herself in the hearing means that the very decision to refuse to adjourn, even if justified, was taken in a manner that contributed to a concern that the complaint about fairness is reinforced.

15. At paragraph 19 of her decision the judge explains why it would be reasonable to expect the children to return with their mother to Nigeria. An important part of this reasoning was that:

> “… Their mother is a qualified microbiologist and while she claims she was unable to find work as a microbiologist in Nigeria, on her oral

> evidence she limited her search to private companies making no reference to the many Government clinics and hospitals which are likely to be desperate for her services."

The difficulty with that is that in the brief note of the appellant's oral evidence made by the judge in the record of proceedings the judge recorded that her evidence was precisely the opposite, and that she had tried to find work with "Government hospitals" as well as "private places" but she said that few had called her back. This error in reciting the appellant's oral evidence in respect of a pivotal finding of fact contributes further to the concern that there has been an appearance of unfairness, even if that was not intended by the judge.

16. I take account of the fact that this is a decision by an experienced judge who was entitled to manage the hearing robustly. However, this particular hearing was conducted in a manner that left the appellant and her witnesses feeling upset and in a manner that led equally experienced counsel to consider it appropriate to record the concerns that she did. I am satisfied that a reasonable and well informed observer of these proceedings would have entertained real concerns at the fairness of the hearing.

17. Drawing all of this together, I am satisfied that the grounds have identified that there has been an appearance of procedural unfairness such as to constitute an error of law.

Summary of decision:

18. First tier Tribunal Judge Bart-Steward made an error of law material to the outcome of this appeal.

19. The appeal to the Upper Tribunal is allowed to the extent that the decision is set aside and the appeal is remitted to be determined afresh by a different judge of the First-tier Tribunal.

Signed

Date: 6 April 2016

Upper Tribunal Judge Southern