Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/24684/2015**

IA/31755/2015

HU/00802/2016

,

HU/00806/2016

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 25th April 2017	**On 15th June 2017**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

ECO
PCO
BCO
GOO
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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 original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For the Appellant: Mr Atueabe, R&A Solicitors
For the Respondent: Mrs M.Aboni, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The respondent has permission to appeal the decision of First-tier Judge Lever who, following a hearing in September 2016, allowed the appeals. For convenience I will continue to refer to the parties hereinafter as they were in the First-tier Tribunal.

2. The appellants are siblings from Nigeria. They came to the United Kingdom as children in the company of their mother in 2005/2006 on visit visas. They then overstayed and have remained here since.

3. First-tier Judge Lever found that the appellants' parents brought them to the United Kingdom intending they would overstay and benefit from life here including getting a free education. Their parents were relatively wealthy, their mother being an accountant. When immigration control eventually caught up with the family their parents left them to be cared for by the State. Since September 2012 Manchester City Council has been providing them with free accommodation and supporting them financially. The judge said that the eldest appellant, B, was placed in the position of being the main carer of her siblings.

4. Their mother went to Dublin with another sibling. In the Republic of Ireland she gave birth to another child and she is now an Irish citizen.

5. The appellants are aged 23, 22, 20 and 16. E has been in the United Kingdom from the age of 12 to 22, B from 13 to 23, P from 10 to 20, and G from 6 to 16.

6. The judge referred to the reprehensible conduct of their parents but said that no blame should be attached to the appellants who were children at the time. In line with the decision of PD [2016] UKUT 00108 the judge considered their claims jointly.

7. The judge concluded that G succeeded under the immigration rules because she was 16 years of age and was assisted by paragraph 276 ADE (1)(iv). She was entitled to remain on the basis of private life as she was under the age of 18 and had lived continuously in the United Kingdom for at least seven years and

it would not be reasonable to expect her to leave. The judge said that the case of G could not be considered in isolation.

8. The other appellants could not succeed under the rules because of their ages. The judge concluded that it was appropriate to consider their situation outside the rules. The judge referred them being abandoned by their parents and left destitute. Whilst they are now adults the judge found a greater and deeper family life between them than was the norm because of their circumstances. The judge allowed their appeals on a freestanding article 8 basis.

9. The judge did not consider section 117 B (1)-(5) on the basis that section 117B (6) applied. This provides:

> 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 was a qualifying child, and
> (b) it would not be reasonable to expect the child to leave the United Kingdom.
>
> A qualifying child means someone under the age of 18 who has lived in the United Kingdom for a continuous period of seven years or more.

10. The judge went on to say that whilst the appellants may have come from a reasonably moneyed family in Nigeria it was uncertain whether they had a home in the country. The judge accepted they had limited relatives in Nigeria but they were not close. The judge accepted they had not been in contact with anyone from Nigeria for over 10 years. The judge concluded they could not look for support from either parent: they were unlikely to return to Nigeria.

The appeal

11. Permission to appeal was sought on the basis the judge failed to adequately consider the reasonableness of G leaving the United Kingdom. It was submitted that the judge had entirely discounted the poor immigration history of the appellants on the basis the fault lay with their parents. Reference was made to the Court of Appeal decision in MA Pakistan and others 2016 AWC CAV 705 and that the test involves balancing factors, including the public interest and the interests of the child. The judge had failed to balance adequately the public interest in the face of serious deception.

12. Reference was also made to the absence of consideration of the factors set out in section 117B, including the cost to the public purse of the family. It was contended the judge materially erred in applying section 117B (6) as there was no reasoned finding as to how the three adult siblings were in a parental relationship with G.

13. It was contended that the judge disregarded the potential for their mother, as an Irish national with whom they were in contact, to become involved and assist in their return to Nigeria. It was submitted the judge did not adequately reason why they could not return to their home country, even in the absence of parental support, given they were from a wealthy background; had benefited from a decade of British education; and very likely, still had access to their family home in Nigeria.

14. Permission was granted on the basis the judge did not properly consider the public interest in immigration control nor apply section 117B of the 2002 Act. It was also arguable that the judge erred in concluding a parental relationship existed between the three older appellants and the younger sibling.

15. At hearing the presenting officer, Mrs Aboni, continued to rely on the grounds for which leave had been sought. She submitted that the judge had failed to consider the fact that the appellants would be returned as a group and the youngest child would have the support of her siblings. The judge also failed to consider potential support from their mother. She submitted there was inadequate reasoning as to why the appellant could not return to Nigeria where they had extended family. The judge also erred in relation to section 117B (6) in that a parental relationship did not exist. There was no consideration by the judge of the other sections of section 117B and in particular, the need to demonstrate financial independence. In this case the appellants have been a burden upon the taxpayer and have benefited from the all that the United Kingdom could offer, including free education and financial support. She invited me to set aside the decision and remake it.

16. In response, Mr Atueabe said the youngest appellant came here when she was 6 and was 16 at the time of the appeal. He submitted that her mother and brother in the Republic of Ireland have played no part in her life. She has been going to school here and was active in the community. Regarding section 117B he said Manchester Council had treated the eldest appellant as if she were the youngest child’s main carer.

Conclusions

17. Having considered the points made my conclusion is that the First-tier Judge materially erred in law in allowing the appeals on the basis indicated. I advised the parties of this at the hearing. There being no factual dispute on the judge's findings I remake the decision from the facts there and the evidence within the file.

18. In PD[2016]UKUT 00108 the Upper Tribunal referred to the situation where the claims of several family members coincide and said it would be artificial and unrealistic to determine them on their individual merits in a rigid sequence and in insulated packages(para 21). Consequently, there is interplay between the reasonableness test in 276 ADE (iv) and the claims of the remaining family members.

The position of G and 276 ADE(iv)

19. The youngest child, G, is the only one who potentially has a claim under the immigration rules. This is in relation the requirements for a grant of leave to remain on the basis of private life. Paragraph 276 ADE (iv) applies in so far as she is under the age of 18 and has lived in the United Kingdom for more than seven years. She has exceeded the seven-year benchmark. She is now 16 and has been here since the age of 6. On 13 December 2012 paragraph 276ADE was amended to include whether it would be reasonable to expect the applicant to leave. Consequently, it is not sufficient to simply show 7 years continuous residence. Therefore the issue for her under the rules is the reasonableness of her leaving.

20. In MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705 the Court of Appeal pointed out rule 276ADE (iv) and section 117B (6) are similarly framed: both require seven years' residence and in both, a critical question is whether it would be unreasonable for the child to be expected to leave the UK. The court considered the application of the reasonableness concept in both provisions. Lord Justice Elias having considered various arguments on the reasonableness test took the view that the focus was on the child. His Lordship saw no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of parents as part of an overall analysis of the public interest. He acknowledged that this might result in some cases in undeserving applicants being allowed to remain. As part of the assessment of the reasonableness of her leaving it is necessary to consider the position of her siblings.

21. I set out below my conclusion is in respect of G's siblings. In summary my conclusion is that their removal would not be disproportionate. The intention is that they would be removed as a unit. In that situation I do not find it established that it would be unreasonable to expect G to leave.

Article 8

22. Bossade (Sections 117A-D: Inter-relationship with Rules) [2015] UKUT 415 (IAC) held that a tribunal will first consider an appellant's Article 8 claim by reference to the Immigration Rules. This exercise is performed without reference to Part 5A which is engaged directly only where the decision making process reaches the stage of concluding that the person does not satisfy the requirements of the Rules. Thereafter, Part 5A will be applied in the determination of the proportionality question.

23. I have considered G on a freestanding article 8 basis. She is a child. The Supreme Court in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4; [2011] 2 AC 166 that the best interests of the child are a primary consideration which has to be taken into account in all cases where the child's interests are affected. Those interests are incorporated in section 55. In Zoumbas v Secretary of State for the Home Department [2013] UKSC 74; [2013] 1 WLR 3690 it was held that whilst the best interests of a child must be a primary consideration the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant.

24. Her best interests are tied up with her siblings' fate. I find Judge Lever materially erred in law in concluding section 117B (6) applied to them. In R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC) it was pointed out that Part 5A sets out no definition of what constitutes a "genuine and subsisting parental relationship." Para 42 of the decision reads:

> Whether a person is in a "parental relationship" with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have "parental

responsibility" in law for there to exist a "parental relationship," although whether or not that is the case will be a relevant factor. What is important is that the individual can establish that they have taken on the role that a "parent" usually plays in the life of their child.

25. First tier Judge Lever had concluded that the eldest appellant had taken the place of their parents. That role was extended to the other siblings so as to apply section 117B (6). I find no basis for doing this. There is reference in the letter from Manchester City Council dated the 31st August 2016 to B being the main carer of her younger siblings. Beyond that, I do not find it demonstrated that she is acting in a parental role. There is no legal guardianship nor has it been demonstrated she has acted as a de facto parent in relation to significant decisions. There is no evidence of a parental role by the other two siblings. Consequently, the interests of the appellants should have been balance against the public interest considerations in section 117B.

26. I find section 117 B (1)-(4) weighs heavily against the appellants. They have been a significant burden on taxpayers. They continue to rely on public funds. The private life they have established here has developed almost entirely whilst they were here unlawfully. There family life together has similarly continued.

27. The respondent intends returning all four to Nigeria. Consequently, the family unit will not be disrupted. Given the family history of deception comments made in the statements of the appellants must be treated with caution. For instance, the statements suggest their parents leaving came as a surprise and they were unaware of their lack of status. It is claimed they would have no support and would not be familiar with the language and culture of Nigeria. I reject this.

28. Within the papers there is a psychiatric report from a consultant psychiatrist, dated 16 December 2015 in respect of E. There is reference to the interview-taking place via Skype. The report records no past history of contact with the psychiatric services. The report does not indicate that the doctor had access to his medical records. JL (medical reports-credibility) China [2013] UKUT 00145 (IAC) called for a critical and objective analysis. The doctor diagnosed generalised anxiety disorder and delusional disorder. The later is based upon the appellant telling the doctor he imagines he is being watched and followed by immigration services. This relies upon the patients account and a diagnosis of delusional belief is reliant on what is relayed. The doctor concludes that by moving country E’s stress will increase.

The doctor goes on to state he would be moving without savings or access to mental health services and would likely end up destitute. The doctor is not in a position to say this however. The doctor makes no reference as to what facilities are available in Nigeria. I see nothing about the report that significantly enhances his claim. It does not indicate he is suffering from any major mental disability.

Summary.

29. I find that G does not succeed under paragraph 276 ADE (iv).This is because I do not find it established that it would not be reasonable to expect her to leave the United Kingdom. Regarding her freestanding article 8 rights her best interests are to be with her siblings. I find that section 117B (6) does not apply. The public interest favours their removal. Even were it in her best interest to remain I find this outweighed by the needs of immigration control in the circumstance.

Decision

The decision of First-tier Judge Lever allowing G's appeal under the immigration rules and the appeals of the other appellants on a freestanding article 8 basis materially errs in law and is set aside.

I remake the decision dismissing all of the appeals.

Deputy Judge Farrelly

14th June 2017