



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/10739/2016
HU/10744/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3 July 2018

Decision & Reasons Promulgated
On 6 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

RABIAT [A](1)

[M U] (2)

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Allen, Counsel

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. This is an article 8 appeal. The appellants are citizens of Nigeria. The first appellant claims she entered the UK in 2004 as a visitor. She has certainly not had leave since then. The second appellant, her son, was born in the UK on 2 May 2008. He has never had leave to remain. On 5 April 2016 the respondent made a decision to refuse the appellants leave to remain on human rights grounds. I shall summarise the reasons for refusal.

2. In terms of the 10-year family life route under the Immigration Rules, the first appellant could not succeed because, although the second appellant had lived in the UK for over seven years, it was not considered unreasonable for him to leave the UK and continue his family life in Nigeria. In terms of the 10-year private life route, it was not considered that there would be very significant obstacles to the first appellant's integration in Nigeria. The second appellant was not eligible under the 10-year routes either.
3. In terms of exceptional circumstances, the letter noted the application raised concerns about the health of both appellants. The first appellant was diagnosed with breast cancer in 2009 and was suffering from diabetes and hypertension. The second appellant was born with a hole in his heart. Both appellants required check-ups. However, the appellants' conditions did not appear to be life-threatening and Nigeria has a healthcare system capable of assisting them. In terms of the best interests of the second appellant, he would be returning to Nigeria with the first appellant who could support him. Nigeria has a functioning education system. It was noted the first appellant previously entered the UK illegally through an agent and, since 2004, had "gone to ground" without making any attempt to regularise her stay prior to an application in 2010. She then waited until 2015 make another application. She had accessed NHS treatment she was not entitled to.
4. The appellants' appeal was heard by Judge of the First-tier Tribunal Nicholls at Taylor House on 27 October 2017. The appellant was represented by counsel. The judge noted that, at the date of hearing, the second appellant was nine years old. The judge directed himself that the fact that child had been in the UK for more than seven years must be given significant weight when carrying out the proportionality balancing exercise because he would have put down roots and developed social, cultural and educational links in the UK such that it was likely to be highly disruptive were he required to leave the UK. He directed himself that the conduct and immigration history of the child's parent were not relevant considerations when assessing the best interests of the child. However, when balancing the weight to be given to the best interests of the child with the weight to be given to the public interest in controlling immigration, he was bound to apply section 117B of the Nationality, Immigration and Asylum Act 2002.
5. The judge found there was no doubt that the best interests of the second appellant were to live with his mother. He found the first appellant had been in receipt of medical care for breast cancer and diabetes. The second appellant's medical condition had now been satisfactorily resolved. The judge noted the second appellant's progress at school and he accepted the second appellant had only ever lived in the UK and had been attending school for nearly 5 years. He did not have any special educational needs and there were no anxieties about his health. He was still of an age at which he could adapt to changing environments, particularly if he were to have close family to support him. Whilst it was clear that his best interests would be to remain in the UK, the weight given to those best interests was "not unusual nor increased by any special factors". The judge noted the first appellant's immigration history was "a bad one", which included the use of an agent to secure entry to the UK and delay in seeking to

regularise her status. Little weight could be given to private life ties when a person was in the UK unlawfully.

6. The judge therefore turned to section 117B(6), which provides that the public interest does not require a person's removal if she has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. When assessing the reasonableness issue, the judge directed himself that the first appellant's conduct should be taken into consideration. The weight to be given to controlling immigration was substantial. He noted the key factors in favour of the appellants, including the position of the second appellant, his length of residence and his best interests. He also noted the impact of the first appellant's medical conditions, although he did not attach great weight to the argument that the first appellant would be at risk of receiving counterfeit medication in Nigeria. He noted the first appellant has two adult children in employment in Nigeria and that some healthcare is free at the point of use. He concluded there would be medical care available to the first appellant and that any difficulties in paying for medical care did not outweigh the requirements of immigration control. He found, in conclusion, that it had not been shown that removing the appellants would be disproportionate.
7. The appellants applied for permission to appeal in person. The short grounds state that the first appellant suffers from cancer and this limits her ability to find a job and look after the second appellant in Nigeria. This would interfere with his education and livelihood.
8. Permission to appeal was granted by the First Tribunal on the basis that it was arguable the judge had attached insufficient weight to the degree of integration on the part of the second appellant across the social, educational and cultural spectrum of the UK given the adoption of seven years as the benchmark period reflected in the rules and section 117B.
9. The respondent has filed a rule 24 response opposing the appeal, pointing out the reasons for the grant of permission bore no resemblance to the arguments put forward in the grounds.
10. The appellants' solicitors applied to adduce additional evidence showing the second appellant, having now spent ten years in the UK, has applied for British citizenship. Of course, this is only of relevance if the judge's decision is set aside.
11. I heard submissions from the representatives on the question whether the judge made a material error of law in his decision.
12. Ms Allen argued the judge had erred in his assessment of the weight to be given to the length of the second appellant's residence and the threshold of reasonableness. She argued the judge should have started from the point that the second appellant had been in the UK for 9½ years, which would attract significant weight. Whilst the judge had noted this matter, his decision did not show that he had given it significant weight. When assessing private life generally, he had directed himself to start from the position that little weight could be given to the appellants' private life. The judge had suggested

special factors were required and he had focused on the negative aspects of the case, such as the absence of medical or educational needs. He had ignored the evidence that the second appellant had many friends. He had thereby impermissibly elevated the threshold which the appellants had to surmount.

13. Mr Melvin argued the judge's decision should stand. He had directed himself correctly as to the tests to be applied. His conclusions were based on the evidence and were not irrational.
14. I reserved my decision as to whether the decision contains a material error of law. Having carefully considered the grounds seeking permission to appeal and the submissions of the representatives, none of which were based on the original grounds, I have concluded that the decision of the First Tier Tribunal does not contain any material error of law. My reasons are as follows.
15. It is clear from paragraph 11 of the decision onwards that the judge had in mind the correct legal tests and he set out a number of passages from the judgment of Elias LJ in *MA (Pakistan) v SSHD* [2016] EWCA Civ 705, including paragraph 49. Ms Allen agreed this is the correct starting-point. The fact the child appellant had been in the UK for seven years would need to be given significant weight in the proportionality balancing exercise. It establishes the starting-point that leave should be granted unless there are powerful reasons to the contrary.
16. In the circumstances that the judge has expressly directed himself in these terms, it is difficult to argue that he failed to adopt this starting-point. It is clear from the decision as a whole that the judge was fully conscious of the length of residence of second appellant and he noted that he had never lived in any other country. While some criticism was made of his references to the evidence of his schooling, it is clear that the judge had read the evidence from his school. I think his decision is best understood as meaning that he found nothing in that evidence which showed that the second appellant would be unable to continue his education in Nigeria. That is clearly a finding which the judge was entitled to make and I note that Ms Allen made no submissions along the lines indicated by the original grounds seeking permission to appeal that the first appellant's health problems would mean she would be unable to look after the second appellant. Happily, it seems that her health problems have been resolved. In any event, the judge found there would be family members to assist with supporting the appellants.
17. Moving forward through the decision, the judge identified that the best interests of the second appellant required him to remain living with the first appellant and, later in the decision, he made it clear that his best interests also would be to remain in the UK. In reaching this conclusion, he did not give particular weight to any health concerns relating to the second appellant which also appear to have been resolved. It is clear that the judge gave weight to his finding on the best interests of the child when conducting the proportionality balancing exercise, as he was required to do.

18. The judge's reliance on *MA (Pakistan)* is also significant because it was that case which held that, when considering the reasonableness of expecting the child appellant to leave the UK, the immigration history of the adult appellant had to be taken into account. That is what this judge did. He regarded the first appellant's immigration history as a very bad one because she had entered the UK illegally and she had failed to take any steps to regularise her stay for a lengthy period of time. I see no error in this approach.
19. Nor do I see any error in the judge's approach to the section 117B factors. It was suggested to me that paragraph 24 of the decision showed that he had muddled up the assessments to be made with respect to the first and second appellants and that this was another error in terms of how the judge structured his decision. I do not accept that argument. The judge was required to have regard to the factors listed in the section. It is sufficiently clear that he applied the section to his proportionality balancing exercise. He was plainly aware that the second appellant was a 'qualifying child' and that, as such, there was no public interest in removing him if it would not be reasonable to expect him to leave the UK (see paragraph 19 of the decision). However, as seen, he concluded on the basis of the facts that it was reasonable to expect the second appellant to leave the UK.
20. The challenge to the decision mounted on behalf of the appellants essentially disagrees with the outcome of the balancing exercise as conducted by the judge. However, once it is clear that the arguments that he used the wrong starting-point or applied an elevated threshold to his consideration of reasonableness have fallen away, Mr Melvin was right to observe that it was for the judge to give such weight as he considered appropriate and his decision in this case could not be classed as irrational.
21. I find no error in the decision, which is upheld. The appellants' appeal is dismissed.

Notice of Decision

The Judge of the First-tier Tribunal did not make a material error of law and his decision dismissing the appeal shall stand.

No anonymity direction is made.

Signed

Date 4 July 2018

Deputy Upper Tribunal Judge Froom