Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13926/2016
HU/13933/2016
HU/13929/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11 May 2018

Decision & Reasons Promulgated
On 25 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

S M O – FIRST APPELLANT
OV D T A – SECOND APPELLANT
E I E D A – THIRD APPELLANT
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A N Ikie, Legal Representative.
For the Respondent: Ms A Fizikiala, Home Office Presenting Officer.

DECISION AND REASONS

1. Albeit that anonymity directions were not made in these proceedings in the First-tier Tribunal I consider, given the age of the second and third Appellants that it is appropriate to do so.

2. The Appellants are all citizens of Nigeria. The first Appellant is the mother and the second and third Appellants are children born in the United Kingdom and at the time of the hearing before the First-tier Tribunal aged 8 years and 5 months and 6 years and 11 months. They appealed against the decisions of the Respondent to

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refuse them leave to remain in the United Kingdom on human rights grounds. That appeal was heard by Judge of the First-tier Tribunal Thew who, in a decision promulgated on 17 November 2017, dismissed it.

3. The Appellants sought permission to appeal which was initially refused. However, a renewed application was made and in a decision dated 12 March 2018 Upper Tribunal Judge Canavan gave her reasons for granting permission. They are: -

> "1. The appellant seeks permission to appeal the decision of First-tier Tribunal Judge Thew ("the judge") who, in a decision promulgated on 17 November 2017, dismissed her appeal against the respondent's decision to refuse a human rights claim.
>
> 2. The judge directed herself to the correct legal framework relating to the weight to be given to the best interests of children who are in the UK [18-20 & 25]. It is also clear that she gave weight to the fact that at least one of the children had been resident in the UK for a continuous period of seven years at the date of the hearing [32]. However, it is at least arguable that the judge did not make any clear findings as to whether the best interests of the children lay in remaining in the UK or returning to Nigeria with their parents.
>
> 3. It is also arguable that the judge's findings focussed on the practicalities of return to Nigeria rather than balancing the best interests of a 'qualifying child' against relevant public interest considerations. The respondent's policy on family and private life (10-year route) states that "strong reasons" must be given to outweigh the interests of a non-British child who has been continuously resident for a period of seven years. Although the judge noted that there was no suggestion that the children's mother "has any adverse immigration history", in fact, she had no leave to remain since 2008. It seems that she made several unsuccessful applications to regularise her status since then. On the face of it, the appellant's immigration history was not at the serious end of the scale of breaches of immigration control e.g. deliberate or repeated breaches involving deception or false documents. The judge arguably failed to consider whether the appellant's immigration history was sufficiently poor to outweigh the interests of the children. It is at least arguable that the judge failed to follow her own direction, which required her to consider whether the best interests of the children were outweighed by the cumulative effect of public interest considerations.
>
> 4. However, the point relating to the section 120 notice appears to be immaterial given that the test of "reasonable to expect the child to leave the UK" is the same as the one considered under section 117B(6) of the Nationality, Immigration and Asylum Act 2002" ("NIAA 2002").
>
> 5. Permission to appeal is granted."

4. Thus, the appeal came before me today.

5. At the outset of the hearing Mr Ikie handed up the following: -

   a) **Zoumbas v SSHD [2013] UKSC 74**

   b) **MA (Pakistan) and Others v SSHD [2016] EWCA Civ 705**

   c) **Kaur (children's best interest/public interest interface) [2017] UKUT 00014 (IAC)**

   d) Appellant's reply to Respondent's Rule 24 response

   e) A statement of additional grounds

6. Ms Fizikiala handed up: -

   a) **AM (Pakistan) and Others v SSHD [2017] EWCA Civ 180**

   I have taken all the above material into account before coming to my below mentioned decision.

7. Mr Ikie relied upon the grounds for seeking permission to appeal. There are three. Firstly, he asserted that the Judge failed to treat the best interests of the children as a primary consideration. Although the Judge correctly set out the law he maintains that it is "plain" that she treated the best interests of the children as a "secondary" rather than "primary" consideration. He asserts that it is "difficult to identify anywhere in the 45 paragraphs of the adverse determination where the Judge engaged with the requirements of the children's best interests". It was incumbent upon the Judge to firstly identify what the best interests of the children were and where they lay before proceeding to balance them against other material considerations. He relied on the above-mentioned authority of **Zoumbas** and also cited the authority of **PD and Others (Article 8 conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC)** which he submitted was authority for the best interests of the child to be first established before other material considerations were engaged. He then relied, in his second ground, on **PD,** in asserting that it was for the Judge to consider when looking at a conjoined Article 8 claim of multiple family members to firstly apply the Immigration Rules to each individual applicant and, if appropriate, then consider Article 8 outside the Rules. Mr Ikie asserts that the Judge has failed to do this. Finally, he asserts that the Judge erred by failing to resolve a fact in dispute as to whether or not a Section 120 Notice was served, and if served the implication on the assessment of the second Appellant's appeal.

8. Ms Fizikiala relied upon the Respondent's Rule 24 response dated 25 April 2018 wherein it states that the Judge has given careful consideration to the position of the children (for example at paragraphs 38 to 42 of the decision) and that the Judge attached significant weight to the seven years' residence of the second Appellant's position at paragraph 44 of her decision before coming to a conclusion that it was not unreasonable to expect the second and third Appellants to leave the United Kingdom

with their parents. The Judge has considered the best interests of the children whilst recognising that even where the child's best interests are to stay it may still be not unreasonable to require the child to leave. She referred me to paragraph 47 of **MA** which states:

> "Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interests assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so. The concept of "best interests" is after all a well established one. Even where the child's best interests are to stay, it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed he should return. What could not be considered, however, would be the conduct and immigration history of the parents".

The Judge was entitled to find that it was not unreasonable for the second and third Appellants to go to Nigeria. She had considered the position of the children whilst in the United Kingdom including the absence of any medical evidence preventing the children going to Nigeria and the second Appellant's progress at primary school where he has significantly achieved. The Judge has then gone on to attach weight to the public interest in maintaining effective immigration control along with duties under Section 55 before concluding that it was reasonable to expect the second Appellant to leave the United Kingdom along with the first Appellant and third Appellant as part of a family unit. The first Appellant's position in the United Kingdom was always precarious as recorded at paragraph 31 of the Judge's decision which states: -

> "31. There is no evidence of any criminality on the part of the Appellant. Whilst there is an adverse immigration history in that she is an overstayer, and has been since 2009, this does not in my view come under the category of a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules".

Ms Fizikiala referred me to paragraph 27 of the judgment in **AM** which states: -

> "27. In my judgment, there was no material error by the FTT judge and she reached a conclusion well open to her on the evidence. I recognise that the FTT judge had regard to the other public interest considerations specified in section 117B which, in view of MA (Pakistan), she was not entitled to do. But she could legitimately have regard to the matters she considered in the context of applying the reasonableness test. Mr Chelvan submitted that the original grounds of appeal to the UT had envisaged a challenge to the conclusions of the FTT judge, even assuming that the interests of effective immigration control could be taken into account, and that counsel before the UT had never had the opportunity to advance those grounds because the UT had found in his favour

on his alternative ground that the focus should be on the children alone. But in substance the UT did engage with this issue and found nothing wrong with the decision of the FTT on the assumption that wider public interest considerations were engaged. In my judgment there is no realistic prospect of the UT on any reconsideration coming to a different conclusion".

9. Dealing firstly with the Appellant's third ground in relation to the Section 120 notice like Upper Tribunal Judge Canavan I find that this appears to be immaterial given that the test of "reasonable to expect the child to leave the UK" is the same as the one considered under Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. Even therefore if the Judge had erred in failing to consider the second Appellant's appeal under the Immigration Rules such an error would be immaterial in light of the above.

10. This is a decision where the Judge has set out the correct legal framework relating to the weight to be given to the best interests of children who are in the United Kingdom. She sets them out at paragraph 18 onward in her decision. At paragraph 32 she states that she has carefully considered the evidence in relation to each of the three Appellant's and particularly noting that the second Appellant, the first Appellant's son, had been present in the United Kingdom for a period over eight years. The Judge has made clear findings as to whether the best interests of the children lay in remining in the United Kingdom or returning to Nigeria with their parents. For example, she states at paragraph 44 that she has attached the required weight of the public interest in maintaining effective immigration control but goes on to find that the second Appellant's seven years plus residence is a factor to which she attaches significant weight. She also records considering all the factors set out and the duties under Section 55 paying attention to the length of time that the second Appellant has lived in the United Kingdom and the length of time that he has been in the education system in the United Kingdom but comes to a conclusion, which was open to be made, that it is reasonable to expect him to leave the United Kingdom with his mother and sister as part of a family unit. In coming to that conclusion the Judge factored into her analysis at paragraph 33 onward the absence of any medical or health issues relating to any of the Appellants, the fact that first Appellant lived in Nigeria until moving to the United Kingdom at the age of 25 years, the presence of family members in Nigeria and the qualifications that she has attained whilst in the United Kingdom. The Judge took account of the fact that the second and third Appellants would be going to Nigeria with the first Appellant and given their father's lack of status in the United Kingdom and the Home Office statement that he is liable to be removed, there was no reason to believe that both parents would not be with them in Nigeria to assist them in adjusting to life in a different country and to be able to guide them through that process. The Judge also took account of the fact that the first Appellant might have to choose between leaving the second Appellant in the United Kingdom and taking him to Nigeria but on the facts before the Judge it was open for her to conclude, as she did, that leaving him in the United Kingdom would not appear to be realistic if the first Appellant returns, given that the child's father is liable to removal. At paragraph 39 the Judge found that there was no reason to believe that the first Appellant would be unable to provide for the safety and

welfare of the second and third Appellants in Nigeria where she had visited between 2002 and 2009 when she had lawful leave in the United Kingdom. The Judge also factored into this analysis a consideration of the impact of the children, in particular the second Appellant, in leaving friends and school. However, she also found that there was no reason to believe that they would be unable to form such contacts and become involved in such types of activities as they have in the United Kingdom when in Nigeria.

11. The Judge has not simply focussed on the practicalities of return to Nigeria but, upon reading the decision as a whole, has carried out the balancing exercise of the best interest of a "qualifying child" against relevant public interest considerations. In coming to her conclusions, the Judge acknowledged that the first Appellant's immigration history was not at the serious end of the scale of breaches of immigration control and has plainly, amongst other things, considered whether the First Appellant's immigration history was sufficiently poor to outweigh the interests of the children.

12. The Judge, it is acknowledged by the Appellant's representatives, has correctly set out the law. I find that she has not treated the best interests of the second and the third Appellants as "secondary". She has looked at the claims of all three Appellants jointly. She recorded at paragraph 10 of the decision that the Appellant's representative had conceded that at the date of the application originally made, none of the three Appellants had a viable claim under the Immigration Rules and has then gone on to deal with the appeal on human rights grounds subsuming within her Article 8 consideration the best interests of the children.

13. This is a structured decision where the Judge has treated the best interests of the children as a "primary" consideration. The Judge has applied the law before carrying out a balancing exercise and giving adequate reasons as to why she has come to the decision that she has.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision but order that it shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 24 May 2018.

Deputy Upper Tribunal Judge Appleyard