Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00157/2020; HU/00160/2020
HU/00162/2020; HU/00164/2020

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)
On 26 April 2021

Decision & Reasons Promulgated
On 05 May 2021

Before

UPPER TRIBUNAL JUDGE BLUM

Between

KINGSLEY [P]
JOY [A]
[P P]
[D P]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellants: Mr J Plowright, counsel, instructed by Perera & Co Solicitors
For the respondent: Mr S Whitewell, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. These are appeals against the decision of Judge of the First-tier Tribunal Plumptre ("the judge"), promulgated on 6 November 2020, in which she dismissed the appellants' appeals against the respondent's decisions dated 10 December 2019 refusing their human rights claims.

Factual Background

2. The appellants are nationals of Nigeria. The 1st appellant was born on 25 May 1972 and the 2nd appellant, the wife of the 1st appellant, was born on 6 July 1981. The 3rd appellant was born in the UK on 1 September 2013. She is the daughter of the 1st and 2nd appellants. The 4th appellant was born in the UK on 11 August 2015. He is the son of the 1st and 2nd appellants. The 3rd and 4th appellants have continuously resided in the UK since their birth.

3. The 1st appellant entered the UK in February 2002 concealed in a lorry. The 2nd appellant entered the UK in 2005. Her claim to have been trafficked into the UK and to fear for her personal safety in Nigeria as a result have been rejected by both the respondent and the First-tier Tribunal and are not the subject of the 'error of law' appeal to this Tribunal.

4. The 1st and 2nd appellants formed a relationship in 2008. The genuineness and subsisting nature of their relationship has not been disputed. A refusal of an earlier human rights claim made by the 1st appellant led to an appeal before Judge of the First-tier Tribunal Fox, which was heard on 15 April 2015. In a decision promulgated on 28 July 2018 Judge Fox dismissed the 1st appellant's appeal concluding that the 1st, 2nd and 3rd appellants (the 4th appellant was not yet born) return to Nigeria would not breach of paragraph 276ADE(1) in respect of any of them and that the refusal of the human rights claim was proportionate under Article 8 ECHR.

5. The appellants made human rights claims on 12 August 2019. In her decisions dated 10 December 2019 refusing these human rights claims the respondent found there were no very significant obstacles, as required by paragraph 276ADE(1)(vi) of the Immigration Rules, preventing the 1st and 2nd appellants' integration into Nigeria, and that the 3rd and 4th appellants did not meet the requirements of paragraph 276ADE(1)(iv) because they had not resided in the UK for at least 7 continuous years. Nor was the respondent satisfied that there were any exceptional circumstances sufficient to warrant a grant of leave to remain in accordance with Article 8 principles outside the immigration rules. The appellants had a right of appeal to the First-tier Tribunal which they exercised.

The decision of the First-tier Tribunal

6. The judge heard oral evidence from the 1st and 2nd appellants and considered a bundle of documents running to 172 pages. In her decision the judge accurately set out the relevant Immigration Rules, she properly directed herself on the burden and standard of proof, and noted that relevant case law included **KO (Nigeria)** [2018] UKSC 53 and **Younas (section 117B(6)(b); Chikwamba; Zambrano)** [2020] UKUT 00129 (IAC). At [13] the judge noted that the 3rd appellant was now a qualifying child within the definition in s.117D of the Nationality, Immigration and Asylum Act 2002 As she had lived in the UK for a continuous period of just over 7 years at the date of the hearing. The 4th appellant was and is not a qualifying child.

7. At [15] to [18] the judge summarised the medical evidence and school reports relating to the 3rd and 4th appellants. The judge noted in particular, and by reference to a "Communication Clinic Assessment" report written on 4 March 2020 by Dr Jacqueline Bold, Consultant Community Paediatrician, that the 4th appellant had been diagnosed with Autism Spectrum Disorder with severe speech and language difficulties involving both expressive and receptive language schools and was not yet fully toilet trained. A letter from Holy Cross Catholic Primary School dated 28 February 2020 relating to both the 3rd and 4th appellants indicated that both children had Special Educational Needs ("SEN") and were on the SEN register. The judge referred to further evidence relating to the provision of speech and language therapy and support to the 4th appellant and speech therapy to the 3rd appellant.

8. In the section of her decision headed "Findings of Fact and Credibility" the judge directed herself (at [21]) that the best interests of the 3rd and 4th appellants were a primary but not paramount consideration as per the reasoning in **ZH (Tanzania)** [2011] UKSC 4. The judge reminded herself that the immigration history of the parents were not the fault of the children. At [22] the judge found that all 4 appellants would be returned to Nigeria as a family unit and that it was …

> "… clearly in the best interests of the sadly disadvantaged children that they remain living with their parents. I find as per the reasoning in **EV (Philippines)** [a reference to **EV (Philippines) & Ors v SSHD** [2014] EWCA Civ 874] that sadly both children will have the same linguistic and possibly medical or other difficulties to adapting to life in Nigeria as in the UK. I give weight to the terms of the Holy Cross Primary School report that neither of the children is in any position to socially integrate with other children and hence into society in the UK because of their learning disabilities which applies with particular force to the autism spectrum disorder son who as Dr Bold noted prefers to play by himself and not interact with other children."

9. At [23] the judge applied the principles established in **Devaseelan v SSHD** [2002] UKIAT 00702 and, having considered the oral evidence from the 1st and 2nd appellants, found that both had given incredible evidence and concluded

that the 2nd appellant had to adult siblings living in Nigeria who could provide assistance to the family unit on return. No challenge has been made to this finding.

10. At [27], under the heading "Medical Evidence", the judge found that the 1st and 2nd appellants had made few if any enquiries about facilities in Nigeria for children diagnosed with autism spectrum disorder. Having referred to extracts from the CPIN 'Nigeria Medical and Health care Issues Version 3.0 January 2020' the judge noted that the appellants' barrister (Mr Plowright, who represented the appellants at their 'error of law' hearing) was not advancing their case on the basis that health care or medical care was totally unavailable in Nigeria, but was relying on the support network and private life available to the 3rd and 4th appellants in the UK coupled with the private lives of all 4 appellants.

11. At [31] the judge indicated that she was applying the reasoning in **Azimi-Moayed and others (decisions affecting children; onward appeals)** [2013] UKUT 00197 (IAC) that the starting point was that the best interests of children was to be with both their parents and that it was generally in the interest of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. At [32] the judge found again that it was in the best interests of the children that they remain living with their parents, with reference to their medical conditions.

12. Given that the appellants could not meet the requirements of the Immigration Rules, the judge proceeded to consider whether the refusal of the human rights claims would constitute a disproportionate breach of Article 8. From [34] onwards the judge considered and applied the factors contained in s.117B of the Nationality, Immigration and Asylum Act 2002. The judge noted that the private lives of the appellants have been established when the parents' immigration status had always been precarious and she attached little weight to the private lives established by the parents in the UK. At [41] the judge again found that it was in the best interests of both children that they return to Nigeria with their parents as per the reasoning in **Azimi-Moayed**. In the same paragraph the judge considered that the children's learning difficulties and diagnosis of autism spectrum disorder were relevant factors under the Article 8 balancing exercise.

13. At [42] the judge stated:

> "Since the word "and" occurs between Section 117B(6) (a) and (b) the issue is whether or not it is reasonable to expect both children to leave the UK with their parents. The compassionate circumstances of the children's disabilities are considerable but as found earlier, there is health care and mental health provision in Nigeria. I find it reasonable to expect both children to return to Nigeria with their parents and that the respondent's decision is proportionate when set against the provisions of Section 117B."

14. The appeal was dismissed.

The challenge to the judge's decision

15. The grounds of appeal, amplified by Mr Plowright in his further written submissions dated 8 February 2021 and in his oral submissions, contend that the judge's reasoning and approach to s.117B(6) of the Nationality, Immigration and Asylum Act 2002 was inadequate and constituted an error of law. Although it was not in dispute that it was in the best interests of the children that they remain with their parents, the issue whether it was 'reasonable' for the 3rd appellant to leave the UK was of critical importance and the judge failed to refer to the Home Office policy guidance 'Family Policy: Family Life (as a partner or parent), private life and exceptional circumstances', Version 10.0, published on 18 August 2020, which had been drawn to her attention in oral submissions. This reads, in material part:

> "The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK. In the case law of KO and Others [2018] UKSC 53, with particular reference to the case of NS (Sri Lanka), the Supreme Court found that 'reasonableness' is to be considered in the real world context in which the child finds themselves. The parents' immigration status is a relevant fact to establish that context. The determination sets out that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that it would not be reasonable."

16. The grounds contend, with reference to paragraph 12 of **SF and others (Guidance, post–2014 Act) Albania** [2017] UKUT 00120 (IAC), that the judge should have treated, as a starting point, the respondent's policy that she would not normally expect a qualifying child to leave the UK, but appeared instead to take as her starting point the fact that if the appellants are removed they would be removed together to Nigeria as a family. The grounds further contend that the judge should have given consideration to s.117B(6) prior to making her best interests assessment.

Discussion

17. I have considered version 10 of the respondent's policy, identified above at [15] of this decision, as it was when the judge made her decision. The full terms of the policy must be considered. Whilst the starting point is that the respondent would not normally expect a qualifying child such as the 3rd appellant to leave the United Kingdom, that starting point is heavily qualified by reference to the remainder of the paragraph. The last sentence of the extract quoted above is particularly relevant. "*The determination sets out that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that it would not be reasonable*." Both of the 3rd appellant's parents were expected to leave the UK, a matter that was not in dispute, and the policy makes clear that the 3rd appellant would normally be expected to leave with them

unless there was evidence that this would not be reasonable. It is tolerably clear that this was the approach adopted by the judge.

18. At [42] the judge specifically reminder herself that the issue was whether or not it was reasonable for the children to leave the UK with their parents. This approach is entirely consistent with the policy. The starting point is no more than a starting point, and the judge in any event gave full consideration to the issue of reasonableness. The judge was demonstrably aware of the evidence relating to the children's disabilities and she fully engaged with that evidence, but she was nevertheless satisfied that there was healthcare and mental health provision in Nigeria. In reaching this conclusion the judge noted that the 1st and 2nd appellants had made few if any inquiries about facilities in Nigeria for children diagnosed with autism spectrum disorder. I note that neither the letter from Holy Cross Catholic primary School nor the documents produced by Lewisham and Greenwich NHS Trust or Lewisham Council considered the impact on the children (but specifically the 3rd appellant given that the 4th appellant was not a qualifying child) of being returned to Nigeria. The judge had found as a fact that the family would be provided with assistance on return to Nigeria from the 2nd's siblings and that the family would be returned together as a single unit. Although the judge did not make express reference to the relevant policy guidance, her assessment accords with the essence of the guidance and the binding principles established in **KO (Nigeria)** [2018] UKSC 53.

19. Mr Plowright relies on paragraph 12 of **SF and others (Guidance, post–2014 Act) Albania** [2017] UKUT 00120 (IAC). This reads:

> "On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it."

20. The policy in question in **SF** ('Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes", August 2015') contained guidance at 11.2.3 headed "Would it be unreasonable to expect a British Citizen Child to leave the UK?" This guidance was in different terms to that relied on by the appellant in the instant appeal and did not contain any qualification such as considered above. The application of the guidance set out at [15] of this decision did not, on any rational view, point clearly to a particular outcome as understood by the panel in **SF**.

21. I reject Mr Plowright's submission that the judge should have given consideration to s.117B(6) prior to making her best interests assessment. It is a

trite proposition of law that the assessment of a child's best interests is conducted prior to an assessment of the proportionalty under Article 8 of a decision that affects the child (see, for example, **EV (Philippines)**). Mr Plowright does not identify any authority in support of his contention. Sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002 require courts and tribunals to consider a number of considerations when assessing the "public interest question", i.e. when undertaking a proportionality assessment. The assessment in s.117B(6) is an assessment directly relating to the proportionality of a decision. The judge did not consequently err in law in considering the bests interests of the 3rd appellant before approaching s.117B(6). The judge demonstrably had in mind the proper legal approach to a 'best interests' assessment as detailed in **Azimi-Moayad** and **EV (Philippines)** and she took account of all material considerations, either expressly or by necessary implication, including the children's medical and education needs, the support the children received from their parents, the network of support available in Nigeria and the availability of healthcare and mental health provision in Nigeria.

22. For the reasons given above I am not persuaded that the determination contains any material legal error.

Notice of Decision

The First-tier Tribunal's decision did not contain a material error of law. The appeals are dismissed.

D.Blum 27 April 2021

Signed Date
Upper Tribunal Judge Blum