IAC-HW-MP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/43258/2013
IA/43259/2013
IA/43260/2013
IA/43262/2013
IA/43263/2013
IA/43264/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th October 2014	**On 6th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR JAMES OSBORN NANJO (FIRST APPELLANT)
MRS ANTONINA MARIE NANJO (SECOND APPELLANT)
MISS HADESSAH EMMANUELLA NANJO (THIRD APPELLANT)
MASTER JOSEPHUS ELIJAH NANJO (FOURTH APPELLANT)
MASTER JETHRO JAMES ELIAS JOHNSON NANJO (FIFTH APPELLANT)
MASTER JESHURUN ELYON NANJO (SIXTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr D. Olawanle, Solicitor
For the Respondent: Mr S. Whitwell, Home Office Presenting Officer

DECISION AND REASONS

Reasons for Finding an Error of Law

1. The First Appellant who I shall refer to as the Appellant is a citizen of Ghana born on 21st February 1973. The Second Appellant is his wife, born on 25th June 1979. She is a citizen of the United States of America as are the Third, Fourth, Fifth and Sixth Appellants who are the couple's children. They appealed against decisions of the Respondent dated 1st October 2013: (i) to refuse their applications for leave to remain which had been made on the grounds that refusal would breach this country's obligations under Article 8 (right to respect for private and family life) of the European Convention on Human Rights and (ii) to give directions for the Appellants' removal under Section 10 of the Immigration and Asylum Act 1999. Their appeals were allowed by Judge of the First-tier Tribunal Abebrese sitting at Taylor House on 3rd June 2014. The Respondent appeals with permission against his decision to allow the appeals.

2. The First Appellant last entered the United Kingdom with entry clearance as a student on 19th August 2000. This was subsequently extended in various capacities until 17th October 2009. The other family members were granted leave in line with this but none have had leave since 17th October 2009. The present proceedings arose out of the refusal of an application made by the family on 28th June 2012 for leave to remain on the basis of their family and private lives and the service of removal papers on 1st October 2013.

3. The Judge heard oral testimony from the First and Second Appellants and noted that the Third Appellant who was born on 12th May 2005 had by that stage been in the United Kingdom for a period of eight years and four months and therefore met the requirements of paragraph EX.1(a)(i). He found that it would be unreasonable to remove the remaining members of the family leaving the Third Appellant behind. The Third Appellant was entitled to British citizenship. It would not be proportionate to remove the Appellants as they were a family unit, the First and Second Appellants were credible and consistent in their evidence and there would be medical difficulties for the family in either Ghana or the United States especially for the Sixth Appellant.

4. The Respondent appealed against this decision on two grounds. The first was that the Judge had not considered paragraph EX.1 adequately as he should have gone on to consider whether it was reasonable to expect the Third Appellant to leave the United Kingdom. The second ground was that the Judge had not made clear why there were compelling factors in the case such that the Appellants' appeals should be allowed outside the Immigration Rules. The reasons the Judge did give were not sufficiently compelling. First-tier Tribunal Judge Ford granted permission to appeal on 19th August saying that it was arguable that Judge Abebrese had confined

his consideration to paragraph EX.1(a)(i) and not considered EX.1(a)(ii). However the Respondent's second ground was not arguable.

5. At the hearing before me it was argued that the Judge had embarked on a freestanding Article 8 consideration of the sort disapproved of in the case of **Gulshan**. Financial inability to pay for health insurance in the United States was not a matter which should have any bearing. For the Appellant it was argued that the Judge had not made any error in law and found the Appellants to be credible. It would take up to two years before the First Appellant would be able to rejoin his family if the remaining family members were returned to the United States. The First Appellant had done charitable work in the community. The Judge had looked at all the circumstances. The Judge should have applied the Rules in force after July 2012.

6. I consider that the Judge made two errors of law in this case such that his decision falls to be set aside. The first is that he has not adequately considered paragraph EX.1. The adult applicants undoubtedly had a genuine and subsisting parental relationship with the child who had lived in the United Kingdom for at least seven years immediately preceding the date of application. That satisfies EX.1(a)(i) but the second limb of the test, whether it would or would not be reasonable to expect the child to leave the United Kingdom, was not adequately dealt with by the Judge or at all. The Judge proceeded on the assumption that it was unreasonable that the Third Appellant had to remain in the United Kingdom and therefore it was a question of whether it was unreasonable to expect the others to leave the Third Appellant behind. That was the wrong test. The test was whether it was reasonable to expect the Third Appellant to go with the other Appellants.

7. The second material error made by the Judge was in his treatment of the weight to be afforded to the fact that none of the Appellants had leave to remain and were seeking leave outside the Rules. I would disagree with the Judge who granted permission that the argument made by the Respondent under the case of **Gulshan[2013] UKUT 00640** was not arguable. There appears to be little or no reference to the public interest in the removal of the Appellants in the balancing act which the Judge had to consider under Article 8. The case law of **Gulshan** and the requirements of Appendix FM were relevant in this case notwithstanding that the applications made by the Appellants were made before July 2012, see the recent case of **YM Uganda [2014] EWCA Civ 1292.**

8. At the conclusion of the hearing the Appellants' solicitor indicated that if the matter were to proceed to a re-hearing, further evidence under Article 8 would be submitted by the Appellants which would relate to medical difficulties of another one of the child Appellants.

9. The law has changed again since 28th July 2014 and therefore the re-hearing of this case will now be dealt with under the law as it is now. I will therefore be taking into account, along with the other factors in this case, the effect of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 inserted by Section 19 of the Immigration Act 2014. All further evidence upon which the parties propose to rely should be filed at court and served on the other party at least fourteen days before the forthcoming hearing. As the matter is to be reheard in the light of the new legislation and in view of the shortcomings I have found in the reasoning applied by the Judge none of the Judge's findings will be preserved and the matter will be heard de novo.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error of law and I have set it aside. The decision will be re-heard on a date to be fixed with a time estimate of two hours.

No anonymity direction is made.

No fee was payable and there can be no fee award made.

Signed this 3rd day of November 2014

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Deputy Upper Tribunal Judge Woodcraft