Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/17317/2013,
IA/17324/2013,
IA/17364/2013,
IA/17367/2013
IA/17369/2013

THE IMMIGRATION ACTS

Heard at Field House	**Sent**
On 29 April 2014	**On 2 May 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

UVYONNE ITAKPE, ENDURANCE ENEHIZENA, JOSHUA ENEHIZENA, JOANNE ENEHIZENA and JEWEL ENEHIZENA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr T Lay of counsel instructed by Farani Javid Taylor LLP
For the Respondent: Mr G Saunders a Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellants are citizens of Nigeria and respectively wife, husband and their three children. They were born on 20 July 1984, 24 June 1981, 3 June 2006, 18 October 2008 and 7 February 2013. They have been given

permission to appeal the determination of First-Tier Tribunal Judge Wiseman ("the FTTJ") who dismissed their appeals against the respondent's decisions of 29 April 2013 to remove them from the UK following the refusal of their applications for leave to remain on human rights grounds.

2. The wife claimed to have entered the UK in September 2000 and the husband in December 2003. She said that she was brought here with the Nigerian family as a housemaid having been homeless in Nigeria. She was abused by the father of the family and ran away from them during 2001. The husband said that he came here to visit his uncle but ran away after he had been abused. The couple claimed to have met during 2004 and to have been together for most of the time since, although there had been periods of separation. The husband was arrested for affray and, on another occasion, for common assault on his wife but charges were not pursued. He has been arrested and convicted for shoplifting for which he received a caution and for fraud and related offences for which he received a community order. On one occasion he attempted to enter the UK, was refused leave to enter and was removed to Nigeria. He has attempted to enter the UK using a passport belonging to somebody else. He made an application for a visit visa which was refused.

3. The immigration and relationship histories of the husband and wife are complicated and recorded in more detail in the determination of the FTTJ. He heard the appeals on 3 January 2014. Both parties were represented, the appellant by Mr Lay who appeared before me. The FTTJ heard evidence from the husband and the wife and submissions from both representatives. The appeals were argued on Article 8 human rights grounds. The FTTJ concluded that the key relationships were primarily within the family unit, that the children could adapt to a new lifestyle in Nigeria and that the husband and wife had settled down in the UK, increasing their family over the years notwithstanding that neither of them had any right to be here. The best argument which could be put forward arose because of the best interests of the children. The FTTJ dismissed the appeal on Article 8 human rights grounds and made no anonymity direction.

4. The appellants applied for and were refused permission to appeal by a judge in the First-Tier Tribunal. However, on renewal to the Upper Tribunal, permission to appeal was granted. Whilst permission was granted on all grounds there was specific mention of whether the FTTJ erred in not considering whether the wife could succeed under paragraph 276ADE(vi) of the Immigration Rules.

5. There is a Rule 24 response from the respondent. Mr Lay submitted a copy of his skeleton argument which was before the FTTJ and indicated that he would be arguing the grounds of appeal to the Upper Tribunal which were considered by the judge in the First-Tier Tribunal.

6. Mr Lay relied on these grounds of appeal. It was put to the FTTJ that the wife had a strong claim under paragraph 276ADE(vi). He accepted her evidence

as appeared from paragraph 62. It was not correct to say that “the only reason they have any case to put forward at all concerns the best interests of the children” (paragraph 66). The FTTJ had failed to consider whether the wife had ties in Nigeria and it was not open to him to say, in paragraph 67, that she had lost all cultural and other ties with her home country. The FTTJ erroneously considered the husband and the wife together, without separating out their very different circumstances. It appeared that in the mind of the FTTJ her position had been adversely affected by his immigration and criminal history. This was not a case where husband-and-wife could effectively be treated as one because they had always been in a stable partnership with an identical or similar immigration history. Under paragraph 276 it was necessary for the FTTJ to look at the position at the date of the hearing without trying to assess what the future might hold. Outside the Immigration Rules it was necessary to try and look to the future. There was no mention of the wife’s position in Benin City before she left Nigeria.

7. Mr Lay also submitted that the wife’s private life was not properly considered in the light of the fact that her son had achieved seven years continuous residence in this country by the date of the hearing. If the wife succeeded on private life grounds under the Immigration Rules then this fed into proper consideration of the Article 8 grounds outside the Rules. The FTTJ did not properly address the children’s best interests if they would go to Benin City or anywhere else in Nigeria. I was asked to find that there were errors of law, to set aside the decision, and to remake it without an adjournment. No further evidence was required.

8. Mr Saunders submitted that there was no clear credibility finding in relation to the evidence of the husband all the wife. What was said in paragraph 62 did not amount to such findings. The FTTJ had taken the evidence of the husband and the wife at its highest and made his assessment on that basis. He accepted that the Secretary of State had not cross-appealed on the basis that this was an error of law and he was not going to argue that it was. The Secretary of State’s position was that the FTTJ had reached conclusions open to him on all the evidence and there was no error of law.

9. Mr Saunders argued that the final decision in the appeal came down to consideration of the family’s circumstances on their return to Nigeria. It was open to the FTTJ to find, in paragraph 67, that the husband and wife had not lost all cultural and other ties with their home country. Whilst the FTTJ did not deal with the position of the wife separately from that of the family unit there were no clear findings which showed that she could succeed on her own. All significant Article 8 matters were properly considered and the FTTJ was correct to treat the family as a whole. In reply to my question, Mr Saunders accepted that the FTTJ should have considered the question of paragraph 276ADE in relation to the wife on her own. However, he submitted that the question of the family’s ties with Nigeria and the length of Joshua’s residence in the UK were properly addressed in paragraphs 58,

59, 60 and 61. If I was to find that there were errors of law he submitted that I should remake the decision without hearing further evidence.

10. In his reply Mr Lay accepted that if I came to the conclusion that what was said in paragraph 62 did not amount to clear findings of credibility and fact in relation to the evidence of the appellant and the wife then there would not be findings on which I could remake the decision. However, Mr Lay submitted that there were some findings of fact in relation to the evidence of the husband in paragraph 64. The question of whether the wife could succeed on Article 8 private life grounds under the Immigration Rules was a discrete issue which required separate consideration and a separate conclusion. The FTTJ's conclusion in relation to ties to Nigeria was not properly or adequately addressed in paragraph 67.

11. I asked the representatives to make any further submissions they considered necessary as to the course of action I should take if I found that there were errors of law and set aside the decision; were the findings of credibility and fact sufficiently clear to enable me to do so and were there any other factors which they wished me to take into account? Mr Lay submitted that, in addition to the matters he had already addressed, the appellants were not legally aided, were not likely to be able to obtain legal aid and he was appearing pro bono. There was a real risk that if there was a full rehearing they would not be able to afford or obtain legal assistance. Neither side had raised the question of the adequacy of the findings of credibility and fact in grounds of appeal to the Upper Tribunal. Mr Saunders did not make any further submissions.

12. I reserved my determination.

13. The proper course would have been for the FTTJ to make clear findings of credibility and fact on all the relevant issues, address and reach conclusions on the Article 8 grounds under the Immigration Rules and then, if it was thought that they might apply, address and reach conclusions on the Article 8 grounds outside the Immigration Rules. I find that the Article 8 grounds under the Immigration Rules and outside the Immigration Rules have not been separated but conflated. In some cases the immigration and personal histories of partners or husband-and-wife are so similar and closely interrelated that they can be considered as one. This is not such a case. Whilst their histories intermingle there are important separate and different elements. For example the husband has a very poor immigration history including removal from this country, the use of a false passport and criminal convictions although these have not been particularly serious. None of these factors apply to the wife. If her evidence is believed she was homeless and destitute in Nigeria, had lost her parents, was brought to this country before she became an adult, was under the control of others, suffered serious abuse and then became homeless in this country.

14. Had the FTTJ given separate consideration to the question of whether the wife could bring herself within the provisions of paragraph 276ADE(vi) he

would have had to consider whether she was aged 18 years or above, had lived continuously in the
UK for less than 20 years (discounting any period of imprisonment) but had no ties
(Including social, cultural or family) with the country to which she would have to go if
required to leave the UK. Her evidence was that she had no remaining ties to Nigeria apart from the fact that she had lived there for a number of years whilst a child but against that that she had been homeless and destitute and both her parents were dead. The FTTJ only considered her position together with that of her husband. Had he fully considered her position separately from that of her husband and assessed her evidence about this it is difficult to see how he could have concluded that she had not lost all cultural and other ties to Nigeria unless that is, he disbelieved her evidence.

15. I am not persuaded that the FTTJ failed to give separate consideration to the position of the wife under the provisions of Appendix FM because her eldest son had been in the UK for more than seven years before the date of the application. This is adequately dealt with in paragraph 68.

16. My conclusion that the FTTJ erred in law by not separately and consecutively dealing with the Article 8 grounds is brought into sharper focus by the question of how, if I set aside the decision, it should be remade. One of the first questions which arises is whether in those circumstances the FTTJ made sufficiently clear findings of credibility and fact upon which I could base my conclusions. The closest I can find to findings of credibility and fact are contained in paragraph 62 where the FTTJ said; “I do not lose sight of the fact that both these parents may well have somewhat troubled history in terms of abuse; there is of course no independent evidence to support what they say in that connection but it may well have happened. In addition I do not lose sight of the fact that the wife was apparently very young when she first came to this country and may have had a modest amount of control only over her life some time. All these factors carry with them an element of appropriate sympathy.” I am unable to interpret this as a blanket positive credibility finding amounting to an acceptance of all the evidence given by both the husband and wife. I also find it difficult to accept that “may well” amounts to a positive finding to the required standard.

17. In these circumstances I conclude that there are insufficiently clear findings of credibility and fact for me to remake the decision without all the evidence being re-heard. I reach this conclusion with regret because I am conscious of the consequences for the appellants who may not be able to obtain further legal representation unless continuing pro bono assistance is available.

18. I have not been asked to make any anonymity direction and can see no good reason to do so.

19. Having found that there are errors of law I set aside the decision of the FTTJ and direct that the appeal be reheard by a judge in the First-Tier Tribunal, other than First-Tier Tribunal Judge Wiseman.

Signed:..... Date: 30 April 2014
Upper Tribunal Judge Moulden