Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers:
IA/23187/2014

IA/23193/2014
IA/23198/2014
& IA/23200/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 04 December 2014	**On 11 December 2014**

Before

The President, The Hon. Mr Justice McCloskey and
Deputy Upper Tribunal Judge Holmes

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABOLAGI SHAKIRU ISMAIL (AND 3 OTHERS)

Respondents

Representation:

Appellant:	Mr I Kingham, Senior Home Office Presenting Officer
Respondents:	Unrepresented, in person

DETERMINATION AND REASONS

Introduction

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1. The Appellants are all citizens of Nigeria and members of the same family. The first and second Appellants are the father and mother respectively. The third and fourth Appellants are the children, now aged 9 and 6 years respectively.

The Secretary of State's Decision

2. These conjoined appeals originate in a decision dated 08 May 2014 made on behalf of the Secretary of State for the Home Department (hereinafter the "*Secretary of State*"). The context of the decision is apparent from the opening passage:

> "*….. You have asked that your case be considered under the* [ECHR]*. You claim it will breach your human rights to return you to Nigeria, a country which is listed in section 94(4) of the Nationality, Immigration and Asylum Act 2002.*"

The case made by the Appellants was summarised by the decision maker in the following terms:

> "*You have stated that removal would be a breach of your human rights because you have established private life during your time in the United Kingdom, particularly your daughter ……. who is now over seven years of age and has spent the whole of her life in the United Kingdom, so you do not feel it would be reasonable to expect her to leave the United Kingdom ……*
>
> [Further] *you claim that you and your family have a fear of returning to Nigeria due to the fact that you no longer have any links to Nigeria, where there is a very high level of poverty and unemployment and poor standards of education and health care which would inflict physical and mental stress on the children and the family as a whole.*"

The decision maker concluded, firstly, that the Appellants' claims could not succeed under Appendix FM and paragraph 276ADE of the Immigration Rules. In particular, the assessment was made that the parents had submitted no evidence that they have lost all family, social and cultural ties with Nigeria. The parents' evidence that both had attempted to find work there during the preceding three years was noted.

3. It was acknowledged that the older of the two children had lived continuously in the United Kingdom for at least seven years. This triggered consideration of whether it would be "*reasonable to*

expect [her] *to leave the United Kingdom.* The decision maker reasoned as follows:

> *"It is usually considered in the best interests of the child to remain in the family unit with their parents and siblings. The children would not be separated from their parents, as the family would be expected to return to Nigeria as a whole unit. Both you and your wife grew up in Nigeria and would be able to support the children in the family and outside in the wider community in order to help them to adapt to living in Nigeria and learning the language if required ……. You and your wife have family living in Nigeria and they could also help and support the children to integrate into the way of life ……*
>
> [The older child] *…… is young enough to adapt to the education system in Nigeria …… Primary education in Nigeria begins at six years of age and lasts for six years …… Education to junior secondary level (from 6 to 15 years of age) is free and compulsory……*
>
> *Neither child has any health problems. Any friendships formed in the United Kingdom can be continued from abroad by modern methods of communication ……*
>
> *You have not submitted any evidence to show that* [the older child] *has formed exceptional bonds with anyone in the United Kingdom which would make it unreasonable to expect her to live in Nigeria ……* [or] *…… that there is exceptional physical or emotional dependency on other members of the family in the United Kingdom outside your immediate family unit."*

It is then stated that due consideration has been given to the needs and welfare of the children as required by Section 55 of the Borders, Citizenship and Immigration Act 2009 (the "*2009 Act*"). This is followed by a rehearsal of the factors put forward in support of the contention that it would be in the childrens' best interests to remain in the United Kingdom. Stripped to its essentials, the case made was that this country provides a much better place for the education, care and development of the children than Nigeria. This case was rejected, essentially on the same grounds as the case advanced under the Immigration Rules.

4. Finally, the decision maker purported to consider the Appellant's cases under the rubric of "*exceptional circumstances*".

The passage which follows appears to be directed to the first Appellant, the father of the family:

> "*You have attempted to obtain leave to remain using false documents and your wife obtained entry clearance by deception. You have remained in the United Kingdom beyond the period of granted leave to remain and your wife has remained beyond the period of granted leave to enter. You failed to bring your children under immigration control following their births, when you submitted applications for leave after they were born in the United Kingdom.*"

The decision continues:

> "*You have not submitted any evidence that there are compelling compassionate circumstances which would lead to a grant of leave to remain because it would not be reasonable to expect the children to leave the United Kingdom. Education and health services are available in Nigeria, albeit not necessarily to the same standard as in the United Kingdom.*"

In accordance with the usual practice, removal decisions were made in respect of all four Appellants one week later. Being immigration decisions, these attracted a right of appeal which the Appellants duly exercised.

Decision of the FtT

5. The First-tier Tribunal (the "*FtT*") allowed the appeals. The basis for doing so is encapsulated in the following passage, in [89]:

> "*I am therefore satisfied that in the context of my findings set out above the Respondent's removal decisions were not a proportionate and fair balance between the relevant competing considerations.*"

The appeals were allowed under Article 8 ECHR accordingly.

6. The "*findings set out above*" in the determination are, on analysis, the following:

(a) The first two Appellants entered the United Kingdom legally, but have now over stayed following exhaustion of their application and appeal rights.

(b) (In terms) the Appellants' extensive periods of residence in the United Kingdom is a weighty factor: see [48].

(c) The third and fourth Appellants, the children, have spent the whole of their lives in the United Kingdom and are integrated into UK society.

(d) The fourth Appellant has special educational requirements because of his elective mutism, giving rise to the need for speech therapy intervention.

(e) The parents have been lawfully present in the United Kingdom during most of their sojourn.

(f) The act of registering each child's birth demonstrated "*a willingness to engage with the authorities*".

(g) The two children "*are positively thriving in a school with excellent pastoral care …* [and] ..... *clearly feel very much a part of the school community and are progressing well .....* [and] ..... *the school and the surrounding community are parents and members of the congregation at church where they attend are extremely attached to the children and family as a whole*".

(h) "*Every resource available to the teaching staff and pupils has been engaged for the benefit of these children*".

7. Next, having referred to ZH (Tanzania) [2011] UKSC 4, the Judge reasoned that a period of substantial residence as a child may become a weighty consideration in the balance of competing factors because –

> "*During such a lengthy period of time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit*".

The Judge then noted the periods during which the two children had been attending school, the parents' heavy involvement with their church and the childrens' participation in Sunday school and other church activities. In [77] the Judge directed himself impeccably:

> "*I have considered the best interests of both children as a primary consideration but not the primary consideration within the context of the entire countervailing factors.*"

The Judge then acknowledged the public interests, being "*the clear need to maintain immigration controls ….. and the economic interests of the country*". Finally, the Judge identified the factors which tipped the balance in the Appellants' favour. These focused almost exclusively on the well developed settlement of the two children in the United Kingdom, linked mainly to the lives they are leading through their education here. He found, by implication, that the childrens' enforced return to Nigeria "*…. would seriously impact upon their development with a strong possibility that* [the younger child's] *elective mutism would return*". The appeals were allowed accordingly.

8. The manner in which the FtT dealt with the discrete issue of the parents' "immigration conduct" warrants separate consideration. The Judge noted clear findings in an earlier Tribunal determination that the father had submitted a false invoice in support of his Tier 1 application and a forged letter from a firm of solicitors, while the mother had used a different (though not false) name in her second visa application for the sole purpose of securing entry to the United Kingdom: see [56] – [60]. The Judge further found, contrary to the father's assertion, that contact had been maintained both with his brother and other family members of both parents in Nigeria: see [61] – [62].

Appeal to this Tribunal

9. The Secretary of State's grounds of appeal contend that the decision of the FtT is vitiated by a fundamental error of law. This is said to arise from its incompatibility with the decision of the Court of Appeal in EV (Philippines) [2014] EWCA Civ 874, at [58] - [64] especially. The grounds also canvass a separate error of law, constituted by the FtT's failure to give effect to the new section 117B of the Nationality, Immigration and Asylum Act 2002, inserted by section 19 of the Immigration Act 2014 and commenced on 28 July 2014, which was in force on the date of promulgation of the decision, 04 September 2014. Permission to appeal was granted on both grounds.

10. On behalf of the Secretary of State, the submissions of Mr Kingham, in substance, adopted the grounds of appeal. Reference was also made to the decision of the Supreme Court in Zoumbas – v – Secretary of State for the Home Department [2013] UKSC 74.

11. We were addressed by both Mr and Mrs Ismail. They presented their case in a dignified manner. They were articulate in their submissions. Further, there was evident passion in all that they said on behalf of their children. They are obviously caring and

responsible parents. The central theme of their submissions was that by remaining in the United Kingdom the future for their children will be immensely better in all material respects. They emphasised their lack of real family support in Nigeria, the dangers prevailing in that country and the inadequacies in the education system, with particular reference to the speech disability of their younger child. They contrasted the safe environment of the United Kingdom with that prevailing in Nigeria. They argued that it would be very difficult for their children, who have spent all of their lives in this country, to adjust to living in Nigeria. They contrasted the facts of their case with those in Zoumbas and EV (Philippines) [2014] EWCA Civ 374, contending that their case is to be viewed in a much more favourable light.

12. At the conclusion of the hearing, we announced our decision, with brief reasons, which is that the determination of the FtT must be set aside as it is vitiated by material error of law. We draw attention, firstly, to what was stated by the Supreme Court in Zoumbas, at [24]:

> "*There is no irrationality in the conclusion that it was in the childrens' best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, all things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education ….*
>
> *But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit.*"

In the context of this appeal, the significance of this passage is that it draws attention to the limitations of the rights protected by Article 8 ECHR. This is nowhere acknowledged in the decision of the FtT.

13. Properly analysed, the judgment of the FtT, while replete with reference to and quotation from authority, fails to articulate the governing test. In particular, there is no recognition of the criterion of unjustifiably harsh consequences. Furthermore, in the recitation of reported cases, there is no mention of the decision of the Court of Appeal in MF (Nigeria). Nor does the decision give

effect to the following passage in Patel – v – Secretary of State for the Home Department [2013] UKSC 72, at [57]:

> "*It is important to remember that Article 8 is not a general dispensing power .....*
>
> *One may sympathise with Sedley LJ's call in Pankina for 'common sense' in the application of the Rules to graduates who have been studying in the UK for some years. However, such considerations do not by themselves provide grounds of appeal under Article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8.*"

This is nowhere acknowledged in the decision of the FtT.

14. The final clearly identifiable error in the determination of the FtT is its failure to consider the decision in EV (Philippines) – v – Secretary of State for the Home Department [2014] EWCA Civ 874. This is an important decision of the Court of Appeal concerning the correct approach to the question of proportionality in Article 8 ECHR cases involving the best interests of children. The Upper Tribunal, giving effect to section 55 of the 2009 Act, had found that while it would be in the best interests of the children concerned to continue their education in England, the countervailing public interest in the maintenance of firm immigration control should prevail. As appears from [34] and [43] – [44] of the leading judgment, this involves a balancing exercise. As Christopher Clarke LJ observed at [36]:

> "*In a sense the Tribunal is concerned with how emphatic an answer falls to be given to the question: Is it in the best interests of the child to remain?*"

Thus a case in which the Tribunal's assessment is that it is overwhelmingly in a child's best interests not to be removed from the United Kingdom is to be contrasted with one in which non-removal is merely in the child's best interests. In essence, the Tribunal found that it was reasonable to expect the children to live in another country. The Court of Appeal concluded that this was unimpeachable. In a concurring judgment, Lewison LJ added, at [55]:

> "*These statements of principle recognise the real world fact that the parent has no right to remain in the UK. So no*

counter-factual assumption is being made and the interests of the other family members are to be considered in the light of the real world facts ……..

… Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

The Lord Justice's further observations in [60] constitute a plain recognition of the limitations of Article 8. None of this was considered by the FtT.

15. Finally, the decision of the FtT neglects entirely the newly introduced provisions of sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002, inserted by section 19 of the Immigration Act 2014, in force from 28 July 2014. This amounts to a fundamental misdirection in law *per se*. In practical terms, its main consequence in the context of the present appeal is that the FtT failed to give effect, in particular, to section 117B(5), which prescribes that little weight should be given to a private life established by a person at a time when such person's immigration status is precarious. The reality of the present case is that, subject to further argument in the remaking hearing (*infra*), the immigration status of all four Appellants has at most, or all, material times been precarious. The error of law of the FtT was to neglect this obligatory statutory factor and to compound this by, ultimately, giving determinative weight to the private lives of the two Appellant children. The error of law is unmistakable.

Decision and Directions

16. On the grounds and for the reasons elaborated above, the Secretary of State's appeal must succeed.

17. We decide and direct as follows:

    (a) The decision of the FtT is set aside.

    (b) It will be remade in this forum, on the first available date in 2015, to be notified.

    (c) We accede to the Appellants' application to adduce the further documentary evidence produced at the hearing.

    (d) Any application to adduce additional documentary evidence must be made at least seven days in advance of the scheduled hearing date.

Finally, we repeat our observation at the conclusion of the hearing that in cases of this kind it is invariably desirable that legal representation is secured, if possible.

Bernard McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 04 December 2014