Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/37027/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 April 2014	**On 12 May 2014**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABIODUN ABAYOMI BELLO
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr G Saunders, Senior Home Office Presenting Officer
For the Respondent: Mr T Ojo instructed by Graceland solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against her decision to refuse him settlement outside the Immigration Rules HC 395 (as amended) on Article 8 ECHR private and family life grounds. The claimant is a Nigerian citizen who has been in the United Kingdom since 13

September 2002: on various occasions thereafter, he was granted leave to remain in the United Kingdom as a student, a spouse, and a Tier 4 Migrant dependant, but he has not had extant leave since 31 May 2012.

2. There were three subsequent applications: the first, on 30 May 2012, was rejected for non-payment of fees. An application for leave to remain in the United Kingdom as a spouse on 3 August 2012 was rejected for the same reason. On 26 October 2012, the claimant submitted an application for indefinite leave to remain on the basis of 10 years' residence, which was also rejected. The present application, again for indefinite leave to remain on long residence grounds (10 years) was made on 19 November 2012, and was considered and rejected under the new Appendix FM and paragraph 276ADE and also under Article 8 ECHR outside the Rules.

Background

3. The claimant and his wife have three children, the eldest born in Nigeria in 2001, and two further children born in 2005 and 2011 in the United Kingdom. The claimant was 26 years old when he came to the United Kingdom. The claimant's wife joined him in the United Kingdom April 2003, initially as a student. The family have returned to Nigeria on approximately four occasions in the period of almost 11 years in the United Kingdom, most recently in September 2010.

4. All members of the family are Nigerian citizens: there are no citizen children. The wife is not settled in the United Kingdom and is no longer either studying or working; she became ill during her third pregnancy in 2011 and has been unable to work since then because she has high blood pressure. The children have spent, respectively, 11, 9 and 3 years living with their parents in the United Kingdom.

First-tier Tribunal determination

5. This is not a 'sole responsibility' case and, save for the question of paragraph EX-1, the basis of the claimant's application is one which could not succeed within the Rules.

6. First-tier Tribunal Judge Ford found that the claimant could not bring himself within the Rules but allowed the appeal because of the length of time for which his children had been in the United Kingdom. She found that the requirements of EX.1 were therefore met and at [23] that 'the [claimant] … should have been granted leave to remain in the United Kingdom on that basis without further reference to any other Rules'.

7. The First-tier Tribunal accepted that in relation to Article 8 outside the Rules, the claimant could not show sufficient private life to make removal

disproportionate and that medical treatment was available for the claimant's wife's hypertension in Nigeria. The judge nevertheless concluded that because two of the children had spent more than seven years in the United Kingdom, it was unreasonable to expect the family to relocate to Nigeria and that there were compassionate circumstances sufficient to enable the claim to succeed outside the Rules, even if EX.1 were not determinative in their favour.

Basis of appeal

8. The Secretary of State appealed. She contended that there was no consideration of s.55 Immigration, Asylum and Nationality Act 2006 in the determination; that nevertheless the best interests of the children were to be wherever their parents were living; that insufficient weight had been given to the Nigerian citizenship of all members of the family; that there was insufficient evidence to support a finding that the children would not be able to reintegrate in Nigeria. She relied upon the decision of the Supreme Court in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74.

9. Permission to appeal was granted on the basis that the reasons given in the First-tier Tribunal were arguably inadequate in terms of the best interests of the children and the reasonableness of their relocation, and ran counter to recent case law.

Upper Tribunal hearing

10. At the hearing before me, Mr Saunders relied on the grounds of appeal and the perceived inadequacy of the reasons in the First-tier Tribunal determination. The family were all Nigerian nationals with family and cultural connections to Nigeria, which had been maintained. It was in the best interests of the children to be with their parents, whether in Nigeria or the United Kingdom, and to be together as a family. There was no evidence from the children before the Tribunal and the claimant's wife was a former student who was now unable to study. The claimant himself had not had leave to remain for almost two years. In approaching reasonableness under EX.1, the Tribunal should have considered the Nigerian cultural factors.

11. For the claimant, Mr Ojo argued that the determination was properly reasoned and that the relevant rules and case law had been correctly applied. He would rely upon the guidance given by the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192 and by Mr Justice Sales in the Administrative Court in *Nagre, R*

(on the application of) v Secretary of State for the Home Department [2013] EWHC 720 (Admin). The decision which the judge made had been open to her and there was no error of law therein.

12. The family had been in the United Kingdom for more than 11 years and the children, for more than nine years. The situation of the parents had not been precarious until the money ran out in 2011/2012. Paragraph 277A of the Rules, which dealt with the position of single parents with sole responsibility unlawfully discriminated against those in stable two-parent families. He accepted that he had not filed a rule 24 reply asserting that the claimant was entitled to succeed on discrimination grounds on that basis.

13. Mr Ojo argued that the claimant and his family had no adverse immigration history, criminal records or recourse to public funds which, he suggested, made them unique and exceptional. Their financial problems were not of their own making: the claimant had tried to go into business, invested all his money and the business had then collapsed. He did have permission to work at the material time. The wife had been ill since her last pregnancy three years earlier, beginning with a diagnosis of pre-eclampsia during pregnancy and continuing with high blood pressure up to the present day. Her health was continuing to deteriorate. The claimant's parents had died, but the wife's parents were still in Nigeria. Their circumstances were exceptional and the Tribunal should consider the whole issue. The Upper Tribunal should uphold the determination and end the family's problems.

14. In relation to the children's best interests, while they undoubtedly lay in living with their parents, the Tribunal should have regard to the difficulties which the middle child had experienced simply in changing schools. There was a letter from his head teacher to that effect. He sought to introduce a number of unreported decisions (without having made any application to do so under the Practice Direction), to consider like cases should be treated alike, and dismiss the appeal.

15. In reply, Mr Saunders asked me to exclude the unreported decisions and to consider that the claimant had spent two thirds of his life in Nigeria, to which he and the rest of the family could adapt on return. Moving children in these circumstances was not sufficient to meet the 'reasonableness' test in EX.1 or disproportionate outside the Rules on Article 8 grounds.

Discussion

16. The 'sole responsibility' discrimination argument which Mr Ojo sought to raise at the hearing was not the subject of a rule 24 Reply on behalf of the

claimant. Mr Saunders for the Secretary of State did not rely on paragraph 277A. I do not consider that I am seised of this argument.

17. As regards paragraph EX.1, the First-tier Tribunal plainly erred in consider that it stood alone and was determinative of the appeal: in *Sabir (Appendix FM – EX.1 not free standing) (Pakistan)* [2014] UKUT 63 (IAC) , the Upper Tribunal held that:

> "It is plain from the architecture of the Rules as regards partners that EX.1 is "parasitic" on the relevant Rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a free- standing element some mechanism of identification would have been used. The structure of the Rules as presently drafted requires it to be a component part of the leave granting Rule. This is now made plain by the respondent's guidance dated October 2013."

18. In this case, the question whether it is 'reasonable' to expect the claimant's children to return to Nigeria with their parents is considered in paragraphs 19-21 of the determination. The reasons challenge to that element of the decision is well-founded, particularly as they take no account of a number of visits which the family has apparently made to Nigeria in the years they have been here. The claimant does not have leave to remain in the United Kingdom and his wife is no longer either working or studying. There is care for her hypertension available in Nigeria, as the First-tier Tribunal Judge accepted. There is nothing exceptional in requiring children to accompany their parents returning to the country of origin and, as stated in the Supreme Court's decision in *Zoumbas*, at paragraph 24, non-citizen children do not enjoy the same protected status as British citizen children:

> "24. There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other 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 which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. ..."

19. For all of the above reasons, I am satisfied that the First-tier Tribunal made a material error of law and I proceed to remake the decision. I do not consider it unreasonable or in breach of s.55 best interests for these children to accompany their parents to Nigeria. Accordingly, the children cannot bring themselves within EX.1, which, in any event, does not stand alone and is not determinative of this appeal. There are no exceptional

compassionate circumstances which, following *Nagre*, would mean that the appeal should be allowed outside the Immigration Rules.

20. The appeal is dismissed on all grounds.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision. I re-make the decision in the appeal by dismissing it.

Date

Signed

Judith Gleeson
Judge of the Upper Tribunal