Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/50295/2013
IA/01294/2014
IA/01300/2014
IA/01297/2014
IA/01303/2014

THE IMMIGRATION ACTS

Heard at Field House
On 11 September 2014

Determination Promulgated
On 22 September 2014

Before

Deputy Upper Tribunal Judge Pickup

Between

Shakirat Olayinka Olaleye
Dhikrullah Alani Olaleye
Mohammedameen Olawale Olaleye
Aliya Omorolake Olaleye
Yasmeen Ayatola Olaleye
[No anonymity direction made]

Appellants

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellants: Ms CH Bexson, instructed by Levens Solicitors
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants, comprising husband, wife and their three children, are all citizens of Nigeria with respective dates of birth 1.9.77, 15.5.77, 7.4.05, 29.6.06 and 17.12.12.

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2. This is their appeal against the determination of First-tier Tribunal Judge Brennells promulgated 7.7.14, who dismissed their appeals against the decisions of the respondent, dated 6.11.13, to refuse their applications made on 28.2.13 for leave to remain in the UK outside the Immigration Rules. The Judge heard the appeal on 26.6.14.

3. First-tier Tribunal Judge Andrew granted permission to appeal on 24.7.14.

4. Thus the matter came before me on 11.9.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Brenells should be set aside.

6. The grant of permission to appeal erroneously stated that Judge Brenells had allowed the appeals. Clearly the appeals were dismissed. However, Judge Andrew found, "It is arguable that the Judge should have considered both Paragraph EX1 and also Paragraph 276ADE(4) in respect of the older child, submissions in relation to both matters having been put to him. I find there is an arguable error of law."

7. The first appellant came to the UK as a student in 2004 and thus has been in the UK for some 10 years. Her husband joined her as a dependant partner and their three children were born in the UK between 2005 and 2012. Their last leave expired 2.3.13. The refusal decisions state that on 17.10.12 the first appellant made an application for indefinite leave to remain on the basis of her child's residence in the UK exceeding 7 years and under Human Rights. It also appears that another application for leave to remain outside the Rules was made on 28.2.13, shortly before the expiry of the first appellant's student leave.

8. The refusal decisions considered both Appendix FM and paragraph 276ADE, taking into account section 55 of the UK Borders Act in relation to the best interests of the children. However, the first appellant did not meet the requirements of Appendix FM in respect of either her partner or her children. Further, the appellants do not meet the requirements of paragraph 276ADE in relation to private life, as they have not lived continuously in the UK for at least 20 years and they have failed to demonstrate that they have no ties, including social, cultural and family, to their home country of Nigeria.

9. Judge Brenells considered the appellants' claim under human rights and article 8 ECHR. However, following Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the judge found no arguably good grounds that there are compelling circumstances insufficiently recognised in the Rules so as to justify granting leave to remain outside the Rules on the basis that the decision was unjustifiably harsh.

10. At §21 the judge stated that even had he considered a free-standing article 8 EHCR claim, he would have reached the same conclusion because the family have only ever been in the UK on a temporary basis and they will be removed together as a family.

"There is no evidence to show that the children's welfare would be so affected by the family being required to leave the UK as to render the family's removal disproportionate. There is no evidence which establishes that the appellants' family ties and private life here is such that their removal would not be a proportionate response permitted by Article 8(2)." The Human Rights appeals were thus dismissed.

11. The grounds of appeal complain that the judge failed to consider paragraph EX1 of Appendix FM and failed to consider 276ADE(vi) in relation to the private life of the eldest child, who had lived in the UK for at least 7 years and that it would not be reasonable to expect him to leave the UK.

12. For the reasons set out herein, I find that there is no merit in the grounds of appeal and I am surprised that permission to appeal was ever granted.

13. In her submissions Ms Bexson failed to understand that EX1 is not a free-standing consideration. In Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63 (IAC) it was held that the architecture of the Rules as regards partners is such that EX.1 is "parasitic" on the relevant Rule within Appendix FM that otherwise grants leave to remain.

14. Ms Bexson erroneously submitted that EX1 applied because of a genuine and subsisting parental relationship with their eldest child. However, as the refusal decision pointed out, the first appellant neither meets the requirements of R-LTRP and E-LTRP 1.2, because her partner does not have settled status in the UK, nor R-LTRPT and E-LTRPT 2.3 because she does not have sole responsibility for a child who has lived in the UK for at least 7 years. The first appellant shares responsibility with her partner, the second appellant.

15. Thus even if EX1 had been considered, the appellants fail under Appendix FM.

16. In relation to paragraph 276ADE, Ms Bexson was correct to stated that it had not been considered by the First-tier Tribunal Judge, but that was because the application was brought outside the Immigration Rules and it was clear from the refusal decision that the appellants did not meet any of the requirements of the Immigration Rules, including paragraph 276ADE.

17. Even if the First-tier Tribunal Judge had considered paragraph 276ADE, it is clear that none of the appellants met the requirements.

18. In relation to the eldest child who has been in the UK for in excess of 7 years, 276ADE(iv) as in force at the date of application and decision is that not only must there be a 7 year minimum period, but it must not be unreasonable to expect the applicant to leave the UK. In this regard Ms Bexson submits that the judge has given no consideration to the reasonableness assessment and in particular to the best interests of that child. She relied on EV (Philippines) & Ors [2014] EWCA Civ 874, where at §35 the Court of Appeal set out some factors for consideration of what is in the best interests of children. However, Ms Bexson ignored the conclusion in relation to the appellants in that case at §60 where Lord Justice Lewison pointed out that the facts of that case were a long way from ZH (Tanzania). None of the family was a

British citizen. None had the right to remain in the UK. If the mother was removed, the father has no independent right to remain. If the parents are removed, "then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the Tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot proved medical treatment for the world, so we cannot educate the world." The judge went on to state that it would have been appropriate to consider the cost to the public purse in providing education to the children. Ms Bexson submitted that the judge had given no consideration to the best interests of the children. However, it is clear that the welfare of the children was carefully considered. At §21 the judge found that there was no evidence before the Tribunal that the children's health and development would be severely affected by returning to Nigeria with their parents.

19. In the circumstances, on the facts of this case, even if the Judge had considered 276ADE(iv) in relation to the oldest child, there is nothing to demonstrate that it would be unreasonable to expect that child to accompany his parents back to Nigeria. Whilst the best interests of a child are a primary consideration, it cannot be a trump card but should be considered with all the other relevant circumstances of the family. I am satisfied that in effect this is what the First-tier Tribunal Judge has done. It would be a bizarre submission to suggest that simply because one child has spent 7 years in the UK the rest of the family should also remain. I thus find there is no material error in not considering 276ADE(iv).

20. In relation to 276ADE(vi) and the adult appellants, the same considerations that are apparent in the determination demonstrate that they retain ties to Nigeria. The mother of the first appellant is in contact with the family; she visits them in England once a year (§14). Both first and second appellants have family in Nigeria (§15). The difficulties the family would face on return to Nigeria were considered at §16. However, the judge reached the conclusion at §17 that there was no evidence that the family would not be able to resettle in Nigeria. Their evidence was that they had given no thought to this, although they have only ever been in the UK on a temporary basis. It is clear that they retain ties to Nigeria, the country to which they must have expected to return on conclusion of the first appellant's studies. They are not entitled to remain simply because they now wish to settle in the UK because it is more advantageous to them that returning to Nigeria. The family has had no legitimate expectation of being able to remain indefinitely in the UK.

21. In the circumstances, it is clear that consideration of 276ADE would not have been of assistance to the appellants and could have produced no different outcome. The judge considered the appellants article 8 ECHR rights but found no compelling circumstances to justify granting leave outside the Rules. The judge also stated that even if he had considered article 8 private and family life outside the Rules he would have reached the same conclusion, as there was nothing to suggest that removal was disproportionate.

22. It follows that even if there are errors of law in not specifically considering Appendix FM and 276ADE, there are no material errors requiring the decision of the First-tier Tribunal to be set aside. Even if I did set the decision aside and remade it, it is clear for the reasons given above that I would have come to the same conclusion and dismissed the appeal.

Conclusions:

23. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of each appellant remains dismissed.

Signed: Date: 22 September 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.

Signed: Date: 22 September 2014
Deputy Upper Tribunal Judge Pickup