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	**Determination Promulgated**
On 5 February 2015	**On 9 February 2015**

Before

THE HONOURABLE MRS JUSTICE PATTERSON DBE
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

UYVONNE ITAKPE (1)
ENDURANCE ENEHIZENA (2)
JOSHUA OSAGIEDUWA ENEHIZENA (3)
JOANNE ENEHIZENA (4)
JEWEL OSASERE ENEHIZENA (5)
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Pennington-Benton, Counsel
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are all citizens of Nigeria, born on 20 July 1984, 24 June 1981, 3 June 2006, 18 October 2008 and 7 February 2013 respectively. The first appellant and the second appellant are partners and the other three appellants are their children. The appeals have been linked and heard together due to the family relationships.

2. The first appellant claims to have entered the UK in September 2000, aged sixteen, having been brought here by a Nigerian family as a domestic worker. She has remained in the United Kingdom ever since. The second appellant last came to the United Kingdom in May 2007, using a friend's passport, although he had been here previously, arriving in December 2003. The first and second appellants met in 2004. The third, fourth and fifth appellants were all born in the United Kingdom. On 4 May 2010 the first four appellants applied for leave outside the rules on the basis that removing them would breach article 8 of the Human Rights Convention. This was refused on 15 March 2011 without a right of appeal. Further representations were made on 6 May 2011 (the date of application). The first appellant was served with notice of liability to removal on 10 October 2011. Additional evidence was submitted on 20 October 2011 and 5 January 2012 after which the first appellant stopped reporting. On 5 April 2013 the fifth appellant's birth certificate was submitted together with information that the first appellant was a single mother. Subsequently, information was submitted to the effect she had reconciled with the second appellant.

3. On 29 April 2013 the respondent made decisions to remove the appellants to Nigeria, refusing the applications by reference to Appendix FM and paragraph 276ADE of the Immigration Rules. The appellants appealed. Judge of the First-tier Tribunal Wiseman heard the appeals on 3 January 2014 and dismissed them in a decision promulgated on 31 January 2014. Judge Wiseman's decision was set aside by Upper Tribunal Judge Moulden because he had conflated the article 8 claims of the respective appellants and he had failed to consider whether the first appellant could succeed under paragraph 276ADE(vi) of the rules[1]. The appeal was remitted to the First-tier Tribunal to be heard again by a different judge because Judge Wiseman had not made sufficiently clear findings of fact in order to re-make the decision.

4. On 15 October 2014 the appeals were heard again by Judge of the First-tier Tribunal Onoufriou. Counsel for the appellants, who had also appeared before the Upper Tribunal, took a new point and submitted that, as the applications were made before 9 July 2012 when Appendix FM and paragraph 276ADE came into force, the decisions were not in accordance with the law. Reliance was placed on **Edgehill v Secretary of State for the Home Department** [2014] EWCA Civ 402. In that case the Court of Appeal held that it was unlawful to apply paragraph 276ADE to long residence applications that were already outstanding at

[1] At the date of decision, the rules stated as follows:

> "276ADE. The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
> …
> (vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

the date the new rules came into force, which was 9 July 2012. The transitional provisions of the Statement of Changes HC192, given their natural and ordinary meaning, provided that the respondent would not rely on the new rules when dealing with applications made before 9 July 2012. Counsel conceded that the first appellant could not succeed under the pre-2012 long residence rules because the decision taken against the first appellant "stopped the clock" and she could not accrue fourteen years' continuous residence.

5. In any event, Judge Onoufriou did not accept counsel's submission. He noted the case of **YM (Uganda) v Secretary of State for the Home Department** [2014] EWCA Civ 1292, which he regarded as authority for the proposition that, where a case was remitted following the finding of an error of law, the Tribunal should apply the latest rules. He went on to apply paragraph 276ADE(vi) of the rules in its current wording[2]. He was not satisfied the appellants had no remaining family ties in Nigeria, noting the absence of death certificates for the first and second appellants' parents and the fact the second appellant had returned to Nigeria in 2006. He then considered paragraph EX.1 of Appendix FM of the rules, particularly in relation to the third appellant, who was then aged eight[3]. We note, however, that the third appellant was only aged four when representations were made on 6 May 2011, which we regard as the date of application. In any event, Judge Onoufriou found it was reasonable to expect him to leave the United Kingdom. The best interests of all the children were taken into account.

6. The grounds seeking permission to appeal argue three points. Firstly, Judge Onoufriou misdirected himself by applying the rules. As the applications preceded the coming into force of Appendix FM and paragraph 276ADE, consideration should have been by reference to article 8 case law and not the rules. **Edgehill** applied and **YM (Uganda)** did not because the latter was a deportation case and the set of rules in issue were different. Secondly, the judge had misdirected himself in his assessment of the first appellant's credibility, particularly as he appeared to have merged the cases of the first and second appellants (as had

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[2] 2 "276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
...
(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

[3] "EX.1. This paragraph applies if
(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
(bb) is in the UK;
(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and
(ii) it would not be reasonable to expect the child to leave the UK; or …"

Judge Wiseman) in finding the former had a poor immigration history. Thirdly, the judge failed to make clear and separate findings in relation to the best interests of the fourth and fifth appellants.

7. Permission to appeal on all grounds was granted by Judge of the First-tier Tribunal Levin.

8. We heard submissions on whether the Judge made a material error of law.

9. Mr Pennington-Benton appeared before us for the appellants. He focused his submissions on two grounds. First, whether the Judge made a sufficient and properly reasoned decision when he made an adverse credibility finding against each appellant. Second, that the Judge erred in applying the new Immigration Rules to an application made before 9 July 2012 when the new rules came into effect. He relied on **Edgehill** (supra).

10. On the first ground it was submitted that the Judge should have considered the written and oral evidence together to come to an assessment as to whether the appellants were telling the truth: he should have made findings on the core parts of the appellants' case. His failure to do so means that the appellants have no idea whether their account is accepted, or not, or which parts were accepted and which parts where rejected. In addition, the Judge conflated the case of the first appellant with that of the second appellant. He placed particular reliance on the absence of documentary evidence, in particular, the lack of death certificates for the parents of the first appellant when there was an explanation for their absence in the second supplementary statement of the first appellant with which the Judge failed to deal. The appellants' case was that they had no ties with their country of origin. As a result they had no-one who could assist them with providing the documentation.

11. On the second ground the Secretary of State erred because she should have applied the pre-2012 test but also when she considered the article 8 claim she should have considered the current rules as well, which would then include the "no ties" test. The Judge was wrong on the application of **YM (Uganda)**. Because the Judge applied the wrong rules there was an error of law which, it was submitted, was material. The appropriate approach was that in **R (Singh) v Secretary of State for the Home Department** [2014] EWHC 2330, namely, that the decision can only be upheld if it would inevitably have been the same. The correct course was for the matter to be remitted for reconsideration.

12. No oral submissions were made to us on any failure on the part of the Judge to make clear and separate findings in relation to the best interests

of the fourth and fifth appellants. We observe that it is perfectly clear from a reading of the judgement that the FtTJ did so [22].

13. Mr Avery, for the respondent, contended that it was clear from the judgement what evidence the Judge accepted. The Judge was not satisfied on many points. His reasons were set out in paragraph 23 of the judgment. There was no material error in his adverse findings of credibility.

14. Because the appellants were a family the Judge went on to assess them together. His disbelief of the second appellant fed into his conclusions about the lack of documentation. If there were local contacts available then they would be available to both of the adult appellants. Mr Avery did not accept that the Judge was obliged to make the findings which Mr Pennington-Benton submitted he should but, if he did have to, it made no material difference to the issue as to whether the appellant had ties in their country of origin.

15. The appellants' second ground was more complicated. They were unable to rely on the case of **Edgehill** because that concerned rules that were implemented in 2012 under different provisions to the rules which were implemented at the same time as the 2014 Act. The appellants' reasoning, therefore, as to why the Secretary of State should not have applied rule 276ADE cannot stand up because the implementation provisions are different. That is unlike the case of **YM (Uganda)** where the phrasing is the same as the 2014 implementation provisions so that the same reasoning would apply to the current circumstances.

16. The right of appeal here arises from circumstances where rule 400 of the Immigration Rules applied. That was in force at the date of the decision and in fact bypasses the appellants' argument because what is being appealed is the decision to remove.

17. Overall, because of the clear findings by the Immigration Judge on credibility it would make no difference as to which test – whether it was the test of no ties to the country to which the person being removed would have to go if required to leave the United Kingdom or very significant obstacles to the integration into the country to which the person being removed would have to go – that the Immigration Judge applied. Because of the Immigration Judge's findings on credibility it made no difference as to which test he applied because of his justifiable disbelief that he had no evidence to go on.

DECISION
Adverse Credibility Findings

18. In paragraph 22 of his judgment, having earlier set out the evidence that he had received, both in written and oral form, from the first and second appellants at the hearing, the FtTJ said, "The facts that I accept

are that the appellant came to the United Kingdom many years ago although it is not certain precisely when. …I accept that she has been in a long term relationship for some eight years, on and off, with the second appellant by whom she has three children. …" Beyond that there was no independent evidence to support the testimony of the first appellant. The FtTJ regarded some independent evidence as critical to the acceptance of her evidence. Reading the decision letter as a whole we find that the FtTJ was quite clear about what parts of the evidence of the first appellant he accepted. Without any independent evidence he was unable to accept any other part of the first appellant's evidence other than where he said so expressly.

19. On the second appellant the FtTJ found (in paragraphs 22 and 23) that there was no evidence that he was abused by his uncle. He found that the account given by the second appellant of his return to Nigeria in 2006 when he may or may not have returned to claim an inheritance but said he was living on the streets for some six months and being assisted by strangers to obtain a false passport to return to the United Kingdom to be totally implausible. The second appellant's credibility was further undermined by his propensity to lie, as evidenced by his use of a false passport to re-enter the United Kingdom, and his admitted lies in his interview. His lack of candour about the first appellant's circumstances on her arrival to England was a further factor which provided evidence of lack of credibility and a propensity to deceive.

20. For the sake of completeness the FtTJ dealt separately with the third, fourth and fifth appellants in paragraph 22. He had no doubt that the third appellant had learning difficulties as evidenced by medical and school reports. Likewise, the fourth appellant had an asthmatic condition. He was satisfied that there was family life between all five appellants and that they obviously had a private life. That, however, had been established when they were fully aware of their precarious immigration status contrary to the public interest under section 117B of the 2002 Act.

21. The FtTJ went on to make adverse findings of credibility on both appellants particularly in respect of the death certificates in relation to their parents. He recorded, "Even if they themselves did not know how to go about obtaining these documents, they have been legally represented and the legal representatives would have known what to do." We find that was a perfectly justified finding in the circumstances of this case where both appellants were legally represented. He did not conflate the case of the first appellant with the case of the second appellant in this or any other aspect.

22. Contrary to the submissions on behalf of the appellants on this first ground we found that the Judge made adequate and express findings so as to enable the appellants to know which parts of each of their evidence

were accepted and which were not. He dealt with each appellant separately and then proceeded to consider the family and private life situation. He provided an explanation for rejecting their accounts which was the dearth of documentary material. On a full and fair reading of the judgment it is quite clear which parts of the appellants' evidence the FtTJ accepted and which he did not. It was not incumbent on him to deal with each and every part of their evidence only those parts which were material to the issues which he had to determine. That he did in a way which we find is perfectly clear and justifiable.

Ground Two

23. Rule 400 of the Immigration Rules in force at the relevant time reads:

> "Where a person claims that their removal under paragraphs 8-10 of schedule 2 of the Immigration Act 1971, section 10 of the Immigration and Asylum Act 1999 or section 47 of the Immigration, Asylum and Nationality Act 2006 would be contrary to the UK's obligations under article 8 of the Human Rights Convention the Secretary of State may require an application under paragraph 276ADE (Private Life) or appendix FN (Family Life) of these rules. Where an application is not required, in assessing that claim Secretary of State or an immigration officer will, subject to paragraph 353 consider that claim against the requirements to be met under paragraph 276ADE or appendix FN and if appropriate the removal decision will be cancelled."

24. Mr Pennington-Benton accepted in reply that Mr Avery may have a good point on rule 400. He did not, however, accept that it altered the question of whether the "no ties" test was wrongly applied. He submitted that the question was still whether the Secretary of State applied the right test. If she did not the appeal should be allowed because she should have applied the relevant rule in force at the time.

25. We agree with both parties that paragraph 400 of the Immigration Rules is a good point. We accept the submissions that Mr Avery made. They make it clear that what is being appealed is the decision to remove. The clear language used means that, in effect, it bypasses the argument as to the appropriate test.

26. However, given the findings on credibility which the Immigration Judge made, and which we find to be lawful and justified, we are satisfied that it would make no material difference as to which of the tests the Immigration Judge did apply because of his findings in relation to the evidence as a whole. It follows that even if the Secretary of State applied the "no ties to the country" test as opposed to the "very significant obstacles to the applicant's integration test" her decision inevitably would have been the same, applying the approach of Nicol J in the case of **Singh**.

27. The First-tier Tribunal's decision does not disclose any material error of law and shall stand. This appeal is dismissed.

NOTICE OF DECISION

The appeal is dismissed.

No anonymity direction has been made.

Signed **Date**

The Honourable Mrs Justice Patterson DBE

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed **Date**

The Honourable Mrs Justice Patterson DBE