Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/19476/2014
IA/19480/2014
IA/19483/2014
IA/19488/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 July 2015	**On 14 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

CE (NIGERIA)
DBE (NIGERIA
EVGE (NIGERIA
DORE (NIGERIA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Matthias Ume-Ezeoke, Solicitor, The Legal Resource Partnership
For the Respondent: Mr S Kandola, Specialist Appeals Team

DECISION AND REASONS

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal dismissing their appeals against a decision of the Secretary of State to make removal directions under Section 10 of the Immigration and

Asylum Act 1999. The First-tier Tribunal made an anonymity direction, in view of the age of the third and fourth appellants, and I consider it is appropriate for that reason that the appellants should be accorded anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission

2. On 24 February 2015 First-tier Tribunal Judge Nicholson granted the appellants permission to appeal to the Upper Tribunal for the following reasons:

> "1. First-tier Tribunal Judge Davey dismissed these appeals against removal to Nigeria in a decision of 30 December 2014.
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> 2. The appellants are a Nigerian family who have been here without leave. The first and second appellants came in early 2005. The third and fourth appellants were born here in 2005 and 2009 and have been here ever since. The judge did not accept that the family's removal breached article 8.
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> 3. The grounds of the application are poorly drawn.
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> 4. Ground 1 contends that in rejecting the appellant's "generalised" claim that cultural and other ties to Nigeria had been lost, the judge erred because, amongst other things, the judge did not explain why he did not accept the cultural and other ties were lost.
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> 5. The first and second appellant's witness statements contended that contact with family in Nigeria had been lost. The judge did not explain why that evidence was rejected. That would not assist the first and second appellants, so far as paragraph 276ADE of the rules is concerned, if, as the judge indicated at paragraph 3, it was not suggested that they met any category of the immigration rules. However, it was a relevant issue when determining whether the third appellant could reasonably be expected to leave the United Kingdom to return to Nigeria.
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> 6. Ground 2 is disjointed but it infers, if nothing else, that the judge erred when considering the best interests of the children because the judge failed to consider that the elder child in particular had formed a life of her own outside the family home and the judge did not take into account issues relating to her education.
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> 7. In **EV (Philippines) 2014 EWCA 874**, the Court of Appeal identified a number of factors to consider in the context of a child's best interests including how long the child has been in education and the stage that the child's education has reached. Although the judge made a passing reference to **EV (Philippines)** it is not apparent that he considered these factors.

8. The judge had to determine for the purposes of section 117B(6) whether it was reasonable for the eldest child to leave the United Kingdom. Although the child's best interest were not determinative of that issue, they were certainly an important factor to be considered in the determination of that issue. It is arguable that the third appellant's best interests were not properly considered and in those circumstances, permission to appeal is granted on ground 2. I do not refuse permission on the ground 1, although whether it takes the matter any further is questionable."

The Background

3. The first appellant is the lead appellant, and so I shall hereafter refer to her simply as the appellant, save where the context otherwise requires. She was born in Nigeria on 6 July 1966, and her husband was born in Nigeria on 27 August 1961. Their two children were born in the UK on 1 August 2005 (third appellant) and 9 June 2009 (fourth appellant) respectively.

4. The appellant arrived in the UK in March 2005 with her husband. Both of them had entry clearance from Lagos as visitors. The couple overstayed. On 27 September 2012 the appellants' representatives applied to the UK Border Agency for leave to remain, with the other appellants being dependants on the first appellant's application. The representatives relied on the fact that the two children had spent their formative lives in the UK, and that the older child V was in full-time education and had lived in the UK for over seven years. The application was refused on 27 September 2013 with no right of appeal. The appellant threatened judicial review proceedings, and eventually on 10 March 2014 she was served with a form IS15A notice. On 11 April 2014 the respondent gave her reasons for being satisfied that her removal did not breach the European Convention on Human Rights.

5. The appellant was not eligible for leave to remain under Appendix FM, as her partner was neither a British citizen nor had he been granted refugee leave or humanitarian protection. He had remained in the United Kingdom after expiry of his leave to enter as a visitor.

6. The appellant also did not meet the eligibility requirements for leave to remain as a parent of her son D, as he had not accrued seven years' residence. It was accepted that paragraph EX.1 applied to her relationship with her daughter V. She was 8 years old and was currently attending primary school. But it was reasonable to expect V to leave the UK as she was still young and adaptable and she was not in a critical state of her education. She was not in the process of taking important examinations. V and her family would depart together as a family, so she would have the support of her parents. According to the Nigeria Country of Origin Information Report of June 2013, English was an official language in Nigeria, so communication would not be a problem. According to the

application form dated 29 September 2012 at question 6.4, the appellant had her mother in Nigeria who could assist the family to settle on return.

7. The respondent returned to the topic of best interests in the context of a discussion of the impact of Section 55. In respect of V's private life, she would be able to continue her education in Nigeria. The objective country information indicated that children would have access to education in schools upon return to Nigeria. The respondent went on to quote extensively from the country of origin report for Nigeria dated June 2013 on the topic of access to education and schools. The standard of education may not be of an equal standard to that available in the United Kingdom, but it was clear (the respondent asserted) that education was accessible and would be available to the children. They would be able to benefit for such education, and therefore make a positive contribution. Both parents and the wider family could support the children in Nigeria. The appellant and her family would be removed together as a family unit. The children's social wellbeing would be protected within that family unit. No evidence had been put forward to suggest that their health would be affected in Nigeria. They would be living with both parents, and in the absence of any evidence to the contrary, it is presumed that they would therefore be safe and well cared for. With the support of their parents, there was no indication they would not achieve at school. No evidence had been put forward to suggest that the appellant and her husband could not support their family. It was therefore considered the best interests of the children had been regarded as a primary consideration, and that the Secretary of State's duty under Section 55 of the Borders, Citizen and Immigration Act 2009 had been duly considered and discharged.

8. Exceptional circumstances had also been considered. The appellant had not made any attempt to normalise her immigration status until 2012. She had made no attempt to depart the United Kingdom voluntarily, despite the refusal of her application to remain in 2013. In her application form of 29 September 2012 at question 6.5 the appellant said she was scared for her children's safety, as there were tribal wars and unrest in Nigeria to which they were not accustomed. As a result of this statement, the Home Office had written to her on 24 March 2014 to make her aware that this statement amounted to a claim for humanitarian protection, and that she would have to attend the Asylum Screening Unit to register such a claim. But the letter of response dated 31 March 2014 stated that the appellant instructed categorically that she did not wish to apply for political asylum.

The Hearing Before, the Decision of, the First-tier Tribunal

9. At the hearing before Judge Davey, only the appellants were represented. In his subsequent decision, Judge Davey referred at paragraph 9 to a recent statement of the husband. He asserted there was danger in the Delta State and that they were concerned with the risk of kidnapping and ill-treatment, and the UK was a safer place to be. Thus they preferred to bring their children up here.

10. At paragraph 10, the judge referred to a witness statement from the appellant which essentially said the same thing, except that she raised additional fears concerning the Ebola virus, female circumcision (FGM), and how she was afraid of what might happen to her daughter in the event of marriage. The judge's findings were set out in paragraphs 11 onwards:

> "11. The Appellants have the burden of proof of showing that they met the requirements of the Immigration Rules or alternatively that they engaged with the provisions of Article 8 of the ECHR outside of the Rules. In considering these matters I apply the case of Huang [2007] UKHL 11, MM (Lebanon) [2014] EWCA Civ 985 and the analysis in Ganesabalan [2014] EWHC 2712, Aliyu [2014] EWHC 3919 as well as EV (Philippines) [2014] EWCA Civ 874. It seems to me that on the face of the evidence and the submissions made the Appellants do not succeed under the Immigration Rules. I do not accept the generalised claim that cultural and other ties have been lost with Nigeria.
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> 12. Plainly for the children those ties have not directly been established but they have grown up in a family which, absent of contrary evidence, is essentially founded upon the First and Second Appellants Nigerian identity background. In the context that they are still of an age within the family to be dependent upon their parents. It seems to me the likelihood is even if the children at some stage do not particularly like some of the Nigerian food cooked in the traditionally way, that they are being exposed to Nigerian culture. Whilst in the Untied Kingdom the Third Appellant may prefer not to wear more traditional Nigerian dress, as her mother indicated, and would prefer to be in Western clothing that is an understandable position but is by no means an immutable one.
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> 13. I find that the Appellants are not UK nationals and do not meet the requirements of the Immigration Rules, save for the Third Appellant under paragraph 276ADE, given I see no reason why she cannot establish herself in her home country nor would there be significant hardship in doing so.
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> 14. I see nothing of removal depriving her of something to which she would otherwise be entitled. There are no rights under Article 8 to pick the country where you would wish to bring up your children and prefer it. I look at this matter from the standpoint of the parents are bearing in mind the guidance contained in ZH (Tanzania). It is plain that just because the children may benefit from being in the United Kingdom and it is the country of choice for the parents that does not avoid the fact that the parents have only established themselves in the circumstances where they have not had a right to remain and now seek to take the benefit of the children growing up here. It seems to me that EV (Philippines) is a case of some assistance in analysing what is the

correct approach to this matter. Just as the sins of the parents should not necessarily be visited up their children who had no say in the matter similarly the fact that the children have achieved certain benefits which they would otherwise never have been entitled to can not be given undue weight particularly when assessing the public interest. I have considered the claimed employment, housing and social difficulties of the family relocating and possible consequences for the children but the parents views are born of their determine wishes to remain in the UK and I do not accept their perceptions of the difficulties to be faced.

15. Having carefully reviewed this matter I am satisfied that the Appellants have, as a family, family life in the United Kingdom and they have as far as the family forms part of it each lived here enjoying certain private life rights. Be that as it may I find the Respondent's decision lawful and directed at Article 8(2) considerations. I take into account the provisions of Section 117A and 117B of the Nationality, Immigration and Asylum Act 2002 as amended by the 2014 Immigration Act. It seems to me that this is a case where as reflected considerable importance should be given to the public interest bearing in mind none of the Appellants, even with English language abilities, has been able to work in the United Kingdom and are not contributors to the UK community.

16. In the circumstances I find the public interest in removal should prevail that removal is a proportionate step to be taken."

The Error of Law Hearing

11. At the hearing before me to determine whether an error of law was made out, Mr Ume-Ezeoke developed the arguments raised in the application for permission to appeal. On behalf of the Secretary of State, Mr Kandola adopted the position taken in the Rule 24 response dated 18 March 2015, where a colleague argued that there was no material error of law in the judge's decision.

Discussion

12. Ground 1 has no merit. The judge explained why he did not accept the generalised claim that cultural and other ties have been lost with Nigeria. He gave his reasons for not accepting this generalised claim in paragraph 12.

13. In oral argument, Mr Ume-Ezeoke took a different point, which was that the judge ought to have applied the version of Rule 276ADE(vi) which was in force at the time of the hearing, rather than the version which was in force at the date of decision. The judge was not dealing with the deportation Rules, and so he was right to follow the normal course of

applying the Rules as they stood at the date of the Secretary of State's decision, following the House of Lords decision in **Odelola**. Moreover it was not the appellant's case that she could bring herself within the new version of Rule 276ADE(vi), which is no less onerous than the old version of Rules as construed and applied by the Upper Tribunal in **Ogundimu**.

14. As noted by Judge Nicholson when granting permission, the judge did not specifically address the contention in the witness statements that contact with family in Nigeria had been lost. But the judge was not required to address every aspect of the evidence. The assertion made in the refusal letter that the family could lead an adequate private and family life in Nigeria was not predicated on the family being able to access support from other family members who continued to reside there. Similarly, it was not necessary for Judge Davey to make a finding one way or the other as to whether contact with family in Nigeria had been lost or not. Even if it had been lost, the appellant had not sought to discharge the burden of proving that contact could not be revived once she had got back to Nigeria, and made local enquiries. But the main consideration is that the family were an independent unit, and the judge was entitled to proceed on the premise that they were fully capable of looking after themselves and the children in Nigeria without external support.

15. For the purposes of evaluating ground 2, it is helpful to consider the two different approaches to the resolution of the best interest question which were sanctioned by the Court of Appeal in **EV (Philippines)**. Clarke LJ endorsed the orthodox approach whose lineage can be traced back to **MK (India)**, which is to consider the child's best interests from an ideal world perspective and without any immigration control overtones, before going to consider whether "the wider proportionality assessment" prevails over the ideal outcome for the child. Lewison LJ championed the real world approach, whose lineage can be traced back to **Zoumbas**, in which the immigration status of the parents informs the assessment of where the best interests of the child lie.

16. On analysis, Judge Davies' approach is broadly in line with the real world approach championed by Lewison LJ in **EV (Philippines)**. At paragraph 13, Judge Davey acknowledges that child V meets the gateway requirement of the sub-rule in Rule 276ADE which corresponds to Section 117B(6) of the 2002 Act. This was never in dispute. The question in controversy was whether it was reasonable to expect the qualifying child (namely V), to leave the country with the rest of her family. This is a question which the judge only needed to answer once. As he answered it under the Rule, he did not need to answer it separately by reference to the statute; or under the heading of the Secretary of State's duty under Section 55; or as part of a best interest assessment at stage 5 of the **Razgar** test. For, under whatever heading the question was considered, the same considerations had to be taken into account.

17. Having regard to the established case law, in particular **EV (Philippines)** to which the judge makes express reference in paragraph 14, I consider

that the judge has given adequate reasons for finding that it was reasonable to expect the third appellant to settle in Nigeria with her family, notwithstanding the fact that she had accrued over eight years' residence in the UK and was in the middle of her primary school education.

18. In paragraph 14 the judge made no express reference to the third appellant's academic achievements (which are acknowledged in the refusal letter) and he made no finding as to precisely how long the third appellant had been attending primary school. But it is not suggested that the judge did not fairly summarise the broad thrust of her parents' case in paragraphs 9 and 10 of his decision, and accordingly the disruption to the third appellant's education was not something upon which heavy reliance was placed as militating against the family's removal. In any event, in the light of the established jurisprudence, disruption to the third appellant's education was not a matter which could realistically tip the scales in the third appellant's favour, or in favour of the family as a whole, having regard to the family's illegal status and the parents' lack of entitlement to have their children educated in the UK at the UK tax payers' expense when they were all here illegally, and when the parents were not making any financial contribution to the UK.

19. Judge Davey's finding in paragraph 13 that there was no reason why the third appellant could not establish herself in her own country nor would there be significant hardship in her doing so finds an echo in the reasoning of the Upper Tribunal in **AM (Section 117B) [2015] UKUT 260 (IAC)** at paragraph 39:

> "There was no reason to infer that any interruption to the education of the elder child upon return to Malawi would be any more significant than that faced by any child forced to move from one country to another by virtue of the careers of their parents. Nor should the difficulties of a move from one school to another become unduly exaggerated. It would be highly unusual for a child in the UK to complete the entirety of their education within one school. The trauma, or excitement, of a new school, new classmates and new teachers is an integral part of growing up. In too many appeals the FtT is presented with arguments whose basic premise is that to change a school is to submit a child to a cruel and unduly harsh experience. Indeed, as if to illustrate the point, we note the eldest child of this family has been required to move schools, and move from one end of the UK to the other, as the result of the decisions of her parents. The evidence does not suggest she suffered any hardship or ill-effect from so doing."

20. In conclusion, I find the judge has given adequate reasons for dismissing the appeals of all four appellants, and no error of law is made out.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Monson