Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/33574/2014
IA/33578/2014
IA/33579/2014
IA/33582/2014
IA/33583/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 9 July 2015	**14 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADEDEJI OLUBUMMO (1)
FOLASHADE OLABUMMO (2)
AYOMIDE OLUBUMMO (3)
INIOLUWA OLABUMMO (4)
IMISIOLUWA OLUBUMMO (5)
(NO ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr J Parkinson, Home Office Presenting Officer
For the Respondent: Mr O Ogunbiyi, Counsel

DECISION AND REASONS

1. The respondents to this appeal are citizens of Nigeria born on 20 September 1962, 30 October 1968, 18 November 1996, 3 March 2000 and 3 March 2000 respectively. They are a family and therefore their appeals have been

linked and heard together. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Coutts, allowing the respondents' appeals against decisions of the Secretary of State, dated 9 August 2014, to remove them to Nigeria, having refused their applications for leave on human rights grounds. The Secretary of State refused the applications for leave on reconsideration, having found the respondents could not succeed under Appendix FM or paragraph 276ADE of the Immigration Rules, HC395, and there were no exceptional circumstances for the purposes of article 8 of the Human Rights Convention.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to the members of the Olubummo family from now on as "the appellants" and the Secretary of State as "the respondent".

3. I was not asked and saw no reason to make an anonymity direction.

4. The first appellant arrived in the UK in October 2001 with a visit visa. After being refused further leave in November 2002 the first appellant overstayed. The second appellant also came to the UK as a visitor in September 2004, accompanied by all the children. They all returned to Nigeria before the expiry of their leave. They returned to the UK shortly before their leave expired on 10 March 2005. They last entered as visitors on 15 July 2005 and they overstayed their leave. As Judge Coutts recorded, the first and second appellants decided they should all continue their lives here.

5. After a hearing on 6 February 2015 Judge Coutts allowed the appeals. He noted there was no real challenge to the evidence. The first and second appellants had made their choices as to where they made their lives. The first appellant set up a business as a motor trader and the second appellant also ran her own business selling clothing until 2009. Since then she has not worked. The children all attended state schools. The eldest child, Adewale, is not an appellant. He had achieved good grades at A-level and now wishes to go to university. He had been accepted on a course but could not start it because of his lack of immigration status. The third appellant was about to take her A-levels and very high grades were predicted. The fourth and fifth appellants, twin boys, were doing well in their studies also. The first and second appellant now regretted their choices given the impact on the children, which they had not foreseen. Their eldest son was unable to start his degree course. The third appellant had not been able to go abroad on school trips. Judge Coutts concluded that, if the case only concerned the first and second appellants, it would be relatively straightforward. They would have to take the consequences of their poor decisions. However, the children were now experiencing the consequences of those choices and they were blameless. The third fourth and fifth appellants came to the UK when they were 8 and 5 years of age and they would remember little of Nigeria.

Their connection to the country consisted of speaking to their paternal grandfather on the telephone from time to time. They had grown up in the expectation of life here. In paragraph 27, Judge Coutts concluded in respect of the third, fourth and fifth appellants as follows:

> "27. It follows therefore that I am satisfied that it would not be reasonable to expect the third, fourth and fifth appellants … to return to Nigeria; there being no dispute that they have been here for more than seven years. Accordingly, they qualify for leave in respect to their private life under para 276ADE of the immigration rules."

6. Judge Coutts found the first and second appellants did not qualify under the rules but there were exceptional or compassionate circumstances present which were not covered by the rules and which required consideration of the position under article 8 of the Human Rights Convention. That is because the three children he had found were entitled to enjoy their private life in the UK needed their parents here to look after them in order to do that. On proportionality he concluded as follows in paragraph 30:

> "30. I find that it would not be proportionate to remove the first and second appellants to Nigeria. If the first and second appellants were removed to Nigeria they would not be able to return because of their immigration history or, at the very least, there would be a significant delay in them being able to return here which would affect both the private life of their children … and also their family life together with their parents, the first and second appellants. It would therefore be damaging to the children's welfare as they would not be able to look after themselves here without their parents' financial and emotional support nor would it be reasonable to expect them to do so."

7. Finally Judge Coutts considered the position of Adewale, even though he was not an appellant. He purported to allow his appeal on article 8 grounds.

8. The respondent sought permission to appeal from the First-tier Tribunal on three grounds: (1) lack of jurisdiction to allow Adewale's appeal, (2) misdirection in law for failing to apply section 117B in substance, and (3) failing to carry out a balanced assessment of the third, fourth and fifth appellants' appeals so as to determine what was reasonable.

9. Permission to appeal was granted by Judge of the First-tier Tribunal Davidge. She considered it was arguable Judge Coutts had erred in paragraph 27 by treating the length of the children's residence as determinative. All grounds could be argued.

10. I heard argument on the question of whether Judge Coutts's decision is vitiated by material error of law.

11. Mr Parkinson applied to vary the grounds of appeal to include an argument that the judge made a material error of fact amounting to an error of law in paragraph 26 where he said they did not know the language in Nigeria.

English is spoken in Nigeria. The application was unopposed and I allowed it. Whilst the ground did not appear to have great merit seen in isolation, it was in my view part of a wider critique of the judge's overall assessment of the reasonableness of the children returning to Nigeria.

12. Mr Parkinson argued that paragraphs 25 and 26 of the judge's decision, which contain his reasons for finding that it was unreasonable to expect the children to return were little more than a list of the inevitable consequences of the children returning. There was no reason the children would have little appreciation of Nigerian culture as they were part of a Nigerian church group. There was no obligation to educate the appellants in the UK. In *Zoumbas v SSHD* [2013] UKSC 74, the Supreme Court reviewed the applicable principles and confirmed that it was right to take into account the fact the child is not British in assessing the weight to be given to best interests (see paragraph 24). In *EV (Philippines) & Ors v SSHD* [2014] EWCA Civ 874, in the context of an article 8 proportionality balancing exercise, Lewison LJ found on the facts of that case that, where the parents had no independent right to remain in the UK, it was "entirely reasonable" to expect the children to go with them. The desirability of the children being educated in the UK at public expense could not outweigh their best interests, which was to remain with their parents. The judge had not shown it was unreasonable for the children to return. The judge had not taken into account the need for the Secretary of State to control immigration. The case was commonplace. In short, the judge had not given adequate reasons for his decision.

13. Mr Ogunbiyi argued the judge's decision did not contain any material error. The children had never known Nigeria except when they were very young. The judge had made clear findings on this. There was a huge difference between living in Nigeria and familiarity with a Nigerian church group in the UK. The judge was right to look at the emotional impact on the children who were doing well in their education. He argued that there was no need for there to be anything out of the ordinary in the facts. Children who had lived in the UK for seven years would normally qualify unless there were unusual circumstances making it unreasonable.

14. Mr Parkinson argued the case required a more nuanced approach than the judge gave it. Children are adaptable.

Error of law

15. I start by noting the judge plainly erred in allowing the appeal of Adewale for the simple fact there was no appeal before him. He referred to it being well-established that the family life of family members not party to the proceedings could be taken into account. That is correct but does not extend to allowing non-existent appeals. Mr Ogunbiyi referred to the unfortunate circumstances relating to Adewale's case. It appears an appealable decision was not made in respect of him, which might well have

been an error. Mr Ogunbiyi suggested the judge had thought it was sensible to deal with him as well. I agree it was right and sensible to include consideration of Adewale's circumstances given there had apparently been an oversight in failing to make an appealable decision for him. Nonetheless it was erroneous to purport to allow his appeal.

16. The error noted above has no bearing on the remaining appellants. The decision to allow Adewale's appeal is set aside for want of jurisdiction.

17. Turning to the appeals of the third, fourth and fifth appellants, I note the wording of the rule:

> "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:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> …
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> …"

18. I note the appeals turn on whether it would be reasonable to expect the children to leave the UK or not. Insofar as the grounds seeking permission to appeal argued the judge erred by regarding the seven years' residence as determinative (as the judge granting permission to appeal notes in relation to Judge Coutts's paragraph 27), I do not regard the point as arguable. I note it was not pursued by Mr Parkinson. The first sentence of the paragraph shows the judge was firmly planting his decision on the basis of reasonableness and not simply the seven years' residence.

19. Mr Parkinson's arguments amounted in essence to saying the judge failed to give adequate reasons for his conclusion that it would not be reasonable to expect the children to leave the UK. I do not accept Judge Coutts is unaware that English is spoken in Nigeria and I reject the argument that he made a material error of fact.

20. It is helpful to scrutinise the decision to discover which factors led Judge Coutts to his conclusion. As noted, he made no adverse credibility findings. The factors are as follows:

    1) the children were young when they entered the UK (8, 5 and 5 respectively) and had resided in the UK for 10 years;

2) there was no blame attributable to the children for the choices made by their parents;
3) the children would have few memories of Nigeria and their current connection with Nigeria consisted of speaking to their grandfather from time to time;
4) the children have not returned to Nigeria since arrival because they do not have any travel documents;
5) the children did not attend secondary school in Nigeria;
6) the children do not know the language (other than English) and do not have an appreciation of cultural differences;
7) the children have been doing well at school and hope to go to university; and
8) the children's experience has been in the UK and they expect to live their lives here.

21. The judge's decision undoubtedly contains reasons for his conclusion that, having resided here continuously for more than seven years, it would not be reasonable to expect the children to leave the UK. Although Mr Parkinson's challenge was largely framed within an argument as to whether the judge's reasons were adequate, discussion moved on to whether the correct test was applied. Mr Parkinson certainly thought the reasons given by the judge were commonplace and something more than this had to be shown to succeed. The words of Lewison LJ in *EV (Philippines)* supported the view that something more than a desire to pursue education in the UK would be required. I also queried why the private life of high-achieving students should be valued any more highly than students who were not so successful in their studies.

22. In my view strong reasons must be shown for finding that it would be reasonable to expect the children to leave the UK after they have reached the seven-year threshold. It is well-known to immigration law practitioners that the provision now found in paragraph 276ADE(1)(iv) is the latest incarnation of a longstanding policy on the part of the Secretary of State to treat seven years as the point at which enforcement action would not generally be pursued against children. There was a concession called DP5/96 whereby enforcement would "not normally" proceed in cases in which a child had been born here or come here at an early age and had lived continuously for seven years. So the current IDIs (Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes, section 11.2.4, April 2015) recognise that the longer the child has resided in the UK the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK and strong reasons will be required in order to refuse a case with continuous residence of more than seven years.

23. Seen in this context, I do not see that Judge Coutts's decision can be challenged on the grounds either that he applied too low a threshold or that the reasons he gave were inadequate to reach that threshold. He

recognised the parents had achieved their long residence through overstaying, which was not to their credit, but no blame attached to the children for these choices. His reasons in essence explain why he did not think the children would find it possible to adapt to life in Nigeria without considerable hardship. They had successfully integrated in to the UK, which they naturally regarded as home following ten years' residence, and removing them would have an adverse impact on them. In other words, strong reasons had not been shown why it would be reasonable to remove them. I conclude Judge Coutts's decision was one which it was open to him to make and his reasons were adequate.

24. Mr Parkinson did not argue that, if Judge Coutts's decision was correct with respect to the third, fourth and fifth appellants, the decision to allow the appeals of the first and second appellant were nonetheless erroneous. In other words, he accepted that their appeals would stand or fall with their children's.

25. Accordingly the respondent's appeal is dismissed.

NOTICE OF DECISION

The First-tier Tribunal did not make a material error on a point of law and its decision allowing the appeals shall stand.

No anonymity direction has been made.

Signed **Date 14 July 2015**

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal