Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/41302/2014
IA/41316/2014
IA/41306/2014
IA/41312/2014
IA/41325/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 September 2015	**On 14 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

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OO (2)
OIO (3)
AOO (4)
MOO (5)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A. Burrett, Counsel, direct access
For the Respondent: Ms A. Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellants against a decision of the First tier Tribunal promulgated on 27 January 2015 dismissing their appeal against a decision of the respondent to refuse them leave to remain.

2. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

The Appellants

3. The appellants are citizens of Nigeria. The first and second appellants are husband and wife. The other three appellants are their children.

4. The first appellant entered the UK in 2002 as a student and on several occasions was granted further leave to remain as a student. On 15 February 2008, he applied for leave as a highly skilled migrant and this was granted until 26 February 2010. However, this grant was said by the respondent to have been obtained by deception and he was served with form IS.151A.

5. On 10 March 2009 the appellants applied for leave to remain under human rights law. Their application was refused on 8 April 2009. On 8 May 2012 they applied again and this was refused on 11 July 2013 with no right of appeal. Following judicial review proceedings, the respondent agreed to reconsider the application and make a decision with a right of appeal. This was made on 1 October 2014 and the application was refused.

6. In refusing the application, the respondent, applying the Immigration Rules in force post 9 July 2012, assessed whether the appellants could satisfy the requirements of Appendix FM or Rule 276ADE of the Immigration Rules. Having found that they could not, the respondent proceeded to consider whether there were exceptional circumstances, having regard in particular to Section 55 of the Borders, Citizenship and Immigration Act 2009, that would warrant a grant of leave outside the Rules. The decision on 1 October 2014 stated that the respondent did not accept there were exceptional circumstances or that removal would be disproportionate.

First-tier Tribunal decision

7. The appellants appealed and their appeal was heard by First-tier Tribunal judge Thanki ("the judge"). The judge assessed the appeal following the five step analysis in **Razgar** ([2004] UKHL 27). Having first found that Article 8 of the ECHR was engaged he proceeded to consider proportionality, finding that removal would be proportionate. The judge's consideration of proportionality included an analysis of the appellants' immigration history (finding that they are in the UK unlawfully), their

circumstances in Nigeria (accounts of which by the first and second appellant were not believed) and of the best interests of the children. The judge's assessment also took into account what he described as the "burden on the public purse".

8. The grounds of appeal submit that:

   a. the case should have been considered under the Immigration Rules in force on 8th May 2012; and

   b. the judge failed to properly consider the best interest of the children taking into account that the eldest two have been in the UK for over seven years and that the oldest child is now thirteen having lived in the UK since she was three.

Submissions

9. Mr Burrett, on behalf of the appellants, submitted that the judge's approach to the children, the eldest of whom had been in the UK for ten years, was fundamentally flawed. He argued that the judge's starting point was to consider the parents and then, having found they were not entitled to stay in the UK, to decide the children should follow. However, the proper approach would have been to start with the children, by examining their individual circumstances including their ties to and in the UK and the impact on each of them of removal to Nigeria. He pointed to paragraph [82] of the decision, where the judge finds that the private life claim of all the appellants requires little weight because it was established whilst in the UK unlawfully, as an example of the judge not giving separate treatment to the children, whose private life should not be given little weight just because their parents have acted unlawfully.

10. Mr Burrett further submitted that the judge failed to ground his decision in the Immigration Rules and legislation and had he done so he would have given greater weight to the individual interests of the children in remaining in the UK. Both Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and Rule 276ADE of the Rules state that the public interest does not require removal of a child who has lived in the UK for at least seven years where "it would not be reasonable to expect the child to leave the UK". Mr Burrett contended that the judge, by failing to properly consider the Rules and moving straight to the five step **Razgar** assessment, failed to appreciate the implication and importance of two of the children having been in the UK for over seven years.

11. He further argued that the judge had failed to take account of the actual circumstances of the family. The mother and father were not cohabiting and it may well have been appropriate to consider their circumstances separately.

12. Mr Burrett did not make any submissions with respect to the appellants' first ground of appeal which was that the judge should have applied the Immigration Rules in force prior to 9th May 2012. In light of **Singh** [2015]

EWCA Civ 74 there is no merit in this ground and Mr Burrett was right not to pursue it.

13. Ms Fijiwala submitted that the judge, in his assessment of proportionality under Article 8, had addressed the best interests of the children and whether it would be reasonable to expect them to leave the UK. As clarified in **AM (S117B)** UKUT 0260, there is no need to set out the analysis twice. The judge had considered the relevant factors including their ties to the UK including their education, friends and community and reached a decision that was consistent with **EV (Philippines) v SSHD** [2014] EWCA Civ 874.

14. With respect to the fact the first and second appellants are no longer living together, Ms Fijiwala argued that it is apparent from the decision the judge has had regard to this. The judge noted at paragraph [17] that the first appellant sees the children daily, takes them to school and assists with their homework. Ms Fijiwala argued that it was reasonable to find that this role could continue in Nigeria.

Findings

15. Where, as in this appeal, the consequence of the respondent's decision is that children will be removed from the UK, the best interests of those children must be "a primary consideration."

16. In **EV (Philippines)** the Court of Appeal set out what is involved in considering the best interest of children and how this should be weighed against other factors including a poor immigration history of the parents.

> "35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
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> 36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.
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> 37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration

history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully"

17. The same court also explained at paragraphs [58] – [61]:

"58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?

59. On the facts of **ZH** it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.

60. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is 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 provide medical treatment for the world, so we cannot educate the world.

61. In fact the immigration judge weighed the best interests of the children as a primary consideration, and set against it the economic well-being of the country. As Maurice Kay LJ pointed out in **AE (Algeria) v Secretary of State for the Home Department** [2014] EWCA Civ 653 at [9] in conducting that exercise it would have been appropriate to consider the cost to the public purse in providing education to these children. In fact that was not something that the immigration judge explicitly considered. If anything, therefore, the immigration judge adopted an approach too favourable to the appellant."

18. The approach taken by the judge in the present appeal is consistent with that set out in **EV (Philippines)**. He has taken into consideration a broad range of factors, as contemplated in that judgment, in balancing the interests of the children against the public interest in immigration control. His starting point was to consider the current situation of the children, whom he describes as being well settled at school and having substantial ties to the educational system in the UK. He then considered the consequences for them of being removed to Nigeria. Both their parents will be removed at the same time, so there will not be a separation from either parent. The judge found that the children will be able to continue their education in Nigeria. In considering their educational opportunities, the judge has had regard to difficulties with the educational system in Nigeria (he refers to concealed fees and the duty to provide education terminating at 12) but also that the system is a functioning one which the

first and second appellant (who are both educated) will have the resources and ability to access for their children.

19. The judge has also considered the likelihood of the first appellant being able to work in Nigeria which clearly has implications for the economic situation of the children. Another factor he considered was that the children have been raised in a Nigerian cultural environment - he commented that the second appellant cooks Nigerian food and speaks to the children in their local Nigerian language (the language is not specified).

20. In addition, the judge has attached weight to his finding that the appellants are unlawfully in the UK and that the second appellant used deception to enter the UK. He has also had regard to the public expense both of educating and housing the children (who, with the second appellant, were being provided with emergency accommodation).

21. Mr Burrett submitted that the judge failed to put the children at the centre of his assessment and address why it would be reasonable to expect them to leave the UK (rather than it being reasonable for their parents to be removed). However, in setting out and considering the factors relevant to the children and their circumstances that is in fact what the judge has done.

22. The judge has followed the correct approach in reaching his conclusions, which were open to him on the information before him and for the reasons he gave. I find that there is no error of law and that the decision of the First-tier Tribunal should stand.

Notice of Decision

1. The appeal is dismissed.

2. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.

3. An anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Sheridan