Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/44409/2014
IA/44419/2014
IA/44437/2014
IA/44442/2014
IA/44444/2014

THE IMMIGRATION ACTS

Heard at Stoke	**Determination Promulgated**
on 21st July 2015	**On 27th July 2015**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

OMOWUNMI OLUWASEUN KAKA
TEMITOPE REYIKAT KAKA
FARUK PRECIOUS AYOMINE KAKA
SHERIFF PROMISE KAKA
AYISHAH KAKA
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance
For the Respondent: Mrs Johnstone – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge E.E.M Smith promulgated on the 5th February 2015 in which the appeals of this mother and her four children, all nationals of Nigeria, born on 9th September 1984, 10th April 2004, 2nd June 2006, 8th June 2014 and 2nd August 2010 respectively were dismissed. The application is dated 1st

November 2013. Following a judicial review of the original refusal the Respondent reconsidered the decision and re-refused on 22nd October 2014. It is this decision that was the subject of the appeal.

Preliminary issue

2. An application for permission to appeal to the Upper Tribunal was lodged and limited permission granted on 11th June 2015. Standard directions were sent to the parties together with notice of hearing. The letter being posted on 23rd June by first class post to each appellant and their representative Burton & Burton Solicitors.
3. The case was called on at 10.00AM, the listed time, but there was no attendance from the appellant nor any representative. As a result of enquiries made the court clerk was advised by Burton & Burton that a letter had been sent to Field House in London seeking an adjournment. No such letter had been forwarded to Stoke and so a duplicate copy was requested. Later in the day, at 13:46, a copy of a letter received from Burton & Burton was e-mailed showing a fax transmission time of 10:14 from Burton & Burton. The delay is explained by the fact the fax cover sheet failed to mention the hearing date and so was not expedited. A further copy of the letter was received at Stoke at 12:49.
4. The request is in the following terms:

> We hereby request an urgent adjournment for the above appeal which was due to be heard today at IAC Stoke.
>
> Unfortunately, counsel has been very ill with fever since last night and is not able to attend due to this. We have contacted numerous chambers to try and arrange alternative counsel but our attempts have been unsuccessful.
>
> We would be very grateful if an adjournment can be granted in the interest of fairness and justice as it is extremely crucial that counsel is present to put forward the case for the Appellant.
>
> We look forward to receiving confirmation that an adjournment has been granted.

5. No such confirmation was transmitted and so the representatives were aware that the appeal remained as listed.
6. There is no medical evidence of illness or of the attempts to secure alternative representation, which is not determinative. It is also noted that the letter fails to explain why the first appellant failed to attend, if she intended to, and why the solicitor advocate who attended the First-tier Tribunal or any other with conduct of the case failed to attend.
7. It is important to recognise that the test to be applied is that of fairness: will there be a deprivation of the affected party's right to a fair hearing if the adjournment request is refused.
8. The only basis on which permission to appeal was granted in the renewed application is:

6. However, it is arguable that the judge has erred in considering paragraph 276ADE (iv) of the Rules and Section 117(B)(6) of the 2002 Act because it is arguable that he did not consider reasonableness in this context. It is arguable that he did not properly consider the children's best interests and it follows that it is arguable that that art 8 assessment is flawed. Permission granted on this basis only.

Discussion

9. The assessment of any material legal error has to be made on the basis of the evidence made available to the First-tier Tribunal and the findings made upon that material. An example of an attempt to suggest arguable legal error based upon other issues is the claim in the grounds seeking permission to appeal that the children have contact with their father in the UK whereas there was no evidence of this available to First-tier Tribunal. Failure to consider such a claim cannot amount to legal error if the First-tier Tribunal was unaware of it, hence permission on this basis being refused. If a claim can be founded on this basis a fresh application can be made.
10. The basis of the claim before the First-tier Tribunal is set out in paragraph 22 of the decision. It was said that the third appellant has resided in the UK for seven years and should be allowed to remain under the Rules or in the alternative outside the Rules with the rights of the remaining appellants cascading from this.
11. It was not disputed before the First-tier Tribunal that the first appellant cannot satisfy the requirements of R-LTRPT 1.1 (a-c) as she fails to meet the requirements of paragraph E-LTRPT 3.2 in that she has overstayed in the UK of longer than 28 days, although as the third appellant has been in the UK for longer than seven years it was stated that consideration must be given to whether EX.1 applies.
12. The First-tier Judge found the best interests of the children had been considered by the Respondent [para 26].
13. It was not found that the family are able to satisfy the requirements of the Rules for reasons that are in accordance with the evidence. The first appellant was found to be an 'unimpressive witness' [para 31]. Her evidence was said to be 'unreliable'.
14. The Judge found:

    i. If the appellant is removed she will have people to rely upon who are more likely to be relatives [35].
    ii. There is no suggestion that the health of any of the appellants constitute reasons why they could not live in Nigeria [36].
    iii. The basis of the first appellant's appeal is that the third, fourth and fifth appellants' have been brought up in the UK and the second appellant lived for many years in the UK and that they are integrated [36].
    iv. It is for the appellant to prove her case and discharge the burden of proof [37].
    v. "I must also take into account of the accepted fact that the 1st appellant remained in the UK illegally, did not come as a genuine visitor but came intending to remain. She made no

attempt to regularise her status before she had her children or at any time thereafter until this application. She arranged for the 2nd appellant to travel to the UK falsely. Throughout that time she has been fully aware despite her evidence she was not, that her position in the UK and that of her children was at best precarious. [37].

vi. "It is accepted … that the starting point is that the best interests of the children are to be with their parents if the parent is being removed from the UK. I am satisfied the appellant has not discharged the burden of proof and established there are any insurmountable obstacles for her and her children returning to Nigeria. They have cultural ties, there are, I am satisfied, relatives and/or close friends who will assist with their integration and not least she has the support of her church that will no doubt help. I have no evidence before me that returning the children with their mother will have an adverse impact upon their health, schooling or ability to make friends. Each is young enough to adapt as the 2nd appellant adapted when he came to the UK. It follows that the appellants do not satisfy the provisions of paragraph EX1.1 in Appendix FM or paragraph 276ADE. I am further satisfied the respondent has not failed to follow her own guidance" [38].

vii. In the instant case, no good arguable grounds have been advanced that there had been factors particular to the appellants that had not been capable of being assessed from within the framework of the Rules. The Respondent considered all relevant factors. [40]

viii. Taking into account the facts surrounding the appellants, the case law, the findings made under the Rule and not least the best interests of the children, there are no compelling or exceptional circumstances that justify consideration outside the Rules. There is nothing exceptional in the appellants' case. [41]

15. The grounds assert the judge erred for in the assessment of proportionality the burden rests upon the Respondent. This may be so under ECHR but the actual finding was that all relevant issues had been considered within the Rules meaning there was no need to undertake a freestanding Article 8 assessment. This is an approach confirmed in the recent Court of Appeal decision of Singh v SSHD [2015] EWCA Civ 74. As no freestanding Article 8 assessment was required the issue does not arise.

16. It is accepted the language used in 276ADE and section 117B of the 2002 Act is that of 'reasonableness'. The judge refers to insurmountable obstacles which is the test in EX.1(b). The definition of this term is, however, relevant: "EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means there are very significant difficulties which would be faced by the appellant or their partner in continuing their family life together outside the UK and which could not be overcome or would result in very serious hardship for the appellant or their partner". It is not realistically disputed such a test

cannot be satisfied, even if the issue was not a grant of leave as a partner.

17. It is also important to consider the guidance provided in the case of Dube (ss 117A-117D) [2015] UKUT 00090 in which it was found that what matters is substance not form. A reading of the decision shows the judge was fully aware of the facts and circumstances of the family unit in relation to its connection and ties to the UK and Nigeria, the immigration history, and available assistance on return. The judge found there was nothing to support a claim it was not in the best interests of the children to return with their mother. It can be inferred it was found that it was reasonable in all the circumstances for them to do so.
18. The judge was aware of the time the children have been in the UK but on the basis of the evidence relied upon it was not shown that the impact upon them of removal would result in consequences that support a finding that their best interests required them to remain in the UK.
19. A reading of the evidence relied upon shows the findings of the judge, while not expressed by reference to the correct 'test', shows that it had not been shown to be unreasonable in all the circumstance for the appellant to return to the country of which they are nationals and where family support was found to exist. As in all cases it is accepted that when any person has to relocate a degree of hardship will be experienced but that is not the test. It was not proved that the impact was sufficient. As the judge put it, there are simply no compelling or exceptional circumstances in the appellants' cases.
20. There are no realistic prospects of success on the basis of the evidence provided and pleadings filed. No skeleton argument has been provided to show how this is not so. Other than by a claim the children should be entitled to stay in the UK as the education system is better, they have ties here, and have been here for some time, all of which was considered by the judge, and which is not the determinative factor, there is little to be advanced on their behalf that was not considered at the hearing. No arguable basis for delaying the assessment of the making of any legal error has been made out.
21. On the basis of the evidence it is found the Appellants have failed to establish that any error the judge may have made is material to the decision to dismiss the appeal.

Decision

22. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity

23. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 24th July 2015