Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/05214/2015
IA/05221/2015
IA/05225/2015
IA/05261/2015
IA/05263/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 March 2016	**On 6 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

[Omowunmi O]
[Adebowale A]
[U A]
[A A]
[O A]
~~**(NO ANONYMITY ORDER MADE)**~~

Appellants

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Sirikanda, counsel instructed by Ahmed Rahman, Carr solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

ERROR OF LAW & REASONS

1. The First Appellant is a national of Nigeria, born on 27 December 1985. This appeal arises from an application made by her on 21 July 2014 for leave to remain based on Article 8 of ECHR. Her husband, the second Appellant, born on 18 June 1974 and her three children born on [ ] 2007, [ ] 2008 and [ ] 2013 (the Third to Fifth Appellants) were named as dependents to that application, which was ultimately refused with the right of appeal on 21 January 2015. All five Appellants exercised their rights of appeal and the appeals came before Judge of the First tier Tribunal Malins for hearing on 27 July 2015, when the first and second Appellants gave evidence.

2. In a decision dated 26 August 2015, the First tier Tribunal Judge dismissed the appeal. She entirely rejected the credibility of both witnesses at [10] and [11] and went on to dismiss the appeal. An application for permission to appeal to the Upper Tribunal was made on 7 September 2015. The grounds in support of the application assert that the Judge erred materially in law: (i) in failing to make a finding under paragraph 276ADE(iv) of the Immigration Rules and in failing to identify or apply the relevant test set out therein; (ii) in treating the third and fourth Appellants as dependents on their mother's appeal; (iii) in attaching weight to immaterial considerations in the assessment of the children's best interests; (iv) in failing to give adequate reasons and/or to make a finding as to the impact of the prevalent practice of corporal punishment in the Nigerian educational system on the best interests of the children and (v) making findings that were not compatible with Article 14 and 8 of ECHR on the basis that they were racially and or religiously discriminatory [14(b)] and [13(h)] refer.

3. Permission to appeal to the Upper Tribunal was granted on 16 January 2016 by First-tier Tribunal Judge Mark Davies on the basis that "*there is no indication in the body of the decision what the standard of proof is and that the Judge has applied that standard to the evidence that was put before her and it is arguable that the Judge was in error by not considering the application of the Immigration Rules.*" A rule 24 response was filed by the Respondent on 25 January 2016 seeking to uphold the decision of the First tier Tribunal Judge.

Hearing

4. At the hearing before me, Mr Clarke stated that he was in difficulty in that he felt unable to defend the Judge's finding at paragraph 14(b). Paragraph 14(b) relates to the findings by the First tier Tribunal Judge in respect of the best interests of the third and fourth Appellants and refers to the guidelines set out by the Upper Tribunal in Azimi-Moayed [2013] UKUT 178 (IAC) *viz:* "*the development of social cultural and educational ties that it would be inappropriate to disrupt."* The Judge held in this respect:

> **"… any disruption would I find, be less than might at first sight seem: the third and fourth appellants are at school with a majority of black children with no doubt, a similar or even in some cases, the same cultural heritage."**

5. This finding is impugned at [10] and [11] of the grounds of appeal, which I set out in full:

> "*10. For the avoidance of doubt, the assertion that the third and fourth appellants are at school with a majority of black children was not supported by any evidence before the Tribunal – including the "class photo" mentioned at paragraph 12 (c) of the determination [which would in any event have been a poor yardstick to measure the diversity of an entire school]. Moreover, the cultural background of a boy of Nigerian origin cannot be asserted to be similar to that of any other black child in his class. This is a bizarre and troubling finding on which to rely upon to conclude that disruption on removal to Nigeria would be diminished.*
>
> *11. First, the finding is predicated on the assumption that all black children share "similar heritage" by virtue of their race – a crude and offensive racial stereotype that perpetuates the lie that skin colour is a sound indicator of a person's cultural background. Culture is an entirely distinct concept to racial appearance, and dependent on countless factors removed from the amount of melanin in a person's skin. Second, it suggests that the cultures of black people are lacking in any significant diversity and hence can be assumed to be "similar" which is – as should not be necessary to state – patently false."*

6. In light of this finding and the content of paragraphs 10 and 11 of the grounds of appeal, Mr Clarke submitted that apparent bias would potentially undermine the decision as a whole and he expressly conceded that the decision contained a material error of law. Ms Sirikanda did not seek to make any submissions in light of Mr Clarke's concession.

Decision & reasons

7. I have recorded Mr Clarke's submission that the decision of the First tier Tribunal Judge is vitiated by the appearance of bias. It is not necessary for me to make a finding in respect of that submission given that this was not a point taken in the grounds of appeal to the Upper Tribunal. I simply record that the President of the Upper Tribunal made clear in Alubankudi (Appearance of bias) [2015] UKUT 00542 (IAC):

> **"14. We consider that the linguistic formula selected by the Judge was unfortunate. It had the potential to cause offence and we accept that, in this instance, it did so. It was insensitive. It further had the potential to convey to the Appellant and her mother an unfavourable impression of the legal process in which they had been involved, generating a sense of unease. We are satisfied that it had this effect. The interface between the judiciary and society is of greater importance nowadays than it has ever been. In both the conduct of hearings and the compilation of judgments, Judges must have their antennae tuned to the immediate and wider audiences. As the decision in AAN**

> **demonstrates, Judges must be alert to the sensitivities and perceptions of others, particularly in a multi-cultural society. We consider that statements of the kind which stimulated the grant of permission to appeal in the present case should be avoided. The interaction of most litigants with the judicial system is a transient one and it is of seminal importance that the fairness, impartiality and detached objectivity of the judicial office holder are manifest from beginning to end."**

8. I further note that, whilst it is also apparent from her decision that the First tier Tribunal Judge did not find the second Appellant to be a credible or honest witness, it is unnecessary to repeatedly state this, eight times in all at [10] and in so doing run the risk of breaching the principles set out by the President in Alubankudi (op cit).

9. I find that Mr Clarke's concession that the First tier Tribunal Judge erred materially in law was properly made. The Appellants' counsel did not seek to pursue any of the other grounds of appeal and accordingly I make no finding on them.

Decision

10. First-tier Tribunal Judge Malins made a material error of law and her decision cannot stand. The appeal is remitted to the First tier Tribunal for a hearing *de novo* before a different First tier Tribunal Judge.

Deputy Upper Tribunal Judge Chapman

16 March 2016