Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48156/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 December 2015	**On 6 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

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(No anonymity order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr C. Talacchi, Counsel instructed by Waran & Co Solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal arises from the respondent's decision dated 10 November 2014 to refuse the appellant's application for leave to remain in the UK on the basis of family and private life under Article 8 ECHR. The appellant appealed to the First-tier Tribunal ("FtT") where his appeal was dismissed by FtT Judge Oliver.

2. The appellant, who is a citizen of Nigeria born on 20 September 1970, first entered the UK using another person's passport on 14 October 1995. His wife is a Nigerian citizen who entered the UK in 2004. They have two children, both born in the UK.

The eldest was born on 27 June 2007 and the youngest on 31 January 2011. Neither the appellant nor his wife has valid leave to remain in the UK.

3. The appellant made his application for leave to remain on 19 March 2012. This was refused in April 2013. Two requests for reconsideration were made and refused and further submissions were made on 5 November 2014. On 10 November 2014 the respondent made the decision to refuse the appellant's application and to remove him and his three dependents from the UK under Section 10 of the Immigration and Asylum Act 1999.

4. The reason given by the respondent for refusing the appellant's application was that:

   a. he was unable to satisfy the requirements of Appendix FM to the Immigration Rules;

   b. he, his wife and youngest child were unable to satisfy the requirements of Paragraph 276ADE(1);

   c. his eldest child was unable to satisfy the requirement of Paragraph 276ADE(1)(iv) because although she met the duration requirement of living continuously in the UK for 7 years it would not be unreasonable to expect her to leave the UK; and

   d. there were no exceptional circumstances to favour the appellant and his family being able to remain the UK. In assessing exceptional circumstances the respondent addressed section 55 of the Borders, Citizenship and Immigration Act 2009 and considered issues relating to access to education in Nigeria and the appellant's childrens' exposure to the Nigerian community and culture.

5. The appellant's appeal was heard by FtT Judge Oliver. The respondent was not represented at the hearing. The decision of the FtT is very brief. At paragraphs [8]-[9] the judge sets out the appellant's and his wife's account of the relevant circumstances, although it is not made clear if these were accepted by the tribunal. The information contained in those paragraphs are that:

   a. The family enjoy English culture and education

   b. The appellant has no relatives in Nigeria other than distant family

   c. Only English is spoken in the home and the children do not understand Yoruba (they have a limited vocabulary)

   d. They are not rich enough to send their children to private school in Nigeria

   e. The appellant survived by doing odd jobs and received £50 a week from an uncle but if allowed to remain would work long hours

   f. The appellant's wife is a fashion dress maker

   g. They live rent free and sometimes receive handouts from the mosque. The children receive food from a food bank.

6. The FtT's analysis and reasons are set out in a single paragraph (paragraph [12]), which states:

> "... neither the parents nor the younger child can possibly qualify under the rules and only the older child has spent seven years here. The children are both of an age when they will find it easy to adapt to the life, customs and languages of Nigeria. It is overwhelmingly in the best interests of both children to remain with their parents, who have both shown no regard for the laws of this country. There are no exceptional circumstances which require or permit me to consider the appeal outside the rules."

7. The grounds of appeal assert that the FtT failed to give adequate consideration to, or assess the evidence concerning, the circumstances of the eldest child given that she has been in the UK for seven years and thereby satisfies the duration requirement under both 276ADE(1)(iv) and section 117B(6) of the Nationality Immigration and Asylum Act 2002. Permission to appeal was granted on the basis that the reasons given in relation to the children are wholly generic and that there has been a failure to properly consider their best interests.

8. Before me, Mr Talachi argued that the judge failed to engage with what would be in the best interests of the children. In particular, there is no mention of their education and the difficulties in this regard that would be faced in Nigeria. The only factor, in respect of their best interests, mentioned by the FtT is that it would be in their best interests to remain with her parents, but in the same sentence the judge has referred to the parents' disregard for UK immigration laws which suggests he has taken into account factors he is not entitled to.

9. Mr Melvin accepted that the decision was brief but noted that the respondent's refusal letter is detailed and covers the relevant issues with a detailed consideration of the childrens' best interests and why it would be reasonable for them to move with their parents to Nigeria. The judge's decision is consistent with case law finding that the best interests of young children are to return with their parents.

Consideration

10. For the reasons explained below, I find that the decision contains a material error of law such that it must be set aside.

11. Where removal of a child from the UK is contemplated there must be a fact specific and careful assessment of the best interests of a child. As explained in *EV (Philippines) and others* [2014] EWCA Civ 874:

> "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."

12. The best interests analysis as contemplated by *EV (Philippines)* is absent from the decision. The FtT concluded that "the children are both of an age when they will find

it easy to adapt to the life, customs and languages of Nigeria". This may be true but there are no factual findings to explain why the judge has reached the conclusion that for these children, in their particular and specific circumstances, this would be the case. There are also no findings about their education or the circumstances the family will likely face on return. Although it may frequently be the case that it would be reasonable to expect young children to leave the UK with both their parents who do not otherwise have a legal basis to remain in the UK (in *EV (Philippines),* for example, it was considered reasonable), a conclusion on this cannot properly be reached without a fact specific analysis. That is what the Court of Appeal found the first tier judge had undertaken in *EV (Philippine)* and it is what is absent from the decision now under appeal. This is a material error which requires the decision to be set aside.

13. There are further errors in the decision. Although it is not stated explicitly, the decision reads as if the FtT has assumed that the appellant's eldest daughter satisfied the duration requirement under paragraph 276ADE(1)(iv). This, however, is not the case. Under 276ADE(1)(iv) the daughter must have lived continuously in the UK for seven years *at the date of application*. The date of application was 19 March 2012 and the daughter was born on 27 June 2007. She was under 7 years old at the date of the application and therefore was unable to satisfy the Rules. The failure to recognise this was an error of law.

14. The FtT stated at paragraph [12] that there were no exceptional circumstances *permitting* it to consider the appeal outside the Rules. In so finding the FtT fell into error. Not only was the FtT permitted to consider the appeal outside the Rules, it was incumbent on it to do so. The proper approach, in accordance with established case law, is that upon finding that neither the appellant nor his dependents (including his eldest daughter) were able to satisfy the Immigration Rules, the FtT should then have considered the appeal outwith the Rules, such analysis to include consideration of the factors stipulated in Section 117B of the Nationality, Immigration and Asylum Act 2002 and the best interests of the appellant's children. It is clear that the judge ought to have had regard, in particular, to 117B(6), the interpretation of which has recently been clarified in *Treebhawon and others* (section 117B(6)) [2015] UKUT 00674 (IAC).

15. Having regard to section 7.2(b) of the Practice Statement of the Immigration and Asylum Chambers of the First-tier and Upper Tribunal, and considering in particular the fact finding necessary in relation to the best interests of the appellant's children, I find that the appeal should be remitted to the First-tier Tribunal for re-making.

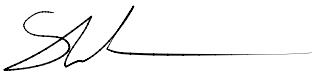
Decision

1. The decision of the First-tier Tribunal contains a material error of law such that it should be set aside in its entirety and the appeal heard afresh.

2. The appeal is remitted to the First-tier Tribunal for hearing afresh before a judge other than First tier Tribunal Judge Oliver.

3. No anonymity order is made.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 29 December 2015