IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/49361/2014
IA/49366/2014
IA/49370/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 5th February 2016	**On 18th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS OLAYINKA FADAYOMI (FIRST APPELLANT)
MASTER DANIEL OLAJIDE ABIOLA FADAYOMI (SECOND APPELLANT)
MISS FAVOUR OLAMIDE PEACE FADAYOMI (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Lams (Counsel)
For the Respondent: Mr C Walker (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Manuell, promulgated on 18th June 2015, following a hearing at Richmond on 9th June 2015. In the determination, the judge dismissed the appeal of the Appellants, who subsequently applied for, and were granted,

permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are a family of a mother with two children. All are citizens of Nigeria. The mother, the first Appellant, was born on 12th December 1967. The son, the second Appellant, was born on 24th May 2008. The daughter, the third Appellant, was born on 23rd January 2006. All appeal against the decision of the Respondent Secretary of State dated 19th November 2015, to refuse their applications for leave to remain in the UK on the basis of their family and private life. The applications were refused by reference to Appendix FM and paragraph 276ADE of the Immigration Rules.

The Appellants' Claim

3. The Appellants' claim is as follows. The first Appellant, the mother, claims that she entered the UK as a visitor on 25th April 2004, but there was no Home Office record of such entry. She had applied for leave to remain on 21st May 2010 and this application was refused on 23rd September 2010. There was no further right of appeal. The two children were then born in the UK and their claim is that they have no ties with Nigeria, live and are settled in the UK, and their education here would be disrupted, resulting in unjustifiably harsh consequence to them if they had to relocate back to Nigeria with their mother.

The Judge's Findings

4. The judge observed how the children were close to their grandmother, a British citizen, aged 86, with whom they lived. The first Appellant took care of her mother, who was in poor health. The first Appellant also had a brother, who was also a British citizen, living in the UK. They are all a close family. The second and third Appellants, the children, attended the same school as their cousins, and their lives would be devastated if they were to leave this social environment and return to Nigeria.

5. The Appellants also claim that the third Appellant, the son, had now lived in the UK for over seven years. However, as the judge observed, none of the Appellants had any leave to remain in the UK. And the Tribunal concluded, on the basis of the lack of evidence submitted by the first Appellant, that she could only have entered the UK illegally, as the Secretary of State asserted. The children were innocent victims of their mother's dishonest conduct and improvidence. The judge had regard to the photographs which showed that the two children had grown up and socialised within their mother and their grandmother's culture. They go to the African Christian Church. They had above average ability and were doing well at school. The Appellants had close emotional ties to their elderly grandmother and she had ties with them.

6. The judge then went on to have regard to the cultural context and observed that the oldest child, the son, was only 9 years of age, and had yet to establish "even a limited or partial degree of independence from her mother" (paragraph 17). The judge observed that he was dealing with a culture which has "very strong emphasis on the family and parental obedience. Put another way, an importance, it is a culture less focused on the individual and more on the group" (paragraph 17).

7. Nevertheless, the amount of time that the children had spent in the UK was as a direct result of the mother's dishonesty (paragraph 21). Regard was had to paragraph 117B(6) of the 2002 Act, and the judge gave consideration to the leading Article 8 cases (paragraph 23) and went on to conclude that nothing was being taken away from the Appellants as they had never had any right to settle in the UK, and given that many persons wishing to settle in this country lawfully have been refused permission to extend their stays because they have accepted the decision and have left the United Kingdom as required, it would not be right to allow this first Appellant to acquire an advantage due to having remained here illegally, in the full knowledge of the fact that she was not meant to be in this country, on the basis that the children would do rather better in this country than back in Nigeria.

8. The judge went on to have regard to the case of **Azimi-Moayed [2013] UKUT 00197** and decided that this was a case where the children could properly return to Nigeria with their mother.

9. The appeals were dismissed.

Grounds of Application

10. The grounds of application state that the judge used a more exacting test than is required under the law. The judge had also formed conclusions based upon cultural stereotyping when he had said that the focus is on the family group rather than on individuals in a culture such as that of the Nigerian community.

11. Permission to appeal was granted by the Upper Tribunal on 19th October 2015.

12. A Rule 24 response was entered on 3rd November 2015 on the basis that the first Appellant had made no attempt to explain how she had entered the UK and the judge was correct in saying that she had entered unlawfully. The judge then embarked on a careful analysis of the situation and concluded that the Rules could not be met and that decision was unassailable. The judge also had proper regard to the best interests of the children and concluded that removal would be proportionate.

13. At the hearing before me on 5th February 2016, the Appellant was represented by Mr Lams of Counsel, and the Respondent was represented by Mr Walker. Mr Lams submitted that he would rely upon his up-to-date

skeleton argument, which he handed up for the Tribunal's assistance. He submitted that the judge at paragraph 17 of the determination had embarked upon cultural stereotyping which had tainted the determination. He also submitted that the first Appellant, the mother, had not waited until the children had been in the UK for seven years before making her application, because she did so in 2010 and that was then rejected. The children had been in the UK now for over seven years and Section 117B(6) said that Section 117B(6) had recently been considered in the case of **Treebhawon** by the Upper Tribunal (see **Treebhawon [2015] UKUT 00674**). The determination made it clear that Section 117B(6) is a freestanding provision. The children had been here for over seven years. The informal practice known as the "seven year Rule" had now been transposed into the Rules. He drew my attention to the relevant parts of **Treebhawon** namely, paragraph 18, which referred to the fact that, "in cases where its conditions are satisfied, the public interest does not require the removal from the United Kingdom of the person concerned. In this respect also it differs from its siblings, which contained no compatible instruction" (paragraph 18). Mr Lams submitted that the "public interest" consideration does not necessarily mean, that the automatic result is to require the removal of the children from his country. He further took me to paragraph 19 of the determination, which referred to "one of the most vulnerable cohorts in a society, namely children" (paragraph 19). The Tribunal had gone on to say that "the focus is based on the needs and interests of these vulnerable people. Furthermore, the content of this public interest differs markedly from the other three, all of which are focused on the interests of society as a whole" (paragraph 19).

14. For his part, Mr Walker submitted that the judge had considered the matter appropriately, because he had observed (at paragraph 26) that the child Appellant's best interests "are to be with their mother". He went on to note that, "their main private life interest at this stage is to continue their education which will be possible in Nigeria. They are young and adaptable enough to make new friendships at a new school and elsewhere" (paragraph 26). These conclusions were findings of fact that were open to the judge. Moreover, the judge also had regard to the well-established Article 8 cases (paragraph 23) and had applied them faithfully. There was no error of law.

15. In reply, Mr Lams drew my attention to the first skeleton argument, which was before the First-tier Tribunal, which highlighted the particular features in relation to these children, and observed that they were fully integrated into British society now, such that it would not be proper to require them to leave this country. This was not a case of joint parents. There was only a single mother, and the only other adult in the children's family was the grandmother, who was a British citizen, and with whom they also had very strong connections. The Appellant had a brother, also a British citizen, with British citizen children, who were cousins to the Appellant children, and who were inseparable. Nigeria had no home for them, and no familiarity for them. The oldest child was now 10 years of age and had actually made an application for registration as a British citizen, to which

he was entitled, and this would also make the decision disproportionate to remove them. He asked me to allow the appeal.

16. I have given careful consideration.

No Error of Law

17. I have given careful consideration to all the documents before me and to the oral submissions and I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision.

18. I come to this conclusion notwithstanding Mr Lams' well-compiled skeleton arguments before me and his oral submissions. The fact is that the judge here did take into account the best interests of the children, their welfare in this country, including their association with their cousins and their grandmother, whilst at the same time taking into account the fact that the mother had been in the UK illegally, with no right to remain.

19. The case of **EV (Philippines) [2014] EWCA Civ 874** establishes that 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" and that if a parent has no right to remain "then that is the background against which the assessment is conducted" and that "the ultimate question would be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?" (see paragraph 58). In this case, the judge observed that it was reasonable simply because the primary private life interests of the children was in relation to their education and that education would continue in Nigeria because they were young and adaptable enough to make new friendships at a new school and elsewhere. They had not established an independent existence of their own and would go with their mother.

20. The references to the cultural context are not such as to have led the judge into error. It was an observation that the judge made, but not one that he gave controlling weight to, given the comprehensive assessment of the factual situation that the judge embarked upon in the body of the determination. Another judge may well have come to a different decision. However, it could not be said that given the high threshold for requirement of "perversity" that this decision amounted to an error of law.

Notice of Decision

21. There is no material error of law in the original judge's decision. The determination is extant.

22. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 13th February 2016