Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/13987/2015
HU/13995/2015
HU/13999/2015

THE IMMIGRATION ACTS

Heard at: Birmingham
On: 23rd October 2017

Decision Promulgated
On: 28th November 2017

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

IQUO NWAJEI
ONYEKACHUKWU JOHN NWAJEI
CHINWE VICTORIA NWAJEI
(NO ANONYMITY DIRECTION MADE)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs G. Fama, Counsel instructed by MB Law and Practice
For the Respondent: Mrs H. Aboni, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are Nigerian nationals. They are respectively a mother, her son and her daughter. They were born on the 20th August 1968, the 18th November 1993 and the 9th September 1997. They appeal with permission[1] the decision of the First-tier Tribunal (Judge James) to dismiss their linked human rights appeals.

[1] Permission granted on the 10th March 2017 by First-tier Tribunal Judge Peart.

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Background and Matters in Issue

2. The First Appellant arrived in the United Kingdom on the 28th May 2006 with leave to enter as a Tier 4 (General) Student Migrant. It is not in dispute that she properly extended her leave on several occasions, the last grant expiring on the 19th May 2015. Her children, the Second and Third Appellants, were given leave to enter as student dependents on the 20th January 2008 and have extended their leave in line with their mother. On the 20th May 2015 the family made applications for leave to remain in the UK on human rights grounds.

3. That application was refused in a letter dated the 10th August 2015. I am told that the applications were rejected and the human rights claims certified with reference to s94(1) of the Nationality, Immigration and Asylum Act 2002. That decision was challenged by way of judicial review with the result that the Respondent withdrew her decision and issued a fresh one, on the 3rd December 2015.

4. The Respondent considered the applications first under Appendix FM. It was accepted that at least one of the children (it is not specified but presumably Victoria, since John was by then over 18) was a 'qualifying child' but not that it would be unreasonable to expect her to leave the UK. The reason given was that the children would be able to return to Nigeria with their mother and be supported by her there. There was an additional reason for refusing leave in Victoria's case. That was that she had four convictions for shoplifting, all committed in 2014. The Respondent found that these convictions engaged S-LTR.1.6 of the Rules: her presence was not conducive to the public good because her conduct makes it undesirable to allow her to stay. Moving on to consider 'private life' the Respondent found that all three applicants failed to meet the requirements of paragraph 276ADE of the Rules, and that there were no exceptional circumstances that would warrant a grant of leave. The applications were refused but this time the case was not certified. The Appellants accordingly had a right of appeal to the First-tier Tribunal.

5. The matter came before Judge James on the 29th September 2016. He heard evidence from all three Appellants. The Tribunal had regard to the evidence that the First Appellant was an ordained pastor who served at her local church; she was a genuine student and had gained a BSc since she arrived in the UK. None of these positive findings as to her work ethic or character were of assistance to her in establishing a case under paragraph 276ADE(1)(vi) of the Rules, since that required her to show that there were "very significant obstacles to her integration in Nigeria". This, found Judge James, she could not do. She had grown up in Nigeria and is well versed in Nigerian culture; she is an educated woman who has degrees from universities in both Nigeria and the UK; she has maintained family connections to Nigeria. On these facts she did not face any obstacle to reintegrating in Nigeria. As to the Second Appellant the Tribunal noted that he is an educated and outgoing young man. In Nigeria he would have the assistance of family members in re-establishing himself in that

country. His father lives in that country and he could reconnect with him. As in his mother's case, the Tribunal could not be satisfied that there were any significant obstacles to his return to Nigeria. Both of these appeals therefore failed under the Rules.

6. Different considerations applied in the case of the Third Appellant. First, she had criminal convictions, and second, she had been a child at the date of application. As to the criminal convictions the Tribunal noted that she had committed three shoplifting offences as a teenager. These were relatively minor offences; her sentence of an 8 month referral order had been curtailed early because of her progress; she accepted full responsibility and had not reoffended. Overall the Tribunal was not satisfied that the Respondent had established that her removal was required for the public good: the test in S-LTR.1.6 was not made out. As to the Appellant's age the Tribunal noted that the applicable sub-paragraph of 276ADE(1) was (iv) which required her to demonstrate that it would not be 'reasonable' to expect her to leave the UK. This being a different test from that applied to her brother and mother the Tribunal further directed itself to some guidance from the higher courts about how it should be interpreted. Reference is made to Azimi-Moayed and Ors (decisions affecting children: onward appeals) [2013] UKUT 00197 (IAC) and several passages from the judgement of Elias LJ in MA (Pakistan) [2016] EWCA Civ 705 are set out. Having directed itself thus, the Tribunal made the following findings of fact. The Third Appellant had lived in Nigeria until she was 10, and would therefore have a good understanding of the culture. She had family there, and could renew her familiarity with those social and cultural ties. She has no linguistic or health difficulties. It would not therefore be unreasonable to expect her to leave the United Kingdom.

7. The determination goes on to address whether there are any particular factors that might render the refusal of leave disproportionate. Finding that there are not, the appeals are all dismissed.

The Appellants' Challenge

8. The Appellants contend that the decision of the First-tier Tribunal is flawed for the following errors of law:

    i) Failing to give appropriate weight to the fact that the Second and Third Appellant's both spent 7 years + as minors in this country;

    ii) Failing to assess the Third Appellant's best interests;

    iii) Erring in its application of the 'reasonableness' test;

    iv) Erring in failing to consider the guidance in Ogundimo (Article 9 – new rules) in respect of ties to Nigeria

v) Failing to consider whether the Secretary of State for the Home Department acted unlawfully by failing to exercise her discretion;

vi) Failing to apply the *Razgar* framework to its consideration of Article 8.

Discussion and Findings

9. Grounds (i)-(iii) are all concerned with Victoria, the Third Appellant. I find them to be made out. Having gone to the trouble of setting out the guidance from MA (Pakistan) the Tribunal appears to have overlooked the most significant part of that judgement. That is the emphasis that is placed on the substantial weight to be attached to the child's private life. Since 1993 countless parliamentary speeches, ministerial statements, Home Office policy documents and reported cases have underlined that seven years is a long time in a young life, and residence of that length of time is likely to be a matter that in itself attracts great weight. That this is so is reflected in the Respondent's current guidance Immigration Directorates' Instruction 'Family Migration: Appendix FM Section 1.0b *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes'* which speaks of "strong reasons" before a child will be refused leave in these circumstances. The approach in that guidance is endorsed in MA - see Elias LJ at 46:

> "Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. **After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment**".

10. I cannot see from this determination that the Tribunal has given any weight at all to Victoria's length of residence, nor her compelling evidence about her life here. The reasoning is almost exclusively concerned with what might happen to her upon return to Nigeria; those matters were not irrelevant, but nor were they determinative. I therefore set the decision in respect of Victoria aside.

11. Ground (i) is also argued in respect of the Second Appellant. It is difficult to see why. First, because he was not a child at the date of the First-tier Tribunal hearing, nor indeed at the time of the Respondent's decision. Nor did he ever spend seven continuous years here as a child: he arrived in January 2008 and turned 18 on the 18th November 2011. Insofar as it might be said that the Judge should have given some weight to the fact that he was a minor for nearly four years of the time he has spent in the UK, that would, in the overall balancing exercise, assume only a small weight. He has lived here for a far longer period as an adult. That ground is not made out.

12. The grounds recite at some length the principles expounded in Ogundimo. This is not terribly helpful, since that case was concerned with the test of "no ties" rather than "very significant obstacles". The real complaint, however, is that the Tribunal has made a factual error/engaged in impermissible speculation when it finds that the Appellants have family members in Nigeria. Ms Fama strongly contested that finding and said that contrary to the findings, they have no-one, save one aunt who would not be able to help them because she has family of her own. For the purpose of this determination I am prepared to accept that the Appellants' evidence is true and that they do not have any close family members in Nigeria save for that one aunt in Lagos. Applying the test of 'very significant obstacles' I am unable to find that this is of any assistance to their case. The First and Second Appellants are university-educated, healthy, industrious adults. They do not, in those circumstances, *need* any other family members to assist them in re-establishing their lives in Nigeria. There is no reason why they cannot find accommodation and employment there. I further note the Appellants' evidence that they are currently supported in this country by relatives in the USA, who meet their rent, their living expenses and have paid for John's university fees. If the family do require any financial assistance upon return to Nigeria, there would appear to be no credible reason why these funds could not be sent to them from the USA. On the facts the First-tier Tribunal could do little else but dismiss the appeal with reference to paragraph 276ADE(1)(vi) and I can find no error in its approach.

13. Finally, it is said that the First-tier Tribunal has failed to properly consider Article 8 'outside of the rules'. The *Aliyu* point is entirely without merit. The Respondent did not fail to exercise her discretion. She expressly does so in the refusal letter; she just does not do so in the Appellants' favour. The Tribunal accepted that the eligibility and suitability requirements of Appendix FM were met (applied by way of 276ADE(1)(i)). It can be taken as read, therefore, that the first of the *Razgar* questions were already answered. The only question remaining was proportionality, which for the reasons that the Tribunal gives, was a balancing exercise that fell in the Respondent's favour.

14. In conclusion I find the grounds relating to the First and Second Appellant are not made out and their appeals are dismissed. In respect of the Third Appellant I am satisfied that the Tribunal erred in it approach to the 'reasonableness' test and the decision in her appeal is set aside.

15. It perhaps follows from what I have said above that in re-making this appeal I would allow the Third Appellant's appeal. Absent any countervailing factors her length of residence is such, and established at such a significant time in her life, that it is a very weighty factor. Although I have no doubt that this educated family would be able to achieve a decent standard of living in Nigeria, the rule brings the focus of my attention to her life here. She has attended school, made friends and built her life here. She and her mother both had lawful residence until very shortly before these applications were made. Applying the terms of the Secretary of State's own policy, I am unable to find that there are strong reasons to refuse her leave. At the hearing the question arose as to whether I could still allow the appeal under sub-paragraph 276ADE(1)(iv) given that the Third Appellant is no longer, at the date of this appeal, a child. By way of letter dated the 3rd November 2017 the Respondent confirmed that the proper approach would be to continue to apply the rule, given that she was a child when she applied. I therefore allow the appeal on the grounds that the Third Appellant met the requirements of the rule at the time that she applied.

16. For the sake of completeness I would add that my decision in respect of Victoria has no material bearing on her mother's position vis-à-vis s117B(6). The test in that statutory provision is couched in the present tense:

> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

At the date of the appeal before me the First Appellant does not have a genuine and subsisting parental relationship with a *child*, since Victoria is now 20 years old.

Decisions

17. The decision of the First-tier Tribunal in respect of the Third Appellant contains an error of law and it is set aside. The decision in her appeal is remade as follows: the appeal is allowed on human rights grounds.

18. The decision of the First-tier Tribunal in respect of the First and Second Appellants contains no material errors of law and it is upheld.

Upper Tribunal Judge Bruce
23rd November 2017