Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23377/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 October 2017	**On 10 November 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

MR ADEYEMI MOSES AJAYI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Adeolu, Counsel, instructed by David Vine Solicitors
For the Respondent: Mr C Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 10 December 1972. He claimed to have entered the UK in April 2000 as a visitor. He applied for leave to remain on 26 February 2015. The application was refused on 9 June 2015 under Appendix FM and paragraph 276ADE of HC 395 and Article 8 ECHR and the respondent decided to remove him to Nigeria.

2. The appellant appealed and his appeal came before a First-tier Judge on 1 February 2017.

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3. The judge noted the respondent's claim in summary in paragraph 2 of her determination. The appellant did not meet the Rules to remain on the basis of family or private life in the UK. He was not in a relationship with a partner in the United Kingdom and his three children were not British citizens or settled in the UK and at the time of the application they had not lived in the UK for at least seven years although it was accepted by the respondent that the appellant had a genuine relationship with them. The appellant did not have sole responsibility for the children as he stated that he lived with his ex-partner, who was not a British citizen or settled in his country. She was a citizen of Nigeria. He had not shown that there were very significant obstacles to his integration in Nigeria. The respondent took into account the children's best interests and found there were no exceptional circumstances under Article 8 or outside the Rules to grant leave to remain.

4. The judge records the following matters were canvassed before her:

> "4. It was agreed at the outset of the hearing that the appellant's twin boys were 7 years at the date of the decision and had lived in the UK continuously since birth and the respondent had failed to consider whether it would be reasonable to expect them to leave the UK (276ADE(iv) and Appendix FM and EX.1.). Mr Briant relied on the refusal letter and **Treebhawon and Others (NIA 2002 Part 5A - compelling circumstances test) (2017) UKUT 00013 (IAC)**. He submitted that the appellant had not shown that he had family life with his children and his ex-partner and in any event it was reasonable to expect the children to return to their country of nationality, Nigeria and in the public interest. He asked that the appeal be dismissed.
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> 5. Mr Adebayo accepted that the appellant did not meet the Rules but asked that the appeal be allowed under article 8 ECHR as a disproportionate interference with the appellant's rights to respect for family life with his children and their best interests under s55 of the Borders, Citizenship and Immigration Act 2009 (the 2009 Act). He referred to **MA (Pakistan) & ors (2016) EWCA Civ 705**. I indicated in response to his submission that the appeal could not be allowed as 'not in accordance with the law' since this was not a ground of appeal under the 2014 Act and that in any event the jurisprudence was that the Judge could assess the children's best interests where the respondent had failed to do so. At the end of the hearing I reserved my decision."

5. Having correctly addressed herself on the burden and standard of proof the judge noted that the appellant claimed to live with his ex-partner and their three children – twins born in 2008 and his son born in 2010. The children had all been born in the United Kingdom and had lived in this country for over six years. It was claimed that it was not in their best interest for them to be removed from the UK.

6. The judge did not find the appellant to be a truthful witness. At the hearing he claimed to have been in a relationship with his ex-partner and stated that she was living at his address.

7. The determination continues:

"9. Upon my seeking clarification of the evidence in his Council Tax bill that he enjoyed the single person discount as the only adult occupier his response was that he had never noticed this which I found not credible given that he has been a business man since 2005 and has his own house. Under cross-examination about his relationship with his ex-partner, his evidence was that the HO had not asked her to attend the hearing, which, given that he was legally represented was not credible. He did not in his appeal take issue with the respondent's view that he did not have a subsisting relationship with a partner in the UK and Mr Adebayo did not seek to argue the appeal on the basis that the appellant has family life with the children's mother but rather on the residence of the twins in the UK for the previous 7 years.

10. Apart from his assertion and a school letter as long ago as 2 June 2015 there was scant evidence that the children were living with him. He produced only 2 photographs with him and the children who are now 8 and 6 years old. One was taken in 2015 and another he claimed, in summer 2016. He claimed that he had photos of his ex-partner on his mobile telephone. Though I do not doubt that the appellant may see his children occasionally and as their father has a relationship with them I was not satisfied that it was other than tenuous. There was scant evidence of time spent with them or of money expended on them or of meetings attended at their school in the nearly 2 years since they were enrolled. I was satisfied that his ex-partner and his children did not live with him."

8. The judge went on to summarise the appellant's oral evidence in which he said that his ex-partner had been at home with the children on the day of the hearing although "he had no recent evidence that the children were living with him". He was aware that the Home Office was seeking to remove his ex-partner and the children.

9. Reference was made to a fraud conviction in 2009 and the appellant said he was now rehabilitated. There had been various visa applications from Nigeria in his name but the appellant denied they were made by him. He denied that his original passport, which he had lost, was false.

10. The judge's determination concludes as follows:

"13. The appellant and the mother of his 3 children and the children are all Nigerian nationals. He does not live with them nor has he shown on balance that he has other than a tenuous family life with his children. Even assuming that he has, they are now 8 years old and 6 years old. They have been attending primary school for the previous 2 years. Their private life is with their parents or if that is not possible, with their mother. In assessing their best interests and welfare under s.55 of the 2009 Act I have borne in mind **EV (Philippines) and others (2014) EWCA Civ 874** and **MA (Pakistan)** above.

14. The duty applies to all children whether or not they are lawfully present. The best interests are to be determined without reference to the immigration history or status of either parent and by reference to such factors as their age, length of residence in the UK, how long they have been in education etc. As a starting point the best interests of

children are, on the whole (and not simply educational) including their physical and emotional welfare, to be with their parents and if not their mother, wherever they may be **Azimi-Moayed & ors (decisions affecting children; onward appeals) (2013) UKUT 00197 (IAC)**.

15. The appellant's children are young and at an age where they are likely to be adaptable. They are likely to have some familiarity with the language, food and customs of their country of nationality though they have never been there. They are not at a crucial stage of their education. Although their presence in the UK is at least 7 years and is of significant weight it is not a determinative factor. Their best interests are a primary but not the primary consideration and are subject to countervailing factors. It cannot be said on the evidence looked at holistically that their best interests require them to be in the UK. In my view their best interests are to be with both parents and if that is not possible with their mother. It appears that they live with her.

16. It was not claimed nor did I find that there were very significant obstacles to the appellant's reintegration in Nigeria (or in so far as his private life comprised his children, or to their integration into Nigeria) as required under 276 ADE(vi) of the Rules given his circumstances and that he lived for the majority of his life in Nigeria. Neither was it claimed nor did I find that there were insurmountable obstacles to continuing family life overseas assuming the existence of family life with his ex-partner. They are all Nigerian nationals.

17. In light of the offences for which he was convicted (fraud, obtaining a false passport and apparatus for making false ID cards, the proliferation of visa applications and that he was generally untruthful I was not satisfied that he had even entered the UK in 2000 as he claimed.

18. I find it reasonable in all the circumstances for the children to leave the UK and/or for the appellant alone to leave the UK under the Rules. The respondent's decision is lawful because the appellant and/or his children did not satisfy the Rules. That is sufficient to dispose of the appeal. I have not found 'compelling reasons' – **Rhuppiah (2016) EWCA Civ 803** and **Treebhawon** above – to conduct an article 8 assessment but I do so in the light of Mr Adebayo's submissions.

19. Turning to the proportionality of the decision under article 8 I took into account the Rules, the children's best interests and the public interest factors in s117A-C of the 2014 Act.

20. The appellant has been in the UK unlawfully throughout his residence in the UK on his evidence for 16 years though it was doubted that he came in 2000. He has a very poor immigration history and was not a credible witness. He has worked in the UK but there was not evidence on balance that he has paid taxes or that he currently owns a business or is working. He has paid business rates from 2005-2008. He and his family would have had access to free education and free health services on the NHS. Looking at the factors in s117B of the 2014 Act while he speaks and understands English, that and his purported financial independence are neutral factors. I have found that it is not

necessarily in the children's best interests to be in the UK and reasonable to expect them to leave.

21. There are not factors in this case to outweigh the maintenance of effective immigration control which has been deemed to be in the public interest by Parliament. I do not find anything 'compelling' or weighty in the appellant's and/or his family's circumstances which, would result in unjustifiably harsh consequences if the respondent's decision was maintained.

22. I find that it is reasonable for him alone or for he and them to return to Nigeria even having regard to the practical possibilities of relocation – **R (application Patel) (2014) EWHC 2583 (Admin)** of which there was scant evidence.

23. The respondent's decision is proportionate in the public interest. It does not prejudice the article 8 rights of the appellant and/or his children in a manner sufficiently serious to amount to a breach of the fundamental rights protected by article 8 - **Huang [2007] UKHL 11**. The human rights claim fails. The appeal is dismissed."

11. The appellant applied for permission to appeal. Reference was made to the concession that the appellant had a genuine and subsisting relationship with the children in the decision letter. The judge had ignored substantial evidence such as a GP letter and the school reports and a letter from the school stating that the appellant was often seen on the school playgrounds. The appellant should have been allowed to adduce further evidence if the respondent were seeking to go behind the concession. The judge should have given the appellant the opportunity to adduce further evidence as he had been effectively ambushed. In paragraph 6 it was argued in the light of the judge's finding in paragraph 11 that the appellant's children did not live with the appellant that a parent could maintain a genuine and subsisting relationship with a child without living with them and the severance of such a relationship might not be in the best interests of the child. It was further argued that the judge had determined the fate of the children by reference to the appellant's conduct only and had erred in so doing. Permission to appeal was granted on 8 September 2017. On 18 September the respondent filed a response submitting that the First-tier Judge had directed herself appropriately and her approach was in keeping with the conclusions set out in the refusal letter. The judge had in any event considered the position of the children and the existence of a genuine and subsisting relationship did not guarantee an appellant success unless the evidence showed it was not reasonable for the family to return to Nigeria.

12. Mr Adeolu submitted that in the decision letter the Secretary of State having carefully considered the matter had found that the appellant had a genuine and subsisting parental relationship with his children. The Home Office Presenting Officer had at the same time as relying on the refusal letter submitted that the appellant had not shown that he had family life with his children and ex-partner. Mr Adeolu confirmed that his supervisor, Mr Adebayo, had appeared for the appellant at the time of the hearing. Mr Adeolu sought to take additional points such as the judge had referred in

paragraph 8 to the sponsor when there was no sponsor but I am not satisfied that the arguments put forward have any substance or merit. Mr Adeolu confirmed that the grounds of appeal had been settled by his supervisor and I am confident that any grounds with any merit would have been put forward initially and not raised halfway through the hearing. Mr Adeolu submitted that the judge had concentrated on the bad behaviour of the appellant and had misdirected herself in referring to the children being of an age when they were likely to be adaptable. While the judge had referred in paragraph 14 to the fact that the best interests of the children were to be determined without reference to the immigration history or status of the parents, the judge had contradicted herself in the ensuing paragraph. The children had been in the United Kingdom for a substantial number of years and it would be difficult for them to adapt to life in Nigeria where they had never lived. There had been no effective consideration of Article 8.

13. Mr Bates submitted that this was a case in which it had been conceded that the Rules were not met and the judge had considered Article 8 outside the Rules as at the date of hearing. The burden of proof was on the appellant. The concession had been made by reference to what the appellant had said at the date of decision but there had been a material change of circumstances since. The concession that had been made was obsolete. Up-to-date evidence had not been provided. There were no compelling circumstances and the judge had referred to that in paragraph 18 of her decision.

14. The children's mother had not got settled status and her situation was precarious. She had not been called as a witness. The judge had applied **MA (Pakistan)** and had referred to **Azimi-Moayed** in paragraph 14 of her decision. It would be reasonable to expect the children to return to Nigeria with their parents. Mr Bates referred to **AM (Pakistan) [2017] EWCA Civ 180**. The issues inside or outside the Rules would be the same and the findings had been open to the judge. There had been no witness statement from the mother of the children. Notwithstanding the Secretary of State's concession the test was reasonableness inside or outside the Rules. Mr Bates referred to **EV (Philippines)** and **MA (Pakistan) [2016] EWCA Civ 705**.

15. In reply Mr Adeolu referred to the circumstances as at the date of the decision. Time had passed by. He accepted that there had been no application by Mr Adebayo, then representing the appellant, for an adjournment in the light of what the Home Office Presenting Officer had said. He submitted the judge had not considered the evidence properly.

16. At the conclusion of the submissions I reserved my decision. I have carefully considered all the material before me. I remind myself that I can only interfere with the decision if it was flawed in law.

17. The refusal letter records that the appellant had stated in his application form that he currently lived with his ex-partner. As Mr Bates points out,

that represented the position as at the date of decision in June 2015. By the time of the hearing matters had moved on.

18. In the grounds of appeal it was said that the withdrawal of a concession at the hearing was unfair and the appellant had been effectively ambushed.

19. However, there was no application for an adjournment of the hearing after the submission had been made by the respondent's representative. What is recorded in the determination is that Mr Adebayo accepted that the appellant did not meet the Rules. I detect no unfairness in the procedures in this appeal and the appellant was not disadvantaged in the way he presented his case and indeed no further evidence has been put in since the hearing.

20. Points were taken in the grounds that the judge had not referred to the evidence before her. The judge does make reference to evidence adduced such as a school letter and scant evidence that the children were living with him and a mere two photographs. It was not incumbent on the judge to refer to each and every item of material before her. It is clear in paragraph 9 of the determination that the appeal was not advanced on the basis that the appellant had a subsisting relationship with his partner and the appeal was not argued on the basis that he had family life with the children's mother. He had no recent evidence that the children were living with him.

21. I am not satisfied that the judge overlooked any material matter when considering the evidence in relation to the children.

22. It is plain that the judge took a very poor view of the appellant's general credibility and was not even satisfied that he had entered the UK when he claimed. He had been throughout in this country unlawfully and had a very poor immigration history.

23. As Mr Bates points out, the judge found, and indeed it was accepted at the hearing, that the case did not come within the Rules but she went on to conduct an Article 8 assessment in the light of Mr Adebayo's submissions as she records in paragraph 18 of her decision. She applied the test of reasonableness and it was open to her to conclude that the decision was proportionate and in the public interest. In relation to the taking into account of wider public interests Mr Bates referred me to **<u>AM</u> (Pakistan) [2017] EWCA Civ 180**, in which judgment was given on 22 March 2017, shortly after the decision of the First-tier Judge. The judge did not err in law in referring to the immigration history of the appellant in the context of reasonableness (see paragraph 27 of **<u>AM</u> (Pakistan)**. She had expressly reminded herself in paragraph 14 of her determination – set out above – that the children's best interests were to be determined without regard to immigration history.

24. However, the judge did remind herself that the children's presence in the UK for at least seven years was of significant weight though not a determinative factor. In paragraph 26 of **<u>AM</u> (Pakistan)** Elias L.J. noted

that the First-tier Judge had recognised that "greater significance is likely to be attached to time spent in this country by a child when they are of school age and therefore developing ties and attachments outside the immediate family unit". This reflects what is said in **Azimi-Moayed**. In paragraph (iv) of the head note it is stated that:

> "Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable."

25. The judge in paragraph 15 of the determination remarks that the children

> "are young and at an age when they are likely to be adaptable. They are likely to have some familiarity with the language, food and customs of their country of nationality although they have never been there. They are not at a crucial stage of their education. ..."

26. I am satisfied that the judge had very carefully in mind the best interests of the children and that she directed herself appropriately on legal issues and her decision was satisfactorily reasoned and based on the authorities to which she refers. I see no evidence of procedural unfairness in the circumstances of this case. The grounds of appeal raise no material error of law and insofar as it was sought to depart from the grounds the points raised had no merit or substance.

Notice of Decision

Appeal dismissed

Anonymity Order

The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date: 8 November 2017

G Warr, Judge of the Upper Tribunal