Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/29319/2015, IA/31660/2015, IA/31666/2015, IA/31668/2015 & IA/31669/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 July 2017	**On 26 October 2017**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

E M O O	First Respondent
A A DO	Second Respondent
A S A O	Third Respondent
A A K O	Fourth Respondent
A A D O	Fifth Respondent

(ANONYMITY DIRECTION MADE)

Representation:
For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Ms S Goh, Counsel instructed by Direct Access

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Respondents, or any of them. Breach of this order can be punished as a contempt of court. I make this order because a similar order was made by the First-tier Tribunal and the case concerns the welfare of children.

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeals of the Respondents, hereinafter "the Claimants", against the decision of the Secretary of State refusing them leave to remain on human rights grounds.

3. The Claimants are all citizens of Nigeria. The first respondent was born on 20 March 1976 and so is now 38 years old. The remaining Claimants are her children. The second Claimant was born in April 2004 and so is now 12 years old, the third Claimant was born in October 2007 and so is now almost 10 years old, the fourth Claimant was born in October 2009 and so is now 7 years old and the fifth Claimant was born in July 2013 and so is now very nearly 4 years old.

4. The minor Claimants are the children of the first respondent and her partner who I will identify here simply as "AG". It is their case that the Claimants and AG have lived together in the United Kingdom as a nuclear family.

5. AG was sentenced to two years' imprisonment in December 2013 for his part in assisting unlawful immigration from an EU member state and providing immigration advice for services in contravention of a prohibition. He is the subject of a deportation order.

6. Mr Mills explained that the deportation order was certified under Section 94B of the Nationality, Immigration and Asylum Act 2002. AG purported to challenge that decision, I assume by way of judicial review. He was unsuccessful and applied for leave to appeal to the Court of Appeal. Clearly following the decision of the Supreme Court in Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 42 and, without being disrespectful of the role of the Court of Appeal, it seems at least likely that, assuming the information given to me is correct, he will soon be given a decision that he can and will choose to appeal to the First-tier Tribunal.

7. It is the first Claimant's case in that she has no family left in Nigeria. Her parents died in 1985 and her grandmother in 2009 and her uncle has since died. She has another close relative, a sister who lives in Dubai.

8. She says there is no family home in Nigeria to which they could return and live. She said that AG is also bereft of relatives. His only living relative in Nigeria is his mother aged 76. His father died in 2004 and his sisters between 2006 and 2011. She understands there are uncles in Nigeria but AG has never met them. She confirmed that he has no home in Nigeria.

9. She did not feel able to find work in Nigeria although she has qualifications as a care assistant.

10. The First-tier Tribunal Judge, in summary, allowed the appeals out of concern for the needs of the children. Paragraph 19 of the Decision is particularly pertinent. The judge said:

> "I find that the [first Claimant] is part of a family unit in this country consisting in particular of her partner and her four children. They are all Nigerian nationals. The third to fifth [Claimants] were all born in the UK and have lived there all their lives. The second [Claimant] has lived here since he was 2 years old. The children all attend school or nursery in the UK. I have seen school reports for the second and third Claimants which show they are progressing well through their education with good attendance, punctuality and behaviour. There is also evidence to show that the third Claimant has participated in extra-curricular activities. The fourth Claimant has also been attending school, is progressing satisfactorily and received certificates of 100% attendance award at the end of the Autumn term 2015 and Spring term 2016. The fifth Claimant has attended nursery at St Luke's Primary School since September 2016."

11. The judge had the benefit of a Social Services report showing the children are well cared for and happy in the UK that they have friends at school and are integrated into society.

12. The third Claimant suffers from asthma and the judge was satisfied with evidence that she had to use the school's emergency inhaler on eight occasions in 2015 and 2016.

13. The judge noted there were no health concerns for the other children.

14. The judge acknowledged letters from the second, third and fourth Claimants saying they did not want to go to Nigeria that they were happy in England where they enjoy school and have friends. The family belonged to a Church where the first Claimant sings in the choir and the second Claimant is learning to play the drums. They had previously attended a different church. The judge acknowledged that she had seen letters of support confirming that the first Claimant and her children have a close relationship with other residents in the United Kingdom. The judge noted how the second Claimant had been in the United Kingdom for ten years, the third Claimant since birth which was then for almost nine years, the fourth Claimant since birth which was then seven years and the fifth Claimant since birth which was three years. The third, fourth and fifth Claimants had never been to Nigeria and the second Claimant had not returned to Nigeria since arriving in the United Kingdom aged only 2. The judge accepted the evidence that neither the Claimant nor her partner had any close relatives remaining in Nigeria and found that if they were to return "they would therefore be entirely self-dependant, with no assistance from family there." In effect in practical terms they appear to have severed all ties with Nigeria and have settled in the UK."

15. The Learned Judge then directed herself about the significance of leading cases involving the removal of children and then considered the Claimants' cases individually.

16. The judge considered the first Claimant and noted that she did not meet the requirements of the Rules because neither she nor her partner were British citizens or refugees or in the United Kingdom with humanitarian protection. She noted that the first Claimant had been in the United Kingdom for at least seven years immediately preceding the application but also noted that she was not the sole carer because she had joint responsibility with her partner who was subject to removal.

17. Clearly she had not lived in the United Kingdom for at least twenty years. She had been in the United Kingdom for ten years. However there is an additional difficulty in her case. At paragraph 18 of the decision the judge said:

> "I have given careful consideration to all the evidence put before me and I accept that whilst the first Claimant has a troubling immigration history given the marriage of convenience she entered into with an EU national in order to attempt to secure permanent residence in the UK, and whilst her partner is the subject of a deportation order because of the immigration offences he had committed, these do not impact on the main issues to be determined in this appeal in that the factual matrix is in effect agreed."

18. I cannot agree with the judge's observation here. She had to decide if it was "reasonable" to remove require the children to leave the United Kingdom. This is a no doubt deliberately imprecise word and there has been disagreement about how it should be interpreted and in particular whether what is reasonable should be understood in the sense of what is reasonable for the child or whether it is reasonable in all the circumstances having regard for the bad immigration history (if any) of the child's parents. It follows that

removal in circumstances that would be unreasonable in the case of parents who had an unblemished or reasonable immigration history might be entirely reasonable in the case of someone whose conduct made it more than ordinarily desirable for them to be removed. This has been considered by the Court of Appeal in **MA (Pakistan) v SSHD [2016] EWCA Civ 705** and although Elias LJ gave a clear indication that, had he not been bound by precedent, he may have taken a different view, he regarded the point as settled by the Court of Appeal in **MM (Uganda) v SSHD [2016] EWCA Civ 450** where the Court was considering the meaning of "unduly harsh" in Section 117C of the Nationality, Immigration and Asylum Act 2002. The court concluded that the reasoning in **MM** had to be followed and applied to the case such as the one I have to decide where Section 117B(6)(b) applied.

19. The First-tier Tribunal's error goes to the very core of its decision and I must set it aside.

20. Given the clear findings about the evidence I have no hesitation in saying that I can remake the decision without the need for further evidence.

21. I begin by considering the case of the oldest Claimant. Her case on human rights grounds is determined by Section 117B and I note the fact that she is an English speaker willing and able to work and has established herself in society as indicated by her involvement in a church. These are not negative features but they do not amount to very much in an Article 8 balancing exercise and do little to outweigh the strong public interest in her removal. Further her private life has been established while her immigration status was precarious and for most of the time it was unlawful. I am restrained from much weight to a private life acquired in these circumstances. She does have a close personal relationship but far from being with a qualifying partner it is with someone who is subject to deportation. Taken on its own her case is close to hopeless and is made worse by her "troubling immigration history". The first appellant is not simply someone who has overstayed but someone who has behaved badly in an unsuccessful attempt to obtain leave. Clearly it is more than ordinarily important that she is not allowed to benefit from her overstaying.

22. There is one further factor that is much more helpful to her. She does have a genuine and subsisting parental relationship with three qualifying children, the third and fourth Claimant. These children are "qualifying" by reason of having lived in the United Kingdom for more than seven years. The public interest does not require the first Claimant removal if it would not be reasonable to expect the children to leave the United Kingdom.

23. The difficulty here is determining what is "reasonable". It is my view that the law requires me to have regard to all the circumstances including the mother's poor behaviour. None of the children have particularly strong reasons to remain in the United Kingdom. It is the country they know and understand and they are doing well enough at school and are settled. These are positive features and do weigh in favour of their being allowed to remain but it is not the law that a child acquires a right to remain in the United Kingdom by reason of seven years' residence.

24. It is difficult to get a clear picture of how they would manage in Nigeria. I must accept the evidence (because there is no reason to doubt it) that there is no useful family support in Nigeria but the mother has lived there for long enough to know how to manage. They

would be returned to their country, and their mother's country, of nationality where she could be expected to find work as an enterprising English-speaking woman.

25. I am satisfied that it is reasonable to expect the children to leave. I reach this conclusion having thought of each of the appellants separately. There is no reason to distinguish between them. For example this is not a case where one of the children suffers from an extremely significant medical condition or has some particularly telling reason to remain in the United Kingdom. Removal is often part of childhood experiences and is not in any way inherently unreasonable.

26. I am required to consider their best interests and I have no hesitation in saying their best interests lie in their remaining in the United Kingdom which is the country they know with both parents. However their father is unlikely to be allowed to remain and at the moment is certainly not entitled to remain and for the reasons I have already explained their mother is not allowed to remain except possibly for their sakes. Although I am required to have regard to their best interests I cannot necessarily make a decision that gives them their best result.

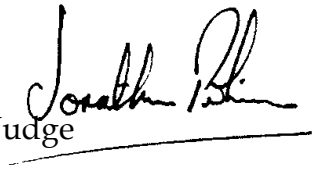
27. Again as the First-tier Tribunal explained in its decision "the ultimate question was whether it was reasonable to expect the child to follow the parent who had no right to remain in the country of origin". I am satisfied that it is reasonable especially when it is remembered that any other decision would involve the first Claimant remaining and therefore establishing a right to stay even though she has lived in the United Kingdom without permission for a long period and has a poor immigration history.

28. I find that the First-tier Tribunal erred in law and I set aside its decision. Further I remake the decision dismissing the appeals of each appellant.

Notice of Decision

I allow the Secretary of State's appeals. The First-tier Tribunal erred in law. I set aside its decision and I substitute a decision dismissing the appeal of each appellant against the decision of the Secretary of State.

Signed



Jonathan Perkins, Upper Tribunal Judge Dated: 25 October 2017