Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/32687/2015
IA/32688/2015
IA/32689/2015
IA/32926/2015
IA/32927/2015
IA/32928/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 September 2017	**On 8 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

[CLO] (1)
[CHO] (2)
[JEO] (3)
PATIENCE [U] (4)
VICTOR [O] (5)
[JAO] (6)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Gajjar, Counsel
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

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DECISION AND REASONS

1. The appellants comprise a family. The fourth and fifth appellants are the parents of the children, all of whom were born in the UK and are minors. The first appellant naturalised as a British citizen after lodging his appeal and is now 11 years of age. The second appellant is 8 years of age. Other than the first appellant, the appellants are all Nigerian citizens who have no leave to remain in the UK. They have appealed a decision of the respondent, made on 24 September 2015, to refuse them leave on human rights grounds.

2. The appeals were heard by Judge of the First-tier Tribunal Doyle at Taylor House on 1 December 2016. In a decision promulgated on 9 December 2016, the appeals were dismissed. The appellants have appealed against that decision, with the permission of the First-tier Tribunal, on the ground that the decision of Judge Doyle is vitiated by material error of law.

3. In very brief summary, the appeals were argued on the basis that removing the family would amount to a breach of their rights under article 8 of the Human Rights Convention. Emphasis was placed on the fact the first appellant had naturalised as a British citizen on 2 June 2016, and also on the fact the second appellant had resided continuously in the UK since her birth, which was more than seven years ago. The judge accepted there was extant family life. He explained that none of the appellants could succeed under the Immigration Rules. He went on to consider the position outside the rules, recognising that he was required to have regard to section 117B of the 2002 Act. The judge concluded that the interference with the appellants' article 8 rights would be proportionate. There was insufficient evidence before him to indicate that there was anything exceptional or compelling about the facts and circumstances of the case and therefore there was no reason to consider the case outside the rules. As he put it, the future of the family lies in Nigeria.

4. The grounds seeking permission to appeal against the decision of Judge Doyle submitted that his decision contains three significant errors: (1) he failed to apply the rules correctly; (2) he failed to have regard to section 117B; and (3) he failed to consider the application outside the rules. The lengthy grounds went on to reargue the case but, in large part, boiled down to an argument that it is inconceivable that it was reasonable for a British child to be removed to Nigeria.

5. It granting permission to appeal, Judge of the First-tier Tribunal Osborne stated as follows:

> "4. In an otherwise careful and focused decision and reasons it is nonetheless arguable that the judge failed to make any finding as to what is in the best interests of the children. It is therefore at least arguable that the judge failed to consider what is in the best interests of the children. It is an arguable error of law for the judge to have failed to make such an assessment."

6. The respondent filed a response opposing the appeal and arguing the judge had been entitled to have regard to the wider public interest considerations, following *AM (Pakistan) and Ors v SSHD* [2017] EWCA Civ 180.

7. At the beginning of the hearing, I felt it was necessary to observe that it was clear from the decision that Judge Doyle did identify and consider the best interests of the children. He did so at paragraphs 20 to 23 of his decision. He found the interests of the children were preserved because the integrity of the family unit was not challenged. It is difficult to understand on what basis it was considered it was arguable he had not. However, permission has been granted and cannot be rescinded.

8. Furthermore, I considered there was a live issue in that no reference had been made to the important decision of the Upper Tribunal in *SF and others (Guidance, post-2014 Act) Albania* [2017] UKUT 00120 (IAC). That decision highlighted the existence of a passage in the current IDIs (see paragraph 7 of the decision where it is set out) giving guidance to case workers on when it would be unreasonable to expect a British citizen child to leave the UK. Although *SF and others* was not promulgated until after the First-tier Tribunal's decision, the guidance had been in force since August 2015. Having been reminded of the case, Mr Bramble helpfully accepted that the respondent's position was that, absent criminality or a very poor immigration history, applicants with a British child should be granted a period of leave. There were no findings in this case showing that there had been criminality or a very poor immigration history.

9. Mr Bramble did raise his concerns that this point had not been mentioned in the grounds seeking permission to appeal and permission to appeal had not been granted to argue it. Mr Gajjar sought to persuade me that the references in the grounds to the fact the first appellant is British and the unreasonableness of expecting him to leave the UK were tantamount to raising the argument. With respect, the grounds do not raise this particular point with sufficient particularity and this is not surprising given the fact that *SF and others* was promulgated after the grounds were drafted. However, I did allow the point to be raised for the following reasons. Firstly, there is an obvious requirement to give effect to any derived rights. Secondly, the importance of correctly assessing the best interests of a child and the caution which should be exercised before depriving a British citizen of the enjoyment of the benefits of holding that citizenship both indicated it was appropriate to exercise flexibility in allowing the ground to be raised late. Thirdly, there was no real prejudice to the respondent in ensuring that her own guidance was taken into account.

10. The failure of the First-tier Tribunal to have regard to the respondent's guidance in deciding whether it would be reasonable to expect the first appellant to leave the UK must amount to a material error of law notwithstanding the fact that no-one appears to have drawn the guidance to his attention. The decision is set aside.

11. The parties agreed that the appropriate course was for me to re-make the decision.

12. It is clear from the extract in the IDIs that the respondent's position is based on the application of the principle derived from *Ruiz Zambrano* (Case C-34/09). In brief, the principle established in that case is that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of rights conferred by virtue of their status. Third country nationals also derived rights if refusal would interfere with the Union citizen's freedom of movement.

13. The guidance remains in force.

14. I observed that no findings had been made about the possibility of the first appellant being cared for by another relative in the event the rest of the family were removed to Nigeria. I heard brief evidence on this point from the fourth and fifth appellants and also the fifth appellant's older sisters, [VA] and [GE]. Having done so, Mr Bramble helpfully accepted that there was nobody in the UK, from among the extended family, capable of looking after the first appellant, who I remind myself is an eleven-year old boy. The fourth appellant has no family in the UK. Neither of the fifth appellant's sisters would be able to take in the first appellant. Both would be willing to if their lives were differently arranged but their current circumstances preclude it. [VA] has five sons of her own at home in Bromley and spends the working week away in Leicester, where she practises as a nurse. [GE] has four minor children at home and she gave compelling evidence that her husband would not countenance another child joining the household.

15. The fourth and fifth appellants made an additional statement in which they described how the first appellant is inseparable from his siblings. He is starting secondary school this week. I accept it would be bewildering and highly upsetting for the first appellant to be detached from his nuclear family at this stage of his development.

16. In *Chavez-Vilchez and Others* (Case C-133/15), the CJEU considered the relevant factors when deciding whether a child would in practice be obliged to leave the EU. They included whether the child is legally, financially and emotionally dependent on the third country national parent, the child's age, physical and emotional development and the risks that separation might entail for the child's equilibrium.

17. Applying this guidance to the findings I have made, it is clear that removing the parents and siblings to Nigeria would deprive the first appellant of the ability to enjoy his rights as a Union citizen because he would be forced to accompany them.

18. For the avoidance of doubt, in *Ayinde and Thinjom (Carers – Reg.15A – Zambrano)* [2015] UKUT 00560 (IAC) the Upper Tribunal explained that placing a child in state

care so that they can enjoy their rights of residence was "beyond the range of proportionate responses".

19. It follows that the IDIs are applicable in this case and the respondent's position is that the second, third, fourth, fifth and sixth appellants should be granted leave to enable the first appellant to enjoy his rights. Whilst the appeals cannot be allowed on the basis the decisions made were not in accordance with the law, as the Upper Tribunal explained in *SF and others*, decisions made in tribunals on the question of whether it would be reasonable to expect a British child to leave the UK should, as far as possible, be made consistently with decisions made by the respondent. Nothing has come to light in this case which could properly lead a decision-maker to depart from the guidance and, as said, Mr Bramble was content for the appeals to be allowed on this basis. I therefore substitute a decision allowing the appeals of the appellants on the ground that the constructive removal of the first appellant would be unreasonable and not in accordance with section 117B(6) of the 2002 Act. Removing his family members would be disproportionate and in breach of article 8.

20. Anonymity has not been sought and I saw no reason to grant it.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and is set aside. A decision is substituted allowing the appeals on human rights grounds.

No anonymity direction.

Signed Date 6 September 2017

Deputy Upper Tribunal Judge Froom

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeals and because a fee has been paid or is payable, I have considered making a fee award and have decided not to make a fee award for the following reasons. The appeals have turned on a change of circumstances which occurred after the appeals were lodged, namely the first appellant's naturalisation.

Signed Date 6 September 2017

Deputy Upper Tribunal Judge Froom