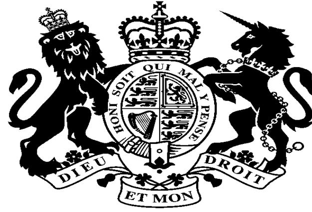

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10472/2016
HU/10475/2016
HU/10479/2016
HU/10481/2016
HU/10483/2016

THE IMMIGRATION ACTS

Heard at Field House
On 8 October 2018

Decision & Reasons Promulgated
On 20 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

ADEBUKOLA [O]
OLUWASEGUN [B]
[O B]
[K B]
[C B]
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Miah (for Del and Co Solicitors)
For the Respondent: Mr A Lindsay (Senior Presenting Officer)

DECISION AND REASONS

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1. These are the appeals of Adebukola [O], Oluwasegun Olanrewaju Bakare, [OB], [KB] and [CB], citizens of Nigeria who are the parents and children born respectively [~] 1983, [~] 1980, [~] 2008, [~] 2011, and [~] 2013. They appeal against the decision of the First-tier Tribunal of 15 September 2017 to dismiss their appeals against the refusal of their human rights claims by the Respondent (of 5 April 2016).

2. Adebukola was granted leave to enter the UK as a spouse on 16 January 2006, until 16 January 2008. She applied for ILR on domestic violence grounds in February 2008, that application being refused on 5 February 2008. She made an application on *Zambrano* grounds in February 2014 which was rejected in March 2014; she re-applied at once, and that was refused on 17 June 2014. She was served with notice of her removability on 22 December 2015.

3. Oluwasegun entered the UK first as a family visitor in September 2004. He subsequently applied to visit again, and a visa was granted in November 2005; he was refused leave to enter when he arrived on 5 December 2005, and the subsequent appeal was allowed, and he was granted leave to enter until 11 November 2007. He subsequently came to the Respondent's attention when he applied for leave on family and private life grounds in April 2013, which was refused in June 2013; subsequently he had made *Zambrano* applications in line with his partner.

4. The family's present application was based on their links with the UK and their children's best interests. The application was refused because there were no viable entitlements under the partner or parent route under Appendix FM. Having regard to the exception therein, it was thought unreasonable for [OB] (then already a seven-year resident child) or her siblings to live in Nigeria, as she was not at a critical stage of her education and Nigeria had a functioning education system. The adults would not face very significant obstacles to integration in Nigeria, where they had grown up and where they presumably retained cultural and social ties.

5. A statement of additional grounds set out that Adebukola's move to the UK following her marriage to a British immigration officer in 2005; he had insisted that she join him in the UK, and she abandoned her education. Their relationship deteriorated and he became violent; she moved to his sister's home and subsequently moved elsewhere. She had reported the injuries she had received to her doctor but had not taken things further as she still loved him, did not want to damage his career, and did not want her childrens' upbringing to be clouded by knowledge of her mistreatment.

6. Before the First-tier tribunal Oluwasegun argued that he lacked connections in Nigeria and has strong family ties here. He had worked here as a construction labourer; his mother in Nigeria was unwell and was herself

cared for by her church community, so could not help him or his family; he had high blood pressure.

7. The First-tier tribunal accepted that Adebukola had established that she had been a victim of domestic violence during her previous marriage, given that her doctor's notes included a reference to her having a human bite mark on one shoulder.

8. There were no school reports and no evidence to suggest the family unit was other than a normal close one which interacted with their relatives here and with the church. [OB] had not expressed any views of her own, and her parents' assertions were the only material relied on to show that she could not adapt abroad. Education would be available in Nigeria. It was not credible that any financial support from family in the UK could not continue once they had returned abroad.

9. The family's application had been made when Adebukola had already overstayed her leave and whilst the Tribunal sympathised with her predicament given the history of domestic violence she had suffered, this in itself did not show that any family member would face very significant obstacles to integration abroad. Examining their cases outside the Rules, there was a strong public interest in their departure given their lack of immigration status. The Judge directed himself that it was necessary to determine the appeal as at the date of hearing; perhaps a different decision might be taken based on more up-to-date circumstances.

10. Grounds of appeal essentially contended that

    (a) The wrong approach had been taken to the best interests of the children;

    (b) There was an inconsistency of approach in apparently accepting the fact of Adebukola having suffered domestic violence yet still penalising her for precarious residence in the UK: the compassionate circumstances should have been given more weight;

    (c) The immigration history of the parents had been wrongly taken into account when assessing the best interests of the children.

11. Although the First-tier tribunal refused permission to appeal on 22 March 2018, the Upper Tribunal granted permission to appeal on 16 August 2018 on the basis that arguably the best interests of the elder child had not been lawfully assessed having regard to the *MA (Pakistan)* requirement to identify strong reasons justifying a seven-year resident child's departure.

12. Before me Mr Miah submitted that the critical principles identified of the governing authorities on the best interests of children had not been applied. Once a family unit contained a seven-year resident child, the case law

established that there was no basis for removing them unless there was some significant public interest factor in play. Bare overstaying was not enough. Mr Lindsay replied that there were sufficient factors identified by the First-tier Tribunal to demonstrate that the parents' immigration history was sufficient to overcome the best interests of the children: they had both overstayed, the children were Nigerian citizens, and the case required assessment of how emphatic an answer should be given to the question of in which direction the best interests of the children pointed. *MA Pakistan* had been referenced and the Judge should be presumed to be aware of the reasoning therein whether or not it had been spelt out.

Findings and reasons

13. It is first necessary to set the scene via the relatively extensive case law that has fallen from the oft-litigated scenario of parents with children. The central provisions in these appeals are those governing the consequences for a family unit of significant residence in the UK by children. The Rules state:

> "**Requirements to be met by an applicant for leave to remain on the grounds of private life**
>
> **276ADE** (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant …
>
> > (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;"

14. Section 117B NIA 2002 provides:

> "**PART 5A**
>
> **Article 8 of the ECHR: public interest considerations** …
>
> **117B Article 8: public interest considerations applicable in all cases**
>
> …
>
> (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."

15. The upshot of these provisions is that a child who has been resident in the UK for seven years can only be expected to depart if that would be reasonable in all the circumstances (Rule 276(ADE(vi)); this conclusion will

also militate against the departure of any parents caring for them (section 117B(6)). Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 explained that wider public interest considerations had to be taken into account when assessing the reasonableness of a child's relocation, beyond its best interests. The fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise as was shown by the Secretary of State's published guidance from August 2015 in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave, because 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. Nevertheless, it may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling.

16. *Every Child Matters: Change for Children* (Guidance issued in November 2009 under section 55(3) and 55(5) of the 2009 Act) specifies that safeguarding and promoting the welfare of children requires:-

> "protecting children from maltreatment;
>
> preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development');
>
> ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and
>
> undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully."

17. A parent's immigration history should not be held against a child – at least under the "best interests" assessment. Lord Hope in *ZH (Tanzania)* [2011] UKSC 4 at [44]:

> "The fact that the mother's immigration status was precarious when they were conceived may lead to a suspicion that the parents saw this as a way of strengthening her case for being allowed to remain here. But considerations of that kind cannot be held against the children in this assessment. It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible."

18. However, as explained by the President in *Kaur* [2017] UKUT 14 (IAC), whilst a child's best interests are to be assessed without regard to the sins of the parents, factors such as illegal entry, unlawful overstaying or illegal working may legitimately enter the equation at the second stage of the assessment, being plainly relevant to the public interest in the maintenance of immigration control. At that stage a child's best interests, though a

consideration of primary importance, can potentially be outweighed by the public interest. The "best interests" assessment is most aptly carried out at the beginning of the overall exercise.

19. Seven-year resident children enjoy especially strong protection, then. Nevertheless, the best interests of children who have not been resident for seven years remain relevant. As it was put in *MM Lebanon* §89 citing *Jeunesse v The Netherlands* (2015) 60 EHRR 17:

> "89. We have already explained how the internationally accepted principle requiring primary attention to be given to the best interests of affected children is given clear effect in domestic law and policy. The same principle is restated as part of the considerations relevant to the article 8 assessment in *Jeunesse* … requiring national decision-makers to:
>
> > "… advert to and assess evidence in respect of the practicality, feasibility and proportionality [of any such removal of a non-national parent] in order to give effective protection and sufficient weight to the best interests of the children directly affected by it." (para 119)""

20. Jackson LJ in *EV (Philippines)* [2014] EWCA Civ 874 at [35] stated: "A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life ..."

21. The bare fact of seven years' residence is not in itself sufficient to demonstrate a lack of reasonableness - an evidence-backed case must be put, in order that the evaluative exercise required by the case law of the European Convention on Human Rights is given effect. In *Azimi-Moayed* [2013] UKUT 197 (IAC) the President's Tribunal set out that:

> "ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

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

22. Bare assertions that a change of school regime is in itself unreasonable do not suffice. The Tribunal in *AM Malawi* [2015] UKUT 260 (IAC):

> "39. … Nor should the difficulties of a move from one school to another become unduly exaggerated. It would be highly unusual for a child in the UK to complete the entirety of their education within one school. The trauma, or excitement, of a new school, new classmates and new teachers is an integral part of growing up. In too many appeals the FtT is presented with arguments whose basic premise is that to change a school is to submit a child to a cruel and unduly harsh experience. Indeed, as if to illustrate the point, we note that the eldest child of this family has been required to move schools, and move from one end of the UK to the other, as a result of the decisions of her parents. The evidence does not suggest she suffered any hardship or ill effect from so doing."

23. The Tribunal here did assess best interests at the appropriate juncture consistently with *Kaur*. And in general it took account of the relevant considerations identified for all children in *EV (Philippines)*. Nevertheless, I accept the grounds of appeal gain some purchase from the lack of an express direction as to the appropriate legal test being that set out in *MA (Pakistan)*. It is not apparent that the First-tier Tribunal appreciated that the presence of a seven-year resident child elevates the case to one where strong or powerful reasons are required to justify the family's departure from the UK. To that extent it seems to me that the First-tier Tribunal made an error of law. I also accept that there is an unresolved tension in the findings of the First-tier Tribunal that Adebukola was consistently present on a precarious basis given she had entered the UK lawfully in a settlement route, her route to indefinite leave to remain being interrupted only by the domestic violence that contributed to her previous relationship's failure.

24. However, that leaves the further question of whether or not the error of law was a material one. One feature of these appeals are the brevity of the supporting evidence. There are no letters from schools or similar. The witness statements are slight in the extreme. Adebukola set out that her partner had a "heavy family presence in the UK and our children are used to them"; the children had no knowledge of any other country than this one. Both the adult Appellants stated they had engaged themselves in creditable endeavours by working, paying taxes and making national insurance contributions. A letter from [OC] stated that Oluwasegun was his brother and that the children were being schooled here. There was nothing of substance beyond these relatively vague assertions.

25. Whilst [OB] is a seven-year resident child, he remained at the more youthful end of the spectrum identified in *Azimi-Moayed* when the First-tier Tribunal determined this appeal around a year ago. Clearly in those circumstances the strength of his UK connections required careful consideration. Yet the evidence base relied on was slight in the extreme.

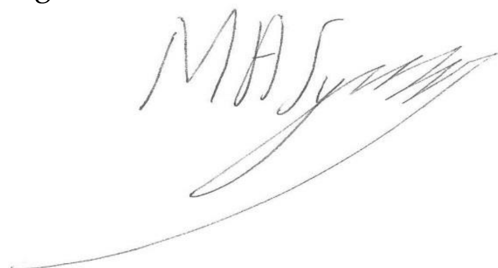
26. Mr Miah pressed on me the submission that evidence from the schools was not required given that this was a case where the Secretary of State had to demonstrate powerful reasons for the family's expulsion. I do not agree. The progress of a child's education and the extent of any meaningful private life of their own outside of the family unit is the centre point of the necessary enquiry. The eponymous Appellant in *MA (Pakistan)* itself 61ff in fact failed to demonstrate that the First-tier Tribunal had erred in finding his departure to be reasonable given the lack of evidence put forward on the child's behalf.

27. Absent sufficient detail of the actual connections, it is much more difficult to be satisfied that the relevant public interest factors present here were overcome. For example, there is no explanation for Oluwasegun's very significant period of overstaying, and whilst Adebukola's continued presence in the UK following her first relationship's breakdown might be understandable, the mere fact of being a victim of domestic violence does not immunise one from having subsequently to satisfy the Immigration Rules (unless of course one succeeds in an application under the Rules that make special provision for such individual). There is no detail provided of Adebukola's state of mind following the domestic violence in question, and no explanation as to why she chose to enter a new relationship in the UK with a person who lacked immigration status rather than returning to her country of origin where she would presumably retain family and social connections. One might add the fact that the three children are presumably being educated at public expense.

Decision

The appeals are dismissed.

Signed Date 8 October 2018



Deputy Upper Tribunal Judge Symes