Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02505/2018
HU/02514/2018
HU/02521/2018
HU/02523/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th May 2019	**On 12th June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MS C C C
MR C C
MR C J C
MR K E C
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms Grell of Counsel
For the Respondent: Ms Willocks-Briscoe, Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellants born on 4th December 1966, 6th April 2000, 5th August 2002 and 26th September 2005 are all nationals of Nigeria. The first Appellant is the mother of the second, third and fourth Appellants. The Appellants had made application for leave to remain on 25th September 2015 on human rights grounds. The Respondent had initially refused their application on 21st January 2017 and then following judicial review proceedings or the potential of such proceedings the Respondent reconsidered the matter and again refused their application on 28th December 2017.

2. The Appellants had appealed that decision and their appeal was heard by Judge of the First-tier Tribunal Anstis sitting at Hatton Cross on 1st March 2019. The judge had allowed all the Appellants' appeals on human rights grounds. Application for permission to appeal was made by the Respondent and permission to appeal was granted by Judge of the First-tier Tribunal Murray on 10th April 2019. It was said that it was arguable that the factors identified by the judge at paragraph 79 were not sufficiently compelling to outweigh the public interest in removal given the fact that one child was an adult and the others had not been in the UK for seven years. It was said that it was also arguable the judge had not considered the availability of healthcare and education in Nigeria on return.

3. A response pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules was provided on behalf of the Appellants on 3rd May 2019. Further a notice pursuant to Section 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules was submitted also on 3rd May 2019 on the basis that the new evidence not available before the First-tier Tribunal hearing on 1st March 2019 was that the Appellant's children who arrived in the UK on 21st April 2012 had now resided in the UK for over seven years and accordingly those children could be considered qualifying children under the Immigration Rules and relevant legislation.

4. Directions had been issued firstly for the Upper Tribunal to decide whether an error of law had been made by the First-tier Tribunal in this case and the matter comes before me in accordance with those directions.

Submissions on Behalf of the Respondent

5. It was submitted by Ms Willocks-Briscoe that the judge's decision essentially relied upon factors that he had identified at paragraph 79 of the decision but in consideration of those factors had failed to adequately consider the public interest or the question of proportionality. It was submitted that the Appellants had not integrated, that the judge had found little in respect of the matter concerning the fourth Appellant's ADHD and that there was little or no problems in terms of reintegration in terms of language. It was further submitted that the judge had previously in the decision made negative findings on issues that he then relied upon in respect of those factors identified in paragraph 79. It was said that no

indication had been given as to the weight that the judge may have given to those statutory requirements under Section 117B of the 2002 Act.

Submissions on Behalf of the Appellant

6. It was said that the central feature in the decision was that which was said by the judge from paragraph 57 onwards. It was noted that it was essentially a case regarding private life only having regard to the matter raised by the judge at paragraph 58. It was further submitted that there was reliance placed upon the fourth Appellant's diagnosis of ADHD.

7. In response Ms Willocks-Briscoe submitted that if the judge had accepted the concession that the Appellants did not come within paragraph 276ADE of the Immigration Rules then that meant that it was accepted that it would not be unreasonable for them to return to Nigeria and therefore issues such as potential destitution referred to at paragraph 79 of the decision were not compelling features.

8. At the conclusion I reserved my decision to consider the submissions and the evidence provided. I now provide that decision with my reasons.

Decision and Reasons

9. The first Appellant was the mother of the other three Appellants. The second Appellant was an adult at the time of the appeal hearing. The third and fourth Appellants had entered the UK on 21st April 2012 (paragraph 3) and were therefore one month short of being qualifying children at the date of the appeal hearing. They now have been in the UK for seven years.

10. The judge had noted at paragraph 38 that the appeal was limited to human rights grounds. In this respect the judge had referred himself to **Razgar** (paragraph 39), and **PD (Sri Lanka) [2016] UKUT 108**, in respect of conjoined Article 8 applications by multiple family members (paragraph 42). He had also firstly considered the best interests of the children in accordance with Section 55 of the Borders Act 2009.

11. At the conclusion of his initial factual analysis under Section 55 of the best interests the judge said at paragraphs 58 to 59 the following:

> "58. The Respondent is not suggesting in this case that the Appellants be separated. They either all remain in the UK or they are all removed to Nigeria. To that extent the primary point of the children remaining with their mother is met either way.
>
> 59. As it is generally in the best interests of children to have stability of upbringing it is generally in the best interests of the third and fourth Appellants remain in the UK. This is particularly so in the case of the fourth Appellant given his ADHD and particularly so in the case of both the third and fourth Appellants given the risk I have found below that they may be destitute and homeless in Nigeria".

12. The judge had at paragraph 60 to 70 looked at other factors presented in the case. He had for reasons provided found:

    (a) The alleged threat from Boko Haram did not amount to a reason why they could not return.

    (b) There was no real risk to the second Appellant of FGM in the circumstances of this case.

    (c) Whilst it was accepted that there was no accommodation to return to in Nigeria the judge accepted that of itself that could not count against the decision to refuse the application.

    (d) There will be significant difficulties in obtaining accommodation and supporting the family on return.

    (e) There will be no real language difficulties.

    (f) The family's private life was developed whilst their status in the UK was precarious but that should not count against the third and fourth Appellants in terms of their best interests.

    (g) An application by the first Appellant alone was bound to fail.

    (h) A factor counting against the first Appellant was her conviction.

13. The judge had noted at paragraph 74 that as the third and fourth Appellants had not been in the UK for seven years then Section 117B(6) of the 2002 Act nor paragraph 276ADE of the Immigration Rules applied. He noted therefore that he was not considering whether or not it was reasonable for them to leave the UK but the question of proportionality under Article 8 of the ECHR. At paragraph 74 he opined

> "proportionality is above all a matter of degree with few, if any, clear dividing lines. The private life of a child who has been in the UK for a month short of seven years may be put as developed and significant as the private life of one who has been in the UK for a month over seven years".

    Those comments from what he said at paragraph 75 later indicate that in his assessment he did not regard their presence in the UK of one month short of seven years to make any real difference in terms of the assessment of proportionality. In his assessment of proportionality the judge had noted that the case was "finely balanced" (paragraph 82), and found removal of the third and fourth Appellants disproportionate for the reasons he gave essentially at paragraph 79. Those factors were:

    (a) their long residence;

    (b) risk of destitution and homelessness in Nigeria;

    (c) the consequences of the fourth Appellant's ADHD.

14. In **KO [2018] UKSC 53** (at paragraph 18) the court said: "Inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be since it will normally be reasonable

for the child to be with them". The court further quoted from **EV [2014] EWCA Civ 74** in the context of consideration of Section 55 by stating

> "if neither parent has the right to remain and that is the background against which the assessment is conducted. Thus the ultimate question will be is it reasonable to expect the child to follow the parent with no right to remain to the country of origin".

15. Whilst that case was primarily concerned with a qualifying child and issues under Section 55 and Section 117B(6) of the 2002 Act, it is clear that the judge in this case when considering proportionality under Article 8 had essentially and understandably treated the third and fourth Appellants as if they were for all intents and purposes qualifying children (as indeed they now are) given they were only one month short of qualification.

16. In paragraph 79 when looking just at the third and fourth Appellants the judge had noted the three factors that led to him allowing the appeal of all Appellants. In terms of long residence that had not been analysed further to see whether that long residence would mean that return was either unreasonable or disproportionate. The factors that appeared to have led the judge to conclude that return would be disproportionate was firstly the risk of destitution and homelessness. He had accepted that the lack of accommodation on return was not alone a factor to prevent removal. The future risk was potentially nothing more than speculative. The only other factor referred to in paragraph 79 was the fourth Appellant's ADHD. However that needs to be set in context with the findings made by the judge earlier in his decision at paragraphs 54 to 56. He had noted inter alia

> "No doubt the fourth Appellant's ADHD will make it more difficult for him to settle and establish himself at school in Nigeria. This is a factor but it is a long way from the significance that Ms Grell sought to give it of him being liable to be regarded as a witch on return to Nigeria".

The judge had further noted that the medical evidence indicated that the Appellant's ADHD was only diagnosed later in life along with the indication that for six months there had been no major incident suggesting to him that the fourth Appellant's condition was not in the nature of an over visible disability that may tend to put him in a disadvantaged position.

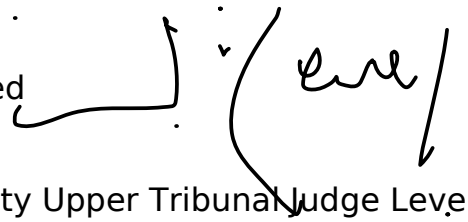
17. In all the circumstances therefore the judge appeared at paragraph 57 to be relying upon essentially two factors, one of which can best be described as speculative and the second a factor that he had already set in context as not demonstrating any significant risk. It is difficult to see in those circumstances when conducting a proper balancing exercise by application of the balance sheet method endorsed in **Hesham Ali** and **AS** that the judge could have concluded that removal was disproportionate.

Notice of Decision

18. I find that a material error of law was made by the judge in this case and I do not uphold the decision of the First-tier Tribunal. This case should be heard afresh in the First-tier Tribunal before a judge other than First-tier Tribunal Judge Anstis.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  Date 11 June 2019

Deputy Upper Tribunal Judge Lever