



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/22032/2018  
HU/22920/2018, HU/22926/2018  
HU/22933/2018, HU/22912/2018  
HU/22936/2018

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
On 24 May 2019**

**Decision & Reasons Promulgated  
On 07 June 2019**

**Before**

**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**PI - FIRST APPELLANT  
BI - SECOND APPELLANT  
WI - THIRD APPELLANT  
MI - FOURTH APPELLANT  
PI - FIFTH APPELLANT  
PI - SIXTH APPELLANT  
(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr S Winter, instructed by Latta & Co Solicitors  
For the Respondent: Mr A Govan, Senior Presenting Officer

**DECISION AND REASONS**

## **Anonymity Order**

Although no order for anonymity was made by the First-tier Tribunal, since these appeals relate to children I make an order prohibiting the disclosure of any matter leading to the identification of the appellants pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Any breach of this order may result in contempt proceedings.

1. The appellants, who are nationals of Nigeria, have been granted permission to appeal the decision of First-tier Tribunal Judge J C Grant-Hutchinson. For reasons given in her decision dated 21 December 2018, the judge dismissed their appeals against the Secretary of State's decision dated 15 October 2018 refusing the first named appellant's human rights claim.
2. The first appellant entered the United Kingdom on 29 October 2010 and his wife on 19 May 2011. The judge considered their cases with reference to paragraph 276ADE(vi) of the Rules and made a number of findings leading to her conclusion that there would not be very significant obstacles to the first and second appellants' integration into Nigeria were they required to leave the United Kingdom. This took account of the first two appellants having been born and spent their formative (and a good part of their) adult lives in Nigeria and their level of education. The fact of these appellants speaking only English had not prevented them from fully integrating into life in Nigeria. Despite the first appellant having fallen out with his family in relation to his marriage, the judge considered he had had to be independent from an early age and, having regard to their resourcefulness, found there was no reason why they could not reintegrate into their own culture and traditions on return.
3. The judge also assessed the cases under Article 8 after noting that none of the children had lived in the United Kingdom for at least seven years. She addressed their best interests. She took account of the circumstances they might face and the evidence produced in support and concluded at paragraph 35:
  - "35. As both parents were brought up in Nigeria speaking English then there is no reason why the children would have any difficulties in this regard as both parents do not speak any other of the Nigerian languages, although the second Appellant says she speaks a little Yoruba. As the first Appellant said in oral evidence English is the "lingua franca" of Nigeria. The said psychological report states that the children are likely to face significant psychological and practical barriers to integrating in Nigeria and that they are likely to find the move very distressing and unwanted. Whilst I accept that the children may find the move distressing and no doubt unwanted and it will take time for them to re-settle, in my view the children are bright, intelligent and well-adjusted. They are socially capable. They are resilient and more than able to adapt

to be able to return to Nigeria with their parents and continue their lives there.”

4. In addition, the judge finally considered the cases with reference to section 117A-D of Part 5A of the Nationality, Immigration and Asylum Act 2002 and concluded at [43]:

“43. For the reasons given I do not find that the best interests of the children outweigh the public interest. I find that interference by the Respondent for the maintenance of effective immigration control is proportionate in this case. I do not find that the Appellants’ appeals succeed outside the Immigration Rules.”

5. Permission to appeal was granted by First-tier Tribunal Gibb who summarised the grounds as follows:

“2. The grounds, which were in time, complain that the judge erred in: (1) failing to assess the psychological report in the round; (2) rejecting the impact of removal on the children without evidence; (3) making a finding as to the children having knowledge of Nigerian customs without adequate reasoning and without evidence; (4) not noting that with 3C leave the appellants had had over 7 years lawful residence; and (5) not taking cost of treatment into account.”

6. Specifically in respect of the children’s presence in the United Kingdom, the judge observed at [4] and [5] of his grant of permission:

“4. At [19] the judge concludes that the children had not been in the UK for 7 years at the date of application, but the judge noted in the Article 8 proportionality assessment that the children were all qualifying at the date of hearing (all 4 arrived in May 2011 and passed 7 years in May 2018). In view of Para 276ADE(iv) and the policy referred to at para 49 of *MA (Pakistan)* [2016] EWCA Civ 705 (leave should be granted unless ‘powerful reasons to the contrary’), arguably not overturned by *KO (Nigeria)* [2018] UKSC 53, it is arguable that the judge erred in not considering whether such powerful reasons existed, and in reaching the finding at the start of [31] without noting the Secretary of State’s own policy which accepts that qualifying children do have private lives normally capable of outweighing the interests of immigration control. The proportionality assessment should arguably also have considered whether the children met the terms of Para 276ADE(iv) as a starting point.

5. It is also arguable that the last sentence of [40] amounts to a legal error in view of paras 16-17 of *KO*, which states that the reasonableness question has to be addressed without reference to the conduct of the parents. Overall it is arguable that the judge erred in not considering the children as a separate matter, thereby omitting to consider the key issue of whether the parents could succeed because of having 4 qualifying children rather than starting with the parents and then deciding the reasonableness question without assessing the private life interference from the children’s perspective.”

7. Before hearing submissions, I observed the parties that with respect to First-tier Tribunal Judge Gibb, his observation that the reference in *MA (Pakistan)*, ‘powerful reasons to the contrary’ was not arguably overturned by the Supreme Court in *KO (Nigeria)* was not correct. Paragraph 276ADE(1)(iv) was considered by Lord Carnwath at [16] to [19] as follows:

“16. It is natural to begin with the first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DP5/96 it contains no requirement to consider the criminality or misconduct of a parent as a balancing factor. It is impossible in my view to read it as importing such a requirement by implication.

17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is “reasonable” for the child. As Elias LJ said in *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber)* [\[2016\] EWCA Civ 705](#), [\[2016\] 1 WLR 5093](#), para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).

18. On the other hand, as the IDI guidance acknowledges, it seems to me 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. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245, [\[2017\] ScotCS CSOH\\_117](#):

“22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, ‘Why would the child be expected to leave the United Kingdom?’ In a case such as this there can only be one answer: ‘because the parents have no right to remain in the UK’. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made ...”

19. He noted (para 21) that Lewison LJ had made a similar point in considering the “best interests” of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in

*EV (Philippines) v Secretary of State for the Home Department*  
[2014] EWCA Civ 874, para 58:

“58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then 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?”

To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that “reasonableness” is to be considered otherwise than in the real world in which the children find themselves.”

8. To my mind it is clear that there was no specific approval by the Supreme Court of the approach considered by Elias LJ as cited by FTTJ Gibb. The rule requires a test of reasonableness as that set out in *KO (Nigeria)*.
9. Mr Winter clarified at the outset of the hearing that the children were aged 3 (twins), 5 and 6 when they arrived with their mother in 2011. The first appellant’s lawful leave came to an end on 18 August 2017. The children are thus now aged 13, 11, and 10 (the twins). The children have not visited Nigeria since their arrival. He further clarified that the policy referred to by First-tier Tribunal Judge Gibb was not before the judge and he confirmed that the policy point was not raised as a ground of challenge. He nevertheless relied on the reference to policy in the grounds and the ability of the granting judge to raise a point for consideration on appeal.
10. Mr Winter argued that his case with reference to ground (i) was essentially based on the judge having made findings in respect of the appellants before considering the psychological report by Dr Alia Ul-Hassan and Dr Ifaf Asghar, the former a Clinical Psychologist and the latter a Chartered Clinical Psychologist. He accepted that the judge had not erred in the reference to the content of the reports but maintained his position that the judge had made findings “against” the family remaining in the UK before considering the report. Had the report been addressed first, this might have resulted in a different view being taken and, as a consequence, the best interests were undermined by this erroneous approach to the first and second appellants’ concerns about return to Nigeria.
11. In relation to the other grounds of challenge (by reference to the paragraph numbering in the grounds), Mr Winter argued in respect of ground (ii) that the judge had erred when rejecting the impact of removal on the children without contrary medical evidence to that in the report. As to ground (iii), which argues the inadequacy of reasons for the judge’s disbelief that the first and second appellants had not instilled Nigerian

customs to their children, Mr Winter accepted all he was able to say with reference to the report was that children had no memory of Nigeria.

12. Ground (iv) was not pursued. Ground (v) challenges the decision on the basis that the First-tier Tribunal had erred in its conclusion that the cost of treatment (for Type 1 Diabetes) was not something that could be taken into account. In this regard reliance was placed on *AM (Zimbabwe) & Anor v SSHD* [2018] EWCA Civ 64 and *Paposhvili v Belgium* (Application no. 41738/10).
13. In the course of Mr Winter's submissions, I invited him to reflect on a number of aspects of the judge's decision in order to establish those passages which he considered came within the scope of his challenge. The detail of that exchange is set out below in my conclusions.
14. By way of response Mr Govan argued that in respect of ground (i), the judge had looked at the psychologist's report and had treated that evidence in the round. Consideration of the report appears in the middle of the decision and it was clear that the judge was aware of the family circumstances. All factors had been considered in a great deal of detail. As to ground (ii), the judge had referred to the children's high level of resilience. Here too there was a careful assessment without error. As to ground (iii), this was more of a disagreement than an error - all the parties had lived in Nigeria.
15. By way of brief response, Mr Winter argued that the tenor of the judge's decision did not appear to be consistent with the jurisprudence in *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123 when I drew to his attention [32] where the judge did make reference to the report which she explained she would be considering later before reaching findings in relation to the children. I had invited Mr Winter to consider whether that was indicative that the judge had the report in mind throughout her findings.
16. The guidance in *AM (Afghanistan)* relates to the approach to be taken where an appellant by virtue of age or other vulnerability may be unable to participate effectively and fairly in the asylum process and the appeal. That issue does not arise in this case. I can discern no unfairness in the approach by the judge which on my reading of her decision shows particular care was taken in the assessment of all of the evidence.
17. As I have noted above, judge's starting point was paragraph 276ADE with particular reference to sub-paragraph (vi) by reference to the first and second appellants. There is no challenge to the judge's correct direction as to the test of "very significant obstacles" contained within that sub-paragraph.
18. The judge structured her decision by beginning with the circumstances of the first and second appellants and, between [15] and [17], set out the various factors she took into account in reaching her conclusion at [18] that there would not be very significant obstacles to the first and second

appellants' integration into Nigeria. The judge then turned her attention to the children and correctly explained at [19] why they could not meet the requirements of paragraph 276ADE(1) as none had lived at the date of application continuously in the UK for at least seven years and they were all under the age of 18.

19. The next step was her consideration of the circumstances of all the appellants under Article 8. The judge correctly directed herself as to the approach to be taken, including a recital of the *Razgar* test. Correctly, she saw no need to repeat the factors which she had set out previously regarding the ability of the first and second appellants to reintegrate into Nigeria and thereafter looked at the circumstances of the first and second appellants in the United Kingdom, in particular the lives they had made and the connections established. The judge specifically addressed the circumstances of the first appellant who suffers from Type 1 Diabetes. She directed herself correctly with regard to *N v SSHD* [2005] UKHL 31 as to the test to be applied and at this stage observed that access to treatment, funding and resources was not something she could take into account in the balancing exercise. Ground (v) was relied on by Mr Winter although he did not advance any argument based on the reference to *Paposhvili*. It is readily understandable why he did not do so since the Court of Appeal in *MM (Malawi) & Anor v SSHD* [2018] EWCA Civ 2482 made it clear that in respect of Article 3 medical cases the decision of the House of Lords in *N v SSHD* was "... clear principled and binding on all domestic courts and tribunals and endorsed by the ECtHR" (per Hickinbottom LJ at [7]). In my judgment, the evidence before the judge justified her conclusion that Article 8 was not engaged in relation to the first appellant's medical concerns particularly in the light of a positive conclusion as to the way in which he would be able to re-establish himself in Nigeria and generate income.
20. At [27], the judge turned her attention to the circumstances of the children. She records the circumstances of each and includes in her survey of the evidence the children's own attitude towards the prospects of return to Nigeria. At [29] she explained:

"29. I remind myself that all the children are Nigerian nationals and have always lived with their parents who are Nigerian nationals. I do not find that any of the children could not continue their education in Nigeria. The oldest child is only in the second year of secondary school. Their parents are examples of what educational achievements they can aspire to in Nigeria. I note that all the children have moved primary school at least on one occasion and have not had any problems settling into a new school in a new environment and make new friends. Whilst it may be said that moving to Nigeria to continue education there may be completely different and I accept that it may take time for the children to settle they have the loving support of two parents who have already experienced such an education system. There is no reason why their parents cannot guide and support their children settling them into a different education system. The first

Appellant has shown that the education system in Nigerian is a good one because he has used it as the foundation for being able to come to the United Kingdom to study for his PhD. All the children have good ambitions for what they want to achieve and there is no reason why they cannot study to obtain their goals in Nigeria.”

21. After referring to the first appellant’s evidence as to the inadequacy of public schools in Nigeria the judge observed at [30]:

“30. In his witness statement the first Appellant states that most fairly good schools are privately owned and the public schools are inadequate in their standards. In my view this does not mean to say that education is not available to the children on return. As can be seen the first Appellant achieved his goals without having a father and by obtaining a scholarship which many people do in other parts of the world including in the United Kingdom. There is no reason why the children cannot continue their education in the public school system and once he and the second Appellant are established and if they so wish, they can send their children to private schools of their choice.”

22. The judge continued at [31] and [32]:

“31. In my view the children are still young and have not formed a private life of their own. Their lives revolve around their parents and their school and the friends that they have made there. The fact that they have moved schools and in accordance with Pauls witness statement he has moved primary school on three occasions as at the date of hearing. I fail to see why the children could not make new friends in Nigeria. They can use social media to maintain contact with their friends in the United Kingdom on return. They can also continue with their sports activities in Nigeria.

32 I find it inconceivable how the first and second Appellants would have me believe that they have instilled into their children none of their culture and traditions from Nigeria to give them a basis of identity considering that is the environment from which they both originate from and where they lived for many years into adulthood. I do not accept what they state. I refer to the psychological report dated 10 December 2018 prepared by Dr Asghar and Dr Ul-Hassan which is lodged in the Appellants’ bundle (which I will come to in due course). However the point I wish to make is the summary assessment for Peter where it is stated that he sees himself as Scottish as well as Nigerian.”

23. The psychological report was analysed by the judge at [33] to [35] as follows:

“33. Turning to the said psychological report itself I note that this report has only been prepared for this hearing as there is no evidence that either the first or second Appellants or their children have psychological or other mental health problems. In the interview with the first and second Appellants they speak



about how well they feel supported by a network of friends that they have in the Aberdeen area (although there is no documentary evidence in support as I have already referred to). If the first and second Appellants can build up a network of friends then there is no reason why they cannot do so on their return to Nigeria. I do not accept that the first and second Appellants do not have friends from their school and university days. They are social and outgoing individuals as can be seen.

34. According to the said psychological report, all the children are doing very well academically and in relation to sports within their schools. Williams presents as a happy boy and there are clear indicators of successful integration across settings. Maris has a very close relationship with her parents and her siblings and enjoys spending time with them. She is also presented as a happy young girl who enjoys school and spending time with her friends. She finds her family and her faith supportive. Paul is described as well integrated into school despite having had several school moves and reports been capable of accessing the curriculum and extracurricular activities. He also shows evidence of successful social integration given that he is well settled within a friendship group both within school and within the community. Peter is also described as successfully integrating across settings. He is able to access the curriculum including extracurricular activities and achieve his potential academically. He has a good sense of self-esteem and is developing a positive sense of self and identity as someone who sees himself as Scottish as well as Nigerian. All four children show many signs of positive and strong integration within Scotland and that they speak English fluently. I have no reason to doubt the contents of the report in this regard.
35. As both parents were brought up in Nigeria speaking English then there is no reason why the children would have any difficulties in this regard as both parents do not speak any other of the Nigerian languages, although the second Appellant says she speaks a little Yoruba. As the first Appellant said in oral evidence English is the "lingua franca" of Nigeria. The said psychological report states that the children are likely to face significant psychological and practical barriers to integrating in Nigeria and that they are likely to find the move very distressing and unwanted. Whilst I accept that the children may find the move distressing and no doubt unwanted and it will take time for them to re-settle, in my view the children are bright, intelligent and well-adjusted. They are socially capable. They are resilient and more than able to adapt to be able to return to Nigeria with their parents and continue their lives there."
24. Mr Winter acknowledged the accuracy of the judge's record of these aspects of the report but maintained as I have noted above, his submission that the report should have been considered first. To my mind I do not find any force in this submission. This was not a case that turned on credibility in the sense that the report had been relied on to demonstrate a party had been telling the truth but not considered until

after a conclusion had been reached. Instead, the report was one part of the evidence which was clearly considered by the judge in an overall assessment of the circumstances of the case. I do not consider that she had erred in her approach based on the challenge in ground (i). She had the benefit of the evidence from the first and second appellants and furthermore was approaching her assessment of the factors after a direction as to the approach she was required to take in the Article 8 consideration. It cannot be said that the report was itself determinative of the Article 8 outcome. The factors relating to schooling in Nigeria and the likelihood of support by the parents for the children that were addressed by the judge at [31] and [32] and earlier at [29] were not specifically addressed in the psychological report. In any event the judge clearly gave careful consideration to the content of the report before reaching her final conclusion. To my mind she did not fall into error in doing so. In my judgment the findings by the judge were open to her on the evidence and she did not err in law in her approach to the material before her.

25. I turn to the remaining grounds. As to ground (ii), the judge took account of the medical conditions at [36] which two of the children suffered. I do not consider that she was required to look for medical evidence to support the findings reached. These were rationally open to her and there was no evidence to the contrary to suggest that the cosmetic knee surgery and the itchy condition could not be treated in Nigeria, as treatment in relation to the first appellant's diabetes. All the concerns raised in the psychological report were satisfactorily considered by the judge and she gave reasons rationally open to her were given why the various points raised would not inhibit return as a reasonable option.
26. As to ground (iii), in my judgment it was properly open to the judge to conclude (relevant to this specific ground) at [32]:

"32. I find it inconceivable how the first and second Appellants would have me believe that they have instilled into their children none of their culture and traditions from Nigeria to give them a basis of identity considering that is the environment from which they both originate from and where they lived for many years into adulthood. I do not accept what they state. ..."
27. This is essentially a matter of plausibility. The finding was one open to the judge without further evidence.
28. Ground (iv): This appears to have been based on a misconception. It was accepted at the hearing that the appellants had lawful leave until 18 August 2017. It was not until 23 February 2018 that the applications were made leading to the decision under appeal. It is understandable why Mr Winter did not pursue this ground.
29. The final ground relating to the first appellant's medical condition has been dealt with above.

30. By way of conclusion I am not persuaded that the judge erred in this detailed well structured determination. She correctly directed herself as to the law and made findings open to her on the evidence all which was correctly evaluated.

NOTICE OF DECISION

This appeal dismissed.

Signed

Date 3 June 2019

UTJ Dawson  
Upper Tribunal Judge Dawson