Upper Tribunal
(Immigration and Asylum Chamber)

Oladeji (s.3(1) BNA 1981) [2015] UKUT 00326 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 21 January 2015

Promulgated

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Before

MR JUSTICE NICOL
UPPER TRIBUNAL JUDGE STOREY

Between

MS YETUNDE OLADEJI
MISS M.A.
MISS D.A.
(ANONYMITY DIRECTION MADE FOR MISS M.A. AND MISS D.A.)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms S Lloyd of Counsel instructed by Freemans Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

Whilst s.65 of the Immigration Act 2014, which came into force on 6 April 2015 inserts new provisions into the British Nationality Act 1981 for persons born before 1 July 2006 that create a registration route for those who would currently have an entitlement to registration under the British Nationality 1981 Act but for the fact that their parents are not married, those provisions (like the pre-existing policy set out in Chapter 9 of the UK Visas and

Immigration and Nationality Instructions), are predicated on there having been an application made under s. 3(1) of the British Nationality Act 1981.

DECISION AND REASONS

1. The appellants are mother and two daughters born on 19.12.77, 25.8.2001 and 6.10.05 respectively. The first and third appellants are citizens of Nigeria, the second a citizen of the U.S.A. In a determination sent on 18 August 2014 the First-tier Tribunal (FtT) comprising Judge Kaler and NLM Bray dismissed the appeals of the first two appellants against decisions by the respondent dated 6 March 2013. In the case of the first appellant (hereafter "the appellant"), the decision was a refusal to revoke a deportation order (the latter which had been made on 9 November 2009 under s.32(5) of the UK Borders Act). In the case of the second and third appellants, the decision was to make a deportation order under s.3(5)(b) of the 1971 Immigration Act as the family members of the appellant. The FtT took into account the decision of an earlier Tribunal panel (Judge Hollingworth and NLM Endersby) (hereafter "first tribunal decision") dated 8 February 2010 dismissing the appeal of the appellant against the deportation order. It will be apparent from what we have set out thus far that we are satisfied that all three appellants lodged an appeal against the aforementioned decisions taken in March 2013. The FtT only listed the first two appellants as appellants, but the grounds of appeal to it clearly identified the appellant and her two daughters as appellants. We will return below to the jurisdictional implications of this for our disposal of the cases before us.

2. What led the respondent to decide to deport the appellant was that on 24 July 2009 she was convicted upon her own confession of two counts of obtaining a money transfer by deception, one count of knowingly with intent possessing a false and improperly obtained ID document and four counts of making a false statement or representation so as to obtain benefit. On 14 August 2009 she was sentenced to fifteen months' imprisonment on each count to run concurrently. The appellant was served with a deportation order on 5 November 2009. As already noted, her appeal against that decision was dismissed by the first tribunal in February 2010. Later in 2010 and in 2011 she made further representations based on her family circumstances. Because her claim was made after the deportation order the respondent treated her application for refusal to revoke as one for revocation of the deportation order, attracting a further right of appeal.

First tribunal decision, 8 February 2010

3. The tribunal panel who decided her appeal against deportation in early 2010 heard evidence from her and submissions from both representatives. In deciding to dismiss the appeal the panel first noted that both parties accepted that Article 8 was the sole ground of appeal. The panel accepted that the appellant had established a family and private life in the UK by virtue of her length of residence and the fact that she had two children. It accepted that the decision made against her amounted to an interference with her Article 8(1) rights. At [23] it said that "a decision will have to be taken whether or not the two children … proceed with [their mother] … [o]r remain with the father in the UK …" In

respect of her private life, the panel said it accepted she had been in the UK for most of the time unlawfully since the mid-1990s, had obtained an educational qualification and had worked sporadically. The panel discounted the existence of any continuing relationship between the appellant and the children's father and was sceptical of claims made by the first appellant that he was wanting sole custody of the children and might be in the process of commencing matrimonial proceedings.

4. As regards the two children, then aged 8 and 4½, the panel said they accepted they were both born in the UK and "[I]t therefore follows that these children are in all probability British citizens, although the appellant's statement does not say this". The panel found that they were in the custody of their father until the appellant's release on bail comparatively recently. It stated that it considered "far more information would have been required from the appellant's side if significant weight was to be attached to the children's position … [and] the effect on them of prospective return to Nigeria". The panel added that if it was decided that the children were to accompany the appellant to Nigeria that would not be contrary to Article 8 as she had family there whose assistance she could seek. The appellant had relatives in the UK but she was not financially dependent on them and if the children were to be removed with their mother they could keep in touch with them indirectly.

5. Turning to public interest considerations, the panel said that it counted against the appellant that she had embarked on a "lengthy criminality" from 2001 onwards involving a sophisticated criminal deception netting her almost £100,000 of state benefits. Whilst it acknowledged the pre-sentence report and similar documentation portrayed her as a low risk of reoffending, this was but one element in the deportation process. The panel also commented on her lengthy history of dishonesty and on her "avarice". Also counted against the appellant was her poor immigration history, she having been regarded as an absconder since 1996 and being someone who had "engineered" her residence in the UK from the mid 1990 through use of a false passport.

<u>The First-tier Tribunal decision of 18 August 2014</u>

6. Turning to the tribunal decision which is the subject of the appeal to us, the FtT heard oral evidence from the appellant and her sister and also submissions from both representatives. The panel stated that it took the findings of the previous tribunal as its starting point. It considered that the appellant had misled the first tribunal as to the nationality of the second appellant, M.A. It was now clear that she was born in the USA and is a citizen of that country. Whilst prepared to accept that M.A. came to the UK when an infant, the panel said "[w]e cannot accept [the appellant's] word that M.A. only left the country once as an infant due to the averse credibility finding [on] the appellant". Further, the FtT said, it considered that neither child was a British citizen.

7. As regards the two children, the FtT said that in the light of a social worker report of 1 December 2011, it accepted that they have a warm relationship with their mother and expressed a wish to live with her, which was also that report's own recommendation. It observed that there was now more information available about the father, who was

granted ILR in 2003. There were family court orders showing he had sought and obtained regular contact with the children although he had withdrawn an application for them to live with him in February 2011. It seemed that he had little contact with the children thereafter until M.A. instigated contact in February 2014 since when he had had one day with them every fortnight. The appellant had said he provided some financial support. The FtT adverted to a statement from him dated 30 July 2014. In this statement he said he saw his daughters on a regular basis and objected to their removal from the UK. He believed the appellant should be allowed to remain in the UK to look after the children. Having considered this statement in the light of the further evidence, the FtT concluded that whilst it is accepted that contact between the children and their father has been re-established, that was only since February 2014, was infrequent and "we do not find that the father plays any significant role in the children's lives".

8. The FtT went on to observe that it did not accept the appellant's and her sister's claims that their mother in Nigeria was unwell. Nor did it accept that the appellant had shown real remorse for her crimes.

9. So far as concerns the legal framework to be applied, the FtT stated that it was required by new Part 5A of the Nationality, Immigration and Asylum Act 2002 to have regard to certain considerations when considering the public interest question under Article 8. Noting that s.117C(2) stipulated that "[t]he more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal", the FtT said that it considered the appellant's defrauding of the public purse for a period of at least seven years as "very serious". It then addressed s.117C and the issue of whether the appellant fell within Exception 2.

10. Section 117C (3) and (5) provide:

> "(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> …
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh."

11. The definition of "qualifying child" contained in s.117D is:

> " "qualifying child" means a person who is under the age of 18 and who—
>
> (a) is a British citizen, or
>
> (b) has lived in the United Kingdom for a continuous period of seven years or more; "

12. As regards the new provisions set out in s.117C (3) and (5), the FtT concluded that:

"Exception 2 does not apply because, although the appellant has a genuine and subsisting relationship with her children, neither of them is a qualifying child. [M.A]. is a citizen of USA, [D.A.] is a citizen of Nigeria".

13. At [30] – [31] it considered the nationality position of D.A.

"30. It is submitted by Ms Lloyd that [D.A] should be treated as a British citizen. It is accepted that no formal application has been made to the Home Office, but the matter was adjourned for the Home Office to consider whether she should be granted citizenship. The matters pleaded in favour of this are that [their father] had settled status in the UK at the date of her birth. Had she been born legitimately, she would have been a British citizen by virtue of section 1(1) of the British Nationality Act 1981. Illegitimate children can now be entitled to the same right by virtue of section 9 of the Nationality, Immigration and Asylum Act 2002. Section 1 of the Family Law Reform Act 1987 did away with most of the distinctions between legitimate and illegitimate children but it did not apply to citizenship. The Respondent's policy as set out in Chapter 9 of the UK Visas and Immigration Nationality Instructions stated that they may normally register an illegitimate minor child born before 1 July 2006 of a British or settled father. The case of Genovese v Malta, App No 53124, 11 October 2011 held that denying the illegitimate child of a Maltese father citizenship where the father refused to recognise him amounted to a disproportionate interference with the right to respect for his right to private life under Article 8. It was unreasonable of the Respondent not to recognise her as being entitled to British citizenship.

31. These arguments were not put to the Home Office directly before they issued their letter of 19 September 2013, citing the relevant law. We have considered the arguments but are not persuaded that [D.A.] would unequivocally be entitled to citizenship if such an application was made. The fact remains that she is not a British citizen. We do however acknowledge that she was born in the UK and has been in the country for her entire life. That is a matter that must be placed in the balance when assessing proportionality, and the public interest."

14. The FtT went on to assess that it would "not be unreasonably harsh for the appellant to relocate to Nigeria". Given that she lives with her children and was their main carer, their best interests were served in being with her. Their father was a remote figure. "That the children are doing well in their education and have no wish to go to Nigeria is just one of the factors to place in the balance". At [34] there then followed this passage:

"The parties have a choice in the matter. The appellant can choose to take the children with her to Nigeria. If the father is willing to look after them, then they can stay here with them. She says he is not able to take care of them but he did so whilst she was in prison. She said this was with the assistance of her sister; there is no reason why the sister could not give such assistance again."

Grounds of appeal

15. The grounds of appeal against the FtT decision of August 2014 advanced three main points. It was said that the FtT had erred in failing to make any specific decision in relation to the second and third appellants and had erred in not even recognising the third

appellant as an appellant. Secondly it was said that the FtT unlawfully discriminated against the third appellant, D.A., in deciding not to treat her as a British citizen. Thirdly it was submitted that in finding that Exception 2 set out in s.117C(5) of the 2002 Act did not apply, the FtT had misdirected itself because that exception covered not just parents of children who were British citizens but any child who "has lived in the UK for a continuous period of seven years or more", which certainly covered D.A.

16. Also under the rubric of "ground 3" the grounds argued that the FtT had additionally misdirected itself in [32] when it stated that it would not be "unreasonably harsh" for the appellant to relocate to Nigeria" . That misapplied the test set out in paragraph 399 of the Rules which concerned whether it would be unduly harsh for the child (D.A.) to be deported. (We should note at this point that prior to 28 July 2014 the phrase used in paragraph 399(a) (ii)(a) was whether "it would not be reasonable to expect the child to leave the UK". However, on that date, for the latter phrase there was substituted "it would be *unduly harsh for the child* to live in the country to which the person is to be deported" (emphasis added).

17. The grounds canvassed three further points: (i) that the FtT had disregarded the fact that both children had been in the UK over the seven year period seen by past policy and continuing practice as a very weighty factor counting against deportation of a parent; (ii) that the FtT had failed to carry out a holistic assessment as to whether it was in the best interests of the children to go to Nigeria "before going on to conduct the proportionality exercise" (the point was made that it was clearly in their best interests to be with both their parents notwithstanding that they have only recently resumed their relationship with their father; and that they had close ties with aunts, uncles and cousins in the UK and in their time here had built up strong private life ties at their schools); and (iii) that when applying paragraph 398 the FtT had wrongly applied an exceptionality test. That test had been removed from the Immigration Rules dealing with foreign criminals on 28 July 2014. Here again, we should explain that at the date of the respondent's decision in March 2013 the relevant parts of paragraph 398 stated:

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
> …
> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
> (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will *only be in exceptional circumstances* that the public interest in deportation will be outweighed by other factors." (Emphasis added)

18. By the time the FtT heard the appellants' case (in August 2014) new Immigration Rules had come into force (with effect from 28 July 2014, the same date that ss.117A-117D came into force).

19. Paragraphs 390 – 397 of these new Rules set out the provisions relating to revocation of a deportation order and the rights of appeal arising hereunder as follows:

"390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

(i) the grounds on which the order was made;
(ii) any representations made in support of revocation;
(iii) the interests of the community, including the maintenance of an effective immigration control;
(iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:

(a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or

(b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time, unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

392. Revocation of a deportation order does not entitle the person concerned to re-enter the United Kingdom; it renders him eligible to apply for admission under the Immigration Rules. Application for revocation of the order may be made to the Entry Clearance Officer or direct to the Home Office.

Rights of appeal in relation to a decision not to revoke a deportation order

396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the

Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed."

20. The deportation and Article 8 provisions of Part 13 of the Immigration Rules also apply when application has been made for a deportation order to be revoked. These are as follows:

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

The Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –
(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

399B. Where an Article 8 claim from a foreign criminal is successful:

(a) in the case of a person who is in the UK unlawfully or whose leave to enter or remain has been cancelled by a deportation order, limited leave may be granted for periods not exceeding 30 months and subject to such conditions as the Secretary of State considers appropriate;

(b) in the case of a person who has not been served with a deportation order, any limited leave to enter or remain may be curtailed to a period not exceeding 30 months and conditions may be varied to such conditions as the Secretary of State considers appropriate;

(c) indefinite leave to enter or remain may be revoked under section 76 of the 2002 Act and limited leave to enter or remain granted for a period not exceeding 30 months subject to such conditions as the Secretary of State considers appropriate;

(d) revocation of a deportation order does not confer entry clearance or leave to enter or remain or re-instate any previous leave."

21. It can be seen that amongst the changes made were that in paragraph 398, for "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors" there was substituted "the public interest in deportation will only be outweighed by other factors where there are *very compelling circumstances over and above those described in paragraphs 399 and 399A*" (Emphasis added). At the same time, para 390A (which is one of several paragraphs dealing with revocation of deportation orders (paras 390-392) retained wording in terms of exceptional circumstances ("Where paragraph 398 applies the Secretary of State…will consider whether paragraph 399 or 399A applies, and, if it does not, *it will only be in exceptional circumstances* that the public interest in maintaining the deportation order will be outweighed by other factors") (Emphasis added).

Our Assessment

22. We shall begin by dealing with grounds we find unpersuasive, taking the last ground first.

Paragraph 398: change from "exceptional circumstances" and "very compelling circumstances"

23. We reject the argument that the FtT erred in law on applying a test of exceptional circumstances. It is true that at the date of decision in March 2013 the test set out in paragraph 398 was exceptional circumstances ("it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors") whereas on 28 July 2014 that requirement was changed to one of considering whether there were "very compelling circumstances". However, the appellant was treated as having made an application for revocation of a deportation order and even after 28 July 2014 the test in 390A remained one of exceptional circumstances ("Where paragraph 398 applies the Secretary of State…will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintain the deportation order will be outweighed by other factors". Hence the First-tier Tribunal panel should have considered the appeal under para 390A, but since the wording of that provision embodied the same "exceptional circumstances" test as the panel erroneously thought was still the test under para 398, this error was not material. (In any event, we doubt that even if para 398 had been the correct rule that it would have constituted a material error; it would only have done so if the new rule had been significantly different. In MF (Nigeria) [2013] EWCA Civ 1192 the Master of the Rolls considered that the expression "exceptional circumstances" was interchangeable with "very compelling circumstances" and both were consistent with Strasbourg jurisprudence:

"43.The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399

and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".

44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence…"

24. We consider that the new rule has not imposed a higher threshold but simply confirmed the approach of the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192 which regarded the two expressions as synonymous. In any event, even if we are wrong about this and one version of the rule is seen to establish a higher threshold, it would have to be the 2014, not the 2013 version, on the basis that use of the adverb "very" adds force to the adjective "compassionate" whereas in the earlier rule "exceptional" has no amplifying adverb. If that is so, then the FtT effectively applied a rule that was more beneficial to the appellants than the new rule. If the appellants could not succeed under the 2013 version, they could not succeed under the 2014 version.

"Best interests of the children"

25. We see no error in the approach of the FtT to assessment of the best interests of the child. It stated more than once that M.A. had said she did not wish to live in Nigeria and that the two children were doing well in education, participated in community affairs, attended church and had regular contact with maternal relatives. They carefully analysed the extent to which their father played a part in their lives. Their ultimate conclusion, that their welfare was best served in being with their mother, was wholly in accord with principles governing the best interests of the child as set out in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 and other leading cases.

26. So far as concerns the FtT's general assessment of the period of time the children had spent in the UK, it was clear that albeit not accepting that M.A. had lived continuously in the UK (see [15]) they were prepared to proceed on the basis that both children had been in the UK for a considerable period and in [31] they stated that D.A. had been in the UK "for her entire life". Its assessment of their best interests and the wider proportionality assessment was clearly informed by that understanding. It was not incumbent on the FtT to accord specific legal significance to the fact that the younger child, D.A., had been in the UK for over seven years and the elder, M.A., for longer than that even if not continuously.

The British nationality issue

27. As regards the second ground, again we see no legal error on the part of the FtT. It correctly observed that at the date of D.A.'s birth she could not qualify for British citizenship under s.1 of the British Nationality Act 1981 ("BNA 1981") even though it was not now in dispute that D.A.'s father had been granted indefinite leave to remain in the UK in January 2003, as she was born illegitimate. At the time of her birth that Act's provision for children born in the UK did not cover illegitimate children. Prior to 1 July 2006, s.50(9) of the BNA provided that a relationship between a father and a child was taken to exist only between a father and a legitimate child born to him. This was amended

from that date by s.9 of the Nationality, Immigration and Asylum Act 2002 but it did not have retrospective effect.

28. The FtT correctly took account of the fact that at the time of the hearing before it there was also a policy set out in Chapter 9 of the UK Visas and Immigration Nationality Instructions stating that officers may normally register an illegitimate minor child born before 1 July 2006 of a British or settled father. Ms Lloyd drew our attention to the following extracts:

> "9.9.2 **Section 1** of the **Family Law Reform Act 1987**, which came into force on 4 April 1988, did away with most distinctions between legitimate and illegitimate children. It did not, however, alter the citizenship position.
> 9.9.3 **Section 9** of the **Nationality, Immigration and Asylum Act 2002** amended the 1981 Act to allow fathers to transmit citizenship to their illegitimate children born on or after 1 July 2006 provided there is satisfactory evidence of paternity. But the changes do not apply in respect of anyone born before that date.
> 9.9.4 However, in accordance with the spirit of the **1987 Act** (and the changes introduced by the **2002 Act**), we may normally register the illegitimate minor child, born before 1 July 2006, of a British citizen or "settled" father if the criteria at a-c. (and, if appropriate, d.) below are all satisfied:
> a. We are satisfied about the paternity of the child; and
> b. We have the consent of all those with parental responsibility (see 9.22.6 below); and
> c. We are satisfied that, had the child been born to the father legitimately:
> i. the child would have had an automatic claim to British citizenship under **s.1(1)** or **s.2(1)** of the British Nationality Act 1981; or
> ii. the child would have had an entitlement to registration under either **s.1(3)**, **s.3(2)** or **s.3(5)** (see **Chapters 8**, **10** or **11**); or
> iii. we would normally have registered under **s.3(1)**; and, if appropriate
> d. There is no reason to refuse on character grounds (see 9.17.28-9.17.29 below and Annex D to Chapter 18)."

29. But this policy was entitled "Chapter 9: registration of minors at discretion - Section 3(1) British Nationality Act 1981"and para 9.1.1. made clear that operation of this section was dependent on there being an application. That reflected the statutory requirement set out in s.3(1) which provides that: " [i]f while a person is a minor an application is made for his registration as a British citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen." (see also s.1(3)(b)). No application was made on behalf of D.A. We would observe that a requirement for an application to be made by persons seeking to acquire nationality by a voluntary act is entirely consonant with international law, certainly where the applicant holds a citizenship already, as in that context it is not necessarily to be expected that they (or their parents if they are minors) will choose to acquire another. There may also important issues regarding consent of the parents.

30. Ms Lloyd sought to argue that the FtT erred in rejecting the additional submission she had made to it that denial of British citizenship to D.A. was contrary to Article 8 coupled with Article 14 of the ECHR as demonstrated by the judgment of the ECHR in the case of Genovese v Malta app. no. 53124, 11 October 2011, in which it was held that denying the illegitimate child of a Maltese father citizenship where the father refused to recognise him

amounted to a "disproportionate interference with his right to private life." However, the applicant in the Genovese case had made (or his mother had made on his behalf) an application for Maltese citizenship; in fact his mother had made two applications for Maltese citizenship on his behalf, one before amendments made to Malta citizenship law in 2007 and one after: see [9], [13] and [25]. The Court was not therefore dealing with the case of someone who has made no application and it is difficult to see on its reasoning on admissibility (and whether there could be said to be a "victim of a violation") that it would have admitted the applicant's case had he/his mother on his behalf made no application to the Maltese authorities. Further, in considering the compatibility of UK law and policy on the acquisition of British citizenship by illegitimate children with the ECHR, the existence of the aforesaid UK Visa policy, being a policy as to the criteria applied under s. 3(1) of the British Nationality Act, it is far from clear that either the Strasbourg Court or any UK court or tribunal seized of the issue would find these domestic provisions contrary to Article 8 in conjunction with Article 14. We would certainly not have done so.

Postscript to the British Nationality Issue

31. Since we heard this appeal there has been a change in the law relating to registration of illegitimate children. Section 65 of the Immigration Act, which was commenced on 6 April 2015, inserts new registration provisions (sections 4E to 4J) into the British Nationality Act 1981 so as to create a registration route for, inter alia, those who would have an entitlement to registration under the 1981 Act provisions but for the fact that their parents are not married. Section 65 provides in its relevant parts:

> "Persons unable to acquire citizenship: natural father not married to mother
>
> After section 4D of the British Nationality Act 1981 insert—
>
> "4E The general conditions
>
> For the purposes of sections 4F to 4I, a person ("P") meets the general conditions if—
>
> (a)P was born before 1 July 2006;
>
> (b) at the time of P's birth, P's mother—
>
> (i) was not married, or
>
> (ii) was married to a person other than P's natural father;
>
> (c) no person is treated as the father of P under section 28 of the Human Fertilisation and Embryology Act 1990; and
>
> (d) P has never been a British citizen.
>
> 4F Person unable to be registered under other provisions of this Act
>
> (1)A person ("P") is entitled to be registered as a British citizen on an application made under this section if—
>
> (a) P meets the general conditions; and
>
> (b) P would be entitled to be registered as a British citizen under—

(i) section 1(3),

…"

32. If we had found that the First-tier Tribunal erred in law and set its decision aside, we would, of course, be obliged to apply s.65 to the benefit of D.A. However, we have found no material error and at the date of the hearing before the FtT the applicable law and policy was as we have set out in foregoing paragraphs. Further, even if we had been able to apply s.65 to the benefit of D.A., it remains as true under the amendments it has wrought to the British Nationality Act 1981 that registration under this route is only possible upon an application being made. As already noted, no application for registration has been made on behalf of D.A.

33. Moving to the third ground, which was that the FtT erred in failing to find that the appellants succeeded under Exception 2 of s.117(5) of the 2002 Act), whilst we see greater force to it than those considered so far, we find ultimately that it fails too.

34. We should forewarn here that Ms Lloyd also sought to rely on a separate argument that even if the appellant could not succeed under s.117(5) she was entitled to succeed under para 399(a) (via para 390A) which required undue hardship to be shown, not (as the panel seemed to think) unreasonableness. It is convenient to address that after we have considered the s.117C(5) issue.

Exception 2 and the meaning of "qualifying child" in ss.117A-D

35. Ms Lloyd is plainly right to say that the FtT misdirected in law when dealing with s.117C(5). Contrary to how the FtT understood it, it is not asserted in this provision that in order for Exception 2 to apply, the qualifying child be a British citizen. Section 117D(1) states disjunctively that:

> "qualifying child" means a person who is under the age of 18 and who
> (a) is a British citizen, or
> (b) has lived in the United Kingdom for a continuous period of seven years or more …".

36. Mr Melvin submitted that this error on the part of the FtT in not applying s.117(5) (b) was not material for two reasons. First, at least in respect of M.A., because according to the wording of this provision the period of seven years must be "continuous" and the FtT plainly did not accept that her residence in the UK had been continuous. It found it could not accept she had only left the country once as an infant: see [15]. However, as Mr Melvin accepted when we raised the matter with him, in respect of D.A., by contrast, its finding of fact regarding the continuity of her residence was unequivocal: it found at [31] that "she was born in the UK and has been in the country for her entire life". It is not in dispute that D.A. was born on 6 October 2005. By the time the respondent came to issue her with the deportation decision in March 2013, she had been living in the UK unbrokenly for seven years five months.

37. Second, Mr Melvin submitted that even in respect of D.A. the FtT error was still not material because in order to fall with Exception 2, there is a further requirement, namely that "the effect of C's deportation on the partner or child would be unduly harsh". Mr Melvin sought to argue that even if the Upper Tribunal was persuaded that the FtT has misread the seven year requirement as set out in Exception 2, its treatment of the situation of D.A. showed that it did not consider the effect would be unduly harsh.

38. We agree with this submission.

The "unduly harsh" requirement under s.117C(5)

39. First of all, it is clear from the wording of s.117C(5) that for Exception 2 of s.117C(5) to apply, it is not sufficient that a "qualifying child" has lived in the United Kingdom for a continuous period of seven years or more; it is also necessary that "the effect of [the parent's] deportation on …the child would be unduly harsh".

40. Secondly, although the FtT did not in terms consider whether the effect of the appellant's deportation on D.A. would be unduly harsh, it is abundantly clear that it was of the view that it would not be. When assessing the issues of their best interests and the proportionality of the deportation decisions, they clearly took into account that both children had lived in the UK for a considerable period; that both were doing well at school and have participated in community affairs and attend church; that both have regular contact with their material relatives; that neither have set foot in Nigeria and neither wished to return there; and that both had stated that if they were deported to Nigeria, they would miss their family and friends. The FtT also took into account the balance of arguments relating to D.A.'s potential British citizenship. Notwithstanding these considerations, the FtT concluded that the factors weighing in favour of the children not being deported were outweighed by those weighing in favour of their deportation. In the latter connection, it found that it would be in D.A.'s (and M.A.'s) best interests to stay with her mother; that both were young enough to adapt to a different way of life and had grown up with people of a Nigerian background; that both would have a grandmother there. It clearly also saw as detracting from the weight to be attached to their ties in the UK that their father is a remote figure. Whilst the FtT only specifically stated that it would not be "unreasonably harsh" for the *appellant* to relocate to Nigeria (see [32]) it clearly considered that it also considered that the effect on the children of being deported along with their mother would not be unreasonably or unduly harsh either.

The "unduly harsh" requirements under para 399(a) of the Rules

41. As noted earlier, another string to Ms Lloyd's bow was to argue that even if the FtT had not erred in applying s.117C(5) it had erred in deciding that the appellant did not meet the requirement of para 399(a) of the Rules because it misdirected itself in [32] in stating that it would not be "unreasonably harsh" for the appellant to relocate to Nigeria". It was submitted that that misapplied the test set out in paragraph 399(a) of the Rules which concerned whether it would be unduly harsh for the child (D.A.) to be deported.

*(*We should note at this point that prior to 28 July 2014 the phrase used in paragraph 399(a)(ii)(a) was whether "it would not be reasonable to expect the child to leave the UK". However, on that date, for the latter phrase there was substituted "it would be *unduly harsh for the child* to live in the country to which the person is to be deported" (emphasis added).) In making this submission Ms Lloyd was effectively arguing that the FtT was required to consider whether the appellants could benefit either under s.117C(5) or under the Rules. We are prepared for the purposes of this appeal to proceed on this basis (which is the most favourable to the appellants). No point was taken about whether the FtT addressed both sets of provisions in the correct order.

42. It will assist our analysis to reproduce the provisions of para 399(a) here:

> "399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported;"

43. It can be seen that para 399(ii) requires an applicant to show undue hardship in two respects: that it would be unduly harsh for the child to live in the country to which the person is to be deported ((a)); and that it would be unduly harsh for the child to remain in the UK without the person who is to be deported ((b)). We are entirely satisfied that whatever meaning is given to the "unduly harsh" requirement it is not one that is less stringent than the previous "reasonable[ness]" test. Hence, even if the FtT erred in referring to reasonableness, it was an error that made no material difference to its conclusion that the appellant could not meet para 399 of the Rules.

44. We have given consideration to whether there was any material error on the part of the FtT in stating at [34] (as already noted) that the children's parents "have a choice" as to whether the appellant takes the children with her to Nigeria or, if the father was willing to look after them, for him to have them stay in the UK with him or the appellant's sister. The reason why we have explored this is that the FtT was plainly wrong to consider there was any such choice. The children were the subject of a deportation order as family members of the appellant. They had no right to be in the UK and no application had been made by their father to have them remain here as his dependent children. However, we do not see that this error had any material effect on the FtT's assessment of the proportionality of the children's return to Nigeria, which they expressly found to be a proportionate measure. At best, the FtT appeared to consider this issue as one arising in the alternative, on the assumption that the children would not be deported with their mother.

45. For the above reasons, we conclude that the FtT did not materially err in law and that its decision is to stand.

46. The one remaining matter we must consider is whether the FtT decision can be taken to include all three appellants or just the first two. As already noted, we are satisfied that there was an appeal to the FtT by all three appellants. The problem is that notwithstanding this fact, the FtT only formally identified two appellants, the appellant and M.A. On one view this should be seen to entail that it has not as yet determined the appeal of the third appellant. Indeed, in her submission Ms Lloyd asked us to consider the FtT's silence about the third appellant (and its apparent disregard of the second appellant when it referred on several occasions to "the appellant" in the singular) as amounting to a material error of law.

47. In our judgment, for us to rule that there was no appeal by the third appellant would be to elevate formalism over substance. We have already noted that the grounds of appeal to the FtT expressly identified the third appellant as an appellant. It is clear from a reading of the determination as a whole that the FtT considered D.A.'s circumstances in every respect that was relevant to determination of her appeal. Indeed there are passages in it that deal very specifically with her circumstances, for example, those addressing submissions made concerning her potential British citizenship. They also state that the fact that she was born in the UK and has been in the country for her entire life "is a matter that must be placed in the balance when assessing proportionality, and the public interest". The decision also considers the three appellants as a family group.

48. For completeness, we should add that we reject, a fortiori, Ms Lloyd's submission that the FtT erred in failing to determine the second appellant's (M.A.'s) appeal: in her case, not only did they formally refer to her as "the second appellant" and refer in the closing paragraph to "the appellants", but they dealt fully and substantively with her individual and family circumstances. Ms Lloyd was unable to identify any aspect of the two children's circumstances that were not considered and assessed by the FtT.

49. Accordingly, we consider that the FtT determined all three appeals in substance. So as to formalise matters, we direct that in any further proceedings, the FtT's determination be read subject to the correction by us that it relates to three appellants, so as to include D.A.

Notice of Decision

50. To conclude:

The First-tier Tribunal did not materially err in law.

Its decision to dismiss the appellants' appeals [read so as to include the appeal of D.A.] on all grounds is to stand.

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

Unless and until a Tribunal or court directs otherwise, the second and third appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Storey