Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/07862/2013
IA/07863/2013
IA/07864/2013
IA/07865/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7th November 2013	**On 11th December 2013**
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Before

UPPER TRIBUNAL JUDGE REEDS

Between

MYIBAT MOJISOLA IBRAHIM (FIRST APPELLANT)
GANIYAT OLUWATOYIN ADENIRAN (SECOND APPELLANT)
RIDHUWANULLAH IBRAHIM (THIRD APPELLANT)
ABDUL-FATAL IBRAHIM (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Al-Rashid, Counsel instructed on behalf of David A Grant
Solicitors
For the Respondent: Mr I Jarvis, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellants, with permission, appeal the decision of the First-tier Tribunal (Judge Fletcher-Hill) who in a determination promulgated on 9th

August 2013 dismissed the Appellants' appeal against the Respondent's decision of 28th February 2013 to refuse their claim for leave to remain under the Immigration Rules and on human rights grounds.

2. The first Appellant is a citizen of Nigeria born on 9th March 1971 and the remaining three Appellants are her minor children born 9th October 2001, 20th September 2007 and 9th April 2009. No anonymity direction has been sought on behalf of any party nor any grounds raised as to why such an order is necessary.

The background:

3. On 1st April 2010 the first Appellant made an application for an in-country settlement and consideration of a claim based on Article 8 and her family and private life in the United Kingdom. It was her assertion that she had arrived in the United Kingdom on 5th July 2003 with her eldest child, the second Appellant, and had remained continuously in the UK ever since where the third and fourth Appellants were children who were born to her in the United Kingdom. The Respondent's refusal letter noted that despite numerous checks from various sources by the Respondent, they were unable to confirm her method of entry in the United Kingdom. Thus it was assumed that she had entered the UK illegally and had remained there without leave. For that reason she was liable for removal in accordance with the Schedule 2 to the Immigration Act 1971 and notice to this effect was served upon her on 4th March 2013.

4. It was noted that no leave was sought to regularise her status or that of her children until 1st April 2010 when an application was submitted for leave to remain in the UK along with her three children. The father of the three children was also resident in the United Kingdom but was also a person without leave. He was also a citizen of Nigeria.

5. The Respondent gave reasons for refusing the application in a letter dated 28th February 2013; it having been refused both under Appendix FM of the Immigration Rules, taking into account private life under Article 8 of the ECHR which fell to be considered under paragraph 276ADE of the Rules since 9th July 2012. The judge in the determination set out at length at paragraphs 7 to 27 of the determination the requirements of the Immigration Rules which it was common ground the Appellants could not satisfy. It was also noted at paragraph 27 that the Secretary of State also considered the exceptional circumstances under paragraph 353B before making a decision to remove the Appellants.

6. The appeal came before the First-tier Tribunal (Judge Fletcher-Hill) on 8th July 2013. The judge heard oral evidence from the first Appellant only and that was reflected in the determination at paragraphs 30 to 68. The judge set out her findings and assessment of the issues at paragraphs 73 to 95 noting that it was conceded on behalf of the appellants that they could not meet the Immigration Rules but the case was advanced on the basis of Article 8 "outside the Rules". The judge after considering the evidence

and the submissions of the parties and weighing up the factors relevant in this appeal which was principally the length of residence of the parties but in particular the evidence of the Appellant and the eldest child, that the decision to remove was a proportionate one. Thus the appeal was dismissed under the Immigration Rules and on Article 8 grounds(outside the Rules".

7. The Appellant sought permission to appeal that decision and on 18th September 2003 permission was granted by First-tier Tribunal Judge Baker.

The proceedings before the Upper Tribunal:

8. Thus the appeal was listed before the Upper Tribunal. Mr Al-Rashid, who was Counsel before the First-tier Tribunal, appeared on behalf of the Appellants and Mr I Jarvis, Senior Presenting Officer appeared on behalf of the Respondent. Mr Al-Rashid relied upon the written grounds as submitted on behalf of the Appellants. In his oral submissions he invited the Tribunal to find that the judge had made a perverse finding at paragraph 76 of the determination in her conclusion that the eldest child had not arrived at the same time as the mother. He submitted that the only evidence was the mother's evidence and there was nothing to counteract that and common sense would demonstrate that in the absence of any countervailing evidence a child of that age would not have travelled alone into the United Kingdom.

9. He further submitted that the judge made a full assessment in relation to the Article 8 issue (outside the Rules) and that the length of residence of the eldest child was of great weight and significance. The judge in this context had dismissed the mother's evidence as "self interested" at paragraph 85 and that in general terms the judge had given the evidence "short shrift" concerning the children's educational integration. The evidence before the Tribunal demonstrated that they were well integrated into the UK educational system and that the eldest child had demonstrated exceptional progress in her education. The third point relied upon by Mr Al-Rashid was that in this case there had been a delay of three years between the application and the date of decision and that had not been a factor that had been taken into account by the judge in weighing the issues of proportionality.

10. Mr Jarvis by way of reply relied upon the Rule 24 response that had been filed on behalf of the Secretary of State. In addition he submitted that there had been no perversity shown in the judge's findings and that the general background of the Appellant, having entered illegally, having provided no evidence in support of her eldest child being resident in the United Kingdom since 2003 and the reasons given by the judge in reaching the decision could not be described as perverse but were findings made on the evidence and were sustainable ones. He submitted that the judge had concerns over the first Appellant's evidence and was entitled to act cautiously given the fact that paragraph 75 was not challenged as to

her immigration history being unreliable and that she had given inconsistent evidence concerning whether she had worked illegally in the United Kingdom as reflected in the determination.

11. The judge considered the factors weighing in the balance carefully and whilst it was submitted that when considering the countervailing factors the judge had sought to place some blame on the children, that was not reflected in the determination where she had referred to them at a number of points as "innocent children". The judge also did consider their educational integration and followed the structured approach set out in **MK (India)** considering the benefits of removal as well as the negative aspects.

12. Whilst it was submitted that there was an error of law by the judge by dismissing the mother's evidence as "self interested", that has to be seen in the context in which the judge was considering it. The judge was talking about independent evidence of harm and this was a distinct and nuanced enquiry. All the judge was stating was that there was no independent evidence and that it had come solely from the mother who desired to remain in the United Kingdom. It was understandable, he submitted, for the judge to be cautious.

13. It was further submitted that the judge did consider the length of residence with care, noting the old DP5/96 policy and it had not been demonstrated that the conclusion reached by the judge was unlawful, or wrong or that any error of law had been shown in the judge's approach. As to the question of delay, the question is whether there was any "culpable delay" and not just simply delay. In this case there was a short period of delay which was small compared to the time the Appellant had been in the country unlawfully. It was not enough to say that there was simply delay but would have to demonstrate how it had effect upon the appellants and there was no evidence before the First-tier Tribunal that because of the delay the family or the children expected to remain in the United Kingdom. This is not a case where there is any prejudice either and in those circumstances, the judge made an entirely sustainable decision based on the evidence.

14. Mr Al-Rashid by way of reply submitted that the issue of delay was based on the fact that during that time it could lead to the development of close ties and that whilst it would have been described by Mr Jarvis as a short period, in the case of minor children any delay was of significance. This is a factor that should have been taken into account. He submitted that there was a degree of blame being attached to the children when it was noted by the judge that they had pursued free education and free medical health treatment and that was not a correct approach.

15. After the submissions were given, it appeared that the main Appellant had given a new document to Counsel which was claimed was an NHS medical card for the eldest child. Mr Al-Rashid asked the Presenting Officer to check his file because it was asserted that such a document had been sent

to the Respondent. There were no copies in the Home Office file nor did they feature in the refusal letter, indeed to the contrary the Respondent had noted that the documents produced did not involve any registration on behalf of the child. This had not been referred to the First-tier Tribunal nor in the grounds of appeal. Mr Al-Rashid stated that there was no support for this document and that this was not a matter that therefore could be considered any further.

16. At the conclusion of the submissions I reserved my decision which I now give.

Conclusions:

17. The first ground relied upon by Mr Al-Rashid relates to paragraph 3 of the written grounds in which it is asserted that the judge made a perverse finding concerning the evidence of when the eldest child had entered the United Kingdom. It is submitted that the conclusion reached by the judge that if the Appellant had arrived with her daughter, then aged 18 months, it was more likely than not she would have needed medical attention and therefore would have been registered with a GP, was a perverse finding, was against the evidence and therefore was a flawed finding. Mr Al-Rashid submitted that there was nothing to counter the mother's oral evidence nor in terms of common sense that a child of that age would have travelled with her mother and would not have travelled alone.

18. The judge's findings at paragraphs 73 to 77 are as follows:-

> "73. I have been able to see and hear the main Appellant give oral evidence on the various issues raised in this case.
>
> 74. I find that the main Appellant arrived in the UK on 5th July 2003 and I accept the evidence that she subsequently registered with a GP practice in Old Kent Road on 16th July 2003. Neither of these claims is challenged by the Respondent.
>
> 75. I find that there is no satisfactory evidence to corroborate the main Appellant's statement that she has remained in the UK continuously ever since.
>
> 76. I find that if she had arrived with her then 18 month old daughter Ganiyat, as she claimed, then a registration at the GP surgery for that child would also have been made and been available for production. It is obvious and more likely than not that a child of tender years would have needed medical attention, especially as the main Appellant was then an experienced mother nursing her first child with no access to her immediate family for guidance and assistance. I find the absence of any medical records for her first child during infancy lead me to conclude that the child arrived in the UK on a date which the main Appellant has chosen not to disclose.
>
> 77. The first reliable records for such arrival show that a child by the name of 'Ganiat Oluwatoyin' attended Surrey Square Infants' School in

> Walworth, SE18 from 8th September 2005 until 22nd July 2009. There is also evidence that a child by the name of Ganiyat Ibrahim joined the Surrey Square Junior School in September 2009. Both letters in relation to that school registration are dated 14th and 15th January 2010 and they are the only evidence in the Respondent's bundle provided by the schools concerned (Respondent's bundle E1 and F1)."

I have considered the submission made by Mr Al-Rashid concerning the finding made by the judge principally at paragraph 76 and that it is challenged on the basis of it being a perverse finding. Such perversity challenge is a high threshold to meet and I have taken that into account in looking at the evidence before the judge and the reasons given for reaching that finding set out at paragraph 76. The judge found that the Appellant entered illegally at the age of 31 and there is no challenge to such a finding. The burden remained on the Appellant to demonstrate on the evidence that she had entered with her first child on the date that she claimed in 2003. The judge was required to weigh up all of the evidence and that would include also the Appellant's oral assertion and give evidence based reasons for reaching a conclusion on this issue. It is plain from the determination at paragraph 76 that the judge did precisely that and gave a number of reasons for reaching that finding. Firstly, the judge noted that if the Appellant had arrived accompanied by her daughter who was then 18 months of age then it is more likely than not that a registration at a GP surgery for that child would also have been made and been available for production. This was based on the fact that the evidence of the Appellant was that she had registered with a GP on 16th July 2003 and had provided documentation in that respect but there was no such similar document produced in respect of the Appellant. The judge also found that given the age of her child at the time that it was asserted she had arrived in the United Kingdom at 18 months, that as she was a child of "tender years" that it was more likely than not she would have needed some medical attention in the light of her age and bearing in mind that the Appellant had no immediate family for guidance and assistance. That does not seem to me to be a perverse finding at all but one that takes into account the particular circumstances of the first Appellant herself, the age at which it is said she entered with a child and the likely needs that a child of such tender years may have based on common sense. Importantly the judge found that the absence of any medical records for her first child during infancy led the judge to conclude that the child had arrived in the UK on a date which the main Appellant had chosen not to disclose. The judge was making the point that the first reliable record of the second Appellant's residence in the United Kingdom was in September 2005 (see paragraph 77) and that there was no evidence from medical records not only concerning the date of registration of which there was none but also the judge made the point there was an absence of any medical records whatsoever for the eldest child during her infancy.

In reaching a decision on this issue the judge was entitled to take into account the Appellant's conduct in that she had entered the UK illegally and that there had been some deception on her part. Indeed it is plain

from the determination that the judge had concerns about the first Appellant's evidence. Such can be seen at paragraph 81 of the determination when the judge considered inconsistent evidence contained in the birth certificate that had been produced on behalf of the Appellants. As the judge noted, the birth certificates described the mothers occupation as "hairdresser/tailor and as a fashion designer respectively". It had been the Appellant's account that she had never worked in the United Kingdom and as the judge correctly recorded that the evidence on the face of the documents that she had produced, namely the birth certificates, "casts doubt on the main Appellant's claim that she had never worked in the UK". Furthermore, paragraph 75 is an unchallenged finding in which the judge found there was no satisfactory evidence to corroborate the main Appellant's statement that she has remained in the UK continuously and thus the judge also found that her immigration history was unreliable.

The Respondent in the refusal letter dated 28th February 2013 also raised the issue of the eldest child's length of residence in the UK as a credibility issue where it was stated:-

> "You claim that you have been in the UK since 2003 but the only evidence you have submitted is a letter from Aylesbury Partnership that states you have been registered with them since July 2003. Even if you have been registered with your GP since 2003, this does not mean you have been in the UK continuously since this date. You have entered the UK illegally at least once and it is possible that you have entered illegally on more than one occasion. For your child Ganiyat Oluwatoyin Adeniran you have submitted a letter from Surrey Square Infant School that states she attended from 8th September 2005 until 22nd July 2009 and also a letter from Surrey Square Junior School that states she attended since joining them in September 2009. You have submitted no evidence to show that she has been in the UK prior to September 2005."

Thus the judge was required to evaluate all of the evidence before her including the Appellant's oral assertion as to when the child arrived and was therefore entitled to make the finding that she did. It is an entirely sustainable finding and cannot be classed as a perverse one and was firmly evidence based. There is no merit in that ground.

19. The second ground advanced on behalf of the Appellant relates to the judge's assessment of the issue of human rights. It is right to observe that Mr Al-Rashid as stated that before the Immigration Judge there was no issue that the Appellants could meet the Immigration Rules. Indeed the judge dealt with that issue in the determination that the Appellants were not able to meet the requirements for leave to remain under Appendix FM of the Immigration Rules and taking into account private life under Article 8 of the ECHR which fell to be considered under paragraph 276ADE of the Rules. However the case was based on Article 8 "outside the rules".

20. As noted in the determination, the oldest child could not meet the Rules at the time of the application in 2010 as she had not been in the UK for seven years. In this respect it was submitted on behalf of the Appellant

that the judge gave little credence to the importance of family life as set out at paragraph 88 of the determination. It was said that the judge gave no weight to the mother's evidence and dismissed it on the basis that she was a "self interested" party. As there was no need for separate representation for the children, the children's and the mother's interests being identical, it was not open to the judge to dismiss this evidence as "self interested". It is submitted on behalf of the Appellant that the judge did not consider properly the best interests of the children, giving what was described as "short shrift" to evidence of their education and integration and that the evidence had demonstrated a substantial degree of integration and that she had been required to give due weight to that.

21. It is plain that this was a carefully considered determination of the Immigration Judge. In doing so the conclusions demonstrate that the judge considered the best interests of all three children. It is common ground that both parents of the minor Appellants had no leave to be in the United Kingdom. In respect of the Appellants' father, he had no leave and therefore as the judge noted at paragraph 85, the removal of the Appellant and her family members would not interfere with their family life as they would be removed together as a family unit. Such an approach is not contrary to law, indeed as noted in the decision of the Upper Tribunal in **EA (Article 8 – best interests of child) Nigeria [2011] UKUT 00315**, the correct starting point in considering the welfare and best interests of a child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Where it is in the best interests of a child to live with and be brought up by his or her parents, and the child's removal with his parents does not involve any separation of family life. Nevertheless the judge considered it on the basis of their established private lives in the United Kingdom. As to consideration of the best interests of the children, the judge quite correctly identified that this was the first issue that required consideration (see paragraph 87 of the determination) and correctly applied the decision of **ZH (Tanzania) [2011] UKSC 4** noting that a child's best interests are a primary consideration but are not a "paramount consideration". The judge also correctly identified the importance of nationality and that both the children and the parents were not British citizens but were all Nigerian nationals, taking into account the importance of nationality as referred to in the decision of **ZH (Tanzania)**.

22. In making an assessment of the best interests of the children, it is plain in my judgment that the judge identified the following relevant factors; firstly that the best interests of the children were a primary consideration and not a paramount one, secondly the importance of the children's nationality and thirdly to assess any harm or disruption caused or may be caused by their removal from the United Kingdom and that included the stage that they were at in the educational system and their integration into society.

23. Whilst the grounds assert the judge failed to give any weight or take into account the evidence of their education I do not find that to be correct.

The judge considered with care any harm or any disadvantages that they would have if returned to Nigeria. The judge found on the evidence that they would not face any problems of adaptation of "any magnitude" noting that English was widely spoken in Nigeria and was the medium of instruction in schools (paragraph 87). The judge noted that they would have their parents to assist and guide them and the judge placed weight on the evidence that unlike the United Kingdom where the Appellants had no family members resident, in Nigeria they had what the judge described as a "wider family circle in Nigeria including at least one grandparent and the friends and contacts of that wider circle" (see paragraph 87). The judge also considered and weighed in the balance the benefits of a move to Nigeria. At paragraph 89 the judge said this:-

> "One particular advantage which the children would have in Nigeria is that both their parents would be able to work lawfully, so that family life would be placed onto a secure footing rather than the economic uncertainties which have beset them in the UK where neither parent is entitled to work. The family would accordingly be better off, whether or not in absolute material terms which cannot be regarded as an absolute measure."

The other factor of benefit to the children was that they would be brought up in the country of their nationality, namely Nigeria (a point expressly considered by **ZH (Tanzania)**.

24. Mr Al-Rashid criticised the judge's approach at paragraph 88 of the determination with regard to the mother's evidence. He submitted that the judge dismissed the mother's evidence wrongly. The judge said this at paragraph 88:-

> "There was no suggestion from any independent source (e.g. the relevant local authority Social Services department) that the removal of the three children to Nigeria would be harmful to them and should be opposed. There was simply the mother's opinion about the children which carried no weight because of its self interested nature. The background country evidence in the COIR shows that healthcare, education and other services are available in Nigeria. There is no suggestion that Nigeria is a hostile or dangerous place. The children would be able to keep in contact with their British friends via Facebook, e-mail and other such social media which can be regarded as part of modern life. The children would be able to make visits to the United Kingdom, funds permitting. It is well-known that children move countries and continents with their parents all the time. No one has suggested that such wider experience of life is harmful. The fact that none of the children, other than the oldest, has been to Nigeria is of no particular significance given their Nigerian heritage and family links."

25. A careful reading of paragraph 88 demonstrates that the judge specifically considered the issue of the effects of removal on the children given their length of residence in the United Kingdom and considered it in the context of any demonstrable harm to their welfare or the harmful consequences of such removal. As the judge correctly noted there was no independent evidence, that is from the local authority Social Services department or indeed from any other source, or anyone objectively tasked with

considering the harmful effects upon a child of removal and that there was no evidence of such harm to the children as a result of their removal from the United Kingdom with their parents. All the judge was stating was that there was no independent evidence of harm other than that of the mother who in that sense could not be classed as providing independent professional evidence as to harm. There is nothing unlawful or wrong in that approach for the judge to state that this was the only evidence concerning the harmful effects of removal and that it came from their mother whose evident desire was to remain in the United Kingdom. The judge had raised concerns about the Appellant's evidence generally having noted at paragraph 76 concerns as to her immigration history, and her inconsistent evidence concerning her working illegally in the United Kingdom (see 81) and therefore it was wholly understandable that the judge was cautious in accepting her evidence on the basis of it being made only on an oral assertion and unsupported by any other evidence as to the harmful effects of removal.

26. The other factors considered by the judge related to the children's personal circumstances noting that there was no evidence that the children had any health needs and considered the effect of removal upon the children. In this context the judge took into account the background country materials, which is an entirely correct and lawful approach and at paragraph 88 noted that the country evidence demonstrated that healthcare, education and other services were available in Nigeria and that there was no suggestion that the children would be in any danger in Nigeria. The judge also considered the consequences of their length of residence in the United Kingdom including relationships with friends but noted that the children would be able to keep in contact with their British friends via Facebook, e-mail and other social media which "can be regarded as part of modern life". The judge also referred to the children being able to make visits if funds permitted. The judge also observed that "children move countries and continents with their parents all the time" and that "no one has suggested that such wider experience of life is harmful". The judge also took into account that only the eldest child had been to Nigeria but reached the conclusion that the fact that the other children had not was of no particular significance given their Nigerian heritage and family links. In this respect, it is common ground that both parents are nationals of Nigeria.

27. Contrary to the assertion in the grounds, the judge did consider and give weight to the issue of the children's education. The judge considered the prevailing country conditions in Nigeria and made reference to the country materials and the COIR for Nigeria of June 2003 at paragraph 90. The judge noted that that indicated that in Nigeria primary education begins at age 6 and lasts six years and is followed by secondary education beginning at 12 and lasting for a further six years. Education to junior secondary level from 6 to 15 years of age is free and compulsory and therefore found that:-

> "All of the Appellant's children would therefore be entitled to participate in the free education in their own country and I note that the oldest child is about to change schools at age 11 in the UK and her younger sibling is about to commence primary school, and will attain 6 years old in September 2013. The children will thus be ideally placed to continue their education in the Nigerian education system."

The evidence before the Tribunal in respect of Ganiyat noted that she had been offered a place at the academy in 2013 (as stated by the judge at paragraph 90). The evidence at page 11 noted that she had joined S. School in 2005 and her attendance had been 100% and that the three children as a whole had excellent attendance records and that their mother was committed to their development and that she had attended parents' evenings. The report showed that there were achievement certificates made. The third Appellant started primary school in April 2012 (see page 36). The judge had regard to their education and the fact that they had excellent attendance records and that the eldest child had done well in the United Kingdom. To some extent such achievement would conversely make her adaptation to Nigeria and her continuation of education there easier because of her ability rather than it being a difficult transition or adaptation as in the case of a child with special needs. As noted in the decision of **MK (Best interests of child) India [2011] UKUT 00475 (IAC)**, it is important when considering a child's education to have regard not just to the evidence relating to any short term disruption of current schooling that will be caused by any removal but also to that relating to the impact on a child's educational development, progress and opportunities in the broader sense. The judge had regard to this by considering the fact that whilst their education would be disrupted, the disruption would be minimal given the ages of the children, the stage of their education presently and also that they would be entitled to free and compulsory education based on the country material that was before the judge.

28. In making an assessment of the best interests of the children, the judge had firmly in mind that an important consideration in respect of the children was the length of residence and in particular for the eldest child. As the judge noted at paragraph 91:-

> "The fact that one of the children has resided in the United Kingdom for at least seven years is an important factor reflected in the latest changes in the Immigration Rules (paragraph 276ADE(iv)) but that cannot be regarded as decisive or the only factor in the consideration of where her best interests lie, given that she was not able to satisfy the Immigration Rules. **Miah and Others v SSHD [2012] EWCA Civ 261** shows that being a 'near miss' cannot assist her, Ganiyat's best interests plainly are to remain with her parents and siblings, who must be removed to Nigeria".

29. After weighing up all of the factors outlined above, the judge reached the conclusion that it was in the best interests of the children for them to remain with their parents and siblings and in doing so the judge carefully considered the length of residence of the children especially the eldest

child. The judge made reference to the period of seven years. As noted in **EM (Zimbabwe) CG [2011] UKUT 98 (IAC)** "in the absence of countervailing factors, residence of over seven years of children well integrated into the educational system in the United Kingdom, is an indicator that the welfare of the child favours regularisation of the status of mother and children. The importance of a child's length of residence had previously been noted and identified as important and was part of a policy on behalf of the Secretary of State known as DP5/96 which was withdrawn from effect on 9th December 2008 but now forms part of the Immigration Rules. The cases of **MK** (as cited) and **EM (Zimbabwe)** were considered before amendments to the Immigration Rules which are a reflection of the executive policy and seven years as a relevant time but this was in the context of seven years before the application is made. Nonetheless the importance of the length of residence is set out in a number of decisions of the Upper Tribunal (**MK**, **E-A (Article 8 – best interests of a child) Nigeria [2011] UKUT 00315 (IAC)** and **Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 197**. As noted in those cases, absent other factors, the reason why a period of substantial residence of a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree of these elements of private life are of course fact sensitive and depend upon the facts of each particular case. It is also noted that seven years from the age of 4 is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than on their peers and are adaptable. In this context, the two youngest children, although born in the United Kingdom were below the age of 7 and fell into that category which is why the focus of the appeal was based on the eldest child who had a more substantial length of residence. The judge was required to make a holistic assessment of the evidence concerning the length of time that the Appellant had been in the United Kingdom as it is plain from the determination that she carried out such an assessment as can be seen from the preceding paragraphs and I do not find that it can be said that the judge did not consider properly or weigh in the balance the level of educational integration in the United Kingdom as asserted in the grounds for the reasons that I have set out.

30. The judge when reaching a decision was also entitled to take into account the family's immigration history as a countervailing factor weighing against the family's claim to remain in the United Kingdom. On the facts of this particular appeal both parents had sought to make their family life in the United Kingdom and to place their children in education in the full knowledge that they had no immigration status and as such it was precarious as they had no right to be in the United Kingdom or remain or have any legitimate expectation of being allowed to indefinitely. They were not British citizens nor had they ever been "settled" within the meaning of the Immigration Rules.

31. Whilst it is right that the case law and principles identified above make a distinction of children who have been in the United Kingdom since the age of 4 and therefore the links that they are likely to have made are more substantial, that is not a complete answer to the issue of proportionality which judges are required to carry out and assess by balancing and weighing all of the relevant factors. Here the judge considered with care all effects upon the children, not only the second Appellant, both positive and negative, whether there was evidence of any harmful effects upon removal, the stage and level of their education. Whilst it would be accepted that their eldest child had made friendships in the United Kingdom, there was no specific evidence advanced on behalf of the Appellants in this respect. The judge also placed weight upon the countervailing factors of the Appellant's history, noting her illegal entry, the precarious nature of the family life and no expectation of being able to remain. The judge considered the circumstances of the main Appellant at paragraph 92 noting that she had been born and brought up in Nigeria and had spent all of her formative years there. At the date of the hearing she was 42 but that despite the length of residence she had spent the vast majority of her life outside of the country and had been educated, had worked there and had her first child there. The judge noted "There was no cogent evidence of the main Appellant having established any significant private life of her own in the UK. On her own case her main concern has been as a mother to her children, that is, family life has been her preoccupation".

32. It was submitted on behalf of the Appellant that when considering the countervailing reasons identified by the judge, she wrongly attached blame upon the children. I do not find that that is reflected in the careful determination of the judge. Whilst the judge noted at paragraphs 82 and 83 that the family had been receiving free NHS treatment and had secured free education despite their lack of entitlement, the judge stated:-

> "The children are of course blameless and are innocent victims of their parents' wrongdoing". (See paragraph 83).

Furthermore at paragraph 87 the judge also said "The best interests of the innocent children must be considered in the balancing exercise by which proportionality is exercised". It is therefore plain from the terminology and words used by the judge that the judge made it clear in the determination that the children were wholly innocent and this should not be taken into account. All the judge was noting at paragraphs 82 and 83 is that the main Appellant herself had no entitlement to remain but that it did not mean that the judge attached any culpability upon the children.

It is also submitted that the judge failed to consider the issue of delay. The application had been made by the main Appellant on 1st April 2010 but the decision was not dated until 28th February 2013. The decision of **EB (Kosovo)** makes it clear that delay in the decision making process is not irrelevant but it depends upon the facts of each particular case as to how it becomes relevant in the proportionality balance. In a case where the issue is private life, as here, it is noted that applicants may develop close

personal social ties and establish deeper roots in the community the longer the length of delay. But also delay is relevant that where Appellants have entered illegally and established a family life or private life in the knowledge that they have no permission to do so and therefore their existence is a precarious one, that is also an issue concerning delay. Delay is also relevant in reducing the weight to be accorded to the requirement of a fair and firm immigration policy. The Appellants in this case could not rely upon any policy, DP5/96 having been withdrawn in 2008, and therefore it cannot be said that they had lost any right to any claim during the period of delay. Indeed the delay in itself enabled the Appellants to continue living in the United Kingdom and enjoying the benefits that the judge had outlined. The way in which this submission was advanced was that because of the delay in the decision making process the Appellants thought that they were entitled to stay. Such a proposition has to be made on the evidence and there is no reference to such a view being taken by the main Appellant either in her witness statement or her evidence that due to delay either she or the children had any expectation to remain.

33. Whilst there is no specific reference to the issue of delay, it is plain that the judge was aware that the parties had been resident in the United Kingdom for a lengthy period of time noting that the application had been made in 2010 but the decision was not made until 2013 and that because of the length of their residence the consequences of removal in the light of that residence was a necessary and weighty consideration. Nonetheless, the length of residence was weighed in the balance against all the other facts in what must have been a difficult decision for this particular judge. After such an assessment on the proportionality exercise, the judge reached the decision that the decision to remove the Appellants together as a family unit would not be a disproportionate one on the particular facts of this case. Whilst she had not specifically referred to delay, it had not been demonstrated on behalf of the appellants that it would have made any difference to the outcome of the appeal and did not add to the overall balance given the fact that she placed weight and took into account the length of residence of the children which would have included the period between 2010 and 2013.

34. A court should not categorise as an error of law what is no more than a disagreement with an assessment of the First-tier Tribunal Judge’s findings and assessment. There is no doubt that the facts of this appeal gave rise to a difficult evaluative exercise and that the judge weighed in the balance the relevant factors including the length of residence of the eldest child and considered the effect that removal would have upon her and the family as a whole, but after weighing all of those factors carefully and in a reasoned decision, reached the conclusion that the balance lay in favour of removal and that the decision was not a disproportionate one. In the circumstances, the judge in reaching the conclusions and the assessment properly assessed the evidence in this appeal. The conclusions were adequately reasoned and were fully open to the judge on the evidence that was before her. The question which I have to answer is not whether

another Immigration Judge or I myself would have reached the same conclusion in this case but whether no Immigration Judge could properly have reached the same conclusion. Whilst Mr Al-Rashid has referred to the judge's findings at paragraph 76 as perverse, and that this meant that the decision was flawed as a whole, I do not find it is possible to say that the findings there were perverse or irrational and find that they were conclusions fully open to the judge on the evidence. I therefore conclude that the Immigration Judge did not make a material error of law and the determination shall stand.

Signed Date

Upper Tribunal Judge Reeds