Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/00545/2014
AA/00549/2014
AA/00548/2014
AA/00547/2014
AA/00546/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Sent**
On 10 July 2014	**On 23 July 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

S S
A I B S
A L B S
B A S
W A S
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr I Palmer instructed by Duncan Lewis Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. These appeals are subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it

pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. The five appellants are citizens of Nigeria. The first appellant was born on 13 April 1972 and is the mother of the remaining four appellants. They were born respectively on 25 June 1995, 30 November 2007, 19 January 1999 and 6 September 2003. Consequently, at present they are aged 19, 6, 15 and 10 respectively.

3. The first appellant claimed asylum on 29 January 2012. The children are dependants upon her claim.

4. The basis of the claim is that the first appellant fears that her two youngest daughters (the third and fourth appellants), "ALBS" and "BAS" would be subject to female genital mutilation (FGM) if they returned to Nigeria. Both the first appellant and her eldest daughter, the second appellant, "AIBS", it is accepted, have undergone FGM. In the light of that, the first appellant claims that she would not be able to prevent her husband's family carrying out FGM on her two youngest daughters.

5. The Secretary of State refused the first appellant's claim on 21 February 2012 and certified it under s.96 of the Nationality, Immigration and Asylum Act 2002. Further submissions were made on 8 May 2012 and again on 23 September 2013. Those submissions were refused on 27 November 2013. Following a pre-action protocol letter dated 30 December 2013, the decision of 27 November 2013 was reconsidered and on 8 January 2014 the respondent made a decision to remove the appellants by way of directions under s.10 of the Immigration and Asylum Act 1999.

6. The appellants appealed to the First-tier Tribunal. Following a hearing on 11 March 2014, Judge Burnett dismissed the appellants' appeals on asylum and humanitarian protection grounds and under Arts 3 and 8 of the ECHR. On 11 April 2014, the First-tier Tribunal (UTJ Deans) granted the appellants permission to appeal to the Upper Tribunal. Thus, the appeals came before me.

The Submissions

7. Mr Palmer, who represented the appellants, relied upon the grounds of appeal which he expanded upon in his oral submissions.

8. First, he challenged the Judge's finding that it had not been established that the first appellant's two daughters (ALBS and BAS) were at risk of undergoing FGM in Nigeria. He submitted that the Judge had been wrong to discount the expert's opinion that they were at risk and it was not rational to conclude they were not at risk given that the first and second appellants had themselves undergone FGM in Nigeria.

9. Secondly, Mr Palmer submitted that the Judge's conclusion in respect of Art 8 that the family's removal to Nigeria would be proportionate failed to have proper regard to the "best interests" of the children, including that the second appellant and fourth

appellant were at a "critical period in their education", namely undertaking A levels and GCSEs respectively; and had also failed to take into account that the fifth appellant (the first appellant's son) had been in the UK continuously for more than seven years.

10. On behalf of the respondent, Mr Richards submitted that the Judge had taken into account the expert report but had found the first appellant not to be a credible witness, in particular in relation to her evidence as to why the fourth appellant, BAS had not been subject to FGM in Nigeria. The Judge had taken into account the background evidence in relation to the reducing prevalence of FGM in Nigeria and, Mr Richards submitted, had come to a proper and rational conclusion that the third and fourth appellants were not at risk of FGM in Nigeria.

11. Secondly, as regards Art 8 Mr Richards submitted that the Judge had fully taken into account the best interests of the children, including the impact upon their education. He had taken into account a social worker's report which did not state that the children's best interests were to remain in the UK and the Judge had clearly been mindful of the fact that the children had been in the UK for upwards of seven years. Mr Richards referred me to the recent decision of the Court of Appeal in EV (Philippines) and Others v SSHD [2014] EWCA Civ 874, especially at [60] that the UK could not "educate the world". The Judge had been entitled to find that it was not unreasonable for the family to return to Nigeria and then to conclude that their removal would not be disproportionate.

Discussion

The Asylum Claims

12. I will first deal with the Judge's decision in relation to the appellants' asylum claims.

13. The Judge dealt with this at paras 76-94 of his determination. The background was, as I have said, that it was accepted before the Judge that the first appellant and the second appellant had been the subject of FGM in Nigeria.

14. The appellant relied upon an expert report from Dr C Momoh (at pages 32-44 of the appellant's bundle) dated 15 September 2013. The Judge summarised Dr Momoh's views at paras 80-81 of his determination as follows:

> "80. The appellant obtained an expert report from Dr C Momoh. Dr Momoh sets out her experience and qualifications. There was no challenge that she was not a suitable expert. I accept she is an expert in her field. The expert states that FGM is widely practiced in Nigeria. She refers to statistics regarding the incidents of FGM in Nigeria. It is stated that 68% are circumcised by the age of five (in 1998). In 2012 the prevalence was 41%. The expert expresses that FGM is performed depending upon the tribe, family preference and the reasons for the practice. The expert states that the main reason why it is performed in Nigeria is to curb promiscuity and that it helps reduce complications at childbirth. It is expressed by the expert that some communities believe that uncircumcised women are 'promiscuous, unclean, and

unmarriageable'. According to Dr Momoh, FGM varies across cultures, ethnic groups and tribal affiliations.

81. The expert concludes that in light of the first appellant's history, her daughter ALBS will be subjected to FGM and would be at risk of being abducted because of the strong belief within the deeply rooted attitude of the first appellant's husband's family. She also concludes that there is no prospect of internal relocation because of social mobility and due to housing and financial problems."

15. The Judge did not accept the expert's view that the third and fourth appellants would be at risk on return. He gave reasons for this at paras 82-91 as follows:

"82. I do not accept the conclusion of the expert. The expert has not explained how she came to the conclusion that the first appellant's daughter ALBS, would be subjected to FGM when BAS had not been subjected to FGM when present in Nigeria, and BAS was with her father. I also note that after BAS was returned to the first appellant, BAS was still not circumcised despite the first appellant being in Nigeria until September 2004.

83. The expert does not state in her report what the particular cultural beliefs are of the Yoruba, and whether it is necessary for the biological mother to be present at the circumcision. This is important in assessing any potential risk to the appellant's daughters and assessing her credibility. This is the reason the first appellant gives as to why BAS has not been circumcised.

84. I note also that the expert has confined her risk assessment to the third appellant and the report does not include BAS, the fourth appellant, in the risk assessment (see paragraphs 45 and 55). This is not explained. I hence give the report little weight.

85. The report confirms that the first and second appellants have been subjected to female circumcision (FGM). Also that the third and fourth appellants have not been subjected to FGM. It is argued by the appellant that the fact that this has occurred supports the risk assessment for the future of the third and fourth appellants. I do not agree. It is a consideration of the potential of risk, however, it is not determinative. The expert notes that culture, and other practices and beliefs, are important in why FGM is performed. The expert also notes the statistics of the incident of FGM. It appears from the statistics she quotes, that the practice prevalence is falling, which suggests a change in these cultural beliefs and practices.

86. It is for the Tribunal to consider the credibility of the account given by the appellants and in particular the first appellant. I do not find the first appellant credible. It is not explained by the expert why FGM could not be performed without her mother being present. Also if the family were so set on performing the FGM why it was not performed when her daughter (BAS) was returned to the first appellant and so would be in her presence. She stated she could not do anything and could not stop it. It appears inconsistent with the actions of the family that they would not then perform FGM at that time. The fact that BAS has not been subjected to FGM whilst she was in Nigeria before 2006 is also an indication of the lack of potential risk to the first appellant's children.

87. I found the first appellant an unsatisfactory witness. I note that she did not claim asylum until after her application for a residence card had been refused. She has

been visiting the UK since 2004 (at least) and has lived continuously in the UK since 2006 but did not claim asylum until 2011. This delay, especially since the birth of her daughter in 2007, affects the credibility of her account to need international protection.

88. I do not accept that the appellant did not return to Nigeria before 2006. There was an entry stamp in her passport by the Nigerian immigration dated 19th October 2004. Making an application in Nigeria by sending her passport through the post, does not explain this stamp. This is another reason why I did not find the first appellant credible in her evidence. I also note there were stamps dated 29th April, 19th May and September 2006. This is also not consistent with the first appellant's claims.

89. I have considered the evidence of the other two appellants (AIBS and BAS). I note that BAS is a vulnerable witness. I have given due allowance for this. However, she was just 7 years old when she left Nigeria. The information she provided, as to risks in Nigeria, is based upon what she has been told by her mother. I do not accept this part of her evidence. I also do not accept that Femi her uncle was killed by her father's family. The second appellant (AIBS) is older but once again her information is not independent of her mother. Most of her evidence about risk were not based on her own independent recollections. I give her evidence in this regard little weight.

90. I also note that the first appellant claims that her husband's family found her in Kaduna because of "ju ju". This is simply incredible.

91. I have also noted and taken into account the appellant's immigration history and the assertion by the respondent that section 8(2) of the Asylum and Immigration (Treatment of Claimants, etc.) Act applies. The Act requires, that if certain activity is displayed by an appellant then this damages her credibility. I have taken this into account in my assessment. I do find that the first appellant's actions affect her credibility."

16. Consequently, at para 93 he concluded that:

93. I have reminded myself of the burden and standard of proof in asylum claims. I have considered all the evidence in the round. I do not accept the appellants' claims to be at risk of FGM or being killed if returned to Nigeria."

17. Mr Palmer challenged the Judge's reasoning on a number of bases. First, he submitted that the Judge had failed properly to take into account the expert report of Dr C Momoh. Secondly, the Judge had failed to take into account the "past persecution" experienced by the first and second appellants in undergoing FGM which was indicative of future risk unless there were good reasons otherwise as set out in para 339K of the Immigration Rules (HC 395 as amended).

18. As regards Mr Palmer's first contention, the Judge accepted the expertise of Dr Momoh. However, he did not accept her conclusions and he gave a number of reasons in para 82 *et seq* of his determination. Central to this was the Judge's view of the first appellant's credibility and her explanation of why the fourth appellant had not been circumcised in Nigeria. The appellant's case was that in 2002 she had left her home area of Ibadan to move to Kaduna in order to prevent the circumcision of

the fourth appellant which, although neither she nor her husband wanted, her husband's parents did. She claims that while she lived in Kaduna for around four months the fourth appellant was abducted. She reported this to the police but was told it was a family matter. The first appellant claims that her daughter (the fourth appellant) was returned on condition that the appellant would accept that she would undergo FGM. She claimed that the fourth appellant did not undergo FGM because the first appellant's presence was required under Yoruba tradition and she was able to avoid being present whenever her husband's family came. Thereafter, in September 2004 the first appellant came to the UK leaving the fourth appellant in Nigeria because her husband promised to keep the fourth appellant safe from FGM as she (the first appellant) was not present. Those matters are set out in the Judge's determination at paras 35-39.

19. The Judge did not consider the first appellant to be a satisfactory witness. She had been in or visiting the UK since 2004 and had lived here continuously since 2006 but had not claimed asylum until 2011 (see para 87). Further, he did not accept the first appellant's statement that she had not returned to Nigeria before 2006 given that there was an entry stamp in her passport for Nigeria from October 2004. He did not, therefore, accept her evidence that the stamp arose from her sending the passport to the Nigerian High Commission to obtain a visa. It was a Nigerian immigration stamp based upon entry. Also, there was no background evidence to support the first appellant's claim that the mother of a child to be subject to FGM had to be present and, as the first appellant claimed, hold the child (see para 13 of her witness statement dated 4 March 2014), before FGM could be performed. Further, Dr Momoh, the appellants' expert, made no mention of this tradition in the Yoruba tribe in her expert report. The Judge reasoned, therefore, that there was no explanation of why FGM had not been performed on the fourth appellant between 2004 and 2006 when the first appellant was outside the UK but the fourth appellant was living with her father and, therefore, could be reached by his family whom, it was claimed, wished the fourth appellant to undergo FGM. Further there was no evidence to explain why the fourth appellant had not been subject to FGM after she had been abducted, following the first appellant's relocation with her to Kaduna in 2002, and subsequently until the first appellant left Nigeria for the UK in September 2004.

20. In my judgment, the Judge's reasons are both adequate and cogent to underpin his finding that the first appellant's evidence was not credible, in particular in explaining why the fourth appellant had not been subject to FGM despite the apparent opportunity that the family of the first appellant's husband had to carry it out either before 2004 or during the period 2004-2006 when the first appellant was in the UK and the fourth appellant was living with her husband. This undermined the expert's conclusions which the Judge was, as a result, entitled not to accept.

21. Further, the Judge was entitled to take into account what the expert said about the decreasing prevalence of FGM in Nigeria. That is set out at para 80 of the determination and paras 18-19 of the expert's report. As at 1998, the expert refers to background material showing that 57 per cent of women were circumcised before the

age of 1 and over 68 per cent by the age of 5. However, again referring to background evidence, the expert notes that in 2012 the national prevalence of FGM was 41 per cent.

22. Although these figures, in themselves, could not have compelled the finding made by the Judge, they were relevant. The compelling part of the Judge's reasoning is that which I have already set out in relation to the first appellant's credibility and the finding that, as a result, there was no explanation as to why the fourth appellant had not been subject to FGM when the opportunity appeared to arise.

23. I am satisfied that the Judge, having taken into account the expert report, was entitled to find that the appellant had failed to establish there was a real risk that her daughters would undergo FGM because of the wishes of her husband's family.

24. As regards Mr Palmer's second contention, those reasons which I have just set out in large part meet the argument made by Mr Palmer in relation to para 339K. That is in the following terms:

> "The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated." (my emphasis).

25. The Judge clearly had in mind that the second appellant (the first appellant's eldest daughter) had been subject to FGM. Paragraph 339K, of course, raises the common sense approach to evidence that if an individual has in the past been subject to persecution, all things being equal, it may be permissible to infer that they will be at risk in the future. That of course is not directly relevant here as the past persecution was in relation to the second appellant (and perhaps the first appellant herself some time ago) rather than the third and fourth appellant who are now said to be at risk. Nevertheless, applying the same general approach, given that they all form part of one family, the Judge has given "good reasons" to justify his conclusion that, even on the basis that the first and second appellants have undergone FGM, the risk to the third and fourth appellants is not well-founded in the light of the fact that the family of the first appellant's husband has had ample opportunity to carry out their desire to subject the fourth appellant to FGM in the past but did not do so. The Judge's adverse credibility finding, which is entirely sustainable for the reasons he gave, justifies his finding that the appellants had failed to establish that there was a future risk to the third and fourth appellant of undergoing FGM.

26. Mr Palmer referred me to the expert view at page 38 of the appellant's bundle in respect of her physical examination of the fourth appellant's genital area which appeared "normal" and which is stated to be "consistent to the information given by [the first appellant] that [the fourth appellant's] FGM was attempted at age 5 while she was out of Nigeria". There are two points that can be made about this. First, it is far from clear why this is said positively to support the first appellant's account. The

absence of injury is equally indicative that nothing happened and that the first appellant is not telling the truth. Secondly, the suggestion that there was an attempt to carry out FGM on the fourth appellant whilst the first appellant was out of Nigeria, is wholly inconsistent with the first appellant's evidence that FGM can only be carried out on her daughters with her present. In short, although I was referred to this part of the expert's report, in my judgment, it does not take the first appellant's case any further.

27. Mr Palmer did not rely upon any other basis to challenge the Judge's conclusion in relation to the risk to the third and fourth appellant of undergoing FGM. He expressly disavowed any reliance on the suggestion in the grounds that the Judge had erred by failing to consider the risk to the first appellant as a "lone woman" returning to Nigeria. He was right to do so and there was no evidence that would be her situation.

28. For the reasons I have given, the Judge was entitled to find that it was not established that there was a real risk that the third and fourth appellants would undergo FGM if returned to Nigeria.

The Article 8 Claims

29. I now turn to the Judge's consideration of Art 8.

30. Mr Palmer made a number of submissions relating to the consideration of the circumstances and best interests of the first appellant's children.

31. First, he submitted that the Judge had failed to take into account the fact that the second and fourth appellants had been in the UK since 2006 when they were 11 and 7 respectively. Unlike the other two appellants, who were younger, they had established ties in the UK since their arrival outside the home as recognised in the case law such as MK (Best interests of child) India [2011] UKUT 00475 (IAC) and Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC). The Judge had made no reference to this case law and had failed to take into account the effect on these appellants' social and educational ties to the UK. In relation to that, Mr Palmer submitted that the Judge had failed to give sufficient weight to the fact that both children were at "critical periods in their education" undertaking respectively A levels and GCSEs.

32. Secondly, Mr Palmer submitted that the Judge had made a factual error in applying para 276ADE(iv) to the fifth appellant who had been in the UK for seven years continuously since he first arrived with the first appellant in September 2004. Consequently, Mr Palmer submitted that the fifth appellant satisfied the requirements of para 276ADE(iv) having, at the date of application, namely 20 February 2012, been in the UK for seven years. Mr Palmer submitted that the Judge was wrong to enquire into whether it would "not be reasonable to expect [the fifth appellant] to leave the UK" since that was introduced into para 276ADE(iv) with effect from 13 December 2012 by HC 760. It did not apply to an application made

before that date and here the application date taken by the respondent was prior to that date.

33. I will deal first with the latter argument. Prior to 13 December 2012, para 276ADE(iv) provided that:

> "The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> ....
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any periods of imprisonment); ..."

34. By virtue of HC 760, para 276ADE(iv) was amended from 13 December 2012 to include the following additional words:

> "and, it would not be reasonable to expect the applicant to leave the UK."

35. It is clear from the implementation provisions of HC 760 that the amendment to para 276ADE(iv) made by para 201 of HC 760 came into effect on 13 December 2012 but that where an application had been made before 13 December 2012

> "and the application has not been decided before that date, it will be decided in accordance with the Rules in force on 12 December 2012".

36. It would seem, therefore, that the applicable Rule to the fifth appellant was that in force prior to 13 December 2012 as any "application" was prior to that date.

37. At paras 99-100, Judge Burnett grappled with the issue of when it could be said the fifth appellant's "application" had been made. At para 103, he recognised that the amendment to para 276ADE was not contained in the Immigration Rules until the amendment in HC 760 took effect. However, whether or not it applied, he found at para 103 that it was not until 21 September 2013 that it could be said that any of the child appellants had been in the UK for seven continuous years. On that basis, none of the child appellants could satisfy the requirements of para 276ADE.

38. Mr Palmer submitted that that was factually inaccurate in relation to the fifth appellant who had been in the UK since September 2004. The difficulty with this submission is that it is based upon what the first appellant said was the situation. The first appellant's case was that the fifth appellant came with her in 2005 and that she did not return to Nigeria before 2006. The Judge did not accept her evidence in that latter respect, not least because of the Nigerian immigration entry stamp dated 19 October 2004. The first appellant now says that the fifth appellant remained in the UK when she travelled to Nigeria. However, the first appellant's evidence was that she did not return to Nigeria before 2006 and the Judge did not accept this or indeed her credibility in relation to her evidence in general. The Judge was, therefore, in my view entitled to conclude that it had not been established that the fifth appellant had been continuously in the UK for seven years until 21 September 2013 which was the

date seven years after the first appellant last entered the UK on 21 September 2006 when (she claimed) she entered with the second and fourth appellants. The Judge was entitled to conclude that she had not established that the fifth appellant had not returned to Nigeria with her prior to that date and had most recently, therefore, returned with her in September 2006. It follows that at the date of application, namely 20 February 2012, the fifth appellant could not establish that he had been in the UK for seven continuous years as required by para 276ADE(iv).

39. The fifth appellant could not meet the requirement in para 276ADE(iv) in force before 13 December 2012. I, therefore, reject Mr Palmer's submission that the Judge erred in law by failing to find that para 276ADE(iv) – in its unamended form prior to 13 December 2012 – applied and the requirements were met by the fifth appellant. Even if it applied, the fifth appellant could not succeed under it.

40. What the Judge in fact did was to consider whether the appellants, including the fifth appellant, met the requirements of para 276ADE(iv) from the point at which they could establish seven years continuous residence in the UK, namely 21 September 2013. It was in that context that he applied the amended version of para 276ADE(iv) in force from 13 December 2012 including the requirement that it would "not be reasonable to expect the applicant to leave the UK". Since the Judge was also considering Art 8 of the ECHR he was entitled to consider whether, at the date of hearing, the appellants met any requirement of the Immigration Rules as relevant to the issue of proportionality and the weight to be given to the legitimate aim of the economic wellbeing of the country (see Haleemuddin v SSHD [2014] EWCA Civ 558). If the appellants could not meet the requirements of the Rules that was an important factor in determining whether the appellants should succeed under Art 8 outside the Rules and whether they could establish "exceptional" or "compelling" circumstances that justify a grant of leave outside the Rules (see MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)).

41. That was the approach followed by the Judge (see paras 113 and 115 of his determination) and whether as an aspect of the Immigration Rules or in assessing the child appellants' "best interests", it was relevant to determine whether it was unreasonable to expect them to leave the UK. That then leads to Mr Palmer's remaining submissions.

42. The Judge clearly had in mind that the "best interests" of the children were a "primary" consideration. He was referred in submissions to the Supreme Court's decision in ZH (Tanzania) v SSHD [2011] UKSC 4 (see para 58 of the determination) and at para 118 noted that their best interests were a "primary consideration".

43. At paras 104-109, the Judge dealt in detail with the circumstances of the child appellants as follows:

> "104. I have therefore considered whether it would be reasonable to expect the children to leave the UK. I have carefully considered the social worker's report. She

concludes that the children need to remain with their mother in a family unit. They need to achieve living circumstances where it is considered they are adequately provided for and they are safe and feel safe.

105. I consider that in determining whether it is reasonable for the children to leave the UK, it is necessary to consider their best interests. It is clear that generally when a child has lived in a country for such a period of time, the child will have put down roots and hence it will be less reasonable to remove them from that stable environment. However, that does not mean that it will never be reasonable to remove, or require a child, who has lived in the UK for 7 years to leave with their parents. An assessment needs to be performed.

106. It is in the children's best interests to be with their mother as part of a stable family unit. Their mother has had no permission to remain in the UK since 2006. She has made an application to remain in the UK on the basis of being in a relationship with an EEA national. She did not effectively pursue that application or attend the appeal hearing. The first appellant's immigration history is poor.

107. The children can receive an education in Nigeria. It might not be as good as in the UK but that does not mean that that consideration should prevail. I note two of the children are at critical periods in their education.

108. The appellants still have family in Nigeria. The social worker commented that the children need access to aspects of their Nigerian culture and their chosen religion. This will be achieved to a greater extent in Nigeria.

109. The social work report did not conclude that the children's best interests will be to remain in the UK. I do not consider it unreasonable in all the circumstances of the case for the children to leave the United Kingdom. I appreciate that the children are innocent in the choices that their mother has made and have taken that into account in my assessment."

44. I do not accept Mr Palmer's submission that the Judge failed properly to consider the circumstances of the child appellants in particular the length of time they had spent in the UK and that in relation to the second and fourth appellants that they were at a "critical period" in their education.

45. The Judge directed himself at para 105 in relation to the importance of a child's period of residence in the UK and that they will have put down roots which will make it less reasonable to remove them from a stable environment but also noting that that did not mean that whenever a child had lived in the UK for seven years with their parent it would never be reasonable to remove them. Mr Palmer accepted that that was a proper self-direction.

46. Mr Palmer drew my attention to para (v) of the head note in MK, where the Upper Tribunal said:

> "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.

47. Mr Palmer also referred me to paras (ii) – (iv) of the head note in Azimi-Moayed as follows:

> "ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
>
> iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable."

48. Whilst the Judge did not expressly refer to MK and Azimi-Moayed, he clearly had in mind the principles and approach set out in those cases, that it is in the interests of children to retain stability and continuity in both their social and educational provision and that a period of residence of seven years, particularly where that seven years arises from the age of 4, rather than the first seven years of a child's life, is likely to be more significant. The Judge took into account the social worker's report and her conclusion that the children's needs were to remain with their mother in a family unit. The Judge took into account that the children could receive an education in Nigeria but that even if it was not as good as in the UK that did not mean that a disruption to their education even at a "critical" period should necessarily prevail. The Judge took into account that the appellants had family in Nigeria and that the social worker had commented that it was important for them to retain access to their Nigerian culture and religion. The Judge noted the social works report did not conclude that it was in the children's best interests to remain in the UK. It is not suggested that the social worker's report said anything different.

49. The Judge concluded that it was not unreasonable for the children to leave the UK and that it was in their best interests to remain here despite the educational consequences for them.

50. Mr Richards drew my attention to EV, a recent decision of the Court of Appeal. There, at [60] Lewison LJ stated that:

> "I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

51. Mr Richards relied upon that passage in Lewison LJ's judgment. As the Court of Appeal makes clear, having referred to MK and ZH (Tanzania), the need to maintain immigration control can outweigh the best interests of children. It cannot be said, in my judgment, that Judge Burnett's assessment of the children's best interests or his

conclusion that it would not be unreasonable to expect them to leave the UK was legally flawed. He took into account the social worker report and the relevant circumstances of the children's education in the UK, noting that it might not be as good in Nigeria. In assessing proportionality (and the weigh to be given to the public interest) he was entitled to take into account the first appellant's poor immigration history and that she had no permission to remain in the UK since 2006 (see EV).

52. Merely to disagree with the Judge's finding comes nowhere near overcoming the "very high hurdle" of irrationality or perversity. In Mukarkar v SSHD [2006] EWCA Civ 1045 at [40] Carnwath LJ (as he then was) stated in relation to a challenge to a Judge's finding that removal was disproportionate on the ground that it was perverse:

> "[t]he mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law. ..."

53. Likewise, I would add merely because a Tribunal has reached what may be seen as an "unusually not generous" view of the facts does not mean that it has made an error of law. It may well be that not every Judge assessing the circumstances of these appellants would have concluded that it was proportionate to remove them. However, it cannot be concluded that no reasonable judge could reach the conclusion that Judge Burnett did on these facts. Consequently, in assessing the circumstances of the children at paras 104-109 and then considering whether, under Art 8, their best interests and the proportionality of their removal, the Judge did not err in law in dismissing the appeal under Art 8 (or indeed the Immigration Rules).

Decision

54. The First-tier Tribunal decision to dismiss the appellants' appeals did not involve the making of an error of law.

55. The decision to dismiss the appeals on all grounds stands.

Signed

A Grubb
Judge of the Upper Tribunal