Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25274/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 April 2015	**On 27 April 2015**

Before

LORD BANNATYNE
UPPER TRIBUNAL JUDGE GLEESON

Between

FEMI TAIWO OLABIRAN
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss N Manyarara, instructed by Freemans solicitors
For the Respondent: Mr C Avery, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria, who appeals with permission against the decision of the First-tier Tribunal Judge Warren L Grant dismissing an appeal against the Secretary of State's decision to remove him to Nigeria pursuant to section 47 of

the Immigration, Asylum and Nationality Act 2006 after refusing leave to remain in the United Kingdom on Article 8 ECHR grounds, either pursuant to paragraph 276ADE and Appendix FM of the Immigration Rules HC 395 (as amended) or on the basis of exceptional and compelling circumstances for which the respondent should exercise her discretion outside the Rules.

Background

2. The appellant came to the United Kingdom in about 2004 with entry clearance as a visitor. He overstayed and made no attempt to regularise his status here. He was later joined by his wife, who entered the United Kingdom irregularly in 2006, allegedly after the death of her parents. The couple have two daughters born while they have been in the United Kingdom, the first in July 2007 and the second in April 2009. They are now 7 and 6 years old respectively: the older girl will be 8 years old in July 2015. They have lived all their lives in the United Kingdom and have attended nursery, and then school, locally. All four family members are Nigerian citizens.

3. The appellant, his wife and children live with his brother and sister-in-law. They are in the United Kingdom lawfully and also have children. They have been contributing £200 a month to the appellant's family expenses. The mother of the appellant lives in the United Kingdom. She is 82 and living alone, a few minutes' drive from the brother's home. She has other children here too but they are said to be too busy to be her carers: the appellant says he helps her get up and cooks for her.

Letter of refusal

4. In her letter of refusal of 4 June 2013, the respondent applied Appendix FM and paragraph 276ADE. She noted that the appellant had spent only 10 years in the United Kingdom and that at the date of decision, neither of his daughters had been here for 7 years. She considered EX.1 and Appendix FM but concluded that it was not disproportionate to expect the family to return together to Nigeria. The respondent also considered Article 8 outside the Rules: the family life was between the appellant, his wife and children. She did not consider that family life existed between the appellant, his elderly mother or his adult siblings. There was another brother in the United Kingdom as well as a sister-in-law and no explanation had been provided as to why they could not care for his mother as they had before this family arrived.

5. The appellant's family life would not be affected by removal of him and his family members to Nigeria and such private life as they had developed was not sufficient to make the family's removal disproportionate or to breach the United Kingdom's international obligations under the ECHR. There were no exceptional or compelling circumstances of the type identified in *Nagre* and *Gulshan*.

First-tier Tribunal determination

6. The First-tier Tribunal Judge found that at the date of decision, the appellant could not succeed under the Immigration Rules and that EX.1 did not apply because it was reasonable for the children to return to Nigeria with their parents if the family were removed. He applied *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874 as to the best interests of the children, in which Lord Justice Christopher Clarke held that the First-tier Tribunal Judge had not erred in law in assessing the best interests of the children and the reasonableness of removal with their parents:

> "45. His overall conclusion was that the need to maintain immigration control did outweigh the best interests of the children. In effect he found that it was reasonable to expect the children to live in another country. The Appellants submit that the judge did not analyse the weight to be given in this case to the need for immigration control. But, as it seems to me, in setting out and examining the factors relating to the Appellants, he was performing that exercise."

7. In relation to Article 8 outside the Rules, the judge relied on *Gulshan* in the Upper Tribunal and *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, as well as a number of other important judgments. He directed himself with reference to the new Part 5A of the Immigration and Asylum Act 2002 inserted by the Immigration Act 2014. He concluded that any private life in the United Kingdom had been established when the parties were here unlawfully and their status precarious and thus should be given little weight. The family would be removed together, if at all: there was no risk to their family life. He concluded that any removal would meet all of the *Razgar* tests and would be proportionate. He dismissed the appeal.

Grounds of appeal and permission to appeal

8. The grounds of appeal are prolix. In short form, they contend that the First-tier Tribunal erred in law in failing properly to apply paragraph 276ADE and to give adequate reasons in that respect; that undue emphasis had been placed on the principal appellant's adverse immigration history which should not have affected the position of his children, born in the United Kingdom; and that he misdirected himself in relation to the relevant case law by giving insufficient emphasis to the best interests of the parties two young daughters.

9. Upper Tribunal Judge Martin refused permission to appeal. The appellant renewed his application to the Upper Tribunal and Upper Tribunal Judge Bruce granted permission because she considered that the First-tier Tribunal had arguably failed to have sufficient regard to the best interests of the children and to paragraph 276ADE(1)(iv) and associated guidance. She stated that:

> "…Although it was not directly applicable, the question of whether the appellant's child qualified for leave to remain under this provision was relevant to whether it

was proportionate that they, and their father, should be removed from the United Kingdom."

Rule 24 reply

10. The respondent served a Reply to the grant of permission under Rule 24. She adopted the reasons given by Upper Tribunal Judge Martin for refusing permission, that the First-tier Tribunal Judge did have the best interests of the children in mind and that the reference to paragraph 276ADE was erroneous since the children were not themselves appellants in these proceedings but were their father's dependants.

Upper Tribunal hearing

11. At the hearing, Ms Manyarara relied on *EV (Philippines)* and argued that the First-tier Tribunal had failed to engage with the facts. The family did not understand the legal implications and were entitled to be assured that the judge had understood and engaged with the specific facts of their case. We asked Ms Manyarara to explain why she had not referred the First-tier Tribunal to the Supreme Court's decision in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, which is binding on the First-tier Tribunal and the Upper Tribunal. Ms Manyarara was unable to explain that or to assist us as to how the facts of this appeal could be distinguished from those in *Zoumbas.*

12. We indicated that we were minded to dismiss the appeal and did not call upon Mr Avery to address the Tribunal.

Discussion

13. This is a situation where both of the adult members of the family came to the United Kingdom unlawfully and in one case clandestinely. Their two children were born here, but no member of this family has had leave to remain and only the father has ever had any leave (a visit visa, which he overstayed) and all of them are Nigerian, not British citizens. The children have been at school for only a short time (although they were at nursery from the age of 3, apparently) and there is nothing particular about their mental or physical health or socialisation.

14. The appellant's two brothers live in the United Kingdom and have not satisfactorily explained why they, or the British care system, cannot care for his mother, whose medical concerns, as the judge found, were not particularly pressing. He found as a fact that she was not bedridden and dependent as alleged.

15. We are guided in our approach to the facts of this case by the opinion of Lord Hodge, giving the judgment of the Court in *Zoumbas.* The facts there were on all fours with the present case: the parents had a very poor immigration history, both having entered the United Kingdom on French passports to which they were not entitled, and their children were at primary school in the United Kingdom. There were three children, aged 7, 4 and under a year. Two of them, like the children here, had not been to their country of origin and had no experience outside the United Kingdom.

At paragraphs [24]-[25], Lord Hodge set out why in those circumstances the best interests of the children do not outweigh the United Kingdom's right to control immigration:

> "24. There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being. We agree with Lady Dorrian's succinct summary of the position in para 18 of the Inner House's opinion.
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> 25. Finally, we see no substance in the criticism that the assessment of the children's best interests was flawed because it assumed that their parents would be removed to the Republic of Congo. It must be recalled that the decision-maker began by stating the conclusion and then set out the reasoning. It was legitimate for the decision-maker to ask herself first whether it would have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance. When one has regard to the age of the children, the nature and extent of their integration into United Kingdom society, the close family unit in which they lived and their Congolese citizenship, the matters on which Mr Lindsay relied did not create such a strong case for the children that their interest in remaining in the United Kingdom could have outweighed the considerations on which the decision-maker relied in striking the balance in the proportionality exercise (paras 17 and 18 above). The assessment of the children's best interests must be read in the context of the decision letter as a whole."

16. The situation here is the same. These children are very young. If there were no children involved, there would be no question but that the parents should be removed because they are here unlawfully and there are no exceptional or compelling circumstances in their case. There is no evidence of any strong private life outside the family for these children either and they are still very young. The proportionality balance was correctly struck in the letter of refusal and the First-tier Tribunal did not err in so holding.

17. At the date when *Zoumbas* was decided, it was not necessary to deal with paragraph 117B of the Immigration and Asylum Act 2002. However, that paragraph, with which this judge did deal, does not assist the appellant since at paragraph 117B(1) the Rules now state in terms that '[t]he maintenance of effective immigration controls is in the public interest' and at paragraph 117B(4) and 117B(5) that 'little weight' is to be given to private life established when a person (in this case these parents) is in the

United Kingdom unlawfully or when their status is precarious (as was always the case for all members of this family).

Decision

18. The First-tier Tribunal Judge's decision is carefully reasoned and neither the grounds of appeal, nor the oral submissions of Ms Manyarara establish any error of law therein, still less a material error of law.

19. We dismiss the appeal.

Signed Date

Upper Tribunal Judge Gleeson