Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38109/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 September 2015	**On 25 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) MRS GRACE IYARE
(2) MISS JESSICA IYARE
(3) MASTER DANIEL IYARE
(4) MASTER JOSEPH IYARE
(ANONYMITY DIRECTION NOT MADE)

Respondents/Claimants

Representation:

For the Appellant: Mr E Tufan, Specialist Appeal Team
For the Respondent: Mr P Uzoechina, Legal Representative, Patterson & Co

DECISION AND REASONS

1. The Secretary of State appeals from the decision of the First-tier Tribunal (Judge O'Garro sitting at Hatton Cross on 23 December 2014) allowing the appeal of the first

claimant against the decision by the Secretary of State to refuse her application for leave to remain in the UK on human rights grounds and to issue directions for her removal from the UK to Nigeria as a person subject to administrative removal under Section 10 of the Immigration and Asylum Act 1999. The second to fourth claimants are her children under the age of 18, and all of them joined in the first claimant's appeal as her dependants. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimants require to be accorded anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 17 March 2015 First-tier Tribunal Judge Levin granted the Secretary of State permission to appeal for the following reasons:

> 2. It is arguable that the Judge's failure to have regard to the judgment and guidance of the Court of Appeal in the leading case of **EV (Philippines) and Others v SSHD [2014] EWCA (Civ) 874** in her consideration of whether it would be reasonable to expect the 2 elder children to return to Nigeria amounted to an error of law which arguably affected the outcome of the Appeal.
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> 3. There is however no arguable merit that the Judge erred by failing to have regard to sections 117B(1) to (5) of the 2002 Act in circumstances where she had found that the elder 2 children were qualifying children and that section 117B(6) therefore applied. However the Judge's findings that section 117B(6) applied is tainted by her failure to consider **EV (Philippines)**.
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> 4. For these reasons both the grounds and the decision disclose an arguable error of law.

The Factual Background

3. The first claimant is the main claimant, and so I shall hereafter refer to her as "the claimant", save where the context otherwise requires. The claimant is a national of Nigeria, as are all her children. Her eldest child Jessica was born in Nigeria on 22 November 1999 and son Daniel was born in Nigeria on 13 February 2003. The claimant was issued with a visit visa which was valid from 24 August 2006 until 24 February 2007. The date of entry was not recorded, but it appears not to be disputed that the claimant came to the United Kingdom as a visitor, with her two elder children, and then returned to Nigeria before the expiry of her visit visa. The claimant was then issued with a multi-visit visa which was valid from 2 March 2007 until 2 March 2009. Again, the date of entry is not recorded. Daniel is recorded as having re-entered the UK with his mother. There appears to be no record of Jessica's re-entry. But there is no challenge to the finding of the First-tier Tribunal that the two children both re-entered with their mother in May 2007 (see below). The claimant must have been pregnant with her third child on entry, as on 27 September 2007 Joseph was born in the United Kingdom.

4. The claimant did not leave the United Kingdom within six months of entering as a visitor, and overstayed. She first sought to regularise her status by making an EEA

application on 25 September 2012. This application was refused. In August 2014 her legal representatives made representations that her case should be considered under Article 8 ECHR. On 29 August 2014 the Secretary of State gave her reasons for rejecting the Article 8 claims of the claimant and her children, and for serving on each of them an IS151A notice notifying them of their liability to removal.

5. At the beginning of the letter, it was explained that the circumstances of the claimant's child Tom Iyare, who was born in Nigeria on 10 September 1993, had been considered separately as he was an adult, and it had been confirmed he was attending university and living at a separate address to that at which his mother claimed to live. The Secretary of State went on to review the claimant's immigration history. It was noted that in her EEA application made in September 2012 only Tom Iyare and Daniel Iyare were listed as her dependants.

6. Her case had been considered under EX.1 of Appendix FM. Her youngest child was born in the UK less than seven years ago, and so he did not meet the requirement of living in the UK continuously for at least seven years immediately preceding the date of application. As the remaining two youngest children were under the age of 18 years and appeared to have lived continuously in the UK for at least seven years, an assessment had been undertaken to determine if it would unreasonable to expect them to leave the UK. She was specifically requested by letter dated August 2014 to explain why her children could not return to Nigeria with her. Not only was no evidence received in this regard, but no mention of this was made in the response of 26 August 2014. No evidence had been provided to demonstrate the impact of removing the children, whose father was known to live in Nigeria, nor indeed had the impact even been mentioned in representations. Nothing had been provided to demonstrate how it would not be in the children's best interests to return to Nigeria with their mother, to a country in which they could reside legally and in which their mother could work to support them. It was not considered that the children's removal would be to their detriment to the extent that it would outweigh the legitimate aim being sought. Remaining with their mother outweighed the desirability of them being educated at public expense in the UK. Although the claimant had apparently been absent for seven years and five months from Nigeria, it was not considered that the passage of time resulted in very significant obstacles to her reintegration. There was no evidence that she had not been integrated within the Nigerian community during her time in the UK, so as to make her reintegration easier.

7. It was noted that the justification for the claimant remaining here illegally was the breakdown of her relationship with her husband, the father of her children. Her legal representative had not explained why this was a good excuse.

8. Consideration had been given to exceptional circumstances. It was claimed that she had been living without recourse to public funds, having been supported by her EEA partner. It was accepted that she did not appear to have claimed public funds, but she had failed to demonstrate how she had been supported. There was no evidence of the duration of her claimed relationship and it was likely that she had worked

illegally. She had also not explained how her eldest child's study at University of Portsmouth had been funded, nor why the child had entered under the name Efosa Iyare, despite having a birth certificate in the name of Tom Iyare, and now a passport in that name. The claimant was not considered of good character as she had remained illegally in the United Kingdom since the expiry of her leave, making only a single application to regularise her stay. So it was considered that her removal from the United Kingdom remained appropriate. Her conduct was extremely poor, as she had remained here illegally and developed ties in the United Kingdom, along with her children, despite being fully aware that she and they had no right to remain here. She had made no attempt to regularise her stay until 25 September 2012, and she had not included two of her children as dependants upon this application. Having failed to leave the UK following the expiry of her leave as a visitor, the claimant had shown a complete disregard for the Immigration Rules. Her minor children were not considered to have responsibility for their overstaying or lack of status. This was entirely her fault.

The Hearing before, and the Decision of, the First-tier Tribunal

9. Both parties were legally represented before Judge O'Garro. The claimant gave oral evidence, and was cross-examined by the Presenting Officer. In her subsequent decision, the judge's findings were set out at paragraphs [27] onwards. She found that the claimant could not succeed as a partner under Appendix FM and she had provided no evidence that she was in a subsisting relationship with a partner. She also could not succeed under the parent route in Appendix FM as she did not meet the eligibility requirements. This was because she had entered the United Kingdom as a visitor. The judge turned to consider Rule 276ADE:

> 34. The first appellant has submitted no evidence to show that there would be very significant obstacles to her reintegration if she was returned to Nigeria. The appellant left Nigeria at the age of 37 and at that age she would have formed solid social ties in her country. I have no doubt that the appellant would still retain some of those ties and may still have close family members in Nigeria who would be able to assist her in reintegration.
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> 35. However, I also have to consider the article 8 rights of the first appellant's dependant children. I accept that the first appellant has been the parent with whom the minor appellants have lived since their entry to the United Kingdom and that she has been the parent providing for their day to day care.
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> 36. It is accepted that the first appellant entered the United Kingdom with her children in May 2007 then Jessica and Daniel have lived in the United Kingdom for more than seven years by the date of the application to the respondent was made. I noted that the respondent in her Refusal Letter acknowledges this may be the case.
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> 37. This must mean that consideration has to be given to Paragraph 276ADE in relation to Jessica and Daniel's Article 8 right to their private lives.

38. Paragraph 276ADE(iv) says that an applicant would meet the requirements of that paragraph if he is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK.

39. Jessica is 15 years old. It has to be accepted that she has formed strong attachments in the United Kingdom. Her brother Daniel is 11 years old and he too would have formed strong attachments by now.

40. The question for me to determine is whether it is in these children's best interest to remove them with their mother to Nigeria. In considering this question and whether it would be reasonable to expect Jessica and Daniel to return to Nigeria, I have born in mind what the Tribunal said in **E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 00315**. The Tribunal held that absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations it 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 ... That during a child's very early years, he or she will be primarily focused on self and the caring parents or guardian. Long residence once the child is likely to have formed ties outside the family is likely to have greater impact on his or her well being.

41. Jessica has lived in the United Kingdom for more than 7 years and would have made firm friends and solid attachments at school and in the community. I am told that she sings in the Church Choir. I am also told that Jessica is in the first year of the GCSE curriculum programme which means that she is getting ready to take her GCSE examination in the summer of this new year. That being the case, I find to disturb her education now by her removal could have a detrimental effect on her future educational progress and that would not be in her best interest.

42. Daniel has also lived in the United Kingdom for more than seen years. He is of the age where he would have started secondary school. I find to disrupt his education now by his removal to an educational system alien to him would not be in his best interest either.

43. I therefore find that it would not be reasonable to expect Jessica and Daniel appellants to leave the United Kingdom and be returned to Nigeria as they are well integrated into the educational system in the United Kingdom.

10. Having found that the two eldest children succeeded in their appeals under Rule 276ADE, the judge went on to consider the Article 8 claims of the mother and the youngest child outside the Rules. She found it was not in the interests of Jessica and Daniel to be separated from their mother and of course it could not be in Joseph's interest to be removed from his mother and siblings. So she allowed the second and third claimants' appeals under the Rules, and the first and fourth claimants' appeals under Article 8 ECHR outside the Rules.

The Rule 24 Response

11. Following the grant of permission to appeal by Judge Levin, the claimant's representative, Mr P Uzoechina, legal representative, Patterson & Co served a Rule 24 response opposing the appeal.

12. His first ground of opposition was that the Presenting Officer at the hearing had not relied or raised any issue touching on the case of **EV Philippines** and therefore it was unreasonable, and indeed unfair in an adversarial system, "to require the Tribunal to argue her case."

13. His second ground of opposition is that consideration of **EV Philippines** would have made no material difference to the outcome of the present appeal, as the facts were clearly distinguishable. Unlike the children in **EV Philippines**, all the children in the present case satisfied the requirements of Rule 276ADE in their own individual right at the date of application and/or hearing. Also, the First-tier Tribunal Judge had properly considered the "reasonability of expulsion" taking into account all the facts that she was required to take into account: namely, the children's age, length of residence, the strength of ties with their community, their ties with the educational community and finally the precariousness of Jessica's educational future if she was forced to leave her settled environment. The judge's conclusion at paragraph [43] that it would not be reasonable to expect Jessica and Daniel to leave the United Kingdom was a finding of fact that was reasonably open to the judge.

14. His third ground of opposition was that in reaching her conclusion on reasonability, the judge also had the benefit of the unchallenged oral and documentary evidence to which the judge refers at paragraphs [22] to [25] of her decision. This evidence supported the finding that removal would be unreasonable and might breach Articles 2 and 3 of the ECHR.

The Hearing in the Upper Tribunal

15. At the hearing before me, Mr Uzoechina developed the grounds of opposition which he had outlined in his Rule 24 response. As well as relying on **Dube [2015] UKUT 90 (IAC)**, Mr Uzoechina also sought to rely on two unreported decisions by Deputy Judges of the Upper Tribunal. Mr Tufan objected to this on the ground that Mr Uzoechina had not complied with the Practice Direction on the citation of unreported determinations. These Practice Directions are to be found at page 612 of Phelan, 9th edition. Paragraph 11.2 provides an application for permission to cite a determination which has not been reported must – (b) identify the proposition for which the determination is to be cited; and (c) certify that the proposition is not to be found in any reported determination of the Tribunal, the IAT or the AIT and has not been superseded by the decision of a higher authority. Paragraph 11.3 provides that permission under paragraph 11.1 will be given only where the Tribunal considers it be materially assisted by citation of a determination, as distinct from the adoption in argument of the reasoning to be found in the determination. Such instances are likely to be rare.

16. I had read the decisions in advance of the hearing, and they did not contain any proposition that was not to be found in any reported decision of the Upper Tribunal.

Moreover, as Mr Uzoechina confirmed, he was only seeking to adopt in argument the reasoning which underpinned the unreported decisions, rather than relying on them as illuminating a legal proposition which was not be found in a reported decision of the Upper Tribunal or Court of Appeal. So I upheld Mr Tufan's objection.

17. Mr Tufan produced a contemporaneous memorandum from the Presenting Officer who appeared before the First-tier Tribunal. She asserted that she had relied explicitly on **EV Philippines** and **Azimi-Moayed** in her submissions to the First-tier Tribunal Judge. Mr Uzoechina insisted this was not true. I informed the parties that there was no explicit reference to either authority in the judge's manuscript Record of Proceedings. There was also no reference to any other authorities. However, the submissions of the Presenting Officer reflected the ratio of **EV Philippines.**

18. After protracted argument on a number of related issues, I gave my ruling. I found that there was an error of law such that the decision should be set aside and re-made. I gave my reasons for so finding in short form, and my extended reasons are set out below.

Reasons for Finding an Error of Law

The developing jurisprudence on the significance of seven years' residence as a child

19. Prior to the introduction of the new Rules, the significance of seven years' residence was that under the child policy concession known as DP5/96 the Secretary of State used to grant discretionary leave to families with an otherwise irregular status where at least one child of the family had accrued seven years' residence. Although this policy was withdrawn in 2008, the President in **LD Zimbabwe** observed that seven years' residence on the part of a child was still significant, as prima facie after seven years' residence a child's best interest lay in him remaining in the host country.

20. However, these observations were made alongside the observation that the circumstances prevailing in the prospective country of return, Zimbabwe, were dire. When the Upper Tribunal considered again the seven year benchmark in **EA (Article 8 – best interests of child) [2011] UKUT 00315 (IAC)** (a panel consisting of the President and Senior Immigration Judge Jarvis) it was noted that the former policy DP5/96 made reference to other factors which had to be taken into account when considering whether to grant leave to remain under the policy:

    (a) the length of the parents' residence without leave;

    (b) whether removal has been delayed through protracted (and often repetitive) representations or by the parents going to ground;

    (c) the age of the children;

    (d) whether the children were conceived at a time when either of the parents had leave to remain;

(e) whether return to the parents' country of origin would cause extreme hardship for the children or put their health seriously at risk;

(f) whether either of the parents has a history of criminal behaviour or deception.

21. A useful summary of the learning on the best interests of children in the context of immigration is to be found the determination of **Azimi–Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**:

> 30. It is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:
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> (i) As a starting point in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
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> (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.
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> (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 reasons 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.
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> (iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than peers and are adaptable.
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> (v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic wellbeing of society amply justifies removal in such cases.

22. The following observations of the Court of Appeal in **JW (China) v Secretary of State for the Home Department [2013] EWCA Civ 1526** are also pertinent:

> 22. In my view the correct approach is very well summarised in the Upper Tribunal decision of **MK (Best interests of child) [2011] UKUT 00475 (IAC)**, where this was said at paragraphs 23 and 24 of the determination:
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> "…If, for example, all the factors weighing in the best interests of the child consideration point overwhelmingly in favour of the child and or relevant

> parents remaining in the UK, that is very likely to mean that very strong countervailing factors can outweigh it. If, at the other extreme, all the factors of relevance to the best interests of the child consideration (save for the child's and/or parents own claim that they want to remain) point overwhelmingly to the child's interest being best served by him returning with his parents to his country of origin ... then very little by way of countervailing considerations to do with immigration control etc. may be necessary in order for the conclusion to be drawn the decision appealed against was and is proportionate."

23. **EV (Philippines) v SSHD [2014] EWCA Civ 874** provides the most recent guidance from the senior courts on the approach to best interests and the question of reasonableness. Clarke LJ said:

> 34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.
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> 35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
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> 36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.
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> 37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

24. Lewison LJ said:

> 49. Second, as Christopher Clarke LJ points out, the evaluation of the best interests of children in immigration cases is problematic. In the real world, the appellant is almost always the parent who has no right to remain in the UK. The parent thus relies on the best interests of his or her children in order to piggyback on their rights. In the present case, as there is no doubt in many others, the Immigration Judge made two findings about the children's best interests:
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> (a) the best interests of the children are obviously to remain with their parents; [29] and
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> (b) it is in the best interests of the children that their education in the UK [is] not to be disrupted [53].
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> 50. What, if any, assumptions are to be made about the immigration status of the parent? If one takes the facts as they are in reality, then the first of the Immigration Judge's findings about the best interests of the children point towards removal. If, on the other hand, one assumes that the parent has the right to remain, then one is assuming the answer to the very question the Tribunal has to decide. Or is there is a middle ground, in which one has to assess the best interests of the children without regard to the immigration status of the parent?

25. The judge went on to analyse **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC** 4 in order to elicit an answer to this question. He reached the following conclusion:

> 58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis the facts are as they are in the real world. One parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

On the facts of **ZH** it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens. That was a long way from the facts of the case before them. No one in the family was a British citizen. None had the right to remain in the country. If the mother was removed, the father had no independent right to remain. With the parents removed, then it was entirely reasonable to expect the children to go with them:

> Although it is, of course a question of fact for the Tribunal, 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.

Jackson LJ agreed with both judgments.

26. The "hypothetical" approach sanctioned by Christopher Clarke LJ is in line with the guidance given by the Upper Tribunal in **MK (India)** which he cites with approval. In **MK**, the Upper Tribunal emphasised the need to conduct the initial best interest assessment without any immigration control overtones. These only came into play when the decision maker moved on to a wider proportionality assessment.

27. However, the "real world" approach is not unprecedented. In particular, it is reflected in the leading speech of Lord Hodge in **Zoumbas v Secretary of State [2013] UKSC 74**, where the Supreme Court dismissed an appeal against removal brought by a Congolese family comprising Mr and Mrs Zoumbas and two daughters, who had been born in the United Kingdom on 3 February 2007 and 14 April 2011 respectively. At paragraph [24] Lord Hodge said:

> 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 healthcare 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 healthcare 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 wellbeing.

28. The significance of this brief survey of the relevant law is that it illuminates the question of how the decision maker should go about the task of deciding whether an applicant meets the requirements of EX.1(a)(ii) or Rule 276ADE(1)(iv). The assessment of reasonableness is a holistic one, and the immigration status and history of the parents is a relevant consideration, following **EV (Philippines)**. The fact that there is a qualifying child, either because the child has accrued seven years residence in the UK or because the child is a British national, is not a trump card, as otherwise there would not be a requirement to go on to consider whether, nonetheless, it is reasonable to expect the child to leave the United Kingdom.

The relationship between s117B(6) and the Rules

29. In **AM (S117B) Malawi [2015] UKUT 260 (IAC)** the Tribunal held that the duty of the First-tier Tribunal was quite clear. The First-tier Tribunal was required to have regard to considerations listed in Section 117B. It had no discretion to leave any of those considerations out of account, if it was a consideration that was raised on the evidence before it. The Tribunal continued in paragraph [13]:

> There is also in our judgment no requirement that the FtT should pose and answer the same question more than once, simply as a matter of form. Thus since both paragraph 276ADE(1)(iv) of the Immigration Rules, and S117B(6), both raise the same question in

> relation to a particular child, of whether or not it would be reasonable to expect that child to leave the UK: it is a question that need only be answered once.

Disruption to education

30. The facts of **AM** were that AM had entered the United Kingdom in September 2006 as a student. His last grant of leave to remain had expired on 2 December 2012. In the meantime, his wife and eldest daughter were granted entry clearance to join him as dependants in January 2007, and a second child was then born to the couple in the UK on 3 April 2011. All the family were citizens of Malawi. As was held by the Upper Tribunal at paragraph [35], the eldest child was a qualifying child as defined by Section 117D(1) by virtue of entry to the UK in January 2007. It was not in dispute before the First-tier Tribunal that she had lived in the UK for a continuous period of seven years or more at the date of the appeal hearing, and as a result the First-tier Tribunal was required to consider her position by reference to Section 117B(6). There was also no dispute that the appellant as her father had a genuine and subsisting parental relationship with his eldest daughter, and thus the only issue was whether or not it would be reasonable to expect her to leave the UK. At paragraph [39] the Tribunal said:

> There was no reason to infer that any interruption of the education of the elder child upon return to Malawi would be any more significant than that faced by any child forced to move from one country to another by virtue of the careers of their parents. Nor should the difficulties of a move from one school to another become unduly exaggerated. It would be highly unusual for a child in the UK to complete the entirety of their education within one school. The trauma, or excitement, of a new school, new classmates and new teachers is an integral part of growing up. In too many appeals the FtT is presented with arguments whose basic premise is that to change a school is to submit a child to a cruel and unduly harsh experience.

31. The Tribunal went on to find that the judge was entitled to conclude, as she did, that there was every reason to suppose that both children would be able to access both primary and secondary education in Malawi. There was no evidential basis on which the judge could find either of them would be denied the opportunity of tertiary education, and the ability to access it if they attained the educational threshold requirements.

Failure to follow one of two alternative methodologies

32. As indicated by my earlier discussion of **EV Philippines**, the case discloses two alternative methodologies. One of them is the real world approach, where in a case such as this the reasonableness question must be framed as whether it is reasonable for the qualifying child to return to his or her country of origin with the parent who has no right to remain here. The other methodology is to undertake a conventional best interest assessment, with a view to establishing where on the spectrum the case for the child remaining here lies; and, having answered that question, to consider whether wider proportionality considerations make it disproportionate, and hence unreasonable, for the child to follow the parent without leave to the country of

origin. Whichever methodology is used, the result should be the same. As I informed the parties in my oral ruling, Judge O'Garro erred in law as she followed neither methodology.

33. Looking at the matter from a real world perspective, Judge O'Garro failed to acknowledge in her assessment of reasonableness that the qualifying children's mother had no right to be here, and that what was being proposed was the removal of the entire family unit to the country of which they were all nationals. It was against this background that the assessment of reasonableness needed to be conducted.

34. Turning to a conventional best interest assessment, the judge rightly placed in the scales the factors which militated in favour of the qualifying children remaining here. But she failed to take account of the considerations which went the other way. These included the fact that there were no significant obstacles to the reintegration of their mother, and hence no threat to the children's well-being in Nigeria; and prima facie it was in the best interests of all the children, including the qualifying children, to remain within the same family unit and to return with their mother who had no right to be here to the country of which they were all nationals. As the Tribunal said in **AM Malawi** at paragraph [13], "the mere presence of the children in the UK, and their academic success, was not a trump card which their parents could deploy to demand immigration status for the whole family".

35. There is a conflict of evidence as to whether the Presenting Officer specifically cited **EV Philippines**. It is not a conflict that I need to resolve, as the law always speaks. In any event, **EV Philippines** simply clarified the law. The decision of Judge O'Garro is clearly erroneous in law by reference to various earlier authorities, including the House of Lords' decision in **Zoumbas** and the well-known Presidential guidance given in **Azimi-Moayed**.

36. Moreover, as indicated to the parties during the hearing, the judge's manuscript Record of Proceedings shows that the Presenting Officer relied on the real world approach illuminated in **EV Philippines** in her closing submissions. She relied on the fact that none of the children were British nationals, and the whole family was present in the country illegally. Although the children were in education here, they could continue with their education in Nigeria. So it was reasonable for the qualifying children to return to Nigeria as part of a family unit. Judge O'Garro did not adequately engage with the Presenting Officer's submissions when giving her reasons as to why it was not reasonable for the qualifying children to leave the country.

37. The third ground advanced for opposing the appeal is that the conclusion of unreasonableness is supported by the unchallenged evidence of the claimant which is set out earlier in the decision.

38. As summarised by the judge in paragraphs [22] to [25], the evidence given by the claimant was that following a breakdown in her relationship with her former

husband, she did not leave the United Kingdom with him to return to Nigeria because she feared that her former husband's family would have subjected their daughter Jessica to female circumcision. She also said that she was subjected to domestic violence at the hands of her former husband due to her refusal to consent to his second marriage. Although they were now divorced, she said she would be vulnerable if she returned to live in Nigeria because according to her culture the children belonged to the husband; and if he knew that she had returned to Nigeria with the children he would find her and take the children away and this would pose a threat to her daughter Jessica's life. She also said that if she was returned to Nigeria she and her children would face destitution.

39. It is apparent from examination of the court file that, shortly before the scheduled hearing of the claimants' appeal against the decision under Article 8, Mr Uzoechina wrote to the Home Office on 6 December 2014 stating that his client's instructions were that the family of her ex-husband, including the ex-husband himself, were threatening to carry out circumcision of Jessica whenever she returned to Nigeria. In a subsequent letter to the First-tier Tribunal at Hatton Cross dated 17 December 2014, Mr Uzoechina said that his client had submitted a claim to the Secretary of State with regards to two issues: her fear of persecution/domestic violence and fear of having her daughter circumcised. It was his view that the issues raised in these claims were such that they needed to be considered first by the Secretary of State, and any adverse decision on the claims would attract a separate right of appeal. So it would be contentious for the Tribunal to decide on the issues without affording the Secretary of State opportunity to conduct an investigation into the claims and to reach a decision on the facts (rejected or otherwise). In the light of the above, he submitted that the appeal could not be justly determined without full consideration of the new claims and consequentially he was requesting an adjournment.

40. The adjournment request was refused, and it does not appear that a claim for international protection was pursued at the hearing. There is no mention of such a claim in the judge's manuscript Record of Proceedings, as well as there being no mention of it at all in her written decision. It is also not mentioned in the skeleton argument which Mr Uzoechina placed before the First-tier Tribunal on 23 December 2014. Finally, there has been no cross appeal from the claimant asserting that the judge has erred in law in failing to make findings on an international protection claim, and specifically on a claim that she has a well-founded fear of persecution at the hands of her ex-husband, or that her daughter Jessica was being threatened with FGM if she returned to Nigeria. Accordingly, I conclude that the judge was not asked to consider an international protection claim, which in any event ought to have been pursued by the claimant presenting herself at the Asylum Screening Unit in Croydon.

41. The evidence which the claimant gave was relevant to the question of whether she faced very significant obstacles to her reintegration if she was returned with her children to Nigeria. But the judge found against her on this issue, and so by necessary implication the judge rejected the evidence of the claimant that she or her children would be at risk of harm on return, whether at the hands of her ex-

husband's family or on account of them facing destitution. At all events, just as there is no cross appeal against the absence of a decision on the international protection claim, there is also no cross appeal against the judge's finding that the claimant retains some solid social ties in Nigeria which will assist her in reintegration, and that there are not very significant obstacles to her re-integration (including economic, familial or cultural obstacles).

The Re-Making of the Decision

42. Following my error of law ruling, I discussed with the parties how the decision should be re-made. In light of the procedural history, I informed the parties that I was not going to entertain an international protection claim which, if it was going to be pursued, needed to be presented to the Asylum Screening Interview Unit in the normal way and examined by the Home Office as primary decision maker. With regard to the Article 8 claim, Mr Uzoechina confirmed that he did not wish to adduce any further oral evidence. Accordingly, I re-make the decision under the rules and/or Article 8 on the basis that the primary findings of fact made by the First-tier Tribunal stand unchallenged and are thus preserved.

43. The claimant has not established an independent right to remain either under the Rules or on Article 8 grounds outside the Rules. She can only resist removal if she can piggyback on the private life claims of her two qualifying children.

44. The question arising under Rule 276ADE is the same question as arises under Section 117B(6), and it need only be answered once. For the purposes of answering it, I will weigh in the balance the best interests for and against the children returning with their mother to their country of nationality. The factors militating against the qualifying children returning to Nigeria are identified by Judge O'Garro, and I adopt them. The best interest considerations in favour of the children accompanying their mother and younger sibling to Nigeria are that Nigeria is the country of their nationality, and their mother can legally work there to support them. They would also have the benefit of enjoying family reunion with relatives on their mother's side, and they would be able to continue their education, albeit at a different school and with a different set of teachers and fellow pupils. Another advantage is that they will be immersed in the social and cultural milieu from which both their parents spring, and they will be able to enjoy to the full the benefits of their Nigerian citizenship. Accompanying their mother to Nigeria will not be detrimental to the children's well-being, and the consequential preservation of the integrity of the family unit and other associated advantages will enhance their well-being.

45. Both qualifying children have strong private life claims as they have accrued over seven years' residence - from the age of four, in Daniel's case, and from the age of eight, in Jessica's case. Nonetheless, for the reasons given above, I consider that overall their best interests lie in them returning with their mother and younger sibling to the country of which they are all nationals. Even if I am wrong about that, the scales are only narrowly tipped in favour of the qualifying children remaining here, and so the considerations arising on a wider proportionality assessment do not

have to be very cogent to render their removal with the rest of the family proportionate, and hence reasonable.

46. As set out in the decision letter, their mother is a significant immigration offender. The children are of course blameless, but they have no independent right to live here as they are not British nationals. They are not financially independent, and they do not have a right to be educated in the UK at the tax payer's expense.

47. Accordingly, I find that the removal of the entire family is proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls. By the same token, it is reasonable to expect the two elder children to leave the United Kingdom with their mother and younger sibling, and therefore the two elder children do not qualify for leave to remain under Rule 276ADE (1)(iv).

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: these appeals against administrative removal on Rule 276ADE and/or Article 8 grounds are dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson

TO THE RESPONDENT
FEE AWARD

I have dismissed these appeals and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Monson