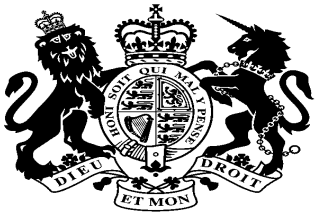

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/49366/2013
IA/49367/2013
IA/49409/2013
IA/49410/2013
IA/49411/2013

THE IMMIGRATION ACTS

Heard at Stoke	**Determination Promulgated**
on 22nd December 2014	**On 7th January 2015**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHUKWUNONYE EZEAH
GRACE NKECHINYERE EZEAH
ODIKACHI FAVOUR EZEAH
EZEZIMAKO WISDOM EZEAH
NOAH AKUKARIA BEKEE EZEAH
(Anonymity order not made)

Respondents

Representation:

For the Appellant: Miss Johnstone – Senior Home Office Presenting Officer
For the Respondent: Mr S Khan of SMK Solicitors.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination First-tier Tribunal Judge Tully promulgated on 7 July 2014, following a hearing at Stoke, in which the Judge dismissed the appeals of this family unit under the

Immigration Rules but allowed them on human rights grounds. The reference to 'Appellant(s) and Respondent' shall be to the status of the parties before the First-tier Tribunal.

2. The Appellants are a family unit composed of a father born on 18th February 1966, his wife born on 22nd February 1972 and three minor children aged 15, 11, and 4 at the date of the hearing before the First-tier Tribunal.

3. The immigration history shows that the First Appellant entered the United Kingdom lawfully as a student in September 2005. Such leave was extended to November 2010 followed by a period of leave as a Tier 2 (General) Migrant to 7 October 2013. The Second Appellant entered the United Kingdom as a dependent spouse with the Third and Fourth Appellants in February 2006. The Fifth Appellant was born in the United Kingdom in April 2010. All are citizens of Nigeria.

4. An application was made for leave to remain in the United Kingdom on the basis of family and private life under either the Immigration Rules, Appendix FM, or outside the Rules under Article 8 ECHR. This application was rejected by the Secretary of State leading to the appeal before Judge Tully.

5. The findings of fact and credibility are to be found between paragraphs 18 to 23 of the determination. It is noted that very little of the evidence concerning the Appellant's circumstances was in dispute although a number of elements of the Appellants' cases were rejected and it found the First Appellant in particular had sought to exaggerate his case to enhance the claim which adversely affected his general credibility. The Judge specifically rejected the contention that the minor appellants will be prevented from being educated or that they will be adversely affected due to their lack of Igbo, as it was found they could attend an English speaking school as the two older children had previously whilst in Nigeria. The Judge also rejected the assertion the First Appellant and his wife will have difficulty securing employment, finding that they will be well placed to obtain employment if they returned. The First Appellant's reference to the dangers of living in Nigeria was rejected and it found that neither he nor his family will face persecution on return and that, in any event, he not made an asylum claim. There was no evidence to suggest the relationship formed with relatives in the United Kingdom amounted to family life in the context of Article 8.

6. In relation to the appeal under the Immigration Rules: the Judge noted that the Appellants are in the United Kingdom legally, had made a valid application and that there was no suggestion they did not meet the suitability requirements when applying R-LTRP. It was found, however, that for these provisions to apply the Appellants had to show they met all the eligibility requirements to be found in E-LTRP or alternatively paragraphs 1.2 -1.12 and 2.1 and paragraph

EX.1. A key requirement in 1.2 is the requirement for the First and Second Appellants to show that their partner is either a British citizen, present and settled, or a person with asylum or humanitarian protection, which applies to neither of the adult appellants. The inability of the First and Second Appellants to satisfy the eligibility requirements prevents them from being able to benefit from paragraph EX.1.

7. Paragraph 276 ADE relating to private life claims is not be met and the three minor appellants fail under Appendix FM as the applications made by their parents did not succeed.

8. The Judge correctly found that the Appellants' could not meet the requirements of the Immigration Rules and proceeded to consider the matter outside the Rules in relation to which a number of findings were made which can be summarised as follows:

   i. In this matter the appellant's cannot benefit from Appendix FM because they are a family unit all of whom are here temporarily [31]

   ii. The parties in the case are in a genuine relationship living together as a couple and a family unit. All five appellants enjoy family life together in the United Kingdom although did not enjoy family life with other family members in the United Kingdom [34].

   iii. The family enjoyed private life in the United Kingdom. The question in the appeal is one of proportionality [34].

   iv. The first appellant has been in United Kingdom since 2005, appellants 2, 3 and 4 since 2006. They have been law abiding and have not overstayed. They have employment that they would be required to leave if removed. Although employment is available in Nigeria they may face some problems in their working lives whilst they re-establish themselves [35].

   v. The family will potentially lose contact with friends in the UK although the appellants have always been here on a temporary basis and any friendships they have formed were made at a time when they did not have leave to stay on a permanent basis and that they might have to leave if they had no basis on which to extend their stay [36].

   vi. Appellants 1-4 were born in Nigeria. All are Nigerian citizens. The first and second appellants have maintained ties and they have parents and siblings living in Nigeria who would be supportive if they returned. Although removal mean the loss of society from

extended family in the United Kingdom the family as a whole would benefit from living near grandparents who remain in Nigeria [37].

vii. In assessing what is in the best interests of children it is generally accepted that the best interests of the children are to stay within an established family unit which would not be affected if the family were returned as a group to Nigeria [39].

viii. The fourth appellant came to the United Kingdom when he was three years old and has lived here for over eight years of his life. He has little recollection of living in Nigeria. He is, however, young enough to adapt with the support of his family. He can be educated in a British speaking school and his lack of Igbo language will not be a barrier to education. He is likely to adapt particularly given that he can undertake his education in English. In the first appellant's own words, having a good understanding of English is important to success in Nigeria [40].

ix. The primary concern is the impact of removal on the third appellant. She was seven years of age when she came to the United Kingdom and whilst is likely to have a better recollection of her childhood in Nigeria, has spent nearly 8 years of her life in the UK during which time she has studied and is likely to have formed deeper friendships and associations than the younger children [41].

x. The third appellant is partway through her GCSEs. Removal at this time would be likely to have a considerable impact on her. Even if allowed to remain for a short period to complete examinations she would be restarting school in Nigeria at a very advanced stage of her education. It will be considerably harder for her to adapt in these circumstances than the younger children. She could be educated in English and no doubt this will be of assistance to her [42].

xi. The length of stay relevant for paragraph EX.1 is seven years. Although this provision does not apply to the third appellant she has spent eight years in the United Kingdom at a critical time when she was forming her personality and social links. It would be unfair to use a higher starting point when assessment of the reasonableness of return in her case than that envisaged in the Rules. Although the parents knew they might have to return this was not the third appellant's choice, it is not her fault she is in this position [43].

xii. The role of the Human Rights Act is not to fill a gap where the appellant was not able to meet the Immigration Rules for whatever reason. There is a strong public interest argument in enforcing a fair

> and transparent immigration policy. The Judge was persuaded that the impact on the third appellant is such that it would be unreasonable to expect her to return to Nigeria at this stage of her education and life. Given that her family had been law abiding and not breached the Immigration Rules, that they are in employment and the other factors as found, the decision to refuse leave was found not be a proportionate breach to the right to private life for the appellants [44].

9. The Secretary of State was granted permission to appeal on 25th July 2014 on the basis it was said to be arguable that the Judge had failed to set out the exceptional circumstances justifying her decision and that in considering the best interests of the children had arguably erred in law in placing too great an emphasis on their education and personal ties.

Discussion

10. Having heard detailed submissions from the advocates the Upper Tribunal found that the Judge had made a legal error although there was as issue as to whether that error was material. I find it is and substitute a decision to dismiss the appeal. I now give my reasons.

11. The finding the Appellants are unable to succeed under the Immigration Rules is not the subject of a cross-appeal and shall therefore stand. It is, in any event, legally correct.

12. The Judges decision is based upon a reliance on E-A (Article 8 - best interests of child) Nigeria [2011] UKUT 00315 which was decided prior to the amendments to the Immigration Rules incorporating the Secretary of State's view in relation to how Article 8 issues should be assessed and later more relevant decision of the Upper Tribunal and Senior Courts. In July 2012 new Immigration Rules were brought into force which were endorsed by Parliament to give them democratic approval. There has been much case law relating to this area. The question of how to proceed when Rules are not met has been in a state of some flux although the current thinking suggests that a full assessment outside the Rules is required.

13. The traditional general starting point for assessing and Article 8 ECHR claim is the judgment in Razgar [2004] UKHL 27 in which the House of Lords set out five steps to follow when determining Article 8 outside of the Rules:

    (i) Does family life, private life, home or correspondence exist within the meaning of Article 8

    (ii) If so, has or will the right to respect for this been interfered with.

(iii) If so, is the interference in accordance with the law.

(iv) If so, is the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

14. Earlier post July 2012 case law, even if indicating there would be no change in approach, supports the argument that the weight to be attached to immigration control when the Rules were not met has increased. A number of recent cases have continued to provide guidance, such as Ahmed v Secretary of State for the Home Department [2014] EWHC 300 (Admin) in which the appellant entered as a spouse but then overstayed. He did not have a recognised ESOL Skills for Life course. Mr Justice Green held that application of the rules and guidance ordinarily meant that Article 8 considerations had been catered for: R (on the application of Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) applied. It was found important to avoid a tick box mentality when applying the exceptional circumstances policy. After working through the analysis required, it was essential to stand back and formulate a view on whether overall there might be a good arguable case of disproportionality if leave was not granted. In the instant case, no good arguable grounds were advanced particularly as it was found that family life could continue in Pakistan and they were no British citizen children.

15. In Meera Muhiadeen Haleemudeen [2014] EWCA Civ 558 Lord Justice Beatson confirmed that the First-tier Tribunal Judge who allowed the appeal erred in his approach to Article 8 because he did not consider the case for remaining in the United Kingdom on the basis of his private and family life against the Secretary of State's policy as contained in Appendix FM and Rule 276ADE of the Immigration Rules. In order for leave to remain to be granted outside of the provisions of the Immigration Rules, there needed to be compelling or exceptional circumstances not sufficiently recognised under the new rules that outweighed the public interest in deportation. In the instant case the First-tier Tribunal gave no explanation of why the case was compelling or exceptional. It identified no particular features which justified the consideration of proportionality outside the rules. The declaration that the Immigration Rules worked harshly against the Claimant did not suffice. These new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been. The new Rules require stronger bonds with the United Kingdom before leave will be given under them. The features of the

policy contained in the Rules include the requirements of twenty year residence, that the applicant's partner be a British citizen in the United Kingdom, settled here, or here with leave as a refugee or humanitarian protection, and that where the basis of the application rests on the applicant's children that they have been residents for seven years. Lord Justice Beatson also confirmed it necessary to find "compelling circumstances" for going outside the Rules. He confirmed that "the passages from the judgments in the cases of Nagre and MF (Nigeria) appear to give the Rules greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights". He did not consider that it is necessary to use the terms "exceptional" or "compelling" to describe the circumstances, and it will suffice if that can be said to be the substance of the tribunal's decision.

16. In MM(Lebanon) and others [2014] EWCA Civ 985 it was suggested that where a particular set of the immigration rules are not a complete code, then the issue of proportionality under Article 8 will be more at large. In this respect in R (on the application of Ganesabalan [2014] EWHC 2712 (Admin) it was held that unlike other Rules which have a built-in discretion based on exceptional circumstances, Appendix FM and Rule 276ADE are not a "complete code" so far as Article 8 compatibility is concerned because Appendix FM and Rule 276ADE have no equivalent "exceptional circumstances" provision.

17. In R (on the application of Ganesabalan it was held that:

(i) Unlike other Rules which have a built-in discretion based on exceptional circumstances, Appendix FM and Rule 276ADE are not a "complete code" so far as Article 8 compatibility is concerned. Appendix FM and Rule 276ADE have no equivalent "exceptional circumstances" provision. "Plainly", as was held in Amin at paragraph 26, they are not "exhaustive"; but there is "always a residual discretion" (see paragraph 42). As the Court of Appeal explained in MM (Lebanon) (paragraph 134): " ... if the relevant group of [Immigration Rules] is not ... a 'complete code' then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law". The Immigration Rules are the important first stage and the focus of Article 8 assessments. Indeed it will be an error of law not to address Article 8 by reference to the Rules. The position is explained by the Court of Appeal in Halleemudeen at paragraphs 40 to 42, 47 and 51.

(ii) The Immigration Rules operate alongside important guidance which is itself part of the relevant overall code and which guidance recognises the discretion outside the Rules and the duty on the SSHD to consider exercising that discretion in the individual case. So far as this is concerned, the relevant guidance for the purposes of this case was in the IDIs December "Family Members Under the Immigration Rules" (December

2012) at paragraph 3.2.7d headed "Exceptional circumstances". This states 'Exceptional' does not mean 'unusual' or 'unique'. Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional just because the criteria set out in EX.1. of Appendix FM have been missed by a small margin. Instead, exceptional' means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely. In determining whether there are exceptional circumstances, the decision maker must consider all relevant factors. The guidance describes in mandatory terms a duty to consider all relevant factors in order to make a determination as to whether there are exceptional circumstances. That follows from the phrase "in determining whether there are exceptional circumstances, the decision maker must consider all relevant factors". So far as exceptional circumstances are concerned, the guidance makes clear that it is describing "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". The court held that it follows from the factual premise in this case and the analysis of the law that there was an error of law because the decision letter and notice contained no indication or reasoning which demonstrates that the SSHD had considered the exercise of discretion or the question of exceptional circumstances or the question of proportionality. In order to be a lawful decision the SSHD was required to address her mind to the question of the discretion and was required in her reasons to demonstrate that she had done so and what conclusion she had reached.

18. In R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) it was held that there is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin**)**, Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.

19. The 'exceptionality' requirement referred to in cases such as Gulshan is also reflected in some ECHR decisions. In Jeunesse v the Netherlands Application 12738/10 the ECtHR said where confronted with a fait accompli the removal of the non-national family member by the authorities would be incompatible with Article 8 only in exceptional circumstances. The Court must thus examine whether in the applicant's case there are any exceptional circumstances which warrant a finding that the Netherlands authorities failed to strike a fair balance in denying the applicant residence in the Netherlands.

20. The Judge clearly accepts that the adult Appellant's cases in isolation, and those of the Fourth and Fifth Appellants, satisfy neither the Immigration Rules nor give rise to circumstances that make the decision disproportionate. The Judge's focus is upon the Third Appellant and makes findings relating to her time in the United Kingdom, educational activities, and impact of removal.

21. In E-A(Article 8 - best interests of child) the Tribunal held that:

(i) The correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Where it is in the best interests of a child to live with and be brought up by his or her parents, then the child's removal with his parents does not involve any separation of family life.

(ii) 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 is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case.

(iii) 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.

(iv) Those who have their families with them during a period of study in the UK must do so in the light of the expectation of return.

(v) The Supreme Court in **ZH(Tanzania)[2011] UKSC 4** was not ruling that the ability of a young child to readily adapt to life in a new country was an irrelevant factor, rather that the adaptability of the

child in each case must be assessed and is not a conclusive consideration on its own.

22. The finding that it is necessary for the adaptability of the child to be properly assessed does not appear on the facts to have been adequately considered by the Judge in the determination under challenge.

23. The decision of the Judge is based upon the extent of the Third Appellant's integration into the United Kingdom and her desire to continue with her education in this country which can be inferred from the Judge's concerns relating to the ability of the child to maximise her potential in this respect elsewhere. Before the Upper Tribunal the First Appellant confirmed that his daughter had in fact nearly completed her GCSE examinations at the time of the appeal hearing, her last examination being taken in June/July 2014. The finding in paragraph 42 of the determination that the Third Appellant was "partway through her GCSEs" is therefore somewhat misleading as the Third Appellant was fact at the conclusion of her GCSE studies and examinations and at the point of a natural break in her education. The reference to a period being allowed to enable her to complete examinations indicates this must be an issue of which the Judge was aware.

24. The First Appellant also stated that his daughter had commenced her A-level studies and wished to go on to university and qualified as a doctor. The Judge indicates that it would be considerably harder for the Third Appellant to adapt than for the younger children, although also accepts she could be educated in English in Nigeria. The First Appellant indicated that for a person to qualify as a doctor in Nigeria it is important they are able to speak Igbo but this statement is not corroborated by any country information and it was found the First Appellant exaggerated his evidence in an attempt to enhance the claim which adversely affected his credibility. Even if there is a requirement to speak both English and Igbo the Third Appellant lived in Nigeria for a number of years and if she is capable of achieving the required academic levels to qualify as a doctor, it has not been shown she is unable to learn this language. It has also not been shown on the evidence that having to spend time learning the language, even if this puts her back in her studies, and while she completed the Nigerian equivalent of A-levels would result in consequences detrimental to her well-being.

25. Miss Johnstone also referred to the assessment of the best interest of the children by reference to the case of EV (Philippines) [2014] EWCA Civ 874. At paragraphs 36 and 37 of their judgment the Court found:

> 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.
>
> 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.

26. In this appeal the children are not British and have no right to remain in the United Kingdom. The basis of their status is temporary with no legitimate expectation that permanent leave will be granted. The children have been educated at the public expense during their time here but there is no obligation upon the United Kingdom to continue to fund or provide future education. It has not been shown on the available material presented to the First-tier Tribunal that the Third Appellant will be unable to reach her potential in terms of her education in Nigeria. The evidence does not support a finding that it was overwhelmingly not in the Third Appellant's best interests to return with the rest of her family to Nigeria.

27. The Judge at paragraph 43 also refers to EX.1. claiming this provision applies when an individual has seven years residence in the United Kingdom which the Judge opines is the benchmark level of assessment. As the Third Appellant had been in the United Kingdom for eight years it was found to be unfair to use a higher starting point for the assessment of the reasonableness of return than that envisaged by the Rules. If this is the case it is incumbent upon the Judge to accurately record the specific provisions of EX.1 which are:

> EX.1. This paragraph applies if
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
> (bb) is in the UK;
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and
>
> (ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

28. The assessment cannot be made based upon time alone in the United Kingdom as this provision is now enshrined within the Rules in paragraph 276ADE, requiring 20 years residence. The loss of connections with the individual's home state is a factor also included in the Rules at 296 ADE (vi). EX.1 requires an assessment of both time in the UK, which must be continuously for at least the 7 years immediately preceding the date of application, and a proper assessment of whether it would not be reasonable to expect the child to leave the UK. This requires a properly conducted proportionality assessment to be undertaken.

29. Miss Johnstone also referred to the case of Zoumbas v SSHD [2013] UKSC 74 which reviewed earlier authorities and confirmed, inter alia, that (1) the best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR; (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration; (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;….

30. The finding of the Supreme Court in paragraph 24 is as follows:

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."

31. It was therefore necessary for the Judge not only to properly assess the best interests but then to weight them as part of the overall proportionality assessment as illustrated by the case of EV (Philippines). The Judge recognises in paragraph 44 that there is a strong public interest argument for having a transparent immigration policy but then appears to discount this by stating that it was unreasonable to expect the Third Appellant to return to Nigeria at that stage of her education and life. When assessing whether the decision is proportionate a Judge is required to balance all parties competing interests. The Third Appellant was unable to meet Appendix FM which sets out the requirements to be met and reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others. It also takes into account the need to safeguard and promote the welfare of children in the United Kingdom.

32. It is also important to set out the weight to be given to the basic principles of Article 8 which can often be overlooked and which were recently repeated by the European Court of Human Rights in the case of BIAO v. DENMARK - 38590/10 - Chamber Judgment [2014] ECHR 304 (25 March 2014) in which it was stated:

> 52. The Court notes that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be a positive obligation inherent in effective "respect" for private and family life (see, for example, *Söderman v. Sweden* [GC], no. 5786/08, § 78, 12 November 2013). In the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation (see, *inter alia*, *Osman v. Denmark*, no. 38058/09, § 53, 14 June 2011). The present case concerns the refusal to grant the second applicant family reunion in Denmark. Therefore, this case is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation (*Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 38, ECHR 2006-I).
>
> 53. The Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, § 67, Series A no. 94, *Boujlifa v. France*, judgment of 21 October 1997, § 42, Reports *of Judgments and Decisions* 1997-VI). Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which

> concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see, for example, *Butt v. Norway*, no. 47017/09, § 70, 4 December 2012; *Antwi and Others v. Norway*, no. 26940/10, §§ 88-89, 14 February 2012; *Nunez v. Norway*, no. 55597/09, §§ 66-70, 28 June 2011; *Darren Omoregie and Others v. Norway*, no. 265/07, § 64, 31 July 2008; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cited above, § 39 and § 43, ECHR 2006-I; *Priya v. Denmark* (dec.), 13549/03, 6 July 2006 and *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Rodrigues da Silva and Hoogkamer*, cited above; *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999; *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious (see *Jerry Olajide Sarumi v. the United Kingdom* (dec.), no. 43279/98, 26 January 1999 and *Andrey Sheabashov v. Latvia* (dec.), no. 50065/99, 22 May 1999). Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances (see *Abdulaziz, Cabales and Balkandali*, cited above, § 68; *Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others*, cited above; and *Rodrigues da Silva and Hoogkamer*, cited above).

33. In assessing the approach taken by the Judge the key question to concentrate on is whether the Judge struck a fair balance between the competing interests of the individual and of the community as a whole. I find for the reasons set out above and an inadequate assessment of the competing interests in the determination by refernce to the later case law, that it cannot be said in this instance that the Judge has undertaken a properly balanced proportionality exercise .

34. I set the determination aside and proceed to remake the decision based upon the evidence that was available to the First-tier Tribunal and in light of an additional factor of the need to consider the statutory provisions now incorporated in 2002 Act which I have reffered above. This respect Mr Khan in his submissions refers to section 117 and the changes to the Immigration Rules. These provisions are to be taken into account in all decisions made after 28 July 2014.

35. A case involving similar issues to that this appeal is R(on the application of Osanwemwenze) v SSHD [2014] EWHC 1563 which, whilst not specifically

concerned with section 117B, has some relevance in terms of the reasonableness of a child leaving the UK. In this case, the claimant's 14-year-old stepson from Nigeria had been in the United Kingdom for more than 7 years and had leave to remain in his own right. It was held that this was an important but not an overriding consideration and it was reasonable to expect the claimant's family including the stepson to relocate to Nigeria. The parents had experienced life there into adulthood and would be able to provide for the children and help them to reintegrate.

36. The statutory provisions provide:

"PART 5AArticle 8 of the ECHR: public interest considerations

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

37. The Tribunal must, in particular, have regard (a) in all cases, to the considerations listed in section 117B. Subsection (2) provides that "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2). Section 117A(2) is mandatory. As the public interest provisions are contained in primary legislation they override existing case law. Section 117A(3) confirms that the Tribunal is required to carry out a balancing exercise. In other words, the Tribunal cannot just rely on the listed public interest factors as a basis for rejecting a claim but must carry out a balancing exercise where a person's circumstances engage article 8(1) to decide whether the proposed interference is proportionate in all the circumstances.

38. In this appeal all Appellants are able to speak English, and it is not suggested they will be a burden to taxpayers or will not be able to integrate into society. It is also the case, however, that they seek to rely upon private life established at a time when it is arguable their immigration status is precarious. It must be the case that unless a person has permission to remain in the United Kingdom by way of a grant of settled status or leave to remain that their status is precarious,

i.e. there is no guarantee they will be permitted to remain. In this respect little weight can be given to the private life this family unit rely upon.

39. Mr Khan submits this is a law abiding family but in Nasim and others (Article 8) [2014] UKUT 25 (IAC) it was held that a person's human rights are not enhanced by not committing criminal offences or not relying on public funds. The only significance of such matters in cases concerning proposed or hypothetical removal from the United Kingdom is to preclude the Secretary of State from pointing to any public interest justifying removal, over and above the basic importance of maintaining a firm and coherent system of immigration control.

40. It has not been established that this is a case in which family life will be lost or in which the Third Appellant will be unable to continue her education in her home state even allowing for the need to make certain adjustments. The fact there may be differences in that education when compared to that available in the United Kingdom, or that such education may not be free, is not determinative. This family could have had no assurance of a guaranteed permanent settlement. It has not been shown that the child will be unable to reach her full potential but has been shown, based upon the changes to the Immigration Rules, statutory provisions and case law referred to above, that Article 8 does not give individuals the right to choose where they wish to live and nor is there any obligation upon the United Kingdom to educate a person in a situation such as that of the Third Appellant who is not settled and has no lawful right to remain.

41. If the third Appellant wishes to study in the United Kingdom there is always an option available to her upon return, and provided she obtains the required grades, of making an application to allow her to re-enter as a student. This places the Third Appellant in the same situation as any other non-British national seeking to study at a UK educational institution. That is, however a matter for her in the future. In relation to the present, there is no right established for her and all other family members to remain. The Secretary of State has proved/established that it is a proportionate decision. Removal and re-adjustment has not been shown to result in consequences of sufficient gravity to make the decision disproportionate to the legitimate aim relied upon.

42. The findings that the First, Second, Fourth and Fifth Appellant's have no basis to remain in their own right is a preserved finding. It has not been established that it is disproportionate to remove the Third Appellant with her family and on that basis the appeals of all five appellants must be dismissed.

Decision

43. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. The appeals are dismissed.**

Anonymity.

44. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 1st January 2015