Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA028752015

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Decision & Reasons**
And at Field House	**Promulgated**
On 7 March and 13 May 2016	**On 24 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

D O
(ANONYMITY DIRECTION MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr A McVeety (07.03.16) and Mr S. Kandola (13.05.16), Senior Home Office Presenting Officers

For the Respondent/Claimant: Ms Patel, IAS Sheffield (07.03.16) and Mr Peter Blackwood, Counsel instructed by IAS Sheffield (13.05.16)

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Garbett sitting at Bennett House on 10

September 2015) allowing on Article 8 grounds her appeal against the decision of the Secretary of State to remove her under Section 10 of the Immigration and Asylum Act 1999, her asylum/human rights claim having been refused. Her husband and their children were dependants on her claim, but none of them appealed in their own right. The First-tier Tribunal Judge dismissed the claimant's asylum claim, and there is no cross-appeal against this decision. The First-tier Tribunal made an anonymity direction, and I consider that it is appropriate that the claimant and her family continue to be accorded anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 29 October 2015 Upper Tribunal Judge Joanna McWilliam granted the Secretary of State permission to appeal as in her view it was arguable that the judge had erred in relation to the assessment of reasonableness pursuant to Section 117B(6) of the 2002 Act. It was arguable that the judge did not properly consider reasonableness in the context of the wider public interest.

The Family's Material History

3. The appellant's family unit comprises herself, her partner F, and their three boys, all born in the United Kingdom. V was born [ ] 2006, M was born on [ ] 2008, and N was born on [ ] 2012. All members of the family are Nigerian citizens. The claimant entered the United Kingdom on a visit visa on 5 April 2004, and overstayed. Her partner F has at all material times been present in the country illegally (since 2005 – see below) as well as being a convicted criminal who is the subject of a deportation order.

4. On 15 May 2009 F applied for an EEA residence card based on an asserted marriage to a Czechoslovakian national.

5. On 7 January 2010 the claimant applied on behalf of herself and her children for discretionary leave to remain on private life grounds, she having resided in the United Kingdom for over four years. On 15 April 2010 the claimant was served with an IS15A notice as a person liable to removal from the United Kingdom as an overstayer.

6. F was arrested by the police on 3 November 2010, and following his arrest he too was served with an IS15A notice. In early 2011 F was convicted at Burnley Crown Court of seeking or obtaining leave to enter or remain in the UK by deception on 22 December 2008, and of knowingly/wilfully making a false declaration to procure the marriage/certificate/licence on the same day. He was sentenced to fifteen months' imprisonment on count one, and to six months' imprisonment on count two, to be served consecutively. So in total he received a sentence of 21 months' imprisonment.

7. On 5 February 2011 the claimant was cautioned by the police for battery of a 3-year-old child.

8. On 6 April 2011 the claimant submitted an application on behalf of herself and the two eldest children for further leave to remain in the UK. These applications were refused on 4 August 2011.

9. F was served with a liability for automatic deportation letter and questionnaire on 28 April 2011. The completed questionnaire stated that F had been in a relationship with the claimant since 2005, and that he was the father of her two children. He also confirmed that he had arrived in the United Kingdom on 2 February 2005 using a Nigerian passport in a different name. The surname was the same, but the first names were different.

10. F was served with an automatic deportation order decision letter and a signed deportation order on 31 August 2011. On 7 September 2011 F claimed asylum. The asylum application was refused on 11 October 2011. His appeal against the refusal of asylum and the deportation decision was dismissed on 18 January 2012. Permission to appeal to the Upper Tribunal was refused on two occasions, and his appeal rights became exhausted on 7 March 2012.

11. On 28 August 2012 the claimant attended the Asylum Screening Unit in Croydon, in order to claim asylum in her own right, with her partner and two children as dependants.

12. In a letter dated 5 February 2015 the Secretary of State gave her reasons for refusing to recognise the claimant as a refugee, as otherwise requiring international or human rights protection.

13. On the topic of the children's best interests, it was noted at paragraph 74 that the children spoke English which was one of the official languages of Nigeria. Her youngest son was 2 years old, and therefore he was still very young and completely dependent upon her and her partner. The two elder sons were at school and were firmly settled. But these children would be able to continue their education in Nigeria. Whilst it was acknowledged that the level of education available to her children might not be of equal standard to that available to them in the United Kingdom, it was clear from the objective information that education in Nigeria was accessible and free.

14. In the Section 55 consideration, there was copious citation from the case law of **E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC)**, **MK (Best interests of child) India [2011] UKUT 00475** and **EV (Philippines) and Others v Secretary of State for the Home Department [2014] EWCA Civ 874**.

15. It was a generally agreed principle that children should grow up within their family and their own cultural identity wherever possible. The

immigration status of the children was dependent upon the claimant's asylum claim and there was no evidence available to suggest that their family life could not continue on return to Nigeria. She, her partner and her three children would be removed to Nigeria together as a family unit, and so the children's social wellbeing would be protected within that family unit. As they would be returning to and living in Nigeria with their parents, it was considered they would be safe, supported and well cared for. She had not demonstrated there were any obstacles or difficulties that went beyond matters of choice or inconvenience to show why the children should not accompany her on her return to Nigeria. It was not accepted they were so integrated to life in the UK that they could not adapt to life in Nigeria.

16. The claimant had previously raised the Article 3 rights of her eldest child V because of his "severe autism" and the fact that he had been born with severe hypospadias. On 11 July 2011 a consultant paediatric urologist had written to the UK Border Agency stating that these conditions should not compromise his fitness to travel. On 15 July 2011 a Country of Origin Information Request was made regarding the availability of treatment for hypospadias and fistulas in Nigeria under request number 07/11-045. The response received on 2 August 2011 showed that treatment for these specific medical conditions was available in Nigeria.

The Grounds of Appeal to the First-tier Tribunal

17. In the grounds of appeal to the First-tier Tribunal, the claimant's representatives argued that the deportation of the family to Nigeria would breach the children's Article 8 rights. The two eldest children were aged 8 and 6. They were settled and in school. Although they were not British citizens, they were born in the UK, had never been to Nigeria, and had no ties there. Given their periods of residence in the UK and their ages, they would undergo great hardship in relocating to Nigeria, and it would not be in their best interests for them to be removed from the UK.

18. In a letter dated 22 May 2014, the claimant's solicitors confirmed that F was dependent on his wife's asylum and Article 8 claim. They referred to paragraph 399 of the Rules pertaining to the proposed deportation of a foreign criminal, and submitted that paragraph 399(a) applied because the eldest child V had now lived in the UK continuously for at least the seven years immediately preceding the date of the immigration decision and it would not be reasonable to expect the child to leave the UK, and there was no other family member who was able to care for the child in the UK.

The Decision of the First-tier Tribunal

19. At paragraph [33] of her decision, Judge Garbett said that the case turned on Article 8. At paragraph [34], she found that no issue had been taken with the claimant's evidence regarding her life and that of her family in the UK. Her three children were born here and had never visited Nigeria. The two older children attended school and had developed friendships.

The children only spoke English. V had health problems and had been issued with a final statement of special educational needs. He received one-to-one support at school. The claimant said that the education of V and M would be severely disrupted if they were to return to Nigeria.

20. At paragraph [35] the judge rejected the submission that there would be significant obstacles to the claimant's integration on return to Nigeria. The judge's reasoning was that she spent her life in Nigeria up until the age of 30. She spoke Yoruba, she was educated in Nigeria and she had worked in Nigeria. Although she had left Nigeria some eleven years ago, she was an educated and resourceful woman and could reintegrate. So she did not meet the requirements of Rule 276ADE(1)(vi).

21. The judge did not make a finding on the submission that V qualified for leave to remain under Rule 276ADE(1)(vi).

22. The judge went on to address an Article 8 claim outside the Rules, setting out at paragraph [41] Section 117B in its entirety. At paragraph [45] she cited **Zoumbas v SSHD [2013] UKSC 74**, and at paragraph [46] she said she was also guided by the Upper Tribunal decision of **Azimi-Moayed and others (Decisions affecting children; onward appeals) [2013] UKUT 00197**. The judge continued:

> "47. Assessing the best interests of the children is a broad notion requiring an assessment of diverse factors. It is in the best interests of the children to remain with their parents as a family unit. The respondent says this will be accommodated in their removal to Nigeria as a family. However there are other considerations. The appellant's children have resided in the United Kingdom since birth, and significantly V has lived here for nine years and M for six years. Both of these children attend school. V and M have formed ties outside the family unit, removal of which would impact their wellbeing. V receives a great deal of support from healthcare professionals for his learning difficulties and medical conditions. None of the children speak any language other than English and none of them have ever visited Nigeria. These children should not be blamed for their parents' conduct and poor immigration record.
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> 48. In conclusion, I find that, the appellant has a genuine and subsisting relationship with a qualifying child; it would not be reasonable to expect that child and the other children of the family to leave and it would be entirely contrary to the best interests of the children to have to leave this country. There is of course a public interest in the maintenance of immigration control and having considered the factors set out above I find that they render the appellant's removal disproportionate to the need for effective immigration control. For these reasons the appellant succeeds."

The Error of Law Hearing in Stoke

23. At the hearing before me to determine whether an error of law was made out, Ms Patel vigorously defended the judge's decision. The judge was

right to direct herself that the children should not be blamed for their parents' poor immigration record. She submitted that permission to appeal should not have been granted, citing **Treebhawon & Others (Section 117B (6)) [2015] UKUT 674 (IAC)** and **Greenwood (No. 2) (Para 398 considered) [2015] UKUT 629 (IAC)**.

Reasons for finding an Error of Law

24. **EV (Philippines) v SSHD [2014] EWCA 874** provides the most recent guidance from the senior courts on the interrelationship between the best interests of children and the question whether it is reasonable to expect a child to return to the country of his or her parent's country of origin. 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."

25. 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?"

26. The judge went on to analyse in **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:

> "60. 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.

The relationship between s117B(6) and the Rules – Treebhawon explained

27. 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."

28. At paragraph [23] of **Treebhawon**, a Presidential panel held that when a Tribunal is first considering an appellants' Article 8 claim by reference to the Immigration Rules, the purpose of the exercise is to decide whether relevant qualifying conditions are satisfied by the person concerned, and that the exercise is performed without reference to Part 5A (and hence Section 117B). The latter is engaged directly only where the decision making process reaches a stage of concluding the person does not satisfy the requirements of the Rules.

29. Part 5A does not apply to the exercise conducted under the Rules, following **Treebhawon**. But this is academic, as the domestic jurisprudence requires the decision-maker to assess relevant public interest considerations arising under Article 8(2) – such as 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" - before reaching a conclusion under Rule 276ADE as to whether it is reasonable to require a child who has accrued seven years' residence to leave the UK.

30. When Judge Garbett's approach is assessed against the guidance given by the Court of Appeal in **EV (Philippines)**, an error of law is clearly made out. The judge had a choice. She could either have followed the real world approach championed by Lewison LJ, or she could have followed the conventional hypothetical approach comprehensively set out by Clarke LJ (assessment of best interests for and against removal without immigration control overtones, followed by assessment of wider proportionality considerations). She did neither. Instead, she performed an inadequate best interests assessment, whereby she focused almost exclusively on the best interests which militated in favour of the children remaining here, and failed to engage with the case advanced in the refusal letter as to the respects in which the best interests of the children would be served by them returning with their parents to the country of their nationality. In particular, as submitted by Mr McVeety, the judge did not make any finding one way or the other on the availability of educational support and medical treatment for child V in Nigeria.

31. In addition, the judge's assessment of wider proportionality considerations was wholly inadequate. Earlier, the judge had directed herself that the parents had an abysmal immigration history. As highlighted by paragraph [37] of **EV (Philippines)**, this was a matter which the judge had to take into account, and to which she had to attach weight in fortifying the public interest in the family's removal. However, the judge misdirected herself in treating the public interest considerations in favour of the family's removal as being effectively neutralised by one of the best interests principles cited with approval by Lord Hodge at paragraph 10 of **Zoumbas v SSHD [2013] UKSC 74**:

> "(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

32. As Lord Hodge goes on to observe at paragraph [11], the principles he endorses in paragraph [10] arise from the United Kingdom's international obligations under the United Nations Convention on the rights of the child, and in particular Article 3.1 which provides that in all actions concerning children, the best interests of the child shall be a primary consideration.

33. What the judge appears to have misunderstood is that the "no blame principle" operates at the initial stage of assessing the child's best interests. It is an exclusionary principle which prevents the best interest assessment being contaminated by immigration control overtones. The assessment of the child's best interests takes place in an ideal world scenario, where hypothetically the children's status is not adversely affected by their parents' conduct. But when the decision-maker moves on, as he must, to consider wider proportionality considerations, the "no blame principle" ceases to bite.

34. This is illustrated by the Upper Tribunal's approach in **MK**, in particular the following passage in their decision at paragraph [62] which is cited at paragraph 73 of the refusal letter:

> "Considering matters in the round, whilst we accept the children are not to blame for their parents' conduct, we view the latter's poor immigration history as adding significant weight to the factors weighing against the family's claim to remain in the UK. Even had we accepted the judge's view that in the years since 25 August 2004 the parents and their children had become 'embedded' in the UK, we would still have attached very significant weight to the fact that on the given facts both parents sought to make their family life here, and to school their children here, in the full knowledge that their immigration status was precarious and that they had no legitimate expectation of being allowed to integrate. They are not British citizens nor have they ever been settled within the meaning of the Immigration Acts."

35. A further significant error in both the assessment of the child's best interests and also in the public interest assessment was the judge's failure to take into account the fact that the father, who shared parental responsibility for the children's care and upbringing, was a foreign criminal who had exhausted his appeal rights in respect of an order to deport him

to Nigeria as a foreign criminal. The significance of this was twofold. Firstly, it meant that the best interest assessment should have been asymmetric. The judge should have assessed the children's best interests on the basis that the only way in which the family could remain together was if the mother and the children followed the deported father to Nigeria. Alternatively, if the claimant was going to be permitted to mount a collateral attack on the deportation order, the judge had to assess the public interest by reference to the deportation Rules governing family life and/or by reference to Section 117D of the 2002 Act. As is apparent from the letter from the claimant's representatives which I have cited earlier in this decision, they recognised in 2014 that the claimant's appeal brought into play the public interest in removing a foreign criminal because they were putting forward the father as a dependant on the claimant's Article 8 claim.

36. I accept that the Secretary of State by way of appeal to the Upper Tribunal did not specifically raise the ramifications of the father's status as a foreign criminal, but the Upper Tribunal cannot ignore a **Robinson** obvious point. Moreover, if it is relevant to take into account the adverse immigration history of the parents in the wider proportionality assessment, *a fortiori* it must be necessary to take into account the fact that one of the parents is facing deportation as a foreign criminal. So the guidance given by the Court of Appeal in **EV (Philippines),** which is heavily relied upon in the application for permission to appeal to the Upper Tribunal, is sufficient to raise the issue of the father's status as a foreign criminal by necessary implication.

37. For the above reasons, the decision of the First-tier Tribunal is vitiated by a material error of law such that it should be set aside and remade.

Future Disposal

38. I do not consider that it is necessary or appropriate to remit this appeal to the First-tier Tribunal for a de novo hearing. Most of the facts bearing upon the assessment of the children's best interests, and the assessment of the public interest, are uncontroversial. The main issue in controversy is whether, and if so, to what extent, V returning with his family to Nigeria will be inimical to his best interests, taking into account his medical conditions and special educational needs. The resolution of this issue will turn on documentary evidence in two categories. Firstly, documentary evidence relating to the availability of treatment and support in Nigeria. Secondly, up-to-date evidence from professionals responsible for V's education and medical treatment in the UK about his condition and progress.

Directions for the Resumed Hearing

39. Both parties were given permission to serve additional evidence that was not before the First-tier Tribunal on the topic of V's best interests,

including the availability (or lack thereof) of suitable treatment and support in Nigeria.

The Resumed Hearing at Field House

40. For the purposes of the resumed hearing, the claimant's solicitors served two bundles of documents that had been compiled since the hearing in the First-tier Tribunal. They also served a letter dated 11 May 2016 from V's head teacher of the primary school which he attends in Derby.

Up to date evidence about V's special needs

41. In order to place the additional material in context, it is convenient to begin with the final statement of special educational needs which was issued on 23 July 2015. This was made by Derby City Council in accordance with Section 324 of the Education Act 1996 in respect of V who resided with other members of his family at an address in Derby. His home language was said to be English/Yoruba and his religion was given as Roman Catholic.

42. The background of V is that he was born prematurely and spent long periods in hospital when he was young as a result of health conditions associated with prematurity. He was late in meeting his development milestones and continued to be developmentally delayed. He and his family had moved to Derby from Manchester in 2012.

43. V was a boy with an endearing personality who interacted with staff socially. He enjoyed being part of his class, was a motivated learner and took pride in his work. His spatial ability was an area of considerable strength and he was good at measuring. V liked the television and computers. He enjoyed making things, such as jigsaws, and particularly enjoyed looking at books at school.

44. The views of his parents were that he found schoolwork difficult, but enjoyed the support he had to help him understand it and he liked school. They were concerned about V's development since he was born and they were worried about how he would get on in his life, including school and work. They would like him to get more involved in a social life.

45. V's views were that he was trying hard at his learning and was getting better and better. He said the best learning was making things. The only thing he found really difficult was times tables. He liked to meet new friends in his class and in playtime. Outside school, he liked football club and doing his maths homework.

46. V is assessed as having special educational needs in the areas of communication and educational attainment.

47. On the topic of his spatial, social and emotional development, V had made progress socially with his peers and was becoming more engagingly interactive, but his communication difficulties were a limiting factor in the

development of friendships. There were professional concerns that his learning difficulties could lead to emotional difficulties.

48. On the topic of motor and sensory skills, V fed himself independently, but depended on some adult support to get dressed as he can sometimes put his clothes on the wrong way round. He was independent in his toileting skills. V was generally fit and healthy. He had asthma for which he had inhalers, but this was not severe.

49. In summary, V's areas of special educational needs were:

- speech, language and communication skills;
- literacy, numeracy and non-verbal reasoning skills;
- social and emotional skills.

50. On 14 December 2015 Angeline Seymour, a degree qualified senior social worker who has worked as an approved social worker specialising in adult mental health as well as child and family work, completed a "social circumstances" report for the family, detailing the bonds, ties and dependency that they had in the UK and the result that their removal from the UK would have upon them. For this purpose, she had an interview with the family for two hours on 29 November 2015. The children V, M and N had been residing in NASS accommodation in Derby since 2012. Before moving to Derby, V and M had attended a primary school in Manchester. Since September 2013 the children had been attending a Catholic primary school in Derby. The youngest child had only been attending a nursery school in Derby since January 2015. V was currently in year 5 at the primary school. His parents informed Ms Seymour that before attending at school, he had found it difficult to mix with his peers and some aggression had been reported. They also explained his difficulties with learning to read, write and learn simple maths. Since transferring to the school and receiving one-to-one support, his parents had seen an improvement in all areas of his education. He continued to struggle to keep up with his peers, and the long term plan was for V to transfer to a special education school.

51. Having started in reception at the primary school, M was now in year 2. On speaking to the children, and having seen their recent school reports, it was clear to Ms Seymour they were well-established and connected to the British education system. Not only were they settled in their current school, they had made friends there and were well supported there. In her opinion, it would be inappropriate to disrupt these connections.

52. Throughout the interview, the mother presented as very upset and tearful. She found it difficult to cope when her husband was incarcerated, and she had been referred to the Community Mental Health Team for counselling. Her sleep pattern had been negatively affected by the stress of her family's immigration difficulties, leaving her with low mood, headaches and little motivation. The husband said that owing to his wife's current

presentation, he was supporting her to attend college and study in an attempt to lift her mood. He had also taken on a lot of the household chores.

53. Ms Seymour addressed the question of what the family could hope to return to in Nigeria. The parents informed her that they had no-one to return to in Nigeria. There was a local school where they both originated from, but the teachers there were regularly on strike. She was informed the family had no savings to pay for accommodation, and there was no access to social housing in Nigeria. This would leave the family homeless, which would present a significant risk to the children. As well as developmental delays, V was diagnosed with asthma for which he required treatment. If one cannot pay for treatment, one is simply turned away from hospitals. The parents were concerned that not only would this leave V without the specialist care and treatment that he required, all the children would be open to diseases such as malaria, typhoid and waterborne infections. There would also be no access to any specialist educational support in respect of V's needs, and that would probably leave V being excluded from any education. He would also be vulnerable to bullying and exploitation.

54. In her summary, Ms Seymour said that the circumstances the family would face if they were forced to relocate to Nigeria were not within her expertise to comment upon. On the basis of the situation as reported to her, any forced relocation would mean that the children would lose out in their ability to continue with their relationship with extended family and friends in the UK. She was of the view that permanent relocation of the family from the UK was likely to cause significant detriment to the children and also to the integrity of the family unit as a whole. If the situation was not resolved in a positive way, it would lead to deterioration in the physical and mental health of the mother, and more importantly to deterioration in the emotional wellbeing of the children.

55. In a letter dated 22 March 2016, Michelle Lowe, from the Special Educational Needs and Disability Information, Advice and Support Service, reported that she had been contacted by the claimant as she wanted support in identifying and obtaining a special school placement for her son V. V had attended mainstream primary school since he began compulsory schooling but had come to the point where he needed a more specialist setting to support his level of additional needs. The family had identified a special school and were going through a process with the local authority to obtain a placement for V from September 2016. She would continue to support them through this process for as long as necessary.

56. On 24 March 2016 the head teacher of the primary school attended by V and M said that specialist provision for V was now available for him in Derby. In Nigeria, V's parents would not get the financial support required to meet V's needs. The education available to him there would not contain the detailed specifics necessary for V to achieve. Children who

had such severe developmental delay were not treated with respect in Nigeria.

57. In a letter dated 11 May 2016, the head teacher reiterated that V was late in meeting his developmental milestones and was still developmentally delayed particularly in language. He presented with the behaviour of a younger child. V needed support to communicate and build relationships with children his own age. At present, his levels of attainment were within one year expectations in English, and also within one year expectations in maths. Previously V had been working at P scales. Throughout his time at his current school he had made slow progress towards the national curriculum targets. When he first came to the school, he had found it very difficult to communicate with others (adults and children). In the school's positive supportive and caring environment he had made small steps towards developing key skills such as reading and writing. Moving V from this country to an environment where he did not have specialist provision would damage and possibly erase any success that he had had so far. It had been reported that people with educational needs were treated very inappropriately in Nigeria. She strongly believed that removing V and his family would have a negative impact on his future development.

Oral evidence from the claimant

58. Mr Blackwood called the claimant as a witness, and she adopted as her evidence-in-chief a short witness statement signed by her on 27 April 2016. She wished to reaffirm that it would not be in V's best interests for him to leave the UK. Following a statement of special needs, the local authority was now obtaining a placement for V to attend a specialist school. His current setting at the mainstream school was not sufficient for his needs any longer. At a specialist school he would get specialist one-to-one teaching. Michelle Lowe had shown them three special needs schools, one in Derby, one in Burton upon Trent, and one in Long Eaton.

59. V was still being cared for by Dr Williams at the Royal Derby Hospital in relation to his hypospadias. He had been physically examined by Dr Williams in February 2016, and he had told them that he would like to see V for a check-up in a year's time.

60. V acted like a child under 5 rather than a boy of nearly 10. He got upset easily when he did not understand things. He was not happy he was not able to do the same things as other children of his age. She did not think his special needs would be taken care of in Nigeria. She thought he would be abandoned by the educational system. She would not be able to afford to pay any fees for him to attend a special school. She knew that children with special needs were treated as outcasts and sometimes seen as witches in Nigeria.

61. In answer to supplementary questions from Mr Blackwood, the claimant said she would make an application to register V as a British national in the coming months, as he is about to reach his 10th birthday. She was

asked what would happen in the event of her appeal being dismissed. Would some of them stay, while others left? She answered no, she wanted the family to stay together. If her appeal was allowed, she would prefer to live in Manchester rather than Derby as her husband's cousins lived in Manchester, and they were very helpful to her. But the choice of residence would also be dictated by the location of V's special needs school. At present, he was due to be at a special needs school in Derby, so she would need for V to be transferred to a special needs school in Manchester.

62. In cross-examination, Mr Kandola asked the claimant why V would have problems in Nigeria given that he had made some progress in a mainstream school here, such as learning to be able to write etc. The claimant answered that children with learning difficulties did not go to school in Nigeria. The claimant was asked whether V had been diagnosed with autism. She answered she did not know. Mr Blackwood confirmed that there had been no formal diagnosis of autism.

Closing submissions

63. In his closing submissions on behalf of the respondent, Mr Kandola submitted that the proposed removal of the entire family was proportionate, having regard to the appalling immigration history of the parents and also the father's criminality. All three children had been educated at the expense of the taxpayer, and there had been additional expenditure to the taxpayer in caring for V. The fact that the level of schooling and care available to V in Nigeria would not be as good or as comprehensive as that which he could access in the UK did not tip the scales in favour of the whole family being allowed to remain here.

64. In response to an enquiry from me, Mr Kandola checked his file and he established that the deportation orders against the claimant and the children had been marked invalid in 2014 because of the time which had elapsed since the deportation orders had been made against them.

65. In reply, Mr Blackwood referred me to his extensive skeleton argument, and submitted that the refusal decision was not in accordance with the law, citing **Mandalia v Secretary of State for the Home Department [2015] UKSC 59**; and that following **PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC)** the family could, and should, succeed under Rule 276ADE(1)(iv), even though both parents relied solely on Article 8 ECHR outside the Rules.

66. In oral submissions, Mr Blackwood accepted that the father's criminality was relevant in the proportionality assessment. However, he submitted that the public interest in the family's removal had been reduced on **EB (Kosovo)** grounds by the lengthy delay in deporting the father and/or by the decision of the Secretary of State in 2014 to cancel the deportation orders which had been served on the claimant and the children (although not cancelling the deportation order that had been served on the father).

This also meant, Mr Blackwood submitted, that the claimant and her children were not subject to deportation, and thus the claimant could claim the benefit of Section 117B(6).

Discussion and Findings on Re-making

67. As the rights of the children are at the forefront of this appeal, Mr Blackwood's submission as to the legality of the refusal decision is arguably academic. Nevertheless, it is convenient to address the issue as it sheds light on an important question which is whether V has a private life claim under the Rules as well as being a qualifying child under the statute.

68. In order to have a viable claim under Rule 276ADE(1) the requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that *at the date of application*, the applicant:

'(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK.'

As shown by Mr Blackwood's chronology at paragraph 14 of his skeleton argument, the last relevant application was the claimant's claim for asylum on 28 August 2012. It was the refusal of the claimant's asylum and associated human rights claims in February 2015 which triggered the Section 10 removal decisions against the claimant and the three children. At the time when the claimant made her asylum claim, V had not accrued seven years' residence in the UK. V accrued seven years' residence on 31 July 2013 while the asylum claim was under consideration. The representations made in 2014 did not constitute a new application, with the consequence that the Secretary of State came under an obligation to treat V as having impliedly made an application under Rule 276ADE(1)(iv) on the ground that he had now accrued over seven years' residence in the UK.

69. Mr Blackwood cites paragraph 276AO of the Rules which provides that for the purposes of paragraph 276ADE(1) the requirement to make a valid application will not apply when the Article 8 claim is raised:

'(i) as part of an asylum claim, or as part of a further submission in person after an asylum claim has been refused; ... or

(iii) in an appeal (subject to the consent of the Secretary of State where applicable).'

70. However, the claimant's representatives did not in terms make a human rights claim on V's behalf, relying either expressly or impliedly on Rule 276ADE(1)(iv). Instead, they submitted that the deportation of all members of the family (including the father) was not in accordance with the Immigration Rules relating to deportation, and in particular with reference to paragraph 399(a) under which it had to be established that:

(a) it would not be reasonable to expect V to leave the UK, and

(b) that there was no other family member who was able to care for V in the UK.

71. As V's father was not making a parallel application to revoke the deportation order made against him as a foreign criminal, I consider that it was open to the Secretary of State not to engage with the claimant's representatives on the territory of deportation, and equally not to treat the further representations as including a private life claim by V under Rule 276ADE(1)(iv).

72. There is also the additional consideration that V, along with the other children, was only given an out of country right of appeal in respect of the Section 10 removal decision. This can be challenged by way of judicial review, but for present purposes it is simply a fact.

73. The facts of **PD and Others** are very different. In that case, the parents and child made a joint application for leave to remain on 12 February 2013. There was no ambiguity about the child making an application in his own right based on him having accrued well over seven years' continuous residence in the UK.

74. V is not disadvantaged by not being able to invoke Rule 276ADE(1)(iv), as precisely the same issue arises under the statute. Mr Blackwood accepts that in determining the question of reasonableness under the Rules the same public interest considerations are in play (including the father's criminality) as are in play outside the Rules. His concession in this regard is in line with **AM (Malawi)**.

75. Before going on to consider the Article 8 claim outside the Rules, I will summarise the position of each of the other family members under the Rules.

76. V's father does not have a viable family or private life claim under Appendix FM or Rule 276ADE as he is a foreign criminal in respect of whom a deportation order has been made, and the deportation order has not been revoked. The claimant does not meet the requirements of Appendix FM because there are not insurmountable obstacles to her enjoying family life with her husband in the country of return, and she cannot invoke EX.1(a). She also does not qualify in the alternative under Rule 276ADE as there are not significant obstacles to her reintegrating into life in Nigeria.

77. M was born on 3 October 2008, and so he did not accrue seven years' residence until 3 October 2015, which is after the date of the decision under appeal. The youngest child N was born on 6 September 2012, and so is still a long way off accruing seven years' residence here.

78. Turning to an Article 8 claim outside the Rules, I accept that questions 1 and 2 of the **Razgar** test are engaged in respect of the establishment of private life rights in the United Kingdom. The claimant's family life rights

are not engaged, as it is not proposed that some members of the family should be removed, while others are allowed to stay. Questions 3 and 4 of the **Razgar** test must be answered in favour of the respondent.

79. On the issue of proportionality, the best interests of affected minor children are a primary consideration in the proportionality assessment. Section 117B(6) provides that in a 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.

80. Both V and M are qualifying children under Section 117(1) of the Act, as they have both lived in the United Kingdom for a continuous period of seven years or more. The father cannot take the benefit of Section 117B(6) as he is a person who is liable to deportation. The difficult question is whether the mother should or should not be treated as a person who is liable to deportation as the family member of a foreign criminal. Although the deportation order against her was cancelled in 2014, it does not follow that she is no longer liable to deportation. Pursuant to his professional duty not to misinform the Tribunal, Mr Blackwood very properly drew to my attention that Section 3(5) of the Immigration Act 1971 provides as follows:

    'A person who is not a British citizen is liable to deportation from the United Kingdom if –

    (a) the Secretary of State deems his deportation to be conducive to the public good; or

    (b) another person to whose family he belongs is or has been ordered to be deported.'

81. In light of the statutory provision, I consider that the claimant cannot take the benefit of Section 117B(6) as she is a person who remains liable to deportation. However, the best interests of the children remain in play, not least because Section 71 of the Immigration Act 2014, which is the Act by which Part 5A to the 2002 Act was introduced, stipulates that, "this Act does not limit any duty imposed on the Secretary of State or any other person by Section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children)". Although Phelan has a note stating that the commencement of Section 71 is from a date to be notified, the Secretary of State's duties under Section 55 are clearly engaged, as was recognised by the Secretary of State in the decision letter.

82. Although child M is a qualifying child, overall his best interests lie in him returning with the rest of his family to Nigeria, the country of which he is a national, where he can enjoy family reunion with extended family

members there (as noted in the decision letter) and can enjoy to the full all the benefits attendant upon his Nigerian citizenship, including immersion in the social and cultural milieu from which both his parents spring. The First-tier Tribunal Judge found that the claimant was an educated and resourceful woman who had worked in Nigeria, and so there are not substantial grounds for believing that M's welfare or wellbeing would be imperilled by an inability on the part of his parents to find gainful employment and to make adequate provision for the family's maintenance and accommodation. M attends school and has formed ties outside the family unit. But he can carry on his education in Nigeria, and can make new ties outside the family unit with new friends, new teachers and new fellow pupils.

83. The First-tier Tribunal Judge found that M had formed ties outside the family unit, removal of which would impact on his wellbeing. But she did not explain why this would be so. M would have the support of his parents in adjusting to life in Nigeria, and an inability to speak Yoruba would not be an impediment to him embarking on his education in Nigeria.

84. The best interest considerations weighing for and against V going to Nigeria are in contrast finely balanced. In a key respect, his best interests lie in him remaining here with continued access to the best possible educational support for his severe developmental delay and learning difficulties. Mr Blackwood also prays in aid an asserted need for V to be able to access specialist medical treatment for conditions such as severe hypospadias and a urethral fistula. However, the evidence before me does not show that V is currently suffering from any physical conditions which require urgent specialist medical treatment or that V has any ongoing health problems, such as asthma, for which he is unlikely to have access to adequate medical treatment or supervision in Nigeria.

85. With regard to V's special needs, it is important to recognise that V has not been formally diagnosed as suffering from autism. While his delay in development can be categorised as severe, he has thus far been in mainstream education, and it is not suggested that he has suffered ostracism or bullying on account of having a presenting behaviour of a younger child. There are not substantial grounds for believing that he would be refused access to mainstream education in Nigeria, or that in a city such as Lagos (from where the claimant originates) he would suffer social stigmatisation, still less accusations of witchcraft, on account of his presentation.

86. The key consideration which ultimately makes it overall in V's best interest to return to Nigeria is that, as matters stand, there are only two possible outcomes. The first is that V returns to Nigeria with the rest of his family, with the consequence that both parents are able to continue to look after him (and each other) and to meet his needs. The alternative scenario is that the claimant remains here with his mother and other siblings. It is simply not on the cards that his father can stay here without having made a successful application to revoke the deportation order against him. It

would be highly inimical to V's best interests to be separated from his father, and for his mother to be left to cope on her own.

87. But even if I am wrong to find that overall V's best interests lie in him returning with the rest of his family to Nigeria, I find that the respects in which it is in V's best interests to remain here are not so compelling so as to outweigh the wider proportionality considerations which weigh very strongly in favour of the removal of the entire family unit. The only consideration in the family's favour arising under section 117B of the 2002 Act is their fluency in English. On the negative side, the parents' immigration history is abysmal, the family is not financially independent, the father is a foreign criminal, and both parents are liable to deportation. I do not consider that the public interest is reduced by the delay in deporting the father and/or by the decision in 2014 to cancel the deportation orders made against the other members of the family. The claimant has held up the putative removal of the entire family by making an unmeritorious trafficking claim, followed by an unmeritorious asylum claim. The interference consequential upon the decision appealed against is proportionate to the legitimate public ends of protecting the country's economic well-being and the prevention of crime and disorder.

Notice of Decision

The decision of the First-tier Tribunal to allow the claimant's appeal on Article 8 grounds contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal against the decision to remove her is dismissed on all grounds raised.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the claimant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 24th May 2016

Deputy Upper Tribunal Judge Monson