Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/02200/2015**

and IA/02475/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 25 February 2016	**On 7 March 2016**

Before

The Hon Lord BURNS
(Sitting as a Judge of the Upper Tribunal)
Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) SL
(2) OA
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondents: Mr R Akther, Counsel
(instructed by Lighthouse Solicitors)

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge Heynes on 30 November 2015 against the decision and reasons of First-tier Tribunal Judge Sweet who had allowed the Respondents' linked appeals against the Secretary of State's decision dated 22 December 2014 to refuse to grant the Respondents leave to remain under Appendix FM and/or under paragraph 276ADE of the Immigration Rules and/or under Article 8 ECHR and to remove them from the United Kingdom. The decision and reasons was promulgated on 6 August 2015.

2. The Respondents, daughter and mother, are nationals of Nigeria, respectively born in the United Kingdom on [see file] and in Nigeria on [see file]. The Second Appellant entered the United Kingdom on her 6 month visit visa on 28 September 2004, and became an overstayer. She formed a relationship with a fellow Nigerian (whom she believed had died in Nigeria in February 2011), resulting in the birth of the First Appellant. The Second Appellant's parents had disapproved of the relationship but both were now deceased. Judge Sweet noted that the First Appellant would be eligible to apply for British Citizenship in September 2015 (s.1(4), British Nationality Act 1981). He found that the First Appellant had never been to Nigeria and was fully integrated into English (sic) society. She would suffer distress if she had to leave. The judge found that it would not be reasonable to expect the First Appellant to leave the United Kingdom and allowed her appeal under paragraph 276ADE(1)(iv) of the Immigration Rules. He further found that there would be very significant obstacles for the First Appellant to be reintegrated into Nigeria because of the difficulties with her family there, and allowed her appeal under paragraph 276ADE(1)(vi) of the Immigration Rules.

3. Permission to appeal to the Upper Tribunal as sought by the Appellant was granted by Judge Heynes because he

considered that it was arguable that the judge had erred in law by failing to consider section 117B of the Nationality, Immigration and Asylum Act 2002, had wrongly believed one appellant to be eligible for British Citizenship and had failed to take account that English is the official language of Nigeria.

4. Standard directions were made by the Upper Tribunal, indicating that the appeal would be reheard and remade immediately in the event that a material error of law were found.

Submissions – error of law

5. Mr Wilding for the Secretary of State following a brief and helpful dialogue with the tribunal conceded that the judge had not fallen into material error of law on the British Citizenship issue, and withdrew that ground of appeal. Nevertheless, it remained the Secretary of State's case that the judge's assessment had been unbalanced. Conditions in Nigeria had not been considered, e.g., the official languages. The best interests issue arising under section 55 of the Borders, Citizenship and Immigration Act 2009 had been met by the fact that the child would be removed with her mother. Again, that had not been adequately factored by the judge into his evaluation. The decision and reasons should be set aside and the decision(s) remade.

6. Ms Akther for the Respondents submitted that there had not been much which the judge had been required to say. He was right about the child's British Citizenship entitlement. It was an overwhelming case, as the determination showed. Clear findings on the reasonableness issue had been reached. It was not easy to see how section 117B of the Nationality, Immigration and Asylum Act 2002 was even relevant, as the appeal had succeeded under the Immigration Rules and there had been no need to consider the Article 8 ECHR claim which had been raised in the alternative or as a "fall back" position: see Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC). There was no basis for setting aside the decision.

The error of law finding

7. The tribunal reserved its determination, which now follows. (For improved clarity in this part of the determination the tribunal will refer to the parties by the original designations.) The application for permission to appeal was an unfortunate one, and the doubly mistaken propositions advanced in ground three as to British Citizenship ought to have been detected at the stage when the application was considered. Nevertheless, it remained properly arguable that the judge had erred in his assessment of the situation in Nigeria, as to language, the possibility of education for the First Appellant and as to the family situation faced on return by the Second Appellant.

8. In the tribunal's judgment the judge failed to provide a logical explanation for his finding that the Second Appellant had any continuing family difficulties in Nigeria. He had accepted that the Second Appellant's parents disapproved of her pregnancy out of wedlock, but he had also accepted (and by implication, found) that both of the Second Appellant's parents were dead, as sadly was the First Appellant's father. The Second Appellant had lived in Nigeria all her life before coming to the United Kingdom for the declared purpose of a short visit. The Second Appellant was an active member of a church whose members were supporting her financially, and there was no suggestion that such support could not be transferred to Nigeria while the Second Appellant re-established herself there. There was no properly reasoned basis for the judge's finding that there were very significant obstacles to the Second Appellants' re-integration in Nigeria.

9. Perhaps because the judge allowed the Second Appellant's appeal under Immigration Rules, he did not examine the Second Appellant's Article 8 ECHR claim and so did not consider section 117B of the Nationality, Immigration and Asylum Act 2002. In the tribunal's view, support for that approach may be drawn from Treebhawon and others (above), and also from AM (S117B) Malawi [2015] UKUT 0260 (IAC): "*When the question posed by s117B(6) is the same question posed in relation to children by paragraph 276ADE(1)(iv) it must be posed and answered in the proper context of whether it was reasonable to expect the*

child to follow its parents to their country of origin; EV (Philippines). It is not however a question that needs to be posed and answered in relation to each child more than once."

10. Hence while there was no error in failing to consider section 117B of the Nationality, Immigration and Asylum Act 2002 since the closely similar provisions in the relevant Immigration Rules had already been considered, in the tribunal's judgment, the judge's decision in favour of the Second Appellant under paragraph 276ADE(1)(vi) of the Immigration Rules was insufficiently reasoned and cannot stand.

11. In contrast, the tribunal considers that the judge provided sufficient reasons for allowing the First Appellant's appeal under paragraph 276(1)(iv) of the Immigration Rules. It was not simply a question of the First Appellant's imminent entitlement to British Citizenship under section 1(4) of the British Nationality Act 1981, as noted above. That situation had arisen in part from the Secretary of State's failure to remove the Appellants, of whose unlawful existence she had become aware at latest on 16 October 2013 when leave to remain had been sought. While of course the Second Appellant should have ensured that she and her daughter left the United Kingdom long ago, the Secretary of State was on notice that enforcement was required. The blameless First Appellant had by 16 October 2013 reached the age of seven and so had already become entitled to have her situation considered on the basis of seven years' continuous residence, a policy concerning children which has existed in various forms for many years. The judge correctly identified the current version of the relevant policy at [17] of his decision. He might also usefully have cited the guidance provided in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT00197 (IAC), but that was not essential as he showed that he had grasped the relevant principles.

12. The judge's findings of fact concerning the First Appellant's degree of integration in the United Kingdom were not challenged. Indeed, there was some independent evidence worthy of weight which the judge identified at [15] of his decision. The tribunal finds that the judge's decision under paragraph 276ADE(1)(iv) of the Immigration Rules

concerning the reasonableness of the First Appellant's removal reflected a proper assessment of the First Appellant's best interests, including her imminent entitlement to British Citizenship, the impact on her of removal, her own growing independence and the fact that she had played no conscious part in her mother's overstay. The fact that another judge might have reached another conclusion and found her appeal less than overwhelming is immaterial. The judge's erroneous assessment of the Second Appellant's position was reached separately and did not affect his reasoning concerning the First Appellant.

13. It follows that the tribunal dismisses the Secretary of State's appeal against the First-tier Tribunal's decision in the First Appellant's favour, but allows the appeal against the First-tier Tribunal's decision in favour of the Second Appellant. The decision in favour of the Second Appellant must now be remade.

14. The tribunal considered that no further submissions were needed in order to remake the decision concerning the Second Appellant, as the central issues had all been identified, and in reality only one outcome was possible in the light of the decision in favour of the First Appellant. In the reasons for refusal letter dated 22 December 2014, it was accepted at [9] that the Second Appellant met the Suitability requirements of Appendix FM (notwithstanding her long overstay) and also accepted at [14] that she met the Eligibility requirements of Appendix FM as the parent of the First Appellant. The application had been refused because the Secretary of State had considered that it was reasonable for the First Appellant to leave the United Kingdom, hence paragraph EX.1(a) of Appendix FM was inapplicable.

15. The effect of upholding Judge Sweet's decision finding that it would not be reasonable for the First Appellant to leave the United Kingdom means that the Secretary of State's decision as conveyed in the reasons for refusal letter dated 22 December 2014 is wrong: the Second Appellant is entitled to the benefit of paragraph EX.1(a) of Appendix FM of the Immigration Rules. The tribunal finds that the Second Appellant has a genuine and subsisting parental relationship with a child who has lived in the United Kingdom continuously for at least the seven years immediately preceding the date of the application and it

would not be reasonable to expect the child to leave the United Kingdom. The Second Appellant's appeal succeeds under paragraph EX.1(a) of Appendix FM of the Immigration Rules.

16. So far as it may necessary to do so, the tribunal dismisses the Second Appellant's private life appeal under paragraph 276ADE(1)(vi) of the Immigration Rules. It is not necessary to consider her private and family claim under Article 8 ECHR she has satisfied the Immigration Rules. AM (S 117B) Malawi [2015] UKUT 0260 (IAC) indicates that no separate consideration of section 117B of the Nationality, Immigration and Asylum Act 2002 is needed in such circumstances.

DECISION

The appeal of the Appellant (the Secretary of State) is allowed in respect of the appeal of the Second Respondent. The making of the previous decision involved the making of a material error of law. The decision in respect of the Second Respondent (i.e., the original Second Appellant) is remade as follows:

The appeal is allowed under paragraph EX.1(a) of Appendix FM of the Immigration Rules

The appeal of the Appellant (the Secretary of State) is dismissed in respect of the appeal of the First Respondent. The original decision of the First-tier Tribunal in favour of the original First Appellant stands unchanged.

(There were no fee awards)

Signed **Dated**

Deputy Upper Tribunal Judge Manuell