IAC-FH-NL-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Numbers: IA/31662/2014
IA/31669/2014
IA/32674/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 9 February 2016**

**Decision & Reasons Promulgated**
**On 3 March 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE O'RYAN**

**Between**

**KEHINDE TOKUNBO ADEBAYO**
**APINKE BASIRAT ADEBAYO**
**MARIAM BUSOLA ADEBAYO**
**(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: Ms M Hannan, Solicitor instructed by Corban Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against a decision of First-tier Tribunal Judge Wilson made on 12 May 2015 in which he decided the appeals brought by the Appellants against decisions of the Respondent dated 30 July 2014 refusing them leave to remain and giving them notice of intention to

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remove them administratively under Section 10 of the Immigration and Asylum Act 1999 as overstayers.

2. The third Appellant is the daughter of the first and second Appellants and was still a minor child at the date of the hearing before the judge. Her date of birth is 23 July 1997 and so by July 2015 she had turned 18. The present appeal involves the consideration *inter alia* of whether the Judge had adequate regard to the best interests of the third Appellant in making his decision. This being a fact sensitive and contextual issue, I find it of assistance to explain the history of this family's presence in the United Kingdom in some detail before turning to the Appellants' challenge before me.

3. The immigration history of the family is set out in greater detail in an earlier decision of the First-tier Tribunal dated 6 June 2012 in which First-tier Tribunal Judge Raymond heard an appeal against a similar set of decisions taken by the Respondent in relation to the members of this family. At that time they had argued that their removal from the United Kingdom would breach their rights to family and private life under Article 8 of the European Convention on Human Rights.

4. In a very lengthy decision Judge Raymond analysed the evidence that this family had relied upon in their attempt to demonstrate that they had resided in the United Kingdom for a prolonged period. In summary, Judge Raymond held that the first and second Appellants were not credible in the accounts that they gave in respect of their dates of entry into the United Kingdom. He also set out the conflicting evidence as to the date that the third Appellant, Mariam, had entered the United Kingdom, but eventually accepted that she had entered the United Kingdom in 2007. In conclusions commencing at paragraph 330 of his decision the judge drew the strings together, and concluded at paragraph 339 as follows:

> "339. I find that the considerable cumulative weight of all of these factors showing a history of cynical contempt for the legitimate immigration controls of this country by the parents, into which world of dishonesty and obfuscation in the presentation of the circumstances of their family they have sadly not hesitated to initiate their eldest child and son Alie leads me to conclude on a balance of probabilities that there is no credible evidence to establish that Mr Adebayo senior was the only innocent victim of the dishonesty of IEI solicitors who relied upon false documentation without his knowledge in their 2008 application. *(This refers to an allegation made by Mr Adebayo senior that a former set of representatives had submitted false documentation in support of an application for leave to remain that he had made).* But rather that the application was made with the actual dishonest knowledge and participation of Mr Adebayo senior. To what extent IEI solicitors themselves connived at this becomes irrelevant once it is accepted that Mr Adebayo was a party, if not, which is more likely, the sole instigator of this attempt to deceive the Secretary of State.
>
> ...

345. Whereas, in the light of my findings that there has in fact been spun a fictitious narrative of the social, educational, and economic circumstances of the family whilst in Nigeria before 2001, and between 2003 and 2007 when the children were purportedly left there by their parents in a state of deprivation. It is much more likely on the balance of probabilities that the fictitious narrative from 1994 involving entry of Mr Adebayo senior legally as a visitor, with an attempt to remain and study, that was cut short by the loss of his parents killed in religious violence, and the subsequent falsely documented employment history in the cleaning industry, all of which bears an uncanny resemblance to the latest employment history of Mr and Mrs Adebayo, carries the imprint of and emanates completely from Mr Adebayo senior. He does after all, with his wife, admit to having had easy and casual access to forged documentation since 2001 so as to support their various employments. They have also after all gone on since to encourage their eldest child Aliu in the same approach over his university education. I therefore find that this 2008 fictitious narrative going back to 1994 was not the result of a fertile imagination of IEI Solicitors, but that of Mr Adebayo senior himself personally."

5. There were further remarks made by the judge as to the reliability of the evidence given by the witnesses before him in those proceedings in 2012. Clearly that appeal was dismissed.

6. Notwithstanding the dismissal of that appeal the Appellants remained in the United Kingdom. On 8 April 2014 the Appellants made further representations to the Respondent that they ought to be allowed to remain in the United Kingdom, referring to the situation of various members of the family. In relation to the third Appellant it was asserted merely that she was a Nigerian citizen; she had no other citizenship; and was aged 16. The remainder of the representations were not specific to the family's circumstances but set out the various authorities and principles of law relating to Article 8 ECHR.

7. On a date which is unclear the Respondent served a notice under Section 120 of the Nationality, Immigration and Asylum Act 2002 requiring the family members to provide a statement of any additional grounds that they may have for seeking to remain in the United Kingdom. That notice is at page C1 of the Respondent's bundle. In response to that the Appellants provided further representations by their solicitors dated 10 June 2014 which specifically related to the third Appellant, Mariam. It was asserted that Mariam should be permitted to remain under paragraph 276ADE of the Immigration Rules and under Article 8 of the ECHR. The facts asserted in relation to Mariam are set out at pages C3 to C4 of those representations which give her name, her date of birth, age, nationality, her parents' names, the fact that her three siblings are also said to reside in the United Kingdom, she lived in the same household as her parents and siblings, and that the date of her arrival was 15 March 2007. (It is accepted on behalf of the Appellants that a later assertion at page C6 of those representations that the third Appellant arrived in the United Kingdom on 31 October 2005 is incorrect). The representations continue

at C4 to assert that the third Appellant arrived in the UK on her own national passport with entry clearance, although no evidence of that that was been brought to the attention of either the First-tier Tribunals.

8. Paragraph 276ADE is referred to. It was asserted that the third Appellant had lived continuously in the UK for at least seven years and that it would be not reasonable to expect her to return to her home country for the following reasons:

- she is attending full-time education in this country;
- her education has been substantially in this country;
- she has a number of church members and friends in this country and maintains a strong relationship with them: she plays an active role in her local church where she provides voluntary services for the benefit of members of her church and locality;
- she has become fully adapted to life in the United Kingdom in several ways;
- she believes that her private and family life can only be lived in this country;
- she has no family ties remaining in the home country;
- she has no social or cultural ties remaining in the home country;
- she believes that her education would be significantly disrupted if she is removed from the United Kingdom to the home country;
- she has no home or financial resources in her home country;
- her moral integrity would be at stake as a young woman, homeless and vulnerable.

The remainder of the submissions are generic and refer to case law. There are no further specific references to the third Appellant's circumstances.

9. Those various representations resulted in a decision of the Respondent dated 30 July 2014 in which each of the family members were refused leave to remain. The Respondent addressed whether each of the Appellants had satisfied the requirements for leave to remain under various elements of Appendix FM for family migration and concluded that none of them did so. The consideration of the third Appellant's situation is set out at paragraph 29 of the Respondent's decision as follows:

> "29. She is now 17 and has lived in the UK for 7 years. Therefore your client's daughter fails to meet parts (iii) and (v) of paragraph 276ADE. Additionally, as your client has lived the majority of her life in Nigeria, it is not accepted that she has lost all social, cultural and family ties to that country and she also therefore fails to meet 276ADE part (vi). With regard to paragraph 276ADE part (iv), you have stated that it would be unreasonable to expect your client's daughter to leave the UK due to not having the support of family and friends in Nigeria. This is not accepted as your client's parents are Nigerian nationals, with no

> leave to remain in the UK and since removal directions have been set against them, it is expected that she could return to Nigeria with them. You have also stated that your client's daughter's education would be disrupted if she were to return to Nigeria. However, it is noted from the evidence of education submitted that your client's daughter's education is due to end in July 2014. She will therefore have finished her education at the time of removal. It is also noted that the education system in Nigeria provides courses for children up to the age of 18 and there is also University education available in that country."

10. It is to be noted that there is no discrete reference to Section 55 of the Borders, Citizenship and Immigration Act 2009 at that point or thereafter within the Respondent's refusal letter.

11. On appeal to the judge the first and second Appellants gave oral evidence as did an adult son of theirs. The third Appellant did not give oral evidence. At paragraph 4 of the judge's decision he held as follows when setting out the second Appellant's oral evidence:

> "4. The statement asserted that Mariam attended full-time education and has fully integrated with UK culture (paragraph 20). That was the only reference to the third Appellant. There was no letter from the third Appellant, there was no statement and on enquiry to her representative I was told there was no intention to call her, but she was in court. She appeared to follow the hearing. The statement of the first Appellant was also adopted and contained identical wording in paragraph 15 relating to the paragraph to the third Appellant.
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> 5. In the absence of the Respondent having regard to the need to have the best interests of a young person under section 55, indeed as pleaded, I considered it appropriate to ask a few open-ended questions as to the position of the third Appellant. The second Appellant stated that the third Appellant was still living with them, she attended Westminster College, she was doing social studies, when I asked her what level she replied stage 3 but looked puzzled as to what that meant. She was clear that the third Appellant was not working, that they supported her, she had lots of friends, she did not know if her daughter had a boyfriend. The third Appellant's father, the first Appellant also stated that she was at school and then after a pause said that she was at a college, he could not remember the college name, he thought she was studying social services and wished to go to university. When asked whether she was working he replied no, full-time school."

12. In relation to the evidence about the third Appellant's circumstances, and specifically dealing with the oral evidence given by the first and second Appellants, the judge held at paragraph 8 that he did not accept the evidence of either parent, given their previous history of deception as set out in detail by Judge Raymond and which I have set out above. From paragraph 9 Judge Wilson held that there had been a change of circumstances since the previous decision, by the passage of time taking place due to the family's ignoring the dismissal of their prior appeal and the fact that they had resided in the UK after exhaustion of all appeal

rights in August 2012. He held that even if the third Appellant had been attending college with an intention to pursue a university education it was clear that she had completed her main education in July 2014. He held:

> "9. I am satisfied that the general opportunities for higher education in the United Kingdom are better and more advantageous generally to students than in Nigeria. I accept the third Appellant has been here for more than seven years and she is under the age of 18. I do not accept that she has severed all ties with her home country. She has been brought up in Nigeria until the age of 7. *(I pause to note here that that is a slip on the judge's part as it would appear if the third Appellant arrived in the United Kingdom in March 2007 that she would have been 9, nearly 10 years old at that point).* She has maintained a position within her family. There was no evidence called of any meaningful relationship outside her family other than simply friends. I am satisfied that while she would have some difficulties in adapting on return to Nigeria and I am not satisfied having regard to paragraph 276ADE that they would be so significant as to prevent her proceeding within the Nigerian further education system if she so wished.
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> 10. Overall while accepting that removal would interfere with her best interests I have to consider, it not being an overriding provision, I now turn to the wider proportionality assessment and as part of that whether or not facts relating to the importance of maintaining immigration control cumulatively reinforce or alternatively outweigh the best interests of the child."

13. The judge then proceeded to consider in the remaining part of his decision the position of the family members. The Judge referred [14] to the need to maintain a fair and transparent system of immigration control, and observed, by reference to the findings of Judge Raymond, that the first and Second Appellants had consistently tried to evade such a system. The Judge stated that he had had particular concern for the third Appellant, but that no attempt had been made to call any further evidence from her or file documents on her behalf. The Judge concluded having regard to the circumstances of the third Appellant and her family that the refusal to grant leave and maintain the earlier removal directions were justified

14. Grounds of appeal were made to the First-tier Tribunal against that decision but permission was refused in the first instance on 10 July 2015. The same grounds were adopted in a renewed application dated 21 July 2015 on which permission was granted by Deputy Upper Tribunal Judge Chapman on 14 October 2015. Those grounds as summarised by Judge Chapman are as follows: that the judge erred (i) in concluding that removal of the third applicant was 'justified in the interests of maintaining immigration control', as the test under paragraph 276ADE(iv) is whether it would be reasonable for her to leave the United Kingdom; (ii) in not remitting the appeal to the Respondent to consider the best interests of the third applicant properly, and (iii) because he did not give anxious scrutiny to all the facts relating to the best interests of the third applicant; it was said that no weight was given to her length of residence or her age when she arrived and the judge did not apply the principle in Azimi-

Moayed [2013] UKUT 197. Judge Chapman thought that grounds (i) and (iii) raised arguable errors of law but she observed that the judge had expressed surprise at the lack of evidence concerning the third applicant and no attempt was made to call her and the judge had not been greatly assisted by this in reaching the decision in respect of the third Appellant, thus the materiality of any errors was debateable. Judge Chapman also indicated that the First tier Judge did not appear to consider the mandatory public interest considerations at Section 117A and B of the Nationality, Immigration and Asylum Act 2002.

15. I have heard submissions today from Ms Hannan who appeared before the First-tier Tribunal and who I believe prepared the grounds of appeal. In relation to the first ground I take this essentially as a suggestion that the judge has misdirected himself in law when undertaking the proportionality balancing exercise under Article 8 ECHR, or when determining whether under paragraph 276ADE(1)(iv) it was reasonable that the third Appellant should leave the United Kingdom. This is because the Appellant seeks to contrast the expressions used by the judge at paragraph 9, at which point he is undeniably considering the application of 276ADE(1)(iv), and the expression that he uses at the end of paragraph 15 which is as follows:

> "I have considered Section 55 of the Borders Act and whilst I am satisfied as to the assertion that her removal to Nigeria would cause detriment to her education and thus to her best interests I am satisfied that having regard to the other circumstances of her and her family that the refusal to grant leave and remain the earlier removal directions are justified."

16. I reject the proposition advanced by the Appellant that there is any conflation of the two issues of (i) whether it is reasonable that the Appellant should leave the United Kingdom, that being the relevant test to be considered under paragraph 276ADE(1)(iv), and (ii) the proportionality of the Appellants' proposed removal. To my mind the judge has addressed the relevant considerations arising out of paragraph 276ADE(1)(iv) in the second part of his paragraph 9 which I have quoted above. There is a reference there to the duration of the Appellant's stay in the United Kingdom being greater than seven years and the fact that she remains a minor. The remainder of the considerations relate to the issue of any difficulty she may have in returning to Nigeria. Those considerations are all in my view clearly relevant to whether it is reasonable for her to leave the United Kingdom to return to Nigeria. There is no misdirection in law at the end of paragraph 9 and no conflation of the two issues of the determination of her entitlement to reside under 276ADE(1)(iv) on the one hand and the proportionality of removing her outside the Immigration Rules under Article 8 ECHR on the other. It is clear that the judge had completed his assessment under 276ADE in paragraph 9 before turning ('I now turn…') to Article 8 at paragraph 10 onwards. I am not shown any authority to establish that the use of the word 'justified' at [15], in relation to a proportionality assessment, amounts to a misdirection in law. There is no challenge to the rationality of the judge's findings at paragraph 9 and I find that the Appellant's first ground is not made out.

17. The second ground is that the judge should have held that the decision appealed against was not in accordance with the law under Section 55 of the Borders, Citizenship and Immigration Act 2009 and that the matter should have been allowed such that a lawful decision remained to be made by the Secretary of State. I do not find this ground to be made out. The consideration of this ground requires consideration of two reported decisions of the Upper Tribunal, being JO & Others (Section 55 duty) Nigeria [2014] UKUT 517, and MK (Section 55 – Tribunal options) [2015] UKUT 223. In the former case the President of the Upper Tribunal gives useful guidance as to the duties on the Secretary of State in considering the best interests of a minor child. In the circumstances of that case evidence regarding a child had been put before the Secretary of State, and the Upper Tribunal held that no proper consideration had been given to it. The head note is as follows:

> “(1) The duty imposed by section 55 of the Borders Citizenship and Immigration Act 2009 requires the decision-maker to be properly informed of the position of a child affected by the discharge of an immigration etc function. Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors.
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> (2) Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations.
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> (3) The question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or tribunal considering this question will frequently be confined to the application or submission made to Secretary of State and the ultimate letter of decision.”

18. That guidance invites the consideration of whether the Secretary of State or the Tribunal is adequately equipped to make proper best interest assessment. In the circumstances of the case of JO the President held that the Secretary of State had failed in her duty to make clear findings as to the best interests of the minor child involved in that case, and her appeal was allowed such that the Secretary of State was obliged to re-make the decision in accordance with the judgment.

19. There is however the case of MK which gives further guidance as to the disposal of appeals before the First-tier or the Upper Tribunal where it is found that the Secretary of State’s duties under Section 55 have not been complied with. The head note of the case provides as follows:

> “(i) Where it is contended that either of the duties enshrined in section 55 of the Borders, Citizenship and Immigration Act 2009 has been breached, the onus rests on the Appellant and the civil standard of the balance of probabilities applies. There is no onus on the Secretary of State.
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> (ii) As regards the second of the statutory duties [the need to have regard to statutory guidance promulgated by the Secretary of State], it is not

necessary for the decision letter to make specific reference to the statutory guidance.

(iii) The statutory guidance prescribes a series of factors and principles which case workers and decision makers must consider.

(iv) Where the Tribunal finds that there has been a breach of either of the section 55 duties, one of the options available is remittal to the Secretary of State for reconsideration and fresh decision.

(v) In considering the appropriate order, Tribunals should have regard to their adjournment and case management powers, together with the overriding objective. They will also take into account the facilities available to the Secretary of State under the statutory guidance, the desirability of finality and the undesirability of undue delay. If deciding not to remit the Tribunal must be satisfied that it is sufficiently equipped to make an adequate assessment of the best interests of any affected child."

20. In that head note it is apparent that a finding that a decision is not in accordance with the law, and a "remittal" to the Secretary of State, is not the automatic result of any finding that the best interests of a child had not been properly taken into account by the Secretary of State. A number of case management powers may be utilised by either the First-tier or the Upper Tribunal, and one issue relevant to the exercise of those powers is whether the Tribunal can consider itself adequately equipped to make a finding on Section 55 itself. However, in giving guidance as to what steps might be taken, the Tribunal rules at paragraph 39(c) as follows:

> "In choosing between the two options identified above, Judges will be guided by their assessment of the realities of the litigation in the particular case and the basis on which the Secretary of State has been found to have acted in breach of either or both of the section 55 duties. It will also be appropriate to take into account the desirability of finality and the undesirability of undue delay."

21. In my view, although it is the case that Section 55 was not directly referred to in the Respondent's decision of 30 July 2014 it cannot be said that she wholly left out of account a consideration of the third Appellant's best interests. Her position is considered in paragraph 29 of the refusal letter as I set it out above. Even if that consideration is insufficient so as to amount to a breach of Section 55 (which I found that it is not) then the options available to the First-tier and Upper Tribunal are varied, as I outline above.

22. In my view there can be no criticism of the First-tier Judge proceeding in the way that he did in the circumstances of this appeal. I have quoted above his surprise at the lack of evidence either directly or indirectly from the third Appellant; specifically there was no letter from the third Appellant, no statement and on enquiry to the representative he was simply told that there was no intention to call her. The judge did what I view to be his best when he decided of his own motion (para [5]) to ask some open-ended questions about the third Appellant's circumstances. In

circumstances where the evidence before a Tribunal is in the state it was before the present judge, and an opportunity was given to those acting for the Appellants to adduce any further evidence that they wished in relation to the third Appellant's circumstances (and such opportunity declined), I cannot see any merit to the criticism that the judge failed in his duties under Section 55, or in any other way, so as to ensure that he was informed about the position of the third Appellant when making an assessment of her best interests. I find that the second of the Appellant's grounds of appeal discloses no material error of law.

23. The third ground I can deal with more swiftly. That is that there has been no anxious scrutiny as to the third Appellant's circumstances and no application of the principle in Azimi-Moayed which, if I may summarise it in this way, requires decision-makers to have regard to the length of residence of a minor child in the United Kingdom and gives guidance that the presence of a child over the age of 4 is likely to result in greater ties to the United Kingdom than the presence of a child under the age of 4. My assessment is that the judge was fully aware of the period of time that the third Appellant was present in the United Kingdom. He made reference to the stage she had reached in her education, he made reference to the relationships which she had established with others in the United Kingdom, though principally he held that these were with her other family members who stand to be removed with her if this appeal does not succeed. I find that there is no failure to give anxious scrutiny to the circumstances of the third Appellant or to apply any principle arising out of the case of Azimi-Moayed.

24. That in my view deals with the grounds of appeal as they have been advanced by the Appellants. Judge Chapman, in granting permission, also raised the possibility that the judge had not had adequate regard to the considerations in s.117B NIAA 2002. It is right to acknowledge that Part 5A of NIAA 2002 was not referred to directly by the judge in his decision, but this is not an error of law in itself: Dube (ss.117A-117D) [2015] UKUT 90 (IAC), head note 2; what matters is substance, not form. In any event, I find that there is nothing in Part 5A which would have been of any assistance to the Appellants, even if it had been referred to directly by the Judge. Even if the Appellants speak English (s.117B(2)) or are financially independent (s.117B(3)) (and I note that any earned income of the Appellants will have arisen from illegal employment), this would not give rise to a positive right to reside in the UK in any event: AM (s.117B) [2015] UKUT 260 (IAC) head note 2. Section 117B(4) and (5) would indicate that the Appellants' private life, acquired in the UK whist here unlawfully, should be given little weight. Finally, the question arising in s.117B(6) in relation to the first and second Appellant's relationship with the third Appellant, who had been present in the UK for more than 7 years, is the same question that the Judge considered and rejected in relation to para 276ADE(1)(iv) of the rules; this question need only be answered once: : AM (s.117B) [2015] UKUT 260 (IAC) head note 6.

25. It is to be noted that there is no discrete argument raised by the Appellants in respect of the dismissal of the appeals of the first and second Appellants. The position the Appellants adopted before me today was that if there was any material error of law in the judge's approach to the third Appellant's appeal such that her appeal needs to be re-heard, then necessarily the position of the first and second Appellants would also need to be reconsidered. I agree with that position up to a point although such argument should have been pleaded in the grounds of appeal.

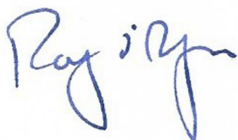
26. However, in the light of my finding that there is no material error of law in the way the judge dealt with the third Appellant's appeal, consequently there can be no criticism of the way the judge dealt with the first and second Appellants' appeals either.

**Notice of Decision**

27. The making of the decision of the First-tier did not involve the making of any material error of law. I do not set aside the First-tier decision. I uphold the First-tier decision and I dismiss the present appeal.

No anonymity direction is made.

Signed: Date 1.3.16



Deputy Upper Tribunal Judge O'Ryan