Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/32307/2014
IA/32316/2014
IA/32319/2014
IA/32325/2014
IA/32328/2014
IA/32331/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th November 2015	**On 9th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

FUNMILAYO ADEWOLE AJELARA (1)
FATAI BABATUNDE AJELARA (2)
OPEYEMI MAIZAT AJELARA (3)
AMEERAT ABIODUN AYOKA AJELARA (4)
ROKIBAT ALARONKE IBIJOKE AJELARA (5)
FRIDAAUZ OLASUNKANMI AJELARA (6)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation:
For the Appellant: Mr T Ojo; Solicitor, Graceland Solicitors
For the Respondent: Mr C Avery, Senior Home Officer Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Rowlands promulgated on 26th January 2015 in which he dismissed the appeals against the decisions made by the Secretary of State on 28th July 2014 to refuse applications for leave to remain in the UK on human rights grounds and to give directions under s10 of the Immigration and Asylum Act 1999 for removal of Mrs Ajelara, her husband and their four children from the UK.

Background

2. The composition of the family and their immigration history is set out at paragraphs [1] to [2] of the decision of First-tier Tribunal Judge Rowlands. Insofar as is material, Mrs Ajelara claims to have arrived in the UK in July 2004, illegally, with the two eldest children. Her husband claims to have arrived in the UK before Mrs Ajelara, but again in or about July 2004. The eldest two children were born in Nigeria. The eldest was aged 2 when she arrived in the UK, and the other was 3 months old. The remaining two children were born in the UK.

3. Between 2010 and 2013 Mrs Ajelara made two applications for leave to remain in the UK. Both applications were refused and in July 2013, she and her husband made a joint application for leave to remain in the UK as a family. That application was refused and that refusal, together with the decision to give directions under s10 of the Immigration and Asylum Act 1999 for removal gave rise to the appeal before the First-tier Tribunal.

The decision of First-tier Tribunal Judge Rowlands

4. It was accepted, as recorded in paragraph [14] of the decision, that the appellants' are unable to fulfil any of the immigration rules regarding family or private life. The Judge notes:

> *"…Essentially it is accepted that the first and second Appellant do not fulfil any of the immigration rules regarding family or private ljfe the reality is it is the claim of the children, in particular the third and fourth Appellants, which is the strongest part of the claim and which effectively makes it unreasonable and unfair for them all to be removed. Although there is some family life with the first Appellants mother and brother being here that in itself would not be sufficient. "*

5. The live issue was whether it is reasonable to expect the children to return to Nigeria with their parents.

6. First-tier Tribunal Judge Rowlands heard evidence from the first and second appellants' and at paragraphs [4] to [9] of his decision that evidence is set out. The findings and conclusions of First-tier Tribunal Judge Rowlands are set out at paragraphs [15] to [18] of the decision, and it is useful to set them out:

> *"15. I have considered all of the evidence in the case including that to which I do not specifically refer and reach the following conclusion. The first point to be made regarding the six Appellants is that they will of course be together wherever they are, either in the United Kingdom or in Nigeria. It is of course in the best interests of the children that they remain together with their parents. It has been accepted by the Appellants that neither the first or second Appellant fulfils any of the immigration rules as far as their private or family life in the United Kingdom is concerned. What appears to be really argued is that it is in the best interests of the children that they remain here. The argument in favour of the children is that so far as the third Appellant is concerned she fulfils one of the requirements of the immigration rules in that she is under the age of 18 and has lived continuously in the United Kingdom for at least seven years. She*

has possibly been here since 2004. Of course, that ignores the second part of the rule which says that at the same time it would not be reasonable to expect the applicant to leave the United Kingdom. So far as that is concerned it would appear that the same would apply to the fourth Appellant in terms of the time spent here. Both of them were very young children when they first arrived and I do not believe that the first possibly couple of years should necessarily count as being time when they were settled and making roots here. However, it is clear that the other length of time has been fairly substantial. Notwithstanding that I am not satisfied that it would be unreasonable to expect all six of these Appellants including the two children who have been here for relatively long period of time to be returned to Nigeria. The fifth and sixth Appellants are small children and can easily adapt to life in Nigeria and I am sure that they have been brought up in a "Nigerian" household. The second Appellant put it quite bluntly when he conceded that in reality he and his family had come to the United Kingdom so that the British people could care for them. It is clearly not the responsibility of the British people to care for them nor to educate their children and I am sure that they will do well with the benefit of the education that they have had hitherto, but the reality is that no-one in their family has any basis to be here. They have remained here for a long period of time and taken advantage of the education and health system and there is no reason why they cannot now go back to Nigeria.

16. The Appellants try to argue that their best interests automatically means that they should be allowed to stay in the United Kingdom, that clearly ignores the fact that Nigeria has an education system as well as hospitals and medical services that they can use. It is, in my view in the interests of Nigerian

children to grow up in Nigeria amongst their family and there is nothing unreasonable about expecting them all to return there.

17. None of the Appellants' fulfil the requirements of paragraph 276ADE and there is nothing exceptional about their circumstances that raises the need to consider their right to a family or private life outside the immigration rules. Their family will continue together in Nigeria.

18. In addition I have considered Section 117A(3) this requires that where a Tribunal is required to determine whether a decision made under the Immigration Acts breaches a person rights to respect for private and family life under Article 8. That in considering the public interests question the Court must have regard to considerations listed in Section 117B and that "the public interest question" means the question of whether an interference with a person right to respect for private and family life is justified under Article 8((2)."

The Grounds of Appeal

7. The grounds of appeal are lengthy and although they appear to have been settled with the assistance of legal advice, they were filed by the appellants without representation. Broadly put, the grounds allege that the Judge failed to take into account the relevant authorities that provide guidance as to the evaluation of the best interests of children. The appellants' state that the requirements of paragraph 276ADE(1)(iv) are met and that in any event, the Judge failed to carry out a step by step assessment of the appellants' Article 8 rights.

8. Permission to appeal was refused on the papers by First-tier Tribunal Judge Grimmett on 14th May 2015, but was granted by Deputy Upper Tribunal Judge Archer on 21st July 2015. In so doing, he noted;

"...The best interests consideration appears at paragraph 15 of the decision. There is a considerable body of recent case law on the section 55 duty but the judge has not referred to that case law. In particular, there is no reference to the case law in paragraph 15. I find that it is arguable that the judge erred in law by failing to consider the individual circumstances of the children and their best interests before considering whether those interests were outweighed by the force of other considerations and failed to carry out a careful examination of all relevant factors given that the best interests of the children were involved in the Article 8 assessment (TO and others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC)).

The reference to the children being brought up in a "Nigerian" household is arguably unclear and it is arguable that the judge has failed to carry out any assessment of the extent of the children's private lives outside the family. It is arguable that the judge has failed to properly consider whether it is reasonable to expect the third appellant to leave the UK given the very limited assessment of her individual circumstances... "

9. The matter comes before me to consider whether or not the decision of the Tribunal involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

The hearing before me

10. At the hearing before me, the appellants' were represented by Mr. T Ojo, of Graceland Solicitors, who now act for the appellants'. Mr. Ojo relied upon the Grounds of Appeal and submitted that the judge had erred in his consideration of the duty under **s55 Borders, Citizenship and Immigration Act 2009** ("s55"). He submitted that both the respondent in her original decision, and the Judge following the hearing

of the appeal, failed to carry out any proper assessment of the private lives of the children. Mr. Ojo initially submitted that the Judge had failed to take account of all of the evidence before him, but when pressed, could not identify what evidence was before the First-tier Tribunal that the Judge had failed to have regard to. In the end, Mr Ojo confirmed that the appellants' do not say that there was documentary evidence in the bundle before the First-tier Tribunal that the Judge has failed to have regard to.

11. Mr. Ojo submitted that the Judge was aware of the relevant authorities but did not apply the relevant legal principles in reaching his decision. Mr Ojo submits that the children have been in the UK for a very considerable period and that the two eldest children have spent the formative years of their lives in the UK. He submits that the Judge did not give adequate weight to the fact that the children have spent the formative years of their lives in the UK, and that had the judge considered such matters, the appeal would have been allowed.

12. In reply, Mr Avery on behalf of the respondent submits that the appellants' grounds and submissions amount to nothing more than a disagreement as to the findings made by the Judge. He submits that the failure to refer to the relevant authorities in the decision, does not disclose a material error of law and that a careful reading of the decision, establishes that the Judge properly considered the best interests of the children as a primary consideration. He submits that in reality, there was very little evidence before the Judge concerning the children and that in reaching his decision, the Judge had in mind the length of time that the children have been in the UK. He submits that it was open to the Judge to reach the decision that he did, upon the evidence before him.

13. In the event that I find there to be an error of law, no further evidence has been adduced by the appellants. No application has been made

under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Decision as to 'Error of Law'

14. It is common ground between the parties that the issues in the appeal before the First-tier Tribunal were confined to paragraph 276ADE of the immigration rules and s55 of the Borders, Citizenship and Immigration Act 2009. The essential issue was whether it is reasonable to expect the children to return to Nigeria with their parents.

15. It is as well at this stage to set out the relevant legal framework. Paragraph 276ADE of the Immigration Rules sets out the requirements to be met by an applicant for leave to remain on the grounds of private life. Insofar as is relevant to this appeal, the rules provide:

> 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 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> ....

16. S55 of the Borders, Citizenship and Immigration Act 2009 requires the respondent to make arrangements for ensuring that her functions in relation to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK.

17. Finally, the relevant provisions of ss.117A-117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") are as follows:

117A: Application of this Part

(1) This part applies where a court or Tribunal is required to determine whether a decision made under the Immigration Act –

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

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

(2) In considering the public interest question the court or Tribunal must (in particular) have regard –

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

…

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

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

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

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

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

(b) are better able to integrate into society.

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

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

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

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

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

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

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

18. In **Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**, the Upper Tribunal in considering the case law in relation to decisions affecting children stated;

"13. It is not the case that the best interests principle means that it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:

i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit

of growing up in the cultural norms of the society to which they belong.

iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well being of society amply justifies removal in such cases."

19. In **E-A (Article 8- best interest of child) Nigeria [2011] UKUT 315 (IAC)** it was held that the correct starting point in considering the welfare and best interest of a young child would be that it is in the best interest of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Where it is in the best interest of a child to live with and be brought up by his or her parents, then the child's removal with his parents does not involve any separation of family life. However, absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the

course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case. This authority goes on to suggest that during a child's very early years he or she will be primarily focused on self and the caring parents or guardian. Long residence once the child is likely to have formed ties outside the family is likely to have greater impact on his or her wellbeing. This authority also goes on to suggest that those who have their families with them during a period of study in the United Kingdom must do so in the light of the expectation of return. The Supreme Court in **ZH (Tanzania) [2011] UKSC 4** was not ruling that the ability of a young child to steadily adapt to life in a new country was an irrelevant factor, rather that the adaptability of the child in each case must be assessed and is not a conclusive consideration on its own.

20. In **EV (Philippines) and Others v SSHD [2014] EWCA Civ 874,** the appellants were a family from the Philippines whose application for indefinite leave to remain in the United Kingdom had been rejected. The First-tier Tribunal found that, although it was in the children's best interests to continue their education in the UK, removal would be proportionate to the legitimate aim of immigration control. The Upper Tribunal upheld that decision. The Court of Appeal, in dismissing the family's appeal, issued guidance on how tribunals were to approach the proportionality exercise where it had concluded that continuing education in the UK would be in the best interests of the children:

> "*32. There is a danger in this field of moving from looseness of terms to semantics. At the same time there could be said to be a tension between (a) treating the best interests of the child as a primary consideration which could be outweighed by others provided that no other consideration was treated as inherently more*

significant; and (b) treating the child's best interests as a consideration which must rank higher than any other which could nevertheless be outweighed by others. It is material, however, to note that Lord Kerr, as he made clear, was dealing with a case of children who were British citizens and where there were very powerful other factors - see [41] below -in favour of not removing them ('the best interests of the child clearly favour a certain course'/ 'the outcome of cases such as the present'). He also agreed with the judgment of Lady Hale. In those circumstance we should, in my judgment, be guided by the formulation which she adopted.

33. More important for present purposes is to know how the tribunal should approach the proportionality exercise if it has determined that the best interests of the child or children are that they should continue with their education in England. Whether or not it is in the interests of a child to continue his or her education in England may depend on what assumptions one makes as to what happens to the parents. There can be cases where it is in the child's best interests to remain in education in the UK, even though one or both parents did not remain here. In the present case, however, I take the FTT's finding to be that it was in the best interests of the children to continue their education in England with both parents living here. That assumes that both parents are here. But the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.

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.

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.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

21. In **MK (section 55 - Tribunal options) Sierra Leone [2015] UKUT 223 (IAC)** it was held that:

"*(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.*

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."

22. Finally, in **JO and Others (Section 55 duty) Nigeria [2014] UKUT 00517 (IAC)** the Tribunal said that the duty imposed by s55 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. 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. The question whether the duties imposed by s55 have been duly performed in any given case will invariably be an intensely fact sensitive and a 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 the Secretary of State and the ultimate letter of decision.

23. Having set out the relevant legal framework at some length, I return to the findings and conclusions set out by the Judge at paragraphs [15] to [18] of the decision. I reject the submission made by Mr. Oko that the Judge did not give adequate weight to the fact that the children have spent the formative years of their lives in the UK, and that had the judge considered such matters, the appeal would have been allowed. At paragraph [15] of the decision the Judge expressly notes that "..*The argument in favour of the children is that so far as the third Appellant is concerned she fulfils one of the requirements of the immigration rules in that she is under the age of 18 and has lived continuously in the United Kingdom for at least seven years. She has possibly been here since 2004.".* He goes on to note "..*it would appear that the same would apply to the fourth Appellant in terms of the time spent here. Both of them were very young children when they first arrived and I do not believe that the first possibly couple of years should necessarily count as being time when they were settled and making roots here. However, it is clear that the other length of time has been fairly substantial.".*

24. The Judge plainly had in mind the lengthy period of time that the two eldest children had remained in the UK. Before me, Mr Oko was unable to identify any evidence that had been placed before the First-tier Tribunal that had been disregarded by the Judge. The appellants' bundle before the First-tier Tribunal comprised of some 132 pages. Of that bundle, the first 97 pages comprised of general documents not specific to the children. The remaining documents were the children's' school documents. Beyond the evidence of the children's' school documents there was no evidence before the First-tier Tribunal of any wider roots put down by the children, evidence of the personal identities developed, or other links with the community outside the family unit.

25. It was open therefore to the Judge, on the evidence before him to find that he was not satisfied that *"..it would be unreasonable to expect all six of these Appellants including the two children who have been here for relatively long period of time to be returned to Nigeria.".*

26. As noted by the Judge, the appellants' would be returning to Nigeria as a family unit. Whilst this may involve a degree of disruption to their private life, it was open to the Judge to find that to be proportionate to the legitimate aim of maintaining effective immigration control.

27. The two eldest children have been in the UK for more than 7 years and they are present within the UK education system. The eldest two children have spent more than 7 years in the UK from the age of 4 years'. They are both in secondary education. Each of the children are in good health and have no special needs. Nothing to the contrary has been suggested by the appellants'.

28. In my judgement, whilst not making express reference to the authorities, the Judge considered the best interests of the children as a primary consideration and concluded that it is in their best interests to remain with their parents. He considered the third and fourth

appellants' length of residence in the UK, and weighed against that, that this family would be returning to Nigeria as a family unit.

29. The Judge considered the public interest considerations set out in s.117 of the 2002 Act.

30. I accept the submission made by Mr. Avery on behalf of the Respondent. The matters advanced on behalf of the appellants' amount to nothing more than a disagreement with the findings of the Judge. The Court of Appeal in **R & ors (Iran) v SSHD [2005] EWCA Civ 982** held that a finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence. In my judgment the findings of the Judge were properly open to him on the evidence and the appeal is dismissed.

Notice of Decision

31. The appeal is dismissed and the decision of the First-tier Tribunal stands.

32. No anonymity direction is made. Although four of the appellant's are children, no application was made for anonymity before me. The First-tier Tribunal made no anonymity direction.

Signed Date

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Mandalia