Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
IA/44935/2014

IA/44936/2014
IA/44939/2014
IA/44943/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 March 2016	**On 28 July 2016**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MOBOLUWADURO ADARANIJO
[E E]
[A O]
[J E]
(Anonymity directions not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellant: Mr A Bajwa, legal Representative
For the respondent: Mr S Walker, Senior Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Nigeria born on 12 September 1976, [ ] 2004, [ ] 2004 and [ ] 2002 respectively. They are mother, son and niece of the first appellant and her daughter. They appealed to the First-tier Tribunal against the decision of the respondent 21 October 2014 to refuse to grant them leave to remain in the United Kingdom under paragraph 276ADE and Article 8 on compassionate grounds. First Tier Tribunal Judge Rothwell dismissed the appellants' appeals in a determination dated 27 July 2015.

2. Permission to appeal was at first refused by first-tier Tribunal Judge AR Cox on 19 November 2015 and subsequently granted by Deputy Upper Tribunal Judge Archer on 13 January 2016 dating that it is arguable that the Judge has not considered the best interests of the second, third and fourth appellants especially as the third appellant, who is the niece of the first appellant as she has been in this country for nearly 10 years.

First-tier Tribunal's findings

3. The Judge made the following findings in his determination which in summary are the following.

   I. In respect of the third appellant, who is the niece of the first appellant, she has been in the United Kingdom for 10 years, as she came when she was aged nine months. It is accepted that she has only ever lived in the United Kingdom. However, her parents are in Nigeria and she does have some contact with them. The first appellant said she was able to contact them last year because the third appellant has their phone number on her mobile phone. It is considered settled law that her best interests of a child are to be with their parents. The first appellant has taken care of the third appellant since 2005, but she does not and has not ever had leave to remain save a six months visit visa.

   II. The first appellant has told the Tribunal that she is supported by friends, but none them attended the Tribunal and missed the chance to give evidence in support the appeal. The evidence shows that the appellant are also supported by a variety of organisation in addition to funds given by friends. There is a letter from Kids Company dated 10 February 2015 that shows that all the appellants were living in a dire situation as the accommodation provided was completely unsuitable for a family. She has reported that there were bedbugs and ladybird infestations. There were male tenants living downstairs

who regularly broke the rules. There were not receiving food or toiletries. The safeguarding manager for Kids Company provided a food parcel which included food, toiletries and bedding.

III. It is accepted that the third appellant is about to change schools in September 2015 and that she has spent all her life in this country save for a few months, but given the situation in which she lives I find that it must be in her best interest to return to parents, with whom she has some contact.

IV. It would not be unreasonable for her to leave the United Kingdom and return to Nigeria to be with her parents. Further, the other appellants have no leave to remain in the situation has always been precarious. She can continue her relationship with the other appellants in Nigeria.

V. The third appellant's appeal has been considered outside the Immigration Rules and in the case of **SS Congo v Secretary of State for the Home Department [2015) EWCA Civ 387,** it was made clear that in respect of children where their interests are an issue, will be a contributing factor which tends to reduce to some degree the width of the margin of appreciation which the State authorities would otherwise enjoy. The European Convention on Human Rights has to be interpreted and applied in light of the UN Convention on the rights of the child but the fact that the interests of a child are an issue does not simply provide a trump card so that a child applicant for positive action to be taken by the State in the field of article 8 (1) must always have their application acceded to. In the case of the **ZH Tanzania v Secretary of State for the Home Department [2011] UK SE 4** it was stated that the interests of the child are a primary consideration, i.e. an important matter but not the primary consideration. It is a factor relevant to the fair balance between the individual and the general community which goes some way towards tempering the otherwise wide margin of appreciation available to the State authorities in deciding what to do. The age of the child, the closeness of their relationship with the other family members in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind.

VI. The case of **AM Malawi [2015] UKUT 2016** has also been considered whether the position was that where one child was a qualifying child under section 117D (6) i.e. had been in the United Kingdom for seven years, the Tribunal stated that the test was essentially the same as under paragraph 276 ADE (iv).

For the reasons given above the Judge found that the circumstances of the appellant's case it is not unreasonable to expect the third appellant to return to Nigeria with the rest of her family.

VII. The first appellant does not fall within the Immigration Rules and she has been in the United Kingdom unlawfully and therefore does not meet the requirements of the Immigration Rules.

VIII. Considering her case outside the Immigration Rules the case of **SS Congo** has been considered which sets out the approach when an appellant does not fall within the Immigration Rules. The case of **Gulshan**, **Nagre** and **MM (Lebanon)** have also been considered and it is considered that the Immigration Rules are a complete code for determination of family and private life claims.

IX. The Judge found that there are no circumstances in this case where the appellant should succeed under Article 8. The first appellant's private life can continue in Nigeria as she goes to church and she can continue to do so in that country. Her private life has been developed while she has been in this country illegally and it was a condition of entry clearance was that she intended to return to Nigeria. The economic well-being of the country is important and her rights have been considered against the public interest. Section 117B of the Nationality, Immigration and Asylum Act 2002 applies because the appellants' situation has always been precarious.

X. The first appellant has developed a family life by bringing in the second and fourth appellants to the United Kingdom as visitors when she had been in the United Kingdom illegally and had overstayed as a visitor. Balancing the public interest with that of the rights of the first appellant who brought in other appellants to the United Kingdom none of whom have status or can have had any expectation that they would be allowed to remain. The problems of the second fourth appellant's problems in Nigeria were caused by the absence of the first appellant and this is why she brought them here as visitors in the knowledge that they would not be returning to Nigeria. The appellants appeared to be living in difficult circumstances in the United Kingdom and this may be because she does not have status.

XI. The first appellant is clearly a resourceful woman and she managed to survive with other appellants in the United Kingdom. She was able to obtain employment and promotion

as a chef and was able to earn sufficient funds to send money to Nigeria and then bring her children to the United Kingdom. She is able to obtain accommodation and resources from charitable organisations. Therefore, she can use the skills on return to Nigeria where she also has family members. Therefore, it i would not be disproportionate for the first appellant to return to Nigeria with her family.

XII. The second and fourth appellants are the children of the first appellant. She left them in Nigeria with their father when she decided to visit the United Kingdom with her niece in 2005 and did not return to them in Nigeria. On the balance I accept that they have some difficulties with that the presence of the first appellant as she is their mother and she left them in 2005. I do not accept they may have had difficulties living with their uncle, but as I found above the first appellant has chosen to exaggerate a position for this appeal, as she did not mention this until the appeal before me. But I am prepared to accept the first appellant's brother was unkind to them as this is supported by the letter of Miss Adebisi. The second and fourth appellant came to the United Kingdom in 2012 and therefore they do not fall within any of the Immigration Rules because of the short time they have been here.

XIII. Considering the appeal outside the Immigration Rules it is accepted that her family and private life in the United Kingdom. However, there will be no interference with that family life as the appellant will return to Nigeria together. They have developed private life but they have only been in the United Kingdom for three years and have been living in Nigeria until July 2012. They can be no interference with their private life to return them to Nigeria because they can continue their education and they will be with their mother, the first appellant.

XIV. Balancing the statute-based public interest consideration against the rights of the second and fourth appellants, much of the reasons why the second and fourth appellants have had difficulties in Nigeria are because the first appellant was in the United Kingdom without them for seven years before they came here. They lived with their father who was unkind to them, then without maternal grandmother who died and then with their maternal uncle, who was also unkind to them. They will be returning with their mother the first appellant and their cousin the third appellant. So they will not be the protection issues that occurred when the first appellant was not there. The first appellant is a resourceful woman who has been able to survive with three children even though she has not been able

to work since October 2014. She has family members are Nigeria.

XV. The Judge dismissed the appellants appeal under the Immigration Rules and under Article 8.

Grounds of appeal

4. The appellant in her grounds of appeal states the following which I summarise. The Judge materially erred in law in failing to have proper regard to paragraph 276 (vi) of the Immigration Rules. That section provides that if the appellant is under the age of 18 and has lived in the United Kingdom for at least seven years….. And it would not be reasonable to expect the appellant to leave the United Kingdom. The first appellant's niece, the third appellant is plainly under the age of 18 and has lived continuously in the United Kingdom for at least seven years in accordance with 276 (vi) of the Immigration Rules. The Judge plainly misunderstood this paragraph and wrongly decided that it would be reasonable for the third appellant to leave the United Kingdom. It cannot reasonably be expected for the appellants to just leave the United Kingdom with the third appellant who is currently set in a standard way of life and that is all she knows.

5. The Judge failed to take the best interests of the first appellant's children and niece as a primary consideration in assessing proportionality under article 8. In the case of **Azimi-moayed and others (decisions affecting children; onward appeals) [2013] UKUT197 (IAC)** it is stated that the starting point is the best interest of the 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 the dependent children who form part of their household unless there are reasons to the contrary. The third appellant has been living in the United Kingdom for over 10 years. It should be accepted that a lengthy residence in the 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 reasons to the contrary. It is submitted that there are no compelling reasons that justify the disruption that will be caused to the children.

6. The Judge did not consider s55 of the Borders, Citizenship and Immigration Act 2009 which states that the best interests of children are a primary concern in decision-making. In **ZH Tanzania** it was held that the best interests of the child must be a primary consideration and that the children are not to be blamed for the errors of their parents. It would therefore be in the best interest of the children to remain in the United Kingdom. The children are in full-

time education and have established their way of life here. It would not be in their best interest to uproot them from everything as they have become accustomed to and expect them to start again in the country they are not familiar with.

The hearing

7. I heard submissions from both parties at the hearing the full notes of which are in my Record of Proceedings.

Decision on error of law

8. The first-tier Tribunal Judge in a careful and detailed determination considered all the evidence in the appeal in respect of all the appellants individually. The Judge found that the first and second and fourth appellants did not meet the requirements of the Immigration Rules and there were no exceptional circumstances as to why they should be allowed to remain pursuant to Article 8 when they cannot meet the requirements of the Immigration Rules. This was a finding open to the Judge considering that the first appellant, their mother came to this country on a visitor's visas and left her children in Nigeria in 2005. She then brought them to this country, in 2012, even though she was living here illegally. They have therefore all been living in this country illegally. The Judge was completely and absolutely entitled to find that there were no exceptional circumstances in the first, second and fourth appellants' appeals that they should succeed pursuant to Article 8 when they cannot satisfy the requirements of the Immigration Rules.

9. It has been argued that the third appellant, who is the niece of the first appellant, has been in this country for 10 years. It was accepted by the Judge that the appellant's niece has been in this country all her life, bar six months. The Judge did not find the first appellant credible and said that she has exaggerated her and the third appellant's circumstances in Nigeria. The Judge took into account that the first appellant's evidence was that her brother, her nieces father, was unkind to his daughter. She found that given that the first appellant will be accompanying her and her children to Nigeria, she will be able to look after the third appellant. The third appellant has been living with the first appellant in this country for 10 years and they are clearly bonded. Therefore, when they return to Nigeria, the Judge was entitled to find that they will live together with the first appellant and her children and she will look after her niece if there was any suggestion that the father will be unkind to his daughter. The Judge also found that the first time that the appellant mentioned this unkindness was at the hearing but accepted that that might be the position because there was a letter from a witness. She was

entitled to find that having the first appellant with her would cause her no problems.

10. The Judge was entitled to find that all the appellants can return to Nigeria and continue with their family and private life in that country. There is nothing perverse in this conclusion based on the evidence that all the appellants have no right to remain in this country. She took into account that paragraph 276 (vi) of the Immigration Rules provides that if the appellant is under the age of 18 and has lived in the United Kingdom for at least seven years….. and "*it would not be reasonable to expect the appellant to leave the United Kingdom*." The judge was entitled to found that it would be reasonable to expect the appellant in this appeal to leave the United Kingdom with the first appellant and her cousins. There is no material error of law in this conclusion.

11. The Judge took into account that the first appellant left her children in Nigeria for nearly 7 years and therefore must have been confident that someone is looking after them. The Judge found that the appellants have other family in Nigeria who can assist them in settling down. The Judge found that the first appellant is a very resourceful woman who has managed to live in this country with three children and therefore on her return she can prevail upon her resourcefulness and settle down with all the appellants. The Judge was entitled to find that the third appellant would be under the protective umbrella of the first appellant. In those circumstances all the appellants are able to return to Nigeria. The third appellant is not a British citizen and continues to be a national of Nigeria. She will be going home to our own country.

12. The Judge stated in her determination that the best interests of the third appellant must inform her decision. There is no perversity in her finding that the all the appellants can accompany the first appellant to Nigeria s all have no right to remain in this country.

13. The Judge took into account all the relevant factors in his proportionality exercise and gave cogent reasons for her decision. The Judge took into account the Article 8 rights of all family members individually. The appellants appeal is no more than a quarrel with the Judge's findings which she was entitled to make on the evidence.

14. The upshot is that the determination of the Judge is not affected by a material error and I find that the Judge did conduct a proper assessment of all the appellants' rights individually pursuant to the Immigration Rules and Article 8. The Judge also took into account the best interests of the all the child appellants and came to a sustainable conclusion.

15. I find that there is no material error of law in the determination of First-tier Tribunal and I uphold her decision.

Conclusions

16. I therefore find that the appellants appeal must fail pursuant to the Immigration Rules and Article 8 of the European Convention on Human Rights.

DECISION

The appellant's appeal is dismissed

I make no anonymity orders
The appeal has been dismissed in the can be no fee order

Signed by

A Deputy Judge of the Upper Tribunal
Mrs S Chana Dated 19th day of April 2016