IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/46994/2014
IA/46989/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 January 2016	**On 11 February 2016**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

YETUNDE KUDIRAT LAWAL
P I
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr J Rendle, Counsel instructed by Brightway Immigration and Asylum
For the Respondent: Ms A Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The First Appellant, who was born on 3 September 1968, is a national of Nigeria. She was granted entry clearance on 20 August 2001, on 25 January 2002, 16 July 2003 and 7 September 2005, which suggests that she was granted entry clearance and was in the United Kingdom for periods of time after these dates. She did not leave the United Kingdom when her last period of leave expired. On 3 March 2014 she applied for

leave to remain on human rights grounds but on 29 March 2014 the Defendant refused her application.

2. In her decision letter, the Respondent accepted that the First Appellant's daughter, the Second Appellant, was born here on [-] and that she had lived here for at least seven years prior to their application for leave. But she concluded that it was not unreasonable to expect the Second Appellant to leave the United Kingdom as she would be returning to Nigeria with the First Appellant as a family unit.

3. There were then judicial review proceedings and the Defendant agreed to reconsider her decision but on 5 November 2014 she again refused to grant the Appellants leave to remain and on 10 November 2014 she made a decision to remove them to Nigeria. They appealed against this decision on 21 November 2014 and on 1 July 2015 First-tier Tribunal Judge Abebrese dismissed their appeal. They appealed against this decision on 14 July 2015 and on 3 November 2015 Designated First-tier Tribunal Judge Zucker granted them permission to appeal.

4. At the hearing before me, Mr Rendle argued that the determination made by First-tier Tribunal Judge Abebrese lacked substantial reasoning. In particular, he submitted that the First-tier Tribunal Judge had not recorded the submissions made by the parties and I note from my file that his Record of Proceedings was very short and he had not recorded any submissions made by the Appellants' counsel.

5. Mr. Rendle referred me to extracts from the First-tier Tribunal Judge's decision. In particular, he noted that in paragraph 13 the Judge says that the First Appellant "gave evidence during cross-examination additionally the Tribunal therefore do not find it credible when the First Appellant claims that she would find it difficult to relocate to Nigeria as a whole". I agree with the Appellants' counsel that it is unclear from this sentence what was said by the Appellant which was not credible and why that means it would not be difficult for her to relocate to Nigeria. Therefore, he did not give adequate reasons for a significant part of his analysis of the Appellants' case.

6. First-tier Tribunal Judge Abebrese also added that "the Tribunal does not accept the submissions of Mr. Rendle on the above points". However, he does not record what these submissions were or why he did not accept them. In addition, the Record of Proceedings did not assist me as the Judge had not recorded Mr. Rendle's submissions.

7. Counsel for the Appellants also asserted that the Appellants had not said that the existence of Boko Haram gave rise to a right to asylum. Instead, he said that the Second Appellant had seen media reports about young girls being abducted by Boko Haram and had a subjective fear that a similar fate may await her in Nigeria and that this impacts on the reasonableness of returning her there and should have been addressed by the First-tier Tribunal Judge.

8. The Home Office Presenting Officer then addressed me and drew my attention to paragraph 16 of the decision where First-tier Tribunal Judge Abebrese did consider whether it was reasonable for the Second Appellant to go to Nigeria with her mother. In particular, he found that the First Appellant had spent most of her life in Nigeria, had family living there and was very familiar not only with the language but the social and economic circumstances in that country. He also noted that the Appellants would be returned to Nigeria together and that the First Appellant had been bringing the Second Appellant up here in the United Kingdom as a single parent. .

9. In addition, the Home Office Presenting Officer submitted that the Appellants were merely disagreeing with the Judge's findings and that viewed holistically the decision was one which was comprehensive and lawful.

10. However, considering the totality of First-tier Tribunal Judge Abebrese's decision, I find that he did make material errors of law in so far as he failed to clarify which evidence he had taken into account and provide cogent reasons based on that evidence for dismissing the Appellants' appeal.

11. **Therefore, I allow the Appellants appeal against the decision of First-tier Tribunal Judge Abebrese to dismiss their appeal**. I then gave the Appellants permission to submit an annual report from the Second Appellant's school and the letter from the Allahu Weehid Islamic Group UK, dated 15 May 2015. The Appellants' counsel was content for the Upper Tribunal to re-make the decision on their appeal. Therefore, I did not find that it is appropriate to remit the appeal to the First-tier Tribunal and decided that I would continue to re-make the decision in the Upper Tribunal. I gave the parties an hour to consider what further submissions they wanted to make on the merits of this case, and in particular the issue about whether it was reasonable to expect the Second Appellant to return to Nigeria.

De Novo Hearing

12. The Home Office Presenting Officer said that she relied on the Respondent's refusal letter and that the issue was whether it was reasonable for the Second Appellant to re-locate to Nigeria. She noted that the First Appellant was the Second Appellant's primary and sole carer and that the Second Appellant had no contact with her father. Therefore, her family unit would not be disrupted if she moved to Nigeria with her mother. She also relied on the case of *Azimi-Moayed & others v Secretary of State for the Home Department* [2013] UKUT 197 (IAC).

13. In addition, she noted that there was no evidence that the existence of Boko Haram in Nigeria would give rise to a breach of the Second Appellant's moral and physical integrity, as described in *Bensaid v United Kingdom* Application No. 44599/95. At most, it was said that the Second Appellant had a subjective fear of Boko Haram having seen reports about them in the media. She then submitted that the fact that the Second

Appellant was at school in the United Kingdom was not a trump card and referred to *EV (Philippines) & Others v Secretary of State for the Home Department* [2014] EWCA Civ 874 and *AM (s117B) Malawi* [2015] UKUT 0260 (IAC). She noted that the Second Appellant was in good health and the Appellants had had no leave to remain here.

14. In particular, she submitted that there may be some degree of interference with the Appellants' private lives but that it should not be exaggerated. She also noted that English was spoken in Nigeria and that the situation in *ZH (Tanzania v Secretary of State for the Home Department* [2011] UKSC 4 was different as the child was a British citizen. She also noted that the First Appellant did have some ties to Nigeria as she had worked there and may be able to resume contact with her other children who lived there.

15. In response the Appellants' counsel concentrated on whether it was reasonable to remove the Second Appellant from the United Kingdom. He noted that she only spoke English, was established and doing well at her primary school and had integrated well with her peers. He also noted that the entirety of her family and private life was here, including her private life at the local mosque. In addition, he relied upon the fact that her grandparents were dead, there was no network of support in Nigeria and she had had no contact with her half-siblings who lived there.

16. The Appellants' counsel also accepted that there was no objective evidence that there was a realistic degree of likelihood that the Second Appellant would be abducted by Boko Haram. But he continued by saying that it was wholly wrong to underestimate the psychological make-up of a nine year old. He added that she had a subjective fear of Boko Haram and it was totally unreasonable to uproot her from the United Kingdom and return her to a life of uncertainty and one where she would be subject to unjustifiably harsh consequences.

17. It was not asserted by the Appellants that their removal would amount to a breach of their family life. It was clear from the evidence that they formed their own family unit and would not be leaving any other member of the unit in the United Kingdom. The Appellants' counsel submitted that the removal of the Second Appellant from the United Kingdom would mean that she would not be able to form a relationship with her father or have any contact with him. However, the First Appellant had confirmed that the Second Appellant had not had any contact with her father since she was one year old. She also confirmed that he was a Nigerian citizen. It was not suggested that he was also a British citizen. Therefore, removing the Second Appellant to Nigeria would not necessarily mean that she would have no contact with him in the future and it was merely speculative to argue that she would not be able to resume contact with him at any time in the future.

18. The First Appellant has been living here since 2005 and will inevitably have developed a private life in the United Kingdom during that time. But

it was not argued that she was entitled to leave on account of this private life under or outside the Immigration Rules. Instead, the Appellants' counsel submitted that the central issue was whether it was reasonable to remove the Second Appellant from the United Kingdom as she had lived here for all of her life and was now nine years old. When considering this question I have reminded myself that the Second Appellant's best interests must be a primary consideration.

19. Paragraph 276ADE(iv) provides for leave to be granted to a child who had lived in the United Kingdom for at least a continuous period of seven years where it would not be reasonable to expect her to leave the country. In *Azimi-Moayed & others v Secretary of State for the Home Department* [2013] UKUT 197 (IAC) the Upper Tribunal did find that:

> i) 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.

20. However, the Upper Tribunal also went on to find that:

> ii) 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.

21. The Second Appellant was born here and, although she has lived here for nine years, in the first few years she will have been mainly focused on the First Appellant who will be removed to Nigeria with her. The Upper Tribunal also found that:

> iii) 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.

22. As was clear from the evidence, the Second Appellant has been brought up by the First Appellant and her father has had no contact with her since she was one. Therefore, he has played no part in bringing her up and she will be returning with the First Appellant who is her sole carer.

23. In paragraph 58 of *EV (Philippines)* the Court of Appeal held that:

> The assessment of the best interests of the children must be made on the basis that that facts are as they are in the real world … If neither parent has the right to remain, then that is the background against which the assessment is conducted.

24. In the Appellants' case, the First Appellant has had no leave to remain since 2005 and the Second Appellant has never had leave to remain. There was no evidence that the Second Appellant suffered from any physical or mental illness and her school report confirmed that she was

doing well at school and had no special educational needs. She had developed a private life through the mosque but there was nothing to suggest that this could not be replicated in Nigeria at a similar mosque. There was also no evidence that the First Appellant could not obtain employment in Nigeria to support them both and forge a private life for them both. There was also no evidence to show that the First Appellant could not attend an English medium school in Nigeria. Taking this and the totality of the evidence into account and applying a balance of probabilities I find that the Appellants have not established that it would not be reasonable for the Second Appellant to be removed from the United Kingdom with the First Appellant.

25. I have also considered whether the Appellants are entitled to leave to remain outside the Immigration Rules. However, the Appellants have not established that there are any exceptional or very compelling circumstances to justify such leave. At best they rely on the fact that the Second Appellant is doing well at school. However, I remind myself that in paragraph 39 of *EV (Philippines)* the Court of Appeal found that:

> "There was no reason to infer that any interruption to the education of the elder child upon return to Malawi would be any more significant than that faced by any child forced to move from one country to another by virtue of the careers of their parents. Nor should the difficulties of a move from one school to another become unduly exaggerated"

26. In paragraph 60 the Court of Appeal also held that:

> "If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

27. In the alternative, I have considered the Appellant's case under Article 8 outside the Immigration Rules. As stated above the Appellants have developed some level of private life here for the purposes of Article 8(1) of the ECHR. Their removal would be justified under immigration legislation due to the fact that the First Appellant has overstayed and States are permitted to impose immigration controls to protect the interests of their own state. The remaining question is whether removal would be proportionate.

28. When looking at this question, I have taken into account section 117B of the Nationality, Immigration and Asylum Act 2002. In particular, I note that the maintenance of immigration control is in the public interest and the Appellants do not have any leave and the First Appellant has overstayed since 2005.

29. I also remind myself that in *AM (Malawi)* the Upper Tribunal found that:

> "An appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources."

30. I note that the Appellants speak English but the letter submitted at the appeal hearing states that they have been financially dependent on support from the mosque. I have also given little weight to the private life developed by the First Appellant as her stay here was firstly precarious and then unlawful. The Second Appellant's residence has been precarious as, although she was born here, she did not obtain indefinite leave to remain here. Therefore, I have also given little weight to her private life.

31. Sub-section 117B(6) includes the same test as that contained in paragraph 276ADE(iv) and note that in *AM (Malawi)* the Upper Tribunal held that:

> "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."

32. Therefore, I adopt my findings above in relation to paragraph 276ADE(iv) and find that it would not be disproportionate to remove the Second and the First Appellants from the United Kingdom.

Notice of Decision

1. The Appellants' appeal against the decision by the Respondent to refuse them leave to remain in the United Kingdom is dismissed.

Signed Date: 5 February 2016

Nadine Finch
Upper Tribunal Judge Finch