Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/50477/2014**
IA/50478/2014
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THE IMMIGRATION ACTS

Heard at Field House
On 17 February 2016

Decision & Reasons Promulgated
On 23 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IYABODE BASIRAT BUSARI
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Respondent

Representation:
For the Appellant: Ms M Hannan, of Corban Solicitors.
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officcer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of

this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Mulholland, promulgated on 24 August 2015 which allowed the Appellants' appeals under the Immigration rules.

Background

3. The First Appellant is the mother of the second, third and fourth appellants. All four appellants are Nigerian citizen. The first appellant was born on was born on 9 November 1972. The second appellant was born on 4 August 1998. The third appellant was born on 16 June 2003. The fourth appellant was born 21 October 2005.

4. On 28 November 2013 the appellants applied for leave to remain in the UK. Those applications were refused by the respondent on 6 March 2014. The appellants then started judicial review procedure, which was withdrawn on 20 October 2014 when the respondent agreed to reconsider the decisions.

5. On 9 December 2014 the respondent refused the appellants' applications for leave to remain in the UK.

The Judge's Decision

6. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Mulholland ("the Judge") allowed the appeals against the Respondent's decision under the Immigration rules.

7. Grounds of appeal were lodged and on 5 November 2015 Judge Grimmett gave permission to appeal stating *inter alia*

> "It is arguable that the Judge failed to consider Zoumbas [2013] UKSC 74, EV Philippines [2014] EWCA Civ 874 and N [2005] UKHL 31 as they were not referred to in the decision and the Judge's conclusion may not have been the same had they been considered.

The Hearing

8. (a) Mr Bramble, for the respondent, simply adopted the grounds of appeal as his submission. There are two grounds of appeal. The first ground relates to the second appellant and is critical of the Judge's findings at [57] to [59]. It is argued that the Judge failed to take account of the cases of Zoumbas and EV Philipinnes. It is argued that the Judge's decision amounts to a comparison of the quality of education available to the second appellant in the UK to that in Nigeria, rather than applying the test of whether or not it is reasonable to expect the second appellant to leave the UK.

(b) The second ground of appeal relates to the fourth appellant and is critical of the Judge's findings at [63] to [73]. It is argued that the Judge's findings are dependent upon a comparison of health care facilities in the UK & in Nigeria, rather than the test of whether or not it would be reasonable for the third appellant to return to Nigeria. It is argued that the errors in law affect the findings at [77].

9. For the appellant, Ms Hannan told me that the Judge had prepared a fully reasoned decision and that the correct balance had been drawn between the appellants' interests & the public interest in immigration control. She urged me to dismiss the appeal and allow the decision to stand.

Analysis

10. In Zoumbas v SSHD [2013] UKSC 74 it was held that there was no "*irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being*". It was also held that there was no "*substance in the criticism that the assessment of the children's best interests was flawed because it assumed that their parents would be removed to the Republic of Congo. ....It was legitimate for the decision-maker to ask herself first whether it would have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance. When one has regard to the age of the children, the nature and extent of their integration into United Kingdom society, the close family unit in which they lived and their Congolese citizenship, the matters on which Mr Lindsay relied did not create such a strong case for the children that their interest in remaining in the United Kingdom could have outweighed the considerations on which the decision-maker relied in striking the balance in the proportionality exercise (paras 17 and 18 above). The assessment of the children's best interests must be read in the context of the decision letter as a whole.*"

11. In EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 it was held that the best interests of the child were to be determined by reference to the child alone without reference to the immigration history or status of either

parent (paras 32 and 33). In then determining whether or not the need for immigration control outweighed the best interests of the children, it was necessary to determine the relative strength of the factors which made it in their best interests to remain in the UK; and also to take account of any factors that pointed the other way. At paragraph 35 of EV (Philippines) and Others [2014] EWCA Civ 874 it was stated that the best interests of children will depend on a number of factors including their age, the length of time that they have been in the United Kingdom, how long they have been in education, the stage that their education has reached, to what extent they have been distanced from the country to which they are to be returned, how renewable their connection with it may be, the extent that they will have linguistic, medical or other difficulties in adapting to life there and the extent to which the course proposed will interfere with their family life or other rights in this country. The longer the child had been in the UK, 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 fell into one side of the scales. If it was 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 was 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. In the balance on the other side there fell 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 claimants had no entitlement to remain. The immigration history of the parents might also be relevant (paras 34 – 37).

12. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC) the Tribunal held that (i) 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 appealed decisions: (a) 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.

13. The grounds of appeal correctly set out that all four appellants' appeals were allowed under the immigration rules on the basis that it would be unreasonable for the second and fourth appellants to return to Nigeria.

14. Between [42] and [50] the circumstances of the first appellant are considered. At [43] the Judge correctly finds the first appellant "…*can only succeed under appendix FM if she can demonstrate that it would be unreasonable for her children to follow her to Nigeria*." When considering the "*reasonableness test*" between [51] and [54] the Judge reminds himself at [53] that this case turns entirely on the question of whether or not it would be unreasonable for the second, third and fourth appellants to return with the first appellant to Nigeria.

15. The second appellant's position is considered between [56] and [61]. The respondent's challenge focuses on [57] to [59]. The grounds of appeal complain that the Judge's reasoning is based entirely on the effect of taking a 16-year-old girl who has spent (now) more than 10 years in the UK away from her friends and interrupting the good progress that she is making education. It is argued that the ratio in Zoumbas & EV Philippines is ignored by the Judge, and that his findings amount to little more than a comparison of the quality of education and social life available to the second appellant.

16. At [60] the Judge summarises the factors he has to balance & the weight he gives to each of those factors, before coming to the conclusion (at [61]) that it would not be reasonable to expect the second appellant to leave the UK.

17. The Judge does not refer to either Zoumbas or EV Philippines, but his decision to cite neither of those cases has no impact on the decision. The circumstances in the case of Zoumbas are distinguishable from the facts and circumstances requiring consideration for the second appellant. In Zoumbas there were three children. The youngest was only a few months old. The oldest was only seven years old and her time in the UK had been interrupted by one year out-with the UK. Lord Hodge, in the final paragraphs of the Zoumbas Judgment, stressed the importance of the test given in the case of ZH (Tanzania) [2011] UKSC 4.

18. The answer to this case lies in guidance given in both EV Philippines and Azimi Moayad. In Azimi Moayad it was held that (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

19. The second appellant is not a child of primary school age whose focus and interests are enshrouded in the family unit. In the case of the second appellant the Judge has carefully and sensitively considered the needs of a girl in her mid-teens at a crucial time in her education. The Judge considers the second appellant's positive response to the benefit of education and the second appellant's social circumstances. He considers the impact of return to Nigeria on the second appellant and comes to the conclusion that removing educational opportunities (from which the second appellant has clearly benefited for more or less a decade) and separating the appellant from the friends that she has had since primary school to make her start again in a country from which she is completely estranged is not reasonable.

20. It is for the Judge to decide what is reasonable and what is not reasonable. That is exactly what the Judge has done. In the grounds of appeal, the respondent relies on only two cases which support the respondent's position. The respondent does not take a balanced approach & cite the cases which do not support the respondent's position.

21. The grounds of appeal move on to the fourth appellant. The Judge deals with the fourth appellant between [63] and [73]. For the fourth appellant the focus is almost entirely on his health difficulties. The fourth appellant suffers from ADHD and autism. He has siezures once a month. The Judge considers background materials and, at [70], concludes that it would be difficult to access the necessary health services, and at [71] that it is unlikely that the fourth appellant's special educational needs will be met in Nigeria.

22. The respondent's criticism is that the Judge has done little more than compare the quality of health services and education. That is an unfair criticism. What the Judge has done is consider the question of whether or not it is reasonable for the fourth appellant to return to Nigeria. In doing so, the Judge manifestly applies the correct legal test

23. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

24. There is no criticism of the Judge's fact finding exercise. In reality the respondent's appeal amounts to little more than a disagreement with the way the Judge has applied the facts as he found them to be to the reasonableness test. It was for the Judge to decide what is reasonable and what is not reasonable. As I have already indicated, that is exactly what the Judge has

done. The respondent might not like the conclusion that the Judge has come to, but that conclusion is the result of the correctly applied legal equation. There is nothing wrong with the Judge's fact finding exercise. The correct test in law has been applied. Some may view the conclusion reached by the Judge to be a generous one, but it is a conclusion which was well within the range of conclusions available to the Judge.

25. The decisions in relation to the first and third appellants were entirely dependent on the decisions in relation to the second and fourth appellants. As I find that there is no material error of law in relation to the second and fourth appellants, the decisions for the first and third appellants must also stand.

26. The Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

27. No errors of law have been established. The Judge's decision stands.

DECISION

28. The appeals are dismissed. The decision of the First-tier Tribunal stands.

Signed Date 22 February 2016
Deputy Upper Tribunal Judge Doyle