Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10244/2015**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 11th September 2017	**On 5th December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MR JOSEPH MWABUEZE NWAKA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr. C Ikegwuruka; Almond Legals
For the Respondent: Ms Peterson; Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons by F*t*T Judge Alty promulgated on 28th November 2016.

2. The appellant is a national of Nigeria. He arrived in the United Kingdom on 7th February 2005 and was granted leave to enter as a student until 30th April 2006. He was subsequently granted leave to remain in the UK until 20th February 2010. In May 2009, he applied for an EEA Residence card as the extended family

member of an EEA national. That application was refused on 26th March 2010, but following a successful appeal, the appellant was issued with an EEA residence card on 15th March 2011, valid until 15th March 2016.

3. On 5th May 2015, the appellant applied for indefinite leave to remain in the UK on the basis of 10 years continuous lawful residence. A decision was made by the respondent on 29th October 2015 to refuse the application, and it was that decision that was the subject of the appeal before the F*t*T Judge.

4. I should note at this stage that the appellant was married to his wife, Hope Nwaka, in Nigeria on 2006. She later joined the appellant as a dependant in 2007 and on 12th April 2008, their son MJN was born. Like the appellant, his wife and their son MJN, were issued with an EEA Residence card as extended family members on 15th March 2011, valid until 15th March 2016. The appellant and his wife have another son, JN born on 20th April 2012. They are all Nigerian nationals.

5. The appellant's immigration history is set out at paragraph [2] of the decision of the F*t*T Judge. At paragraphs [4] to [10] of her decision, the F*t*T Judge sets out the evidence before her and the issues in the appeal. The Judge's findings and conclusions are to be found at paragraphs [20] to [53] of her decision.

6. At paragraph [22] the Judge notes the concession by the appellant that he had not provided any evidence that he was a member of the EEA sponsor's household or that the sponsor was exercising Treaty rights in the UK, and the explanation for the absence of that evidence. The Judge found, at [23], the explanation to be unconvincing and at paragraph [24], concluded that the appellant has not demonstrated that he was part of the same household as the sponsor from 2011, or that the sponsor was exercising Treaty rights during that time. That finding and conclusion of the F*t*T Judge, is not challenged.

7. The Judge then turned her attention to the appellant's human rights claim under the immigration rules and Article 8. The Judge found, at [25], that the requirements for leave to remain in the UK as set out in Appendix FM of the rules

are not met by the appellant. The appellant's wife is not a British citizen, was not settled in the UK, or in the UK with refugee status or humanitarian protection.

8. At paragraph [27] of her decision, the F*t*T Judge noted that the appellant has two sons, both of whom were born in the UK and living in the UK. The Judge noted that neither child is a British citizen or settled in the UK. She accepted that MJN was born on 12th April 2008 and had been living in the UK for seven years as at the date of the appellant's application. At paragraph [28] of her decision, the Judge found that the appellant has a genuine and subsisting relationship with MJN and that the issue is therefore whether it would be reasonable to expect MJN to leave the UK.

9. In reaching her decision, the Judge notes at paragraph [29] of her decision that the best interests of the children are a primary consideration. At paragraphs [29] and [30], she refers to the relevant authorities including **Azimi-Moayed and others (decisions affecting children) [2013] UKUT 00197**, **ZH (Tanzania) –v- SSHD [2011] UKSC 4**, **E-A)Article 8 (best interests of the child) Nigeria [2011] UKUT 00315** and **EV (Philippines) [2014] EWCA Civ 874**. Having considered the evidence before her, and having made findings as to the best interests of the children for the reasons set out at paragraphs [31] to [37] of her decision, the Judge states, at [37]:

> *Taking an overall view, I have ultimately concluded that the best interests of the children lie with their parents within the family unit even upon removal. The best interests of the child are a primary not a paramount consideration. Even had I found that it would be in the children's best interests to remain in the UK, I am satisfied that it would still be reasonable to expect MJN to leave when taking an overall view. In reaching that conclusion, no other consideration would have more inherent significance than the child's best interests.*

10. Having found that the 'family life' requirements as a partner and parent cannot be met by the appellant, the Judge went on to consider the appellant's private life under paragraph 276ADE(1) of the immigration rules. The Judge found, at

paragraph [40], that there are no significant obstacles to the appellant's integration in Nigeria.

11. At paragraphs [41] to [43] the Judge considered the appellant's claim on Article 3 grounds, and in particular, the health of MJN. The Judge found that the high threshold set out by the Grand Chamber in **N –v- UK 26565/05**, is not met.

12. At paragraphs [46] to 53] of her decision, adopting the five-stage approach set out in **Razgar**, the Judge found that the appellant and his family have established a family and private life in the UK. She was satisfied that the respondent's decision may have consequences of such gravity as potentially to engage the operation of Article 8, that any such interference is in accordance with the law and has a legitimate aim. The real issue in this appeal was whether such interference is proportionate to the legitimate public end sought to be achieved.

13. At paragraphs [50] and [51] of her decision, the Judge refers to the matters that she is required to consider as part of the proportionality assessment under s117B of the 2002 Act. Again, the Judge accepted that MJN is a qualifying child, but concluded it would be reasonable to expect him to leave the UK for the reasons she had already given. At paragraph [52], the Judge again notes that she has had regard to the best interests of the children as a primary consideration. At paragraph [53], the Judge states:

> *"Having considered all the evidence, when balancing the public interest against the personal circumstances of the Appellants, by reference to Part 5A of the Nationality Immigration and Asylum Act 2002 (the Act) and taking into account the best interests of the children, I find that it would be proportionate to remove the Appellant to Nigeria, In making this finding, I am conscious that the family wish to remain and that there will be some difficulties to face on return. However, this does not mean it would not be proportionate. In reaching this conclusion, I take into account that the family are Nigerian nationals. The Appellant and his wife have spent the majority of their lives in Nigeria and would be able to support their sons in adapting to life there. There are no language or cultural barriers to return. They could practice their faith. They would be returning to an extended family network. No evidence is given of extended family in the*

UK to which any particular attachment has been formed. MJN's medical issues are not of a severity to persuade me that removal would not be proportionate."

14. In the grounds of appeal advanced by the appellant it is contended that in a separate appeal before the Tribunal, the appeals of the appellant's wife and children have now been heard, and allowed. The appellant advances five grounds of appeal. First, the Judge erred in her assessment of the best interests of the children. More weight should have been given to the private life established by the eldest child, and the Judge did not appropriately consider that the best interest of the affected children must rank higher than any other consideration. Second, the Judge did not properly apply the ratio of **ZH Tanzania** with regards to ascertaining the views of the children and when considering the appellant's immigration history. Third, if she could not decide on the issue of the best interests of the children, *(because the respondent had not carried out a proper assessment of the best interests of the children)* it was open to the Judge to remit the matter to the respondent for a lawful decision as one of the options available to her. Fourth, it was unfair for the Judge to find that it is reasonable for the appellant and his family to return to Nigeria when his partner and their children had an appeal pending before the F*t*T that was to be listed. Finally, the Judge erred in finding that the high threshold for an Article 3 claim has not been met.

15. Permission to appeal was granted by Upper Tribunal Judge Bruce on 4th July 2017. In granting permission, the Upper Tribunal Judge noted: "*On 12th April 2017, the appeals of the Appellant's wife and children were allowed. Judge Alty found that the Appellant had a genuine and subsisting relationship with his eldest child, MJ. MJ's appeal was subsequently successful under the Immigration Rules. Although the judge cannot be criticised for failing to take into account information which was not before him, it is arguable that he erred in law in his assessment of whether it would be reasonable to expect MJ to leave the UK.*" The matter comes before me to consider whether or not the decision of the F*t*T Judge involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

16. Before me, Dr Ikegwuruka submits that the Judge of the F*t*T accepts that the appellant has a genuine and subsisting relationship with MKN. He submits that in reaching her decision as to the best interests of the children, the Judge did not have proper regard to the evidence before her as to the health of the eldest child and that the error lies in the Judge's failure to carry out a proper assessment of the best interests of the eldest child in particular. Dr Ikegwuruka refers to the decision of the Court of Appeal in **MA (Pakistan) –v- Upper Tribunal & Anor [2016] EWCA Civ 705**, in which the Court considered how the test of reasonableness should be applied when determining whether or not it is reasonable to remove a child from the UK once he or she has been resident here for seven years. He also refers to the decision of the Upper Tribunal in **PD and Others (Article 8 – Conjoined family claims) Sri Lanka [2016] UKUT 108** in which the President of the Upper Tribunal held that in considering the conjoined Article 8 ECHR claims of multiple family members, decision-makers should first apply the Immigration Rules to each individual applicant and, if appropriate, then consider Article 8 outside the Rules.

17. Dr Ikegwuruku submits that the Judge of the F*t*T erred in determining the Article 3 claim relying upon the health of MJN through the lens of the decision in **N –v- UK**. He submits that since the decision of the F*t*T, the Grand Chamber of the CJEU has handed down its decision in **Paposhvili –v- Belgium (Application 41738/10)**. He refers to paragraphs [181] to [190] of the decision of the Grand Chamber in particular, and submits that the Judge applied too high a threshold.

18. In reply, Ms Peterson adopts the matters set out in the Rule 24 response dated 12th July 2017 that has been filed by the respondent. She submits that the Judge carefully considered all the evidence before her, and the findings and conclusions reached by the Judge were open to her. She submits that the Judge correctly considered the application under Appendix FM and paragraph 276ADE of the immigration rules and directed herself to the relevant statutory framework. Ms Peterson submits that the Judge adequately addressed the real issue in the appeal. That is, whether it is reasonable to expect the eldest child to return to Nigeria with

the appellant, on the evidence before her. She submits that the Judge could not have guessed the subsequent outcome of a separate appeal before the F*t*T by the appellant's wife and the children. The fact that a different Tribunal had reached a different decision as to the best interests of the children, and whether it is reasonable to expect MJN to return to Nigeria, is not to say that the F*t*T Judge here, made an error of law in her decision. As to the Article 3 claim, Ms Peterson submits that however one reads the decision of the Grand Chamber in **Paposhvili**, the threshold still remains a high one. She submits that the evidence before the F*t*T Judge does not establish that the test, even as set out in **Paposhvili**, is met. Any error in deciding the Article 3 claim by reference to the decision **N –v- UK** is she submits, immaterial.

DISCUSSION

19. I remind myself that in **R & ors (Iran) v SSHD [2005] EWCA Civ 982**, the Court of Appeal 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.

20. It is common ground that in the assessment of the appeal under Article 8, the best interests of the children must be a primary consideration. That meant that they must be considered first. At paragraph [28] of her decision, the Judge correctly identified the issue in the appeal. That is, whether it would be reasonable to expect MJN to leave the UK. At paragraph [29] of her decision, the Judge noted that the best interests of the children are a primary consideration in the analysis. In **ZH (Tanzania)**, the Supreme Court held that the best interests of a child are "a primary consideration" but that is not the same as "the primary consideration" and still less "the paramount consideration. In **MA (Pakistan),** the Court of Appeal held that the fact that a child had been in the UK for seven years should be given significant weight in the proportionality assessment.

21. The Tribunal must "have regard" to the considerations set out in section 117B of the Nationality, immigration and Asylum Act 2002 (section 117A). The Judge

properly identified that in this appeal, by operation of s117B(6) of the 2002 Act, the public interest does not require a 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.

22. I reject the claim that the Judge erred in her assessment of the best interests of the children. At paragraphs [31] to [36] of her decision, having noted the respective ages of the children, the F*t*T Judge found that it is in the children's best interests to live with, and be brought up, by their parents in the family unit. The Judge found that the children and their parents are all Nigerian nationals and the children are entitled to citizenship of Nigeria. The children will have the benefit of growing up in the cultural norms of the society to which they belong. They will be able to continue their education in Nigeria, and to continue attending Church and to pursue their faith. The Judge noted that the appellant's mother, sister and cousins remain in Nigeria, as does his wife's brother. The children would therefore be returning to an extended family network. The Judge considered the challenging behaviour and mental health of MJN, and the Care Plan that notes that he is managing well with few difficulties, and that his social care needs are met by his family.

23. In my judgement, the claim that more weight should have been given to the private life established by the eldest child, and that the Judge did not appropriately consider that the best interest of the affected children must rank higher than any other consideration, is nothing more than a disagreement with the findings and conclusions of the Judge. The Judge of the F*t*T properly noted that the best interests of the children are a primary consideration in the analysis. There is no reason to believe that she did not consider the best interests of the children as a primary consideration in the analysis that followed.

24. Having considered the best interests of the children, in my judgement, it was open to the Judge, on the evidence, to find that it would not be unreasonable to expect the eldest child in particular, to return to Nigeria. The Judge took into account the best interests of the children, and found that it was in their best interests to

continue to live with those who cared for them, namely their parents. When considering the childrens' circumstances, she considered the length of time that they had spent in the UK, their education, and the health of MJN. The judge applied the public interest considerations under section 117 and in particular S117B(6) on the basis that the eldest child had been in the UK for a period in excess of 7 years and she addressed the crucial question of whether it would be unreasonable to expect the eldest child in particular to return to Nigeria.

25. In light of her findings, the Judge applied the decision in **MA (Pakistan)** and had regard to the wider public interest in reaching a decision on the question of reasonableness of return. **MA (Pakistan)** concludes that the reasonableness test in this context is wide ranging, effectively bringing back into play all potentially relevant public interest considerations, including the matters identified in section 117B.

26. I reject the claim that the Judge erred with regards to ascertaining the views of the children and whether she should remit the matter to the respondent for a lawful decision. At paragraph [38] of her decision, the Judge noted that in **ZH (Tanzania)**, the Supreme Court identifies the need to endeavour to seek the child's views in cases where they are capable of forming their own views. The children here were aged 4 and 8 as the Judge recorded at paragraph [31] of her decision. The Judge noted, at [38], that the children are very young and the eldest child is mentally challenged with behavioural problems. In my judgement, it was open to the Judge to conclude that:

> *"38. ….I am not convinced that the children in this case are capable of forming and expressing their views reliably. Had their views been sought and expressed to be that they wished to remain, this would have been a factor for me to take into account, however it would not have altered my findings.in respect of their best interests.*

27. I also reject the claim that it was unfair for the Judge to find that it is reasonable for the appellant and his family to return to Nigeria when his partner and their children had an appeal pending before the F*t*T, that was to be listed. There was no

application for an adjournment made by the appellant so that the two appeals could be heard together. The fact that another Judge of the F*t*T has since held in a separate appeal, that the appellant's wife and children have established that it is unreasonable to expect the eldest child to return to Nigeria, is not to say that the decision of the F*t*T Judge here, is infected by a material error of law. The F*t*T Judge here, properly made her decision on the evidence before her. It is to be noted that the Judge of the F*t*T here heard only the evidence of the appellant. There was no evidence given by the appellant's wife.

28. Finally, I reject the claim that the Judge erred in her assessment of the Article 3 claim based upon the health of MJN. Dr Ikegwuruka relies upon the decision of the Grand Chamber in **Paposhvili**. He submits that the Grand Chamber has now moderated the "close to death" exception applied previously in **N –v- UK**, and that the Tribunal must now consider other factors such as the absence of appropriate treatment in the receiving country, lack access to such treatment, and the risk of being exposed to a serious, rapid and irreversible decline in his or her health resulting in intense suffering, or to a significant reduction in life expectancy.

29. The domestic law at present is that set out by **N v UK** and the high threshold remains. The judgment of the Grand Chamber in **Paposhvili** may be persuasive but it has not been incorporated into domestic law. I do not therefore find the criticism made by the appellant in this respect to be made out. The judge did not accept, having considered the evidence before her, that the high threshold for establishing an Article 3 claim has been met in this case.

30. The decision of the F*t*T Judge must be read as a whole. I have carefully read the paragraphs that the appellant seeks to criticise and the decision as a whole. I am satisfied that it was open to the Judge on the evidence before her, to have reached the conclusion that it would be reasonable to expect the children to leave the UK. It was open to the Judge to reach the conclusion that the appellant's removal was proportionate having regard to all the circumstances. The Judge took into account the best interests of the children which are a primary consideration and the public

interest in effective immigration control. In my judgement, it was open to the Judge to dismiss the appeal on the material that was before her, for the reasons that she has given.

31. Here, it cannot be said that the Judge's analysis of the evidence is irrational or perverse. The Judge did not consider irrelevant factors, and the weight that she attached to the evidence either individually or cumulatively, was a matter for her. I am satisfied that the Judge's decision is a sufficiently reasoned decision that was open to her on the evidence.

Notice of Decision

32. The appeal is dismissed.

Signed Date 20th November 2017

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

The appeal is dismissed and there can be no fee award.

Signed Date 20th November 2017

Deputy Upper Tribunal Judge Mandalia