Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers:**
IA/31566/2015

IA/31578/2015

IA/31575/2015

IA/31573/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 May 2017	**On 25 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

OLUBUKOLA SOREMEKUN
MUYIDEEN SOREMEKUN
OLUWAMUYIWA JEREMIAH SOREMEKUN
MOYINOLUWA ELIZABETH SOREMEKUN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms A Sobande of O A Solicitors
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellants against a decision of the First-tier Tribunal (Judge Paul) dismissing their appeal against the respondent's decision of 19 August 2015 refusing them further leave to remain.

Background

2. The appellants are all citizens of Nigeria. The first appellant ("the appellant") was born on 19 January 1973 and is married to the second appellant born on 4 January 1979. The appellant entered the UK as a visitor in 2005 and the second appellant joined her in 2006. According to his witness statement he last entered the UK as a visitor in 2008 after being granted leave in that capacity. The third appellant was born in the UK on 21 July 2007 and the fourth appellant on 21 July 2010. Subsequently, a further child has been born on 20 March 2015. In December 2009 the appellant applied for leave to remain on human rights grounds with the third appellant as her dependent child. That application was refused. It appears that further representations were made as a further refusal letter was sent to the appellants on 23 March 2011 which decision was the subject of an appeal to the First-tier Tribunal. The appeal was heard on 23 May 2011 and dismissed in a decision issued on 15 June 2011. Permission to appeal was refused by both the First-tier and the Upper Tribunal and on 4 October 2011 their appeal rights were exhausted.

3. On 28 March 2012 the appellant made a further application for leave to remain on human rights grounds for herself, her husband and her two children. Her application was refused on 14 June 2013. An application for judicial review was lodged on 4 March 2015 and following an oral permission hearing on 10 June 2015 the respondent conceded that the decision should be reconsidered and the decision the subject of this appeal was issued on 19 August 2015. The respondent was not satisfied that the appellant could meet the requirements of the Rules in relation to either family or private life. She went on to consider whether there were exceptional circumstances warranting a grant of leave outside the Rules. For the reasons set out in the decision letter, the respondent decided that there were no exceptional circumstances and the application was refused.

The Hearing Before the First-tier Tribunal

4. The appellants appealed against this decision and their appeal was heard on 11 October 2016 by the First-tier Tribunal. The judge pointed out that the appeal arose out of an application that was lodged approximately eight months after the previous decision and raised the issue of whether there were any new circumstances save for the fact that the application was now being considered under the Rules as amended in 2012 such as to amount to distinguishing facts. The appellants' representative said that the new grounds were that another child had been born on 20 March2015 and the oldest child had now been in the country for nine years and therefore qualified under the Rules and that would obviously assist the

appeals of the co-appellants. It was further submitted that due to the period of time that had lapsed a fresh assessment under s.55 of the Borders, Citizenship and Immigration Act 2009 had to be made about the best interests of the children.

5. The judge pointed out that the application could not succeed under the Rules in relation to family life as the appellants could not meet the eligibility requirements and therefore para EX1 did not fall to be considered. They could not bring themselves within the provisions of para 276ADE(1) as they had not been in the UK for a sufficiently long period. The third appellant who was 4 when the application was made could not come within the provisions of para 276ADE(1)(iv), as the relevant periods of time were calculated with time ending immediately before the date of the application.

6. The judge found that the appellant could not succeed under the Rules and in [15] went on to say:

> "... in my view, there is nothing in this case invoking the principles of SS (Congo) and Sunassee that showed there was any gap between the Rules and the appellants' circumstances such as to justify a consideration of Article 8 under the Razgar test. In relation to Section 55, again this is no answer to say that 'because the children have been here for five years since the last application' that somehow strengthens their case for being allowed to remain here."

6. The judge said that there was in his view absolutely no merit in the appeal. He then said at [18]:

> "I have also had regard to Section 117B(6) of the 2002 Act as amended. The public interest does not require a person's removal when a person has a genuine and subsisting relationship with a qualifying child, and it would not be reasonable to expect the child to leave the UK. A qualifying child means a person who is under the age of 18 and has lived in the UK for a continuous period of seven years or more. Under this particular provision it could be argued that the oldest child now has been in the country for more than seven years. However, for exactly the same reasons that, on any Section 55 assessment, it would not be considered detrimental for this child to leave to go to Nigeria, so it would also be reasonable to expect this child to leave the UK with his family, to return to Nigeria."

The appeal was therefore dismissed.

The Grounds and Submissions

7. In the grounds of appeal it is argued that the relevant date for assessing the appeal was the date of hearing before the First-tier Tribunal when the third appellant was 9. The judge had erred by using the judgment in 2011 when considering the appeal. It is further argued that the judge did not allow the appellants to give evidence or to allow them to comment on

matters that he was minded to weigh against them; he erred in his determination by failing properly to assess the best interests of the children as a primary consideration, failing to take into account the guidance in MA (Pakistan) [2016] EWCA Civ 705 or of the guidance in the Supreme Court in ZH (Tanzania) v Secretary of State [2010] UKSC 4 and he failed to carry out the scrupulous analysis required by JO and Others (Section 55 duty) [2014] UKUT 517 by failing to carry out a careful examination of all relevant information and factors when assessing the best interests of the children.

8. Permission to appeal was granted by the First-tier Tribunal for the following reasons:

> "It is arguable that the judge should have made a full assessment of the position of the best interests of the children as at the date of hearing rather than rely on the earlier decision, which was over five years old, in the light of the passage of time since that decision."

9. At the hearing before me Ms Sobande said that no evidence had been heard by the judge. He had been wrong to rely on the previous decision without properly considering the current position in relation to the children's best interests. She submitted that the judge had not carried out a proper assessment when considering article 8.

10. Ms Ahmad did not seek to resist the appeal conceding that it appeared from [15] that the judge did not carry out an assessment under Article 8 because he took the view that there was no gap between the Rules and the appellant's circumstances and although at [18] he had accepted that it could be argued that the oldest child fell within the provisions of s.117B(6), he had not carried out an adequate assessment of the best interests of the children.

Consideration of Whether the First-tier Tribunal Erred in Law

11. I accept that Ms Ahmad's concession is correctly made and that the judge erred in law such that the decision should be set aside. In the grounds it is argued that the judge did not allow the appellants to give evidence or to comment on matters that he was minded to hold against them and further argue that he acted contrary to the principles of natural justice. If allegations such as this are to be made in the grounds they must be supported by evidence and not based on assertions alone. There is no evidence to support these grounds and I reject them.

12. However, I am satisfied that the judge erred in law by failing to give proper consideration to the position under article 8. In [15] he said that there was nothing to show that there is any gap between the Rules and the appellants' circumstances to justify a consideration of article 8 under the test in Razgar [2004] UKHL 27. I am not satisfied that that was the correct

approach in the light of the judgments of the Supreme Court in Hesham Ali v Secretary of State [2016] UKSC 60 at paras 51-3 and MM (Lebanon) and others v Secretary of State [2017] UKSC 10 at para 57. The failure to meet the requirements of the Rules will be an important factor in considering article 8 but that factor alone cannot be determinative. The judge further erred when he commented that when considering the best interests of the children it was no answer to say that because the children have been here for five years since the last application that somehow strengthened their case for being allowed to remain. Length of residence is clearly relevant and whilst not determinative must be taken into account: see para 46 of MA (Pakistan).

13. It is correct that when considering the position under para 276ADE(1) length of residence is assessed up to the date of the application and the third appellant's residence of over seven years could not bring him within the relevant provisions. However, when considering the position under article 8 it is clear that s.117B(6) requires a consideration of the position at the date of the hearing. By that time the third appellant had been in the UK for more than seven years and as set out in MA (Pakistan) a child's residence of over 7 years is significant and must be given due weight as must the best interests of the children generally but it does not follow that their best interests cannot be outweighed by other relevant factors including in particular in this case the fact that the appellants' residence has been precarious since the limited leave granted to the first and second appellants expired.

14. In summary, I am satisfied that the judge erred by failing to carry out a proper assessment of the position in relation to private and family life under article 8 and whether removal would be proportionate to a legitimate aim. That required an assessment of the current best interests of the children together with all other relevant factors and particularly those required to be taken into account in paras 117A and B of the Nationality, Immigration and Asylum Act 2002 as amended.

15. Both parties accepted that the proper course as article 8 had not been considered was for the appeal to be remitted to the First-tier Tribunal for reconsideration by way of a full re-hearing before a different judge.

Decision

16. The First-tier Tribunal erred in law and the decision is set aside. The appeal is remitted to the First-tier Tribunal at Taylor House for a full re-hearing by a different judge.

Signed H J E Latter Date: 22 May 2017

Deputy Upper Tribunal Judge Latter