Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/11984/2018
HU/11986/2018, HU/11989/2018
HU/11992/2018, HU/11995/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 3rd April 2019	**On 30th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(I) POW
(II) TTO
(III) PTO
(IV) EAO
(V) TMO
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: No legal representation
For the Respondent: Mr A McVeety (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Pickup, promulgated on 14th September 2018, following a hearing at Manchester

on 11th September 2018. In the decision, the judge dismissed the appeal of the Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants appear in five linked appeals. They are all citizens of Nigeria. They comprise a single family unit. They consist of the mother, father, and three minor children, and their dates of birth are 1st July 1979, 4th July 1981, 28th October 2010, 2nd March 2012 and 9th October 2014 respectively. The children, at the date of the hearing, were aged 7, 6, and 3 years, and were all born in the UK. The Appellants' appeal against the decision of the Secretary of State refusing their claim to remain in the UK on the basis of their family life, and the decision appealed against is dated 18th May 2018.

The Appellants' Claim

3. The First and Second Appellants met in the UK, although both are citizens of Nigeria. The First Appellant, the mother, entered the UK on 23rd December 2008 with leave as a family visitor. She failed to return after six months. The Second Appellant, the father of the children, entered as a student on 16th October 2009, and following further extensions of stay as a student, which expired in 2010, he also failed to return to Nigeria, and became an illegal overstayer. The children were born thereafter. Then in a number of applications that they made to remain in this country, including two judicial review applications in 2017, which were refused, they also failed to attend for an interview on three occasions in 2015 with the Nigerian High Commission, to facilitate their return to Nigeria.

The Judge's Findings

4. In a detailed, careful, and comprehensive decision, the judge found himself, on the day of the hearing on 11th September 2018, with the Appellants appearing unrepresented. He made it clear that he "would help them present their case and ensure that they had the opportunity to put all the relevant matters before the tribunal" (paragraph 6). The First Appellant gave evidence that she could not return to Nigeria because there were very significant obstacles to their integration to life there and there would be insurmountable obstacles to continuing family life in Nigeria (paragraph 8). They went on to say that they would be destitute and the children would end up on the streets, and there was also a risk of kidnapping (paragraph 17).

5. However, when the judge asked both of the First and Second Appellants, as to why they had overstayed, the First Appellant "has given no explanation for not leaving within the limits of her leave" (paragraph 22), and were clearly determined to remain here. When questioned further,

"the first appellant appeared evasive, and unwilling to answer straight questions with straight answers" (paragraph 25).

6. The judge went on to conclude that:-

> "the picture painted by the parents of life with the children in Nigeria is not as bleak or desperate as they have claimed. I find that they have exaggerated concerns about kidnapping and other difficulties. The family will be returning together and will have at least some element of family network of support as they settle" (paragraph 32).

7. In considering the best interests of the children, the judge observed that:-

> "The matter is finely balanced with significant features pointing to their best interests being to live in the country of their nationality, ethnic and cultural heritage background. Even the elder child is still relatively young and children are adaptable. They will have the support of their parents and, I have found, there is some family so that there will be a network of support in their integration" (paragraph 36).

8. On the other hand, the judge also took the view that:-

> "I find that the best interests of the children, either together or individually, are on balance to remain in the UK to continue the only life they have known and where the older two children have commenced education. Life in the UK is obviously going to be preferable that the uncertainties and perhaps less comfortable life in Nigeria than that which they might look forward to enjoying in the UK" (paragraph 37).

9. However, in asking the question, whether it would be reasonable to expect the children to return with their parents, the judge was of the view that the overwhelming public interest rendered the removal reasonable (see paragraphs 39 to 41).

10. The appeal was dismissed.

Grounds of Application

11. The Grounds of Application state that the judge has misapplied the law, and has come to the wrong conclusions with respect to the position of the children, given that they would not be safe in Nigeria and would have no support network.

12. Permission to appeal was granted by the Upper Tribunal on 17th January 2019, with the observation that:-

> "The judge gave entirely sound reasons for concluding that the first appellant had not established there would be any significant health difficulties and that the two adult appellants had very weak cases".

13. However, given that the Third Appellant (the youngest child) was over 7 years of age, the judge was obliged by principles set out in **MA (Pakistan)** to consider whether there were strong or powerful reasons for

refusing to grant leave to remain. The judge appeared to have started from the position that it was for the Appellants to prove such strong reasons.

Submissions

14. At the hearing before me on 3rd April 2019 the Appellants were again unrepresented. The First Appellant, POW, attended court with two of her children, and submitted that the judge had ignored the fact that the children would not be safe in Nigeria. She, in effect, relied upon the Grounds of Application before the Upper Tribunal. For his part, Mr McVeety submitted that the judge was entitled to come to the conclusions that he did. He had set out the facts of the matter before him carefully. He had applied the case law in a diligent and conscientious manner. It had been recognised by the judge that the best interests of the children lay in remaining in the UK, given that life in this country was the only life that they had known (paragraph 37). However, the judge had then applied the guidance in the leading cases, such as **Agyarko [2017] UKSC 11**, and observed that the issue ultimately is one of "proportionality", such that the fact that family life in this country had been built up on the basis of circumstances which were "precarious" (see paragraph 49), meant that the overwhelming importance of immigration control, as a public interest requirement, could not be overlooked.

Error of Law

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision. I come to this conclusion with some considerable reluctance. The decision by the judge, as recognised by Dr Storey, in granting permission, was one where he "gave entirely sound reasons" for coming to the factual decisions that he did. The reference to the case law is also commendably accurate and well-placed.

16. However, the reason why permission was given was that the judge had failed to quote the matter of the basis that, the onus in showing that there were strong or powerful reasons to refuse to grant leave to remain where a child was in the UK for over seven years, lay not upon the Appellant, but upon the Secretary of State. The judge in this case has stated that:-

> "I find that this is a case of precarious family life as far as continuing it in the UK is concerned, and that therefore a very strong or compelling claim is required to outweigh the public interest in immigration control" (paragraph 49).

17. There has been an absence of a consideration of the Home Office guidance in this respect. This appears in the "Immigration-Directorate Instruction Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes August 2015". The guidance that is given is to the effect that:-

> "the requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of the application, recognises that over time children start to put down roots and integrate into life in the UK …".

18. The guidance goes on to say that in these circumstances, where the balance would be more in favour of a child such that it would be generally unreasonable to expect the child to leave the UK, the position is that "strong reasons would be required in order to refuse a case with continuous UK residence for more than 7 years".

19. The Tribunal decision in **SF and others (Guidance, post–2014 Act) Albania [2017] UKUT 00120 (IAC)** is also instructive because here the Tribunal held (at paragraphs 10 to 12) that in the interests of consistent decision making:-

> "where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it".

20. For these reasons only, I find that there is an error of law.

Notice of Decision

21. The decision of the First-tier Tribunal involved the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision and remake the decision. In remaking the decision I direct that this matter be remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Pickup, pursuant to Practice Statement 7.2(b) of the Practice Directions.

22. An anonymity direction is made.

23. The appeals are allowed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 29th April 2019

Deputy Upper Tribunal Judge Juss