Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:** **Appeal Numbers: IA/21782/2014**
IA/21788/2014
IA/21794/2014
IA/21795/2014
IA/27800/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 20 May 2015	**On 05 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between
FATTAH AFOLABI
OLUWAKEMI HAFSAT AFOLABI
FARID OLAOLU SIMISOLA
TARIQ OLUTADE JADESOLA
MATINA EYITAYO AFOLABI

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mrs A Sobande instructed by OA Solicitors
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are husband, wife and their three children. They are all nationals of Nigeria. They appealed to the First-tier Tribunal against the decisions of the Secretary of State of 8 May 2014 to refuse their applications for leave to remain on the basis of their private and family life in the UK. First-tier Tribunal Judge A R Williams dismissed their appeals and the appellants now appeal with permission to this Tribunal.

2. The first, second, third and fourth appellants entered the UK in 2005 with entry clearance as visitors. The fifth appellant was born in the UK on 4 October 2005. On 18 March 2013 they applied for leave to remain under the Immigration Rules on the basis of their private and family life. Those applications were refused on 3 June 2013 with no right of appeal in the UK. Following applications for Judicial Review a Consent Order was made and the respondent reconsidered the applications and on 8 May 2014 issued fresh decisions to refuse the applications and remove the appellants from the UK.

3. The First-tier Tribunal Judge stated in his determination that it was accepted at the outset of the case that the appeals revolved entirely around Article 8 and that it was accepted that the Immigration Rules did not help the appellants [29]. He went on to consider the appeals outside the Immigration Rules and concluded that the decision to return the family to Nigeria was a proportionate interference with their private and family life.

Error of law

4. The appellants put forward three main grounds of appeal to the Upper Tribunal. The first is that the First-tier Tribunal Judge erred in refusing the application to adjourn the hearing of the appeal which was based on the fact that the second appellant was in hospital with her newborn baby. I agree with First-tier Tribunal Judge Chohan, who granted permission to appeal, that there is no substance in this ground. First-tier Tribunal Judge AR Williams set out reasons for refusing the adjournment request and noted that the essential facts were not in dispute. He heard oral evidence from the first appellant. His decision to refuse to adjourn resulted in no prejudice to the appellants.

5. It is contended in the grounds of appeal that the Judge made a mistake of fact at paragraph 39 of the decision where he says that the fifth appellant was 7 years old at the date of his decision whereas in fact she was 9 years old at that time. That however is not necessarily a material error in light of the fact that the Judge stated earlier that the fifth appellant was born in October 2005 [2], he acknowledged that she was born in the UK [39] and he correctly stated the ages of the other children who are older than the fifth appellant.

6. The other main ground of appeal is that the Judge erred in failing to consider the relevant Immigration Rules. The Judge said that it had been accepted that the Immigration Rules were not met [29] and took into account that the Immigration Rules had not been met in his assessment of proportionality under Article 8 [34]. It is contended that no such concession was made and that in fact it was argued in the First-tier Tribunal that the appellants qualify under paragraph 276ADE. It is contended that the Judge therefore erred in failing to consider the Immigration Rules.

7. Mr Kandola referred to a recent case which he said meant that the appellants should have produced evidence to support their contention that there was no concession made in the First-tier Tribunal. I understand that the case he referred to is that of BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC) where the President outlined what he described as the *'rare'* circumstances where an advocate may be required to submit a witness statement where the grounds of appeal are based, in whole

or in part, on how the first instance hearing was conducted and events which unfolded therein. The President said that in practice this course is most likely to occur '*where it is contended that the litigant was deprived of his right to a fair hearing by reason of events which occurred at the hearing itself*' where *'the Tribunal's decision does not speak for itself on this discrete issue'*.

8. In this appeal the Judge made no reference in his recording of the preliminary issues to a concession '*at the outset of the case*' [29] that the appellants could not meet the Immigration Rules. He did not record any submission to that effect in his record of Mrs Sobande's submissions at the end of the evidence. In fact at paragraph 25 he records that Mrs Sobande relied on her skeleton argument. The skeleton argument clearly relies on paragraph 276ADE (iv) in relation to the children. Further, the Reasons for Refusal letter of 8 May 2014 clearly deals with Appendix FM and paragraph 276ADE in relation to each of the appellants.

9. In these circumstances I am satisfied that the Tribunal's decision, read with the skeleton argument, does in fact speak for itself on this issue. Further, the record of proceedings on file records that the appeals 'revolve around the law of Article 8' as set out by the Judge at paragraph 5, but it does not record any concession. I am satisfied that the Judge erred in stating that there was a concession that the appellants did not meet the Immigration Rules and accordingly in failing to consider the Immigration Rules before going on to consider Article 8 of the ECHR.

10. Mr Kandola submitted that if I accept that the Judge erred in failing to consider paragraph 276ADE any error was not material because paragraph 276ADE (iv) requires it to be shown that it not reasonable to expect the children to leave the UK. He submitted that the Judge did consider that question in his determination.

11. Mrs Sobande submitted that the Judge made a fundamental error in failing to consider paragraph 276ADE. She submitted that this was a material error as, if the Judge had considered it properly, he might have reached a different conclusion.

12. For the reasons set out above I am satisfied that the Judge erred in recording that the appellants' representative conceded that the Immigration Rules could not be met. Mrs Sobande did not submit that any other parts of the Immigration Rules could be met and I am satisfied that the Judge erred in failing to consider paragraph 276ADE in relation to the children before going on to consider freestanding Article 8.

13. I indicated at the hearing that I was satisfied that the Judge made an error of law. I heard submissions from Mr Kandola and Mrs Sobande in relation to remaking the decision. In considering these submissions and the determination of the First-tier Tribunal Judge as a whole I find that the error made by the Judge was not a material one for the reasons set out below.

14. The Judge accepted that the family have a family life and a private life in the UK. He noted that if they are returned to Nigeria they will be returned as a family but went on to consider the appeal on the basis of their private life [30]. Going through the steps set out in R v SSHD ex parte Razgar [2004] UKHL 27 the Judge reached the stage of considering the proportionality of the decision. At that stage he considered the family's

length of stay in the UK and the fact that their visas expired in 2006 and 2007; the best interests of the children in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009; and section 117B of the of the Nationality, Immigration and Asylum Act 2002.

15. In considering section 117B the Judge took account of the fact that all of the family speak English and that little weight should be given to a private life established when immigration status is precarious.

16. The Judge considered section 117B(6) which provides that where a person not liable to deportation has a genuine and subsisting parental relationship with a qualifying child (which includes a child who has lived in the UK for a continuous period of seven years or more) and *'it would not be reasonable to expect the child to leave the UK'*. Therefore whilst the Judge failed to consider paragraph 276ADE (iv) he did consider the same question as posed by section 117B (6). This is the reverse of the situation considered by the Upper Tribunal in the case of AM (S 117B) Malawi [2015] UKUT 0260 (IAC) where the Tribunal concluded;

> "13. There is also in our judgement no requirement that the FtT should pose and answer the same question more than once, simply as a matter of form. Thus since both paragraph 276ADE(1)(iv) of the Immigration Rules, and s117B(6), both raise the same question in relation to a particular child, of whether or not it would be reasonable to expect that child to leave the UK: it is a question that need only be answered once. Although the judge did not make specific reference to s117B(6) or set its provision out in full, it is plain from the terms of her determination at paragraphs 30-37, 48-52, and 56-58, that she did consider at some length the circumstances of the children and their ability to relocate to Malawi. There is no suggestion before us that the judge failed to have regard to any material circumstance relating to either child. The mere presence of the children in the UK, and their academic success, was not a "trump card" which their parents could deploy to demand immigration status for the whole family; Butt v Norway App 47017/09 4 December 2012, and EV (Philippines) and others v Secretary of State for the Home Department [2014] EWCA Civ 874."

17. At paragraphs 37-39 the Judge considered whether it would be reasonable to expect the children to leave the UK and acknowledged that strong reasons are required to remove children who have been in the UK for at least seven years. He identified the kinds of factors he would have to take into account. He noted that the children would be removed with their parents, that there was no evidence of a significant risk to their health if removed to Nigeria, that there was no evidence as to wider family ties in the UK and in particular there was no evidence about or from a cousin who had been mentioned; that upon return to Nigeria they would be able to enjoy the full rights of being citizens of Nigeria; that the children can speak, read and write English which is a language of Nigeria; he considered the length of time each child had been in the UK at the date of the hearing; he considered the evidence as to their education. He took account of the relevant case law including the decision of the Court of Appeal in EV (Philippines) & Others v SSHD [2014] EWCA Civ 874 which made clear that the desirability of being educated in the UK cannot outweigh the benefit to children of

remaining with their parents. He noted that each of the children had always lived with their parents with whom they would be removed.

18. In terms of the parents the Judge considered the fact that the first appellant would be employable in Nigeria and that he and the second appellant had spent the majority of their lives in Nigeria and had not lost ties with that country. He took account of the fact that the parents will be able to provide stability to the children and help them integrate into Nigerian society [44].

19. In her submissions to me Mrs Sobande did not rely on any factors other than those considered by the Judge and set out above. She relied on the length of residence of the children. However even if I were to now consider paragraph 276ADE the provisions of that rule relate to the requirements to be met by an applicant at the date of application (paragraph 276ADE (1)), which in this case was 18th March 2013, when the appellants had been in the UK for around 8 years. Any additional time spent here since then cannot be considered in looking at paragraph 276ADE.

20. Having examined all of the factors taken into account by the First-tier Tribunal Judge I am satisfied that these are the same factors he would have taken into account had he considered paragraph 276ADE. Accordingly, although the Judge erred in wrongly proceeding on the basis that paragraph 276ADE had been conceded and in failing to expressly consider that paragraph, this error was not material because he did consider the same question in his consideration of section 117B (6).

Conclusion:

The making of the decision of the First-tier Tribunal did not involve the making of a material error on point of law.

The decision of the First-tier Tribunal shall stand.

Signed Date: 3 June 2015

A Grimes
Deputy Judge of the Upper Tribunal