Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers IA/23187/2014
IA/23193/2014
IA/23198/2014
& IA/23200/2014

THE IMMIGRATION ACTS

Heard at South Shields	**Decision and Reasons promulgated**
On 17 December 2015	**On 15 January 2016**

Before

The President, The Hon. Mr Justice McCloskey
and Upper Tribunal Judge Plimmer

Between

ABOLAGI SHAKIRU ISMAIL
THEODORA ENOOBONG ISMAIL
MERCY AYOMIKUN TEMITOPE INEMABASI ISMAIL
SAMUEL TOLUWANI ANIEKAN OPEOLUWA ISMAIL

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
Appellants: Mr J Walsh, of Counsel, acting *pro bono*.
Respondent: Mr J Parkinson, Senior Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. This Tribunal, by its decision promulgated on 11 December 2104, concluded that the decision of the First-tier Tribunal (the "*FtT*"), dated 04 September 2014, was contaminated by material error of law and set same aside accordingly. The underlying decision is that of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 08 May 2014, whereby the applications of the four Appellants for leave to remain in the United Kingdom under Article 8 ECHR were refused.

The Secretary of State's Decision

2. It is convenient to adopt [2] – [9] of the earlier decision of this Tribunal. These conjoined appeals originate in a decision dated 08 May 2014 made on behalf of the Secretary of State. The context of the decision is apparent from the opening passage:

> "... You have asked that your case be considered under the [ECHR]. You claim it will breach your human rights to return you to Nigeria, a country which is listed in section 94(4) of the Nationality, Immigration and Asylum Act 2002."

The case made by the Appellants was summarised by the decision maker in the following terms:

> "You have stated that removal would be a breach of your human rights because you have established private life during your time in the United Kingdom, particularly your daughter ... who is now over seven years of age and has spent the whole of her life in the United Kingdom, so you do not feel it would be reasonable to expect her to leave the United Kingdom ...
>
> [Further] you claim that you and your family have a fear of returning to Nigeria due to the fact that you no longer have any links to Nigeria, where there is a very high level of poverty and unemployment and poor standards of education and health care which would inflict physical and mental stress on the children and the family as a whole."

The decision maker concluded, firstly, that the Appellants' claims could not succeed under Appendix FM and paragraph 276ADE of the Immigration Rules. In particular, the assessment was made that the parents had submitted no evidence that they have lost all family, social and cultural ties with Nigeria. The parents' evidence that both had attempted to find work there during the preceding three years was noted.

3. It was acknowledged that the older of the two children had lived continuously in the United Kingdom for at least seven years. This triggered consideration of whether it would be "*reasonable to expect* [her] *to leave the United Kingdom.* The decision maker reasoned as follows:

> "It is usually considered in the best interests of the child to remain in the family unit with their parents and siblings. The children would not be separated from their parents, as the family would be expected to return to Nigeria as a whole unit. Both you and your wife grew up in Nigeria and would be able to support the children in the

> family and outside in the wider community in order to help them to adapt to living in Nigeria and learning the language if required ... You and your wife have family living in Nigeria and they could also help and support the children to integrate into the way of life ...
>
> [The older child] ... is young enough to adapt to the education system in Nigeria ... Primary education in Nigeria begins at six years of age and lasts for six years ... Education to junior secondary level (from 6 to 15 years of age) is free and compulsory ...
>
> Neither child has any health problems. Any friendships formed in the United Kingdom can be continued from abroad by modern methods of communication ...
>
> You have not submitted any evidence to show that [the older child] has formed exceptional bonds with anyone in the United Kingdom which would make it unreasonable to expect her to live in Nigeria ... [or] ... that there is exceptional physical or emotional dependency on other members of the family in the United Kingdom outside your immediate family unit."

It is then stated that due consideration has been given to the needs and welfare of the children as required by Section 55 of the Borders, Citizenship and Immigration Act 2009 (the "*2009 Act*"). This is followed by a rehearsal of the factors put forward in support of the contention that it would be in the childrens' best interests to remain in the United Kingdom. Stripped to its essentials, the case made was that this country provides a much better place for the education, care and development of the children than Nigeria. This case was rejected, essentially on the same grounds as the case advanced under the Immigration Rules

4. Finally, the decision maker purported to consider the Appellants' cases under the rubric of "*exceptional circumstances*". The passage which follows appears to be directed to the first Appellant, the father of the family:

> "You have attempted to obtain leave to remain using false documents and your wife obtained entry clearance by deception. You have remained in the United Kingdom beyond the period of granted leave to remain and your wife has remained beyond the period of granted leave to enter. You failed to bring your children under immigration control following their births, when you submitted applications for leave after they were born in the United Kingdom."

The decision continues:

> "You have not submitted any evidence that there are compelling compassionate circumstances which would lead to a grant of leave to remain because it would not be reasonable to expect the children to leave the United Kingdom. Education and health services are available in Nigeria, albeit not necessarily to the same standard as in the United Kingdom."

In accordance with the usual practice, removal decisions were made in respect of all four Appellants one week later. Being immigration decisions, these attracted a right of appeal which the Appellants duly exercised.

Decision of the FtT

5. The First-tier Tribunal the "*FtT*") allowed the appeals. The basis of its decision is encapsulated in the following passage, in [89]:

> "I am therefore satisfied that in the context of my findings set out above the Respondent's removal decisions were not a proportionate and fair balance between the relevant competing considerations."

The appeals were allowed under Article 8 ECHR accordingly

6. The "*findings set out above*" in the determination are, on analysis, the following:

(a) The first two Appellants entered the United Kingdom legally, but have now over stayed following exhaustion of their application and appeal rights.

(b) (In terms) the Appellants' extensive periods of residence in the United Kingdom is a weighty factor: see [48].

(c) The third and fourth Appellants, the children, have spent the whole of their lives in the United Kingdom and are integrated into UK society.

(d) The fourth Appellant has special educational requirements because of his elective mutism, giving rise to the need for speech therapy intervention.

(e) The parents have been lawfully present in the United Kingdom during most of their sojourn.

(f) The act of registering each child's birth demonstrated "*a willingness to engage with the authorities*".

(g) The two children "*are positively thriving in a school with excellent pastoral care ...* [and] *... clearly feel very much a part of the school community and are progressing well ...* [and] *... the school and the surrounding community are parents and members of the congregation at church where they attend are extremely attached to the children and family as a whole*".

(h) "*Every resource available to the teaching staff and pupils has been engaged for the benefit of these children*".

7. Next, having referred to ZH (Tanzania) [2011] UKSC 4, the Judge reasoned that a period of substantial residence as a child may become a weighty consideration in the balance of competing factors because –

> "During such a lengthy period of time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit".

The Judge then noted the periods during which the two children had been attending school, the parents' heavy involvement with their church and the childrens' participation in Sunday school and other church activities. In [77] the Judge directed himself impeccably:

> "I have considered the best interests of both children as a primary consideration but not the primary consideration within the context of the entire countervailing factors."

The Judge then acknowledged the public interests, being "*the clear need to maintain immigration controls ….. and the economic interests of the country*". Finally, the Judge identified the factors which tipped the balance in the Appellants' favour. These focused almost exclusively on the well developed settlement of the two children in the United Kingdom, linked mainly to the lives they are leading through their education here. He found, by implication, that the childrens' enforced return to Nigeria "*…. would seriously impact upon their development with a strong possibility that* [the younger child's] *elective mutism would return*". The appeals were allowed accordingly.

8. The manner in which the FtT dealt with the discrete issue of the parents' "immigration conduct" warrants separate consideration. The Judge noted clear findings in an earlier Tribunal determination that the father had submitted a false invoice in support of his Tier 1 application and a forged letter from a firm of solicitors, while the mother had used a different (though not false) name in her second visa application for the sole purpose of securing entry to the United Kingdom: see [56] – [60]. The Judge further found, contrary to the father's assertion, that contact had been maintained both with his brother and other family members of both parents in Nigeria: see [61] – [62].

Error of law decision

9. This Tribunal found that the decision of the FtT was unsustainable in law, for three reasons. First, there was a failure to formulate and apply the governing test. Second, there was a failure to consider the guidance and principles contained in the decision of the Court of Appeal in EV (Philippines) – v – Secretary of State for the Home Department [2014] EWCA Civ 874. Third, the FtT failed to give effect to the provisions of Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*").

The decision of the FtT remade

10. In the argument of Mr Walsh, of Counsel (who, admirably, represented the Appellants *pro bono*), there was particular emphasis on the circumstances of the third Appellant (hereinafter "M"), the older of the two children, who is now aged 10. She has made an application for British Citizenship which, having regard to section 1(4) of the British Nationality Act 1981, seems likely to succeed. (This is not in dispute.) A similar application will, predictably, be made on behalf of the fourth Appellant, the second child of the family (hereinafter "B") if he remains in the United Kingdom until attaining his 10th birthday, which will be three years hence. The second factor which Mr Walsh emphasised in his submissions is that on the date when the Article 8 application was made, M had been resident in the United Kingdom for a period of

seven years. This, he submitted, is an important factor in measuring the proportionality of refusing the applications.

11. Mr Walsh further drew attention to the quite different factual matrix in EV (Philippines), submitting that the present appeals are much stronger on their facts. The *soi-disant* "seven year residence rule" also featured in his argument and he reminded us of the pronouncement of the Court of Appeal in NF (Ghana) [2008] EWCA Civ 906 that, as a matter of presumption, leave to remain in the case of a child who has satisfied the requirement of seven years residence will be refused only exceptionally. Drawing attention to the place of M's birth, the length of her residence in the United Kingdom, the stage which her education has reached and the imminence of her teenage years, Mr Walsh submitted that her best interests lie in the *status quo* being maintained. A similar submission was made on behalf of the Appellant S, now aged seven years, with appropriate modifications.

12. The evidence upon which the Appellants relied includes in particular the UKBA Country of Information Report, dated February 2014, which documents a series of substantial shortcomings in the education system of Nigeria: under funding, non-enrolment, non-attendance of pupils, teachers' strikes, insufficiency of schools and teachers and discrimination against girls. There are also serious inadequacies, linked to cultural issues, in the special education sector. According to some commentators, the dominant forces in Nigeria continue to be nepotism, stateism and corruption, all of which are antithetical to socio-educational investment.

13. The legal framework within which these appeals are to be determined has a series of components. First, paragraph 276ADE of the Immigration Rules provides, in material part:

> "The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of the application, the applicant …..
>
> (iv) Is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK."

This particular provision of the Rules dates from 13 December 2012. It followed close upon the major Article 8 ECHR reforms introduced via Appendix FM with effect from 09 July 2012.

14. As noted by this Tribunal in Treebhawon and Others [Section 117B(6)] [2015] UKUT 674 (IAC), the plentiful jurisprudence generated by these new provisions of the Rules has focused in particular on the interplay between the Rules and Article 8 and, hence, (though rarely mentioned), section 6 of the Human Rights Act 1998. It is convenient to adopt the summary in Treebhawon, [5]:

> "In R (Amin) v Secretary of State for the Home Department [2014] EWHC 2322 (Admin) it was held that paragraphs 276 ADE – 276 DH and Appendix FM do not constitute a comprehensive Article 8 Code. Thus it is recognised that a claim based on

> Article 8 can, in principle, succeed either under the prescriptive Article 8 regime within the Rules or outwith the Rules, residually. In Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558, the Court of Appeal espoused the test of "compelling circumstances" in respect of claims outwith the Rules: see [44] and [77]. In MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985 the Court of Appeal, in effect, disapproved the suggestion in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin), at [29], that there is an intermediate hurdle to be overcome prior to consideration of Article 8 claims outwith the Rules: per Aikens LJ at [129]."

It is convenient, at this juncture, to note that, of the four Appellants, only M can conceivably succeed under the Rules, as she satisfies the seven years residence requirement. The claims of the other three Appellants lie squarely outwith the Rules.

15. The second component of applicable the legal framework is constituted by Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*") which provides in material part:

Section 117A

> "(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

Section 117B

> "(1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the 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. "

Section 117D

"(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who-

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;"

16. As decisions of this Tribunal in cases such as Deelah and Others (Section 117B – Ambit) [2015] UKUT 515 (IAC) have held, the considerations enumerated in section 117B do not form an exhaustive list of facts and factors to be weighed by a court or tribunal in determining the issue of proportionality under Article 8(2). This follows from the language of section 117A(2) ("*in particular").* Disregard of the section 117B list is not an option: its contents must compulsorily be considered, *seriatim*. However, this is subject to two observations. First, in certain cases one or more of the individual components of section 117B will not apply, having regard to the particular factual matrix: this applies to all of the subsections with the exception of subsection (1). Second, as decided in Treebhawon, in cases where section 117B(6) applies, this has particular consequences: *infra*.

17. In Treebhawon, this Tribunal's analysis of section 117B yielded the conclusion that its contents consist of four formulations of what is considered to be in the public interest – in subsections (1), (2), (3) and (6) – and two legislative instructions to the court or tribunal that little weight is to be given to certain matters, where they apply: subsections (4) and (5). Having conducted this analysis, consideration was then given to section 117B(6) in some detail: see [18] – [21]. Having identified the three qualifying conditions which section 117B(6) embodies, the Tribunal stated, in [20]:

> "Within this discrete regime, the statute proclaims unequivocally that where the three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none ...
>
> [21] ... In our judgement the underlying parliamentary intention is that where the three aforementioned conditions are satisfied, the public interests identified in section 117B(1) – (3) do not apply."

In short, they have been eclipsed.

18. The third component of the legal framework is section 55 of the Borders, Citizenship and Immigration Act 2009 (the "*2009 Act*"), which provides:

> "(1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> (c) any general customs function of the Secretary of State;
>
> (d) any customs function conferred on a designated customs official.
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)."

In ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, Baroness Hale emphasised that in cases where section 55 applies, the best interests of any affected child must be considered first: see [26]. Lord Kerr suggested, at [46]:

> "Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them."

19. Subsequently in an even more comprehensive analysis of section 55, the Supreme Court, in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, formulated the following code of governing principles (per Lord Hodge):

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
>
> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

20. Section 55 was the subject of still further consideration in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874. Delivering the main judgment, Christopher Clarke LJ stated, at [34]:

> "In determining whether or not, in a case such as the present, the need for immigration control out weighs the best interests of the child, it is necessary to determine the relevant strength of the factors which makes it in their best interests to remain here; and also to take account of any factors that point the other way."

The judgment continues, at [35]:

> "A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens."

And at [36] – [37]:

> "36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, 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 falls into one side of the scales. If it is 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 is 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.
>
> 37. In the balance on the other side there falls 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 applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

Lewison LJ, in a concurring judgment, placed some emphasis on the "real world" scenario of giving effect to section 55 in circumstances where the affected child's parents and, perhaps, siblings, have no entitlement to be in the United Kingdom: see [55]. In [58], he continued:

> "In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

In a passage which resonates strongly in the context of the present appeals, Lewison LJ further stated at [60]:

> "If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents."

21. There are two observations in particular to be made at this juncture. The first is the clear statement of principle in both ZH Tanzania and Zoumbas that a child should not be prejudiced by the misconduct of a parent. The second is that the legal framework in existence when EV (Philippines) was decided did not include either paragraph 276ADE (iv) of the Rules or Part 5A of the 2002 Act.

22. In Bossade (Sections 117A – D: Inter relationship with Rules) [2015] UKUT 415 (IAC), the Upper Tribunal held that, ordinarily, a court or tribunal will first consider an appellant's Article 8 claim by reference to the Immigration Rules. Adopting this approach, the only Appellant who can conceivably succeed under the Rules is the older child, M, as she satisfies the seven years residence requirement prescribed by paragraph 276 ADE (iv) and is aged under 18. The crunch question in her case is whether "*it would not be reasonable to expect the applicant to leave the UK*". At this

juncture, giving effect to the injunction in ZH (Tanzania), we assess what is in this child's best interests. In doing so, we note the statement in the UNHCR Guidelines on Determining the Best Interests of the Child [May 2008]:

> "The term 'best interests' broadly describes the well being of a child".

In the passage which follows, a distinction is made between those provisions of the Convention which require that a child's best interests be the determining factor, such as adoption (Article 21) and forced separation of a child from parents (Article 9) and Article 3 which is, of course, the genesis of section 55. In ZH (Tanzania), Baroness Hale made this observation of the Guidelines:

> "This seems to me accurately to distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live."

23. In our evaluation of the best interests of M, we recognise that she is aged nine years, has spent the entirety of her life in the United Kingdom and that her pending application for British citizenship will succeed. In language, culture, social mores, education and private life her ties are exclusively with the United Kingdom. Her connections with Nigeria, the country of her parents' births, are minimal. Essentially the same assessment applies to the fourth Appellant, S, who is now aged seven years, with the added factor that he has benefited from the specialised facilities available in the United Kingdom in overcoming his condition of elective autism and could well be detrimentally affected if this condition were to revive following return to Nigeria, given the less adequate facilities there. We add that there is no evidence to suggest that departure from the United Kingdom and settlement in Nigeria is likely to reactivate this condition.

24. In its consideration of the best interests case made to the Secretary of State, this Tribunal stated, in [3] of its earlier decision:

> "Stripped to its essentials, the case made was that this country provides a much better place for the education, care and development of the children than Nigeria."

In rejecting the Appellants' cases, the decision maker observed that there are public education and health services in Nigeria "*albeit not necessarily to the same standard as in the United Kingdom*". In short, the United Kingdom is a better country than Nigeria from the perspective of rearing young children. This is because it offers superior publicly funded education, health and other systems and services and greater stability and security. Furthermore, if the children were to remain in the United Kingdom, they would avoid the disruption, sadness and emotional upset of having to uproot and relocate to Nigeria. In short, all of the factors identified in [36] of EV (Philippines) fall into the childrens' side of the notional scales. However, it does not follow inexorably from this assessment that the best interests of these children lie in remaining in the United Kingdom. This is altogether too narrow an analysis, as it excludes the vital factors of their parents and the composite family unit. We consider

that, viewed panoramically, the best interests of these two children will be served by remaining with their parents in an undisturbed family unit.

25. Moving to the next stage of the exercise, we are obliged by paragraph 276ADE(iv) of the Rules to determine the question of whether it would be reasonable to expect M to leave the United Kingdom. This provision of the Rules is not applicable in the case of S. However, we consider that, as in ZH (Tanzania), the reasonableness of expecting S to depart the United Kingdom must be a material consideration in the proportionality assessment. This is precisely what the Supreme Court did in EV (Kosovo) – v – Secretary of State for the Home Department [2008] UKHL 41 and in ZH (Tanzania) at [29], both contexts preceding the advent of this provision of the Rules. We shall examine this discrete issue vis-à-vis S presently.

26. The absence of any definition of "*reasonable*" is unsurprising. It is, in part, a reflection of the intensely fact sensitive nature of every Article 8 case. It has the potential to embrace a potentially broad spectrum of facts and factors. The inexhaustive composition of Christopher Clarke LJ in EV (Philippines), at [36], provides a helpful tool of guidance. There is also a useful barometer in the opinion of Lord Bingham of Cornhill in Huang v Secretary of State for the Home Department [2007] 2 AC 167, at [13], though one must heed his cautionary words in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41, at [12]:

> "... There is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard edged or bright line rule to be applied in the generality of cases is incompatible with the difficult evaluative exercise which Article 8 requires."

Within these and other seminal passages in both the Strasbourg and Supreme Court jurisprudence one finds the genesis of the Article 8 regime introduced in the Rules in July 2012, together with certain of the provisions contained in Part 5A of the 2002 Act

27. We adopt the following approach in applying the test of reasonableness in the case of the Appellant M. We consider her case to be inextricably linked with how the appeals of her parents are to be resolved. Indeed, none of the four claims can be severed from any of the others. This is the reality in every case where those seeking immigration status are members of a family unit. The futures of the two children are wedded to those of their parents. The interplay among the four claims is irresistible. Thus, if it were compellingly in the best interests of M (or indeed both of the children) to remain in the United Kingdom, that would be a weighty factor in determining the parents' claims and could, in principle, lead to the conclusion that it would not be reasonable to expect the child (or children) to leave the United Kingdom, with the result that the public interest would not require the parents' applications to be refused, per section 117B(6) of the 2002 Act. The reality of this case is that success for the parents is ineluctably welded to success for one or both of the children, given that the parents' Article 8 private life claims, viewed in isolation, are amongst the weakest imaginable in the current state of the law.

28. We develop our assessment of reasonableness under paragraph 276ADE(iv) of the Rules in the following way. The application of the reasonableness test requires the Tribunal to consider the circumstances in which the children would be departing the United Kingdom and to make a realistic and adequately informed predictive evaluative judgement of what the future is likely to hold for them thereafter. On one side of the scales, there are the various factors already highlighted above: in brief, M, the older child, now aged nine years, has spent all of her life in the United Kingdom, giving rise to the considerations and consequences noted in [23] above, she will be uprooted to an alien country and it will, predictably, be an unsettling and upsetting experience. We consider that these negative impacts would be largely the same as regards both children.

29. On the other side of the scales, we take into account the absence of any suggestion that the children could not adapt to the language, culture, customs and different way of life in Nigeria. Indeed, adaptation at their ages will probably be easier than, say, in their teenage years. We further take into account that they will remain members of a stable, preserved family unit and will continue to have the support of loving and committed parents. The parents have spent most of their lives in Nigeria and are presumed to be familiar with the language, culture, customs and the Nigerian way of life generally. They are Nigerian citizens. Both are healthy and able bodied. They have family living in Nigeria. The parents are therefore amply equipped to assist and support their children throughout the process of transition and thereafter. Our evaluation of reasonableness must also be informed by the assessment already made that the best interests of both children will be served by the preservation of the family unit. We are satisfied that the negative impacts on the children will be offset by their youth, their resilience and the presence of loving and supportive parents and are likely to be comparatively short term. It follows that if we were to reject the parents' appeals it would not be unreasonable to expect the older child or, indeed, the younger child to leave the United Kingdom.

30. Thus our conclusion in relation to paragraph 276ADE(iv) is that it would be reasonable to expect the Appellant M to leave the United Kingdom if the claims of the other three family members fail. This would mean failure for her claim under the Rules. The only context in which this scenario will not materialise is that of all four claims succeeding. This brings us directly to the claims of the parents and the younger child which, as they lie outwith the Rules, can succeed only if they satisfy the test of compelling circumstances: see [14] above. We conclude that these claims fail to satisfy this test by some measure. Viewing the family unit as a whole there is no medical, physical, psychological, historical, cultural, societal or other factor which even threatens to overcome this threshold. There is nothing exceptional or compelling in the circumstances of this stable, well educated and healthy family. The factual matrix which they present is unexceptional and unremarkable. The claims of the parents and younger child, therefore, call for decisive rejection. Thus their appeals must be dismissed.

31. Given our analysis and conclusions above, the claim of the Appellant M under the Rules also fails as it would be reasonable to expect her, in furtherance of her best interests, which have the statutory pedigree of a primary consideration, to remain in the family unit and resettle with them in Nigeria.

32. It follows also that there will be no interference with any of the Appellant's right to respect for family life under Article 8(1) ECHR. There will, however, be an interference with their private lives. Accordingly, as mandated by section 117A of the 2002 Act, we give consideration to and apply section 117B in the following way:

    (a) The public interest in the maintenance of effective immigration controls is engaged.

    (b) There is no evidence that the "English speaking" public interest in section 117B(2) is engaged.

    (c) While the "financial independence" public interest did not feature explicitly in the case made on behalf of the Secretary of State, we consider that it applies as we readily make the inference that all four Appellants benefit, and will continue to benefit, from publicly funded services, in particular education, to which they have made no financial contribution and there was no evidence that they have any financial resources.

    (d) The immigration status of both parents has been precarious during much of their sojourn in the United Kingdom, thereby attracting the assessment that little weight is to be given to the private lives developed by them during such period. Given our assessment of the two children's' best interests and the application of the reasonableness test we consider it unnecessary to give further consideration to their private lives at this stage of the exercise. We are mindful that the interplay between paragraph 276ADE(iv) of the Rules and section 117B raises potentially contentious issues and may require more detailed examination in a suitable future case.

33. The final port of call in our decision making exercise is section 117B(6) of the 2002 Act. This provision falls to be considered as regards the Appellant M only. As noted in Treebhawon, section 117B(6) enshrines three conditions. The first two conditions are satisfied here, namely none of the Appellants is liable to deportation and the Appellant M is a qualifying child with whom her parents have a genuine and subsisting parental relationship. The final condition is that it would not be reasonable to expect M to leave the United Kingdom. This test of reasonableness is framed in identical terms in paragraph 276ADE(iv) of the Rules. Thus our conclusion in [29] above applies *mutatis mutandis*. It follows that there will be no infringement of the public interest expressed in section 117B(6) if M is required to leave the United Kingdom.

34. Lastly, we address the argument of Mr Walsh, summarised in [11] above, that there is a presumption that, absent exceptional circumstances, a child who has attained seven years residence in the United Kingdom will secure leave to remain. The

primary riposte to this submission is that this topic is now regulated by statute viz section 117B(6) of the 2002 Act and the Rules, neither of which contains any provision to this effect. In short, Parliament and the Secretary of State have entered the arena and occupied the field and the governing legal rules are now to be found in the two sources mentioned. Furthermore, section 55 of the 2009 Act did not feature in NF (Ghana) on which Mr Walsh relies. In the alternative, even if the NF (Ghana) principle survives, this is plainly a case where the presumption is displaced on account of our assessment of M's best interests, which are a primary consideration, our application of the reasonableness criterion and the consequences flowing from the dismissal of the other three family members' appeals.

Decision

35. Accordingly, we remake the decision of the FtT by dismissing all four appeals.

Signed

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

14 January 2016