Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/33486/2014
IA/33494/2014
IA/33495/2014
IA/33498/2014
IA/33509/2014

THE IMMIGRATION ACTS

Heard at Field House
On 15th December 2015

Decision & Reasons Promulgated
On 2nd February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

K J J
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S M A
H O D
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss D Ofei-Kwatia instructed by
For the Respondents: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are mother, father and their three children born on 5 August 2005, 14 May 2007 and 7 April 2012. They appeal against the decision of the Secretary of State, who on 6 August 2014 considered their claims under Article 8 of the European Convention on Human Rights both within and

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outside the Immigration Rules. In respect of the first and second Appellants consideration was given to the partner route and the parent route and the Secretary of State concluded that the requirements of neither route was met. The Secretary of State then went on to consider the first and second Appellants' case under paragraph 276ADE(1) of the Rules and concluded that they could not meet the requirements in terms of the length of residence and had not demonstrated that there were very significant obstacles to integration into Nigeria.

2. The applications of the three children were considered under the child route and a decision was taken in relation to their private life under paragraph 276ADE. The Secretary of State also concluded that they did not meet the requirements of leave to enter under the child route and that the requirements of paragraph 276ADE (iv) were not met. Consideration was also given as to whether there were exceptional circumstances which would mean removal was inappropriate and it was concluded that there were not. The Secretary of State also considered s55 of the Borders, Citizenship and Immigration Act 2009 and concluded that the family could return to Nigeria together and the children could be educated there.

3. The Appellants appealed against that decision and in a determination dated 5 February 2015 First-tier Tribunal Judge Sweet allowed their appeals. The first and second Appellants had been in the UK illegally since 2006. The third, fourth and fifth Appellants were 9, 7 and 2 at the date of the hearing and were all born here. At paragraph 29 of the decision the First-tier Tribunal found that in the light of the evidence provided, both oral and documentary, the third Appellant met the requirements of paragraph 276ADE (iv) and the first and second Appellants met the requirements of paragraph 276ADE (vi).

4. Permission to appeal was granted on 16 April 2015 by First-tier Tribunal Judge De Haney. Permission was granted on the basis that the First-tier Tribunal's bare assertion at paragraph 29 that he was satisfied that the Appellants could meet the requirements of paragraph 276ADE was arguably inadequate to explain to the parties why one had won and the other had lost the appeal. He found that there was an arguable error of law.

5. At a hearing on 8 September I concluded that there was a material error of law in the decision of the First-tier Tribunal. The First-tier Tribunal referred to the requirements of Section 55 of the Borders, Citizenship and Immigration Act 2009 and stated that he did not consider that it would be appropriate for the family to be separated and concluded that it would not be reasonable for

them to return to Nigeria where there were "significant obstacles in their integrating into Nigerian society". There were no reasons given for this conclusion. The short determination disclosed no findings justifying his conclusion that there would be very significant obstacles to the Appellants integrating into Nigerian society or indeed the reasonableness of expecting the children to return to Nigeria. There were no findings in relation to the extent of the Appellants' integration into the UK or the extent of their ties to Nigeria.

6. I determined that the appeals should be reheard in the Upper Tribunal.

Evidence and Submissions

7. In the light of the fact that the eldest child had become a British Citizen on 7 December 2015 I heard submissions from both representatives as to how to proceed. Mr Melvin relied on **MK (section 55 – Tribunal options) Sierra Leone** [2015] UKUT 223 (IAC) and submitted that in the light of the change of circumstances, remittal to the Secretary of State for reconsideration and a fresh decision was appropriate. Ms Ofei-Kwatia submitted that the citizenship was not a surprise to the Respondent. The application was made in 2012 and there would be further delay if the matter was remitted. She submitted that there was sufficient material before the Tribunal to make a decision on the best interests of the children. I was satisfied that I was sufficiently equipped on the evidence before me to make an adequate assessment of the best interests of the children.

8. The First Appellant adopted her witness statement before the First-tier Tribunal. She said that she was happy to be here and the children had family and friends here and enjoyed activities. If they had to return to Nigeria they would have no money for school fees, food and accommodation as they did not have any support. Her mother, father and older sister were there. Her partner had his mum, dad and one brother and one sister. She was living with her parents prior to coming to the UK. He rented an apartment. Her parents were not happy with her because she was pregnant out of wedlock. She would not be able to live with her partner's parents because they did not want him to marry her. She had no savings or assets. Her son was in year 6 at primary school. Her second child was in year 4.

9. Mr Melvin asked if there was anything preventing her return. She said her parents were preventing her. She had a Nigerian passport and came to the UK aged 26. She left school in 2005 and did not have a University education. She was in school until she was 25. She started late and had never had a job. She

had a secondary school certificate. Whilst in the UK she went to people's houses to do hair. She could not be a hair stylist in Nigeria because if you did not have money you could not do business. You had to do hair in salons. If she went to University she could get another job. Her parents could not support her. They had not talked to her. There was no one to sponsor her through university. Her partner worked for a construction company for three years in Nigeria. Since 2005 her family had not wanted her in Nigeria. She had not married as they had no parental support. Her family wanted her to abort the pregnancy and since then she had been staying here. They did not go elsewhere in Nigeria because they did not know anybody there. She did not get a house with her partner because he was not making money.

10. They waited until they had children before trying to regularise their stay because a lot of people told them to do nothing and she was told after 7 years she could apply. Her uncle took her to a lawyer. He said you have to wait for seven years. She made no attempt to contact the authorities for 7 years. She had children at NHS hospitals and put children into government schools. She had not applied for any benefits. Her financial support came from her uncle and the little job she was doing. She did not live with her uncle and rented an apartment. Her uncle gave them £350 every month and she had money from her job. Her partner cleaned houses and ironed. He did not pay national insurance or tax. Mr Melvin asked if it would it be fair to say that she had deliberately avoided UK authorities and was using her children to make a claim to remain in the UK. She said it was not true because she didn't know how this system worked. When her son was 6 her uncle took her to a lawyer. He said wait for seven years.

11. There were state schools in Nigeria. The main language and education system was English. State education was free. You had to buy books. In re-examination she said that she started school at 7 years old and remained in school until the age of 25 because she repeated 3 classes twice. She was not allowed to enter into a customary marriage without consent. She was not in contact with her siblings. Her sister supported her parents and husband's family and did not want him to marry her.

12. I asked why her uncle could not send £350 to Nigeria. She said her uncle wanted her to settle with her parents. He did not agree with her parents but her parents did not listen. He gave her money here because he saw her struggling. If she went back it might stop.

13. Mr Melvin asked if her uncle spoke regularly to her mother and she said he did. He was not here today because the lawyer did not tell her to bring him today. She had her auntie and her father's sister in the UK.

14. The second Appellant adopted his witness statement. He said that his eldest son was doing well here and had lots of friends. He did not have recourse to public funds. He had been paying Council tax since 2006/2008.

15. Mr Melvin asked if there was a record of him arriving legally. He said that he submitted records to the Home Office. There was a photocopy of a visa page. He was visiting his aunt and his partner in the UK who had given birth. The visa said he was visiting his aunt and uncle. His aunt was younger sister to his mum and his uncle was from his dad's family. When the visa expired there were complications with the birth and she needed someone to look after her. They were relatively new and did not know they could go to someone else. They needed money. They waited for seven years because they had no funds to make the application. In Nigeria he had worked in an engineering company for about 2 years. He was 31 when he came to the UK. He was 23 when he left school. He had to repeat a few years. He was not a qualified engineer. He lived in Lagos State by himself. She was 28 when she became pregnant and a student. She had not moved him with him because it was a taboo because they were not married. They were Muslim. Her parents did not bless the relationship. He was not financially in a good position.

16. Since 2006 he had worked here for friends and family and not paid national insurance or tax. He had supported himself cleaning houses and friends and family support them. An uncle helped them and gave them £350 a month. He would not be able to provide that if they went back because he took on the responsibility. He would not be able to put up that kind of money. If they went back he would consider that the first Appellant was her mum and dad's responsibility. If they returned he would become destitute and would be unable to pay for school fees. Lots of people didn't have a job and they had no contacts in terms of employment and it would take more than two years to get a job. He had his mum, dad and two younger siblings. They could not help. Education was free but there were additional costs. They would not have the money for schooling. There were opportunities for work.

17. Mr Melvin relied on the refusal letter of August 2014 and his written submissions. In respect of the oral evidence given by the parents of the children, he did not accept that both parents repeated six years of education. Both were working in Nigeria when they entered the UK and he did not

accept that the second Appellant entered legally. There was no evidence. He did not accept that the uncle who supported them here would not do so were they to return to Nigeria. It was clear that the evidence was that they were waiting until one of the children was 7 years old and could use this to make an application under the Rules. He did not accept that it was due to ignorance. There were family members that could have assisted with an application. It was clear that the whole reason for making the application was to use the children to allow them leave to remain. Section 55 was addressed in the skeleton argument. The case law showed it was in the best interest to remain with both parents.

18. He did not accept that they could not work in Nigeria. There had been past work and it was the responsibility of parents to look after their children and he did not accept that there would be destitution. There was clear evidence of contact with siblings in Nigeria. It was not credible that they would hold such a grudge for approaching a decade and deny themselves opportunity to be part of their grandchildren's lives. The claim of lack of contact was there to assist the Appellants in showing that they had nothing to return to in Nigeria. There would be education for the children in Nigeria. There was no objective evidence to show they would not be education. The schools were free and education was in English. He accepted that the children had made friends in the UK they were primary school children and would not be seen to making relationships outside the family from the age of 11. He accepted that the eldest child was a British Citizen and second child had been here over 7 years and therefore met the requirements of 276 ADE (iv) in terms of length of residence. Children were adaptable and as a British Citizen did not have to remain here. They travelled all over the world to be with parents and could be educated in UK. There were other family members in the UK and the British Citizen could stay with them. It was a ridiculous situation to piggy back on their rights when no other family member had the right to be here. The children were Nigerian citizens as well as the parents and dual nationals. They had not reached a stage in their education which was disruptive. They had also been brought up by Nigerian parents amongst Nigerian people. The Appellant confirmed that the Nigerian family in the UK were of Nigerian descent. The children were being denied rich culture of being brought up of Nigeria. When looking at the proportionality issue it had to be taken into account that the parents were overstaying and only making application when they could. The inability to remove a British Citizen should not mean that other appeals should not be dismissed.

19. Ms Ofei-Kwatia submitted that on the whole the evidence had been consistent. There was no benefit to Appellants in not telling the truth about repeating years of their education. The second Appellant did not know why the first Appellant was studying. He was working. In relation to his entry into the UK, a copy of his visit visa was at p173. The immigration history was irrefutable. At the point at which the eldest child turned six the uncle took them to a lawyer who then advised. At that end of the day there were policies which people could benefit from. The parents had not accepted the relationship between the first and second Appellants. She relied on the skeleton argument. In relation to Article 8 and s55 of the Borders, Citizenship and Immigration Act 2009 and **Sanade and others (British children – Zambrano – Derici)** [2012] UKUT 00048, it was beyond the bounds of reason that the Respondent said it was reasonable to remove the family. It would be a de facto removal and the third Appellant's rights would be truncated. It did not fall within the statutory framework. Every stage of education was important. S117B (6) stated that the public interest did not require the removal of the two qualifying children. One was a British Citizen and the other one had been here for 7 years. In **Sanade** the Respondent conceded that where there is a child who has citizenship it is not reasonable for the family to leave. S117B (6) was a stand-alone provision, and the public interest did not require removal. This had been held in **Treebhawon and other**s s117 B (6) UKUT 00674 which was emphatic about s117 B (6).

20. Mr Melvin said that the Respondent withdrew the concession in **Sanade**. Ms Ofei-Kwatia said that the principles in **Zambrano** were unaffected.

21. I reserved my decision.

Discussion and Findings

22. I have considered the skeleton arguments of both representatives and all the evidence submitted by both parties before coming to my conclusions in this appeal. The Appellants do not claim to meet the requirements of the partner, parent or child routes of Appendix FM of the Immigration Rules. The first two Appellants contend that they meet the requirements of paragraph 276 ADE (1) (vi) and the fourth and fifth Appellant contend that they meet the requirements of paragraph 276 ADE (1) (iv). The third Appellant was registered as a British Citizen on 7 December 2015 and so has the right of abode in the UK under section 1 (1) of the Immigration Act 1971 and cannot be removed from the UK. It follows that his appeal must be allowed.

The First Appellant

23. According to the Respondent's records of the first Appellant's immigration history she entered the UK on 19 October 2005 with entry clearance as a visitor until 19 October 2006 and overstayed her leave. However, she must have been in the UK before then as her first child was born here in August 2005. She applied for leave to remain under the Human Rights Act on 28 August 2012. According to Mr Melvin's skeleton argument that application was refused with no right of appeal but there were judicial review proceedings which led to the Respondent reconsidering the applications leading to the decision to refuse on 6 August 2014 which is the subject of the current appeals.

24. The requirements of paragraph 276ADE are to be considered at the date of the application. The Respondent treated the date of the application as the date of the reconsideration in the refusal letter of 6 August 2014. I do not have the documentation relating to the judicial review proceedings before me and it is unclear what occurred. In view of the fact that there has been no objection by the Appellants to treating the relevant date for the consideration of Rule 276ADE as the date of the reconsideration I do so too.

25. At the date of the reconsideration the first Appellant was 34 years old. She had spent the first 26 years of her life living in Nigeria and it is accepted that she cannot meet the requirements of paragraph 276ADE(1)(iii) and (v). She is therefore required to demonstrate that there would be very significant obstacles to her integration into Nigeria (paragraph 276ADE(1)(vi)). In her witness statement dated 4 November 2014 at page 6 of the Appellant's bundle she states that her parents threatened to disown her because she became pregnant out of wedlock and she fled the country. She states that she has not spoken to her parents since then. She further states that she has no home or job to return to in Nigeria and she and her family would be rendered destitute. She would have no money to provide education and medical care for her family. She also asserts that her daughter would be subjected to female genital mutilation (FGM) by her partner's family.

26. The First-tier Tribunal made no findings of fact in relation to the ability of the first Appellant to integrate into Nigeria save that he found her evidence that her daughter would be at risk of FGM was not credible. I found that there was an error of law in failing to provide reasons for the findings under paragraph 276ADE but the finding in relation to credibility is not disturbed and stands.

27. I do not accept that there would be very significant obstacles to her integration. Having spent most of her life in Nigeria she retains linguistic and cultural links. She has friends and relatives here who are part of the Nigerian diaspora and has remained within the Nigerian community. I find that she would not be without funds and destitute in Nigeria. I found that the Appellant gave no persuasive explanation as to why her uncle who has provided her with £350 a month would be unwilling to send her money in order to re-establish herself. I do not accept that he would cease to want to help her on return. She also states in her witness statement that she enjoys family life in the UK with extended family members including cousins, aunties and uncles. I find it unlikely that were the Appellant removed to Nigeria they would allow her to be destitute. Further, I do not accept that she would be unable to find some form of employment in Nigeria. There was no objective evidence to support her claim that someone without a university education would be unable to find a job or that she could not use her hairdressing skills to find paid work. Whilst I accept that her family may not approve of her relationship with her partner, I find that she would not be at risk as a result and it would not impede her ability to reintegrate into Nigerian society generally.

The Second Appellant

28. The second Appellant claims to have arrived as a visitor on 12 February 2006. The Respondent claims that there is no evidence of his lawful entry. However, he has submitted a copy of his visit visa in his passport at page 173 of the Appellant's bundle. The visa shows that he was granted entry from 20 December 2005 to 20 June 2006. It does not appear that the Respondent has checked whether it was validly issued. In any event, there is no assertion it is a false document.

29. His witness statement is at page 8 of the Appellant's bundle. He states that due to the first Appellant's pregnancy he was threatened with arrest and had to run away. His parents warned him not have anything to do with his wife because she is from Abeokuto. He further states that he has no home or job to return to in Nigeria and would not be able to provide for his family. He asserts that he would be destitute on return and his wife and children would suffer as a result. He would have no money to provide for their education and medical care. He also asserts that his daughter would be subject to FGM.

30. I find that the second Appellant has not demonstrated that there would be very significant obstacles to his integration. At the time of the reconsideration

he was aged 39 and was 31 when he arrived in the UK. He has linguistic and cultural ties to Nigeria. He had employment and accommodation in Nigeria prior to leaving and I do not accept that he would be unable to find employment on return. He provided no supporting evidence to show that he had approached prospective employers and applied for and had been refused jobs or objective evidence to show that the employment situation is such that he would not be employed on return. Further, for the reasons given above, I find that it is unlikely that the support from the UK uncle would cease on their departure from the UK. The First-tier tribunal did not find that the Appellant's claim that his daughter would be subject to FGM was credible and that finding stands. Whilst I accept that the first Appellant's family may not approve of the relationship I do not find that this would impede his reintegration into Nigeria.

The Fourth Appellant

31. The fourth Appellant was 7 years old at the date of the reconsideration and was born in the UK. He is therefore required to demonstrate that it would not be reasonable to expect him to leave the UK (paragraph 276 ADE (iv)). There is evidence from pages 174 to 213 in the Appellant's bundle supporting his claim to have established a private life in the United Kingdom. There are letters in respect of his school attendance and photographs of the family in the UK. In assessing whether it would be reasonable for him to leave the UK I have had regard to his best interests as a primary consideration (**ZH (Tanzania) (FC) (Appellant)** ***v*** **Secretary of State for the Home Department (Respondent) [2011] UKSC 4)**.

32. The best interests of the child broadly describes his well-being. of **EV (Philippines) and Others [2014] EWCA Civ 874** the Court of Appeal stated that the best interests of children will depend on a number of factors including their age, the length of time that they have been in the United Kingdom, how long they have been in education, the stage that their education has reached, to what extent they have been distanced from the country to which they are to be returned, how renewable their connection with it may be, the extent that they will have linguistic, medical or other difficulties in adapting to life there and the extent to which the course proposed will interfere with their family life or other rights in this country. In **Azimi-Moayed and others (decisions affecting children; onward appeals appeals) [2013] UKUT 197(IAC)** the Tribunal held that: (a) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household

unless there are reasons to the contrary; (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong; (iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period; (iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable; (v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors.

33. The best interests of the fourth Appellant are to remain with his parents who do not meet the requirements of the Immigration Rules. He is of an age where he may have started to develop a private life outside his nuclear family with friends at school but is still very young and adaptable. His parents have, I have found, not demonstrated that there would be very significant obstacles to their integration. Education in Nigeria is free and the Appellant has grown up amongst Nigerian relatives and friends in the UK. It has not been argued that these relationships amount to family life for the purposes of Article 8 ECHR. These relationships provide a link to the culture of Nigeria. In the light of my findings in relation to his parents I do not consider that the fourth Appellant would face destitution or hardship on return to Nigeria. I find that his parents would be likely to support him adequately. His education has not reached a critical stage. He is of an age where he is likely to be able to make friends quickly. I also consider that in the light of his parent's strong connection to Nigeria he would be able to integrate into Nigerian society. In all the circumstances I find that it would be reasonable within the context of the Immigration Rules for him to expect him to leave the UK.

The Fifth Appellant

34. The fifth Appellant was 2 years old at the date of the reconsideration. It follows from the case law cited above that she was too young to have established a private life outside the home and that her focus will be on her parents. In the light of my findings above in relation to her parent's ability to integrate and her young age I find that it would be reasonable within the context of the Immigration Rules to expect her to leave the UK.

Article 8 ECHR

35. A two-stage approach with regard to Article 8 has been approved by the Court of Appeal in a number of cases including **Singh and Khalid v SSHD** [2015] EWCA Civ 72. The decision-maker should adopt a two-stage process. The first question is whether the individual can succeed under the Rules and the second is, if not, can he or she succeed outside the Rules under Art 8. There is no threshold requirement of arguability before a decision maker reaches the second stage. However, the extent of any consideration outside the Rules will depend upon whether all the issues have been adequately addressed under the Rules. In **Singh and Khalid** the Court of Appeal opined at paragraph [64] "there is no need to conduct a full separate examination of Art 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

36. In **SS (Congo) v SSHD [2015] EWCA Civ 387** at paragraph [3]2 the Court of Appeal clarified the relationship between the Immigration Rules and the public interest considerations:

"However, even away from those contexts, if the Secretary of State has sought to formulate Immigration Rules to reflect a fair balance of interests under Article 8 in the general run of cases falling within their scope, then, as explained above, the Rules themselves will provide significant evidence about the relevant public interest considerations which should be brought into account when a court or tribunal seeks to strike the proper balance of interests under Article 8 in making its own decision. As Beatson LJ observed in **Haleemudeen v Secretary of State for the Home Department** [2014] EWCA Civ 558; [2014] Imm AR 6, at [40], the new Rules in Appendix FM:
"… are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall, the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been."

Accordingly, a court or tribunal is required to give the new Rules "greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights" (para. [47])."

37. Whilst there is no intermediate test it is important to consider whether all issues have been addressed under the Rules in this case. I find that they have not. The third Appellant became a British Citizen on and cannot be removed

from the UK. Clearly, the Immigration Rules no longer apply to him but since he is affected by the Respondent's decision in respect of the remainder of his family I have to consider his Article 8 rights. His British Citizenship affects the question of whether it is reasonable for the family as a whole to return to Nigeria. As this is an in-country appeal, the circumstances relied on by the Appellants in relation to the Article 8 claim are to be considered at the date of the hearing.

38. In **Omotunde (best interests - Zambrano applied - Razgar) Nigeria** [2011] UKUT 00247(IAC) the Upper Tribunal held that:

1. *When applying the judgment of the Court of Justice of the European Union in Ruiz Zambrano (European citizenship) [2011] EUECJ Case C-34/09 OJ 2011 C130/2 and that of the Supreme Court in ZH (Tanzania) [2011] UKSC 4; [2011] 2 WLR 148, in relation to the proposed administrative removal or deportation of one or both of his non-national parents, the welfare of a child, particularly a child who is a British citizen, is a primary consideration.*

2. *National courts must engage with the question whether removal of a particular parent will 'deprive [the child] of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'.*

3. *Where there are strong public interest reasons to expel a non-national parent, any right of residence for the parent is not an absolute one but is subject to the Community Law principle of proportionality. There is no substantial difference between the human rights based assessment of proportionality of any interference considered by Lady Hale in ZH (Tanzania) and the approach required by Community law.*

4. *In this particular context, the Article 8 assessment questions set out in Razgar [2004] UKHL 27 should be tailored as follows, placing the assessment of necessity where it most appropriately belongs in the final question dependent on the outcome of proportionality and a fair balance, rather than as part of the identification of the legitimate aim:*

    1. *Is there family life enjoyed between the appellant and a minor child that requires respect in the context of immigration decision making?*

    2. *Would deportation of the parent interfere with the enjoyment of that family life?*

    3. *Is such an interference in accordance with the law?*

    4. *Is such an interference in pursuit of a legitimate aim?*

5. *Is deportation necessary, proportionate and a fair balance between the rights to respect for the family life of the appellant and the child and the particular public interest in question?*

39. In **Ruiz Zambrano** the Court of Justice in its ruling concluded at paragraph 45:

> "Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

40. In addressing the **Razgar** questions in this particular context it is clear that the third Appellant enjoys family life with his parents and siblings and that he has resided in the UK with them for over ten years since his birth. In this period he has established also a private life outside the home with his friends.

41. The removal of his parents and siblings would interfere with this right as he would lose both his parents who are his only carers and his siblings. If he were to go to Nigeria he would lose his home, his school, regular contact with his wider family and his friends, and the benefit of being brought up in the country of his birth, as a British citizen, with all the benefits which flow from that upbringing. There was no evidence before me that could lead me to conclude that there was anyone else in the UK with whom he could reasonably live. The removal of both parents therefore would deprive him of the genuine enjoyment of the substance of his rights attaching to his status as a European citizen.

42. The interference is in pursuit of a legitimate aim because the decision to remove the Appellants is a measure reasonably connected with the economic well-being of the country.

43. The final question therefore is whether the removal of the Appellants is necessary, proportionate and a fair balance between the rights to respect for the family life of the Appellants and their British Citizen child/citizen and the particular public interest in question.

44. By virtue of section 117A of the Immigration Act 2014, in considering the public interest question, I must have regard to the considerations listed in

section 117B. Subsection (2) provides that "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). The public interest provisions are contained in primary legislation and override existing case law. Section 117A(3) confirms that the Tribunal is required to carry out a balancing exercise.

45. In **<u>Dube (ss.117A-117D) [2015] UKUT 90 (IAC)</u>** it was held that:

"1) Key features of ss.117A-117D of the Nationality, Immigration and Asylum Act 2002 include the following:

(a) Judges are required statutorily to take into account a number of enumerated considerations. Sections 117A-117D are not, therefore, an a la carte menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty-bound to 'have regard' to the specified considerations.

(b) These provisions are only expressed as being binding on a 'court or tribunal'. It may be that the Secretary of State will consider it in the interests of good administration and consistency of decision-making on Article 8 claims at all levels to have express regard to ss.117A-117D considerations herself, but she is not directly bound to do so.

(c) Whilst expressed in mandatory terms, the considerations specified are not expressed as being exhaustive: note use of the phrase 'in particular' in s.117A(2): 'In considering the public interest question, the court or tribunal must (in particular) have regard—'.

(d) Section 117B enumerates considerations that are applicable 'in all cases', which must include foreign criminal cases. Thus when s.117C (which deals with foreign criminals) states that it sets out 'additional' considerations that must mean considerations in addition to those set out in s.117B.

(e) Sections 117A-117D do not represent any kind of radical departure from or 'override' of previous case law on Article 8 so far as concerns the need for a structured approach. In particular, they do not disturb the need for judges to ask themselves the five questions set out in *<u>Razgar</u> [2004] UKHL 27*. Sections 117A-117D are essentially a further elaboration of *<u>Razgar</u>'s* question 5 which is essentially about proportionality and justifiability.

(2) It is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form."

46. In **AM (S117B) Malawi** [2015] UKUT 260 (IAC) the Upper Tribunal held that an appellant can gain no positive rights to a grant of leave to remain from either s117B(2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. Further, Parliament has now drawn a sharp distinction between any period of time during which a person has been in the UK "unlawfully", and any period of time during which that person's immigration status in the UK was merely "precarious". A person's immigration status is precarious if their continued presence will depend on a further grant of leave.

47. Where the question of proportionality is reached, the 'ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8' **Huang**.

48. I take account of the fact that the maintenance of effective immigration control is in the public interest. In relation to the relevant factors, all Appellants speak English. They are not financially independent as they receive £350 a month in order to accommodate themselves. Their private lives were established whilst here unlawfully and therefore can be given only little weight.

49. The first and second Appellants have a genuine and subsisting relationship with a qualifying child and therefore the public interest does not require their removal where it would not be reasonable to expect the child to leave the United Kingdom (section 117B (6)). In **Treebhawon and others (section 117B(6))** [2015] UKUT 00674 (IAC) the Upper Tribunal held that in any case where the conditions enshrined in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 are satisfied, the section 117B(6) public interest prevails over the public interests identified in section 117B (1)–(3).

50. The removal of the third Appellant's family from the UK would entail his constructive removal in that he is their dependent and could not enjoy the substance of his rights if they were removed. He would be compelled to leave with them. His best interests are to remain with both parents in the United

Kingdom where he is the entitled to all the rights flowing from citizenship. In view of his age, the case law indicates that he will have established a meaningful private life outside the home and I accept on the evidence before me that this is so. Further, he has never been to Nigeria. Whilst the parents have a continuing connection with Nigeria, the importance of his citizenship cannot be played down. Mr Melvin submits in his skeleton argument that the third Appellant could be left with relatives or return when older to pursue his education in the UK. However, this submission does not accord with the ruling of the Court of Justice in **Zambrano** which held at paragraphs 42 to 45 that the refusal to grant a residence card to parents of a dependent European Citizen child has the effect of the deprivation of the enjoyment of their rights because it is to be assumed that the children would have to leave the territory of the Union to accompany their parents. In the circumstances it cannot be reasonable to expect the third Appellant to leave the UK. The public interest therefore does not require the Appellants' removal and the decision is therefore not proportionate.

Decision

51. The appeals under the Immigration Rules are dismissed.

52. The appeals under Article 8 are allowed.

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

This case concerns children and I therefore consider it appropriate to make an anonymity order. 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

Deputy Upper Tribunal Judge L J Murray