UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: IA/28056/2015+5**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 19 April 2017	**On: 8 May 2017**

Before

Deputy Upper Tribunal Judge Mailer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[J T]
OLAOCHA UNWANEANEA VIVIAN EZE
ANTHONY NDUAGUIBE UGOCHUKWU
[D T]
[P T]
[M T]
NO ANONYMITY DIRECTIONS MADE

Respondents

Representation
For the Appellant: **Mr D Clarke, Senior Home Office Presenting Officer**
For the Respondents: **Mr A Burrett, counsel (instructed by Kristal Law)**

DECISION AND REASONS

1. I shall refer to the appellant as the secretary of state and to the respondents as the claimants.

2. The claimants are all nationals of Nigeria, consisting of a married couple and their four minor children, aged 10, 8, 5 and 6.

3. In a decision promulgated on 18 October 2016, First-tier Tribunal Judge James allowed the appeals of the two eldest children appellants under paragraph 276ADE(iv) of the Immigration Rules; the parents and the two eldest children's appeals pursuant to paragraph 276ADE(vi) and the appeals of the fifth and sixth under Article 8 of the Human Rights Convention.

4. On 27 February 2017, First-tier Tribunal Judge Grant-Hutchinson granted the secretary of state permission to appeal against the decision. She found that it was arguable that the Judge erred by failing to give adequate reasons why the appeals of the first and second appellants should succeed under paragraph 276ADE(vi) when it was for them to show that there are very significant obstacles to integration for them in Nigeria where they had spent 30 years; by failing to take into account that the third and fourth appellants had not reached the age of 7 pursuant to paragraph 276ADE(iv) as at the date of application; by failing to assess reasonableness on the basis that the parents had no entitlement to be in the UK and the impact upon the children if returned to Nigeria, having regard to paragraph 34 of EV (Philippines); and failing to give adequate reasons as to the relevance of Treebhawon and Others (s.117B(6)) [2015] UKUT 674.

5. Mr Clarke submitted that the Judge treated ties to Nigeria as determinative of paragraph 276ADE(vi) when the ties test was superseded by the test of "very significant obstacles to integration". The Judge failed to consider the 30 years they had spent in Nigeria, language, employment opportunities, skills, church, education and critically their ability to form a private life.

6. Whilst consideration of ties is an important factor to take into account he submitted that the Judge's approach was inconsistent with the jurisprudence in any event. He referred to Bossadi (Paragraphs 276ADE; Suitability; Ties) [2015] UKUT 00042 (IAC). The consideration of ties requires both a subjective and objective assessment. The Strasbourg jurisprudence requires not only that assessment of ties has an objective as well as subjective dimension, but also that such assessment must consider, as a relevant consideration, whether ties that are dormant can be revived.

7. Moreover, the Judge in effect reversed the burden of proof when she stated that there is no evidence of any substantive ties in Nigeria before her and this would impact negatively on the whole family, and in particular the children and their best interests. She found that there is no evidence of any more than remote and abstract links to Nigeria and that she had no evidence of the continued connection that ties this family to their home country, and that such ties are "not limited to social, cultural and family circumstances" - at [28].

8. He submitted that the Judge found in the alternative that the first and second appellants succeeded under s.117B(6) of the 2002 Act as it would be unreasonable to expect the third and fourth appellants to leave the UK. It was incumbent upon the Tribunal to follow the facts on the ground approach as set out in EV, supra, at [58]. 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 in the country of origin?

9. He submitted that the assessment of reasonableness was to be made on the basis that the parents have no entitlement to be in the UK.

10. He accepted that the Judge had appropriately considered the connections of the third and fourth claimants to the UK. However, the reasonableness assessment under s.117B(6) is flawed by the determination's silence in respect of any kind of consideration of the impact upon the children if returned to Nigeria, having regard to paragraph [34] of EV.

11. On behalf of the claimants, Mr Burrett submitted that any errors of law were not material.

12. The Judge asked herself at [15] whether it is reasonable for the respondent to expect the two oldest children to leave the UK, both of whom have resided here in excess of the required 7 years. That was the starting point for the Judge. The applications were made in 2013.

13. When the appeals came before the First-tier Tribunal, they were children who at that stage qualified under paragraph 276ADE.

14. The Judge has however considered throughout the provisions of s.117B(6) which in effect poses the same question of reasonableness applicable under the Rules or under Article 8. There were no material errors of law in her decision.

Assessment

15. First-tier Tribunal Judge James had given a detailed decision based upon a comprehensive assessment of the claimants' documents, the evidence given and the law which was to be applied.

16. The secretary of state did not attend the hearing and was not represented. Judge James noted that the secretary of state made no written representations. No

application to adjourn was made. She decided under the overriding objective to proceed to hear the evidence on a submissions only basis taking into account the documentary evidence and submissions.

17. The claimants submitted 145 pages of evidence including numerous detailed school reports for each of the children, including letters from the local education authority, their qualifications and certificates awarded to them. There was reference to Daniel's appointment as school prefect and his imminent 11+ examination.

18. She found that all four children were born in the UK and speak English. The two elder children were 10 and 8 respectively at the date of decision.

19. She assessed the position of the parents under paragraph 276ADE(vi), finding that they maintained remote and abstract links to Nigeria. There was no evidence of any continued connection which tied the family to Nigeria. I do not find that this constituted a reversal of the burden of proof as contended. That was the finding based on the fact that the parents have been resident in the UK for 13 years and 11 years respectively. Accordingly, stronger and deeper ties had been forged in the UK and the commensurate ties in Nigeria loosened.

20. It is accepted Judge James erred in applying paragraph 276ADE(1)(iv) of the Rules. The two eldest children had not lived continuously in the UK for at least seven years as at the date of the application, which was made on 3 April 2013.

21. However, she proceeded to consider their appeal on the basis of s.55 and in particular s.117B(6) of the 2002 Act. She referred to MA (Pakistan), supra. She had regard to the basis upon which the secretary of state refused the claimants' applications. She also considered (and allowed) the appeals of the two eldest children under paragraph 276ADE(1)(vi) of the Rules - [30].

22. Judge James also stated at [18] that the question of whether it would be reasonable to remove the children who have been in the UK for seven years under paragraph 276ADE(iv) is linked to s.117B(6) regarding private and family life under the Human Rights Convention. The public interest did not require a person's removal where they have a genuine and subsisting parental relationship with a qualifying child where it would not be reasonable to expect the child to leave the UK.

23. She took into account at [19] the decision of the Court of Appeal in R (on the application of) MA and Others v SSHD [2016] EWCA Civ 705, and in particular paragraphs 46, 49, 102-3. She noted that the Court of Appeal went on to refer to the fact that the same principles would apply with regard to a s.117B(6) case.

24. She also referred at [21] to PD (Sri Lanka) [2016] UKUT 00108 – at [39-41], that the reasonableness test involves the balance of all material facts and considerations and is fact sensitive.

25. She found that the two eldest appellants were born in the UK and have never visited Nigeria. They are fully integrated into UK society. The eldest child was on the cusp of an important educational stage regarding the imminent taking of his 11+ examinations which will impact on the rest of his life. To remove him at that critical stage could prove damaging to his future potential outcomes and schooling which could not be recovered at a later stage.

26. Judge James has assessed the cumulative factors, namely strong family life in the UK; the children are settled into a British way of life; that it is in their best interests to remain in the UK and in particular with regard to the two eldest children. This is a settled migrant family who have strong private life and connections to the UK, who have resided here for many years.

27. She had proper regard to the position of the parents 'and Article 8 issues' – [26], noting that they are overstayers who have remained in the UK in breach of the conditions of their business and visitor's visas. They also worked in the UK knowing they had no permission to do so. They were also always aware that their presence in the UK was precarious and they proceeded to have their children in the UK knowing that they had no right to remain.

28. Against that, she stated that there were few countervailing countervailing arguments presented by the secretary of state. She considered the absence of countervailing arguments following EM & Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC). In the absence of countervailing factors, residence of over seven years with children well integrated into the educational system in the UK is an indicator that the welfare of the child favours regularisation of the status of mother and children.

29. She accordingly allowed the appeal for the two eldest children and the parents under paragraphs 276ADE(1)(iv) and 276ADE(1)(vi) of the Rules respectively with regard to their private life -[30].

30. In coming to that conclusion she found that it was not in the public interest to require the removal of the parents given their genuine and subsisting parental relationship with the qualifying children. To do so would be unreasonable in all the circumstances - PD and Others and s.117B(6). The parents are fluent in English and the family is self sufficient - [31].

31. She referred to Beoku-Betts v SSHD regarding the "intertwined emotional and physical interdependency" of the family relationships. She undertook an

assessment under Article 8 following the Razgar steps. She then had regard to sections 117A, 117B and 117D of the 2002 Act. She has had regard to the relevant considerations regarding Article 8(2) and the "public interest question" - [35].

32. She found in all the circumstances that Article 8 is engaged in this case in regards to the two youngest children and also in respect of the parents – [33]. They should be granted leave in line with the eldest children outside the Rules under Article 8.

33. She found that the decision of the secretary of state was not reasonable and proportionate in the circumstances of this case. Accordingly, even though the appeals of the two youngest children were not allowed under the Rules, she concluded that it would be unreasonable to return them, having regard to s.117B(6) of the 2002 Act.

34. In summary, the Judge has given proper reasons regarding the position of the eldest children and in particular the impact that removal to Nigeria would have especially on the eldest child, at a critical stage of his educational development. She also had regard to the cumulative factors relating to the strength and nature of family life in the UK.

35. She properly took into account the fact that the parents were in breach of the Immigration Rules; they are overstayers who also worked here without permission to do so. They at all times knew that their presence in the UK was precarious but nevertheless proceeded to have children in the UK knowing they had no right to remain.

36. I find that the Judge has provided proper reasons for allowing the appeals under Article 8. She had regard to the nature and extent of the private and family life of the claimants as well as the documentation regarding the educational achievements and progress of the eldest children.

37. There were witness statements presented in which the private life circumstances were set out. There was also a detailed skeleton argument presented by the claimants' counsel. Reference was made to the secretary of state's policy under Appendix FM in respect of family and private life.

38. In the circumstances, the findings of the Judge were available to her on the evidence produced.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error on a point of law. It shall accordingly stand.

No anonymity directions made.

Signed Date 5 May 2017

Deputy Upper Tribunal Judge C R Mailer