



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/21870/2018
HU/21872/2018
HU/21874/2018
HU/21880/2018

THE IMMIGRATION ACTS

Heard at Field House
On Monday 19 August 2019

Decision & Reasons Promulgated
On Thursday 05 September 2019

Before

UPPER TRIBUNAL JUDGE SMITH

Between

- (1) A O F
- (2) M I T
- (3) M Q T
- (4) H A T

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Ntochukwu, solicitor, Cardinal Hume Centre
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Although an anonymity direction was not made by the First-tier Tribunal Judge, it is

appropriate to make an anonymity direction because the case involves minor children. 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.

DECISION AND REASONS

BACKGROUND

1. The Appellants appeal against a decision of First-tier Tribunal Judge Lucas promulgated on 4 June 2019 (“the Decision”) dismissing their appeals against the Respondent’s decision dated 9 October 2018 refusing their human rights claim made in the context of proposed removal to Nigeria.
2. The First Appellant came to the UK as a visitor on 27 July 2007 and has since overstayed. On 13 March 2018, she made the application which led to the Respondent’s decision under appeal. She has three children all born in the UK. None are British citizens. They were born in 2010 ([HAT]), 2011 ([MIT]) and 2015 ([MQT]) and were, at the time of the First-tier Tribunal hearing (and indeed now) aged nine, eight and three respectively. It is on the basis of the position of the two elder children (the Fourth and Second Appellants respectively) that the success or otherwise of the Appellants’ appeal turns.
3. The Judge largely accepted the evidence before him but concluded that the Appellants could adapt to life in Nigeria, that there was “nothing exceptional” in this case and therefore the decision to remove them to Nigeria was not disproportionate.
4. The Appellants raise four grounds of appeal. First, they say that the Judge erred by failing to make findings whether the two elder children meet the requirements of the Immigration Rules (“the Rules”) in particular paragraph 276ADE(1)(iv). Second, they say that the Judge failed to make any or any adequate findings whether it would be reasonable for the two elder children to return to Nigeria. Third, they say that when reaching the findings which he did make as to the return to Nigeria of those two children, the Judge impermissibly focussed on the conduct of their mother which ought to have been left out of account. Fourth, they say that the Judge’s findings that the two elder children could re-adapt to life in Nigeria was irrational or perverse on the evidence and taking account of the tests set by relevant case law.
5. Permission to appeal was granted by First-tier Tribunal Judge O’Brien on 28 June 2019 in the following terms so far as relevant:

“... [3] There is an arguable failure by the Judge to identify the children’s best interests and the wider question of whether it would be reasonable to expect

the two older children to leave the UK. They had lived their entire lives in the UK and the eldest child had been nearly 9 ½ years old at the date of the hearing. There did not appear to be any consideration of why the public interest outweighed the best interests of that child in particular. The Appellant's appeal stood or fell on whether it was reasonable to expect the eldest child to leave the UK."

6. The matters come before me to consider whether the Decision contains a material error of law and if I conclude that it does, either to re-make the decision or remit the appeal to the First-tier Tribunal for redetermination.

ERROR OF LAW DECISION

7. As I observed in the course of the hearing, although the Appellants raise four grounds of appeal, they are in effect a different way of saying the same thing. In essence, they are that the Judge failed properly or at all to consider the position, in particular of the two elder children and to make any or any reasoned findings about what their best interests require or whether it would be reasonable to expect them to return to Nigeria.
8. The Judge's findings are set out in relatively short order at [24] to [37] of the Decision. The Judge accepted at [27] of the Decision that the Appellants' claims centred around the two elder children. He accepted at [28] of the Decision that both were qualifying children given their length of residence. He also accepted that the best interests of those children were "quite clearly at the forefront of this claim". Despite directing himself correctly, the Judge failed thereafter to make any discernible findings about what the best interests require.
9. The Judge accepted at [29] of the Decision that the evidence showed that "the children are well integrated into life within the UK. They are doing well at school and have progressed well." However, thereafter, having regard to the position of the First Appellant and her anticipated circumstances in Nigeria, he concluded as follows:

"[36] It is accepted that Appellants 2 and 3 [sic] have been in the UK for all of their short lives and that they are qualifying children under the Rules. However, in the view of the Tribunal, they are not at a vital stage of their education and can easily adapt to the system of education in Nigeria with the support of their carer - their mother. They also have a grandmother and uncle living in Nigeria who could help them to adapt to life there.

[37] There is nothing exceptional in this case. In the view of the Tribunal, the family life of all of the Appellants in this case are also subject to the equally important public interest in effective immigration control. Any disruption to the life of the family would be temporary and the children will continue to have the sole support of the main Appellant."

10. Having heard Mr Ntochukwu's oral submissions, Mr Melvin for the Respondent conceded that the Judge's consideration of the relevant issues was "scant". Although he said that the Judge had considered the position in the "real world" as he was entitled to do, he accepted that the Judge had not considered the best interests of the children. The Judge was entitled to reach the conclusion that he had on the evidence but there was a lack of proper reasoning in relation to the position of the children.
11. I accept that the paragraphs which I cite at [36] and [37] above are capable of being read as a short-form conclusion that it is reasonable to expect the two elder children to return to Nigeria. However, although the Judge refers to the best interests of those children as being "at the forefront of this claim", he fails thereafter to make any findings about what the best interests of the children require, having regard to the evidence and particularly the evidence which the Judge accepts at [29] of the Decision as to the children's integration and education in the UK.
12. Nor is there any consideration of the case-law in this regard. The Appellants' grounds refer in particular to the Court of Appeal's judgment in MA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 705 ("MA (Pakistan)") and the requirement to give significant weight to the children's length of residence and for there to be strong reasons given to outweigh the significance of that factor. I accept that what the Court of Appeal there says about the approach to the reasonableness issue has to be tempered to some extent by what is said by the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 ("KO (Nigeria)") about the need to assess the position of the children in the "real world". However, the children's interests still require to be determined and assessed giving those interests the weight they deserve. In this case, the Judge has failed properly to conduct such an analysis. Accordingly, I am satisfied that there is an error of law made by the Judge when considering the position of the two elder children.
13. Having found an error of law and indicating that I set aside the Decision, Mr Ntochukwu was content that I should re-determine the appeals without further oral evidence. The only evidence is that of the First Appellant who was present at the hearing. However, there was no application to adduce further evidence from her or any further documentary evidence. Her evidence was largely accepted by Judge Lucas and I could therefore rely on the Judge's account of that evidence coupled with my own examination of the documentary evidence. I therefore turn to re-make the decision.

RE-MAKING

14. As indicated above, the Appellants' cases stand or fall with the cases of [HAT] and [MIT]. It is therefore mainly in that context that I consider the evidence although, because of the need to assess the reasonableness of those children returning to

Nigeria, I will also need to consider the evidence about the position in that country and the First Appellant's circumstances and immigration history.

Legal Framework

15. Paragraph 276ADE (1) of the Rules

“Requirements to be met by an applicant for leave to remain on the grounds of private life

276ADE (1). 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 application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

...

(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;

...

(vi) ...is aged 18 years or above, has lived continuously in the UK for less than 20 years ...but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK”

Section 117B, Nationality, Immigration and Asylum Act 2002 (“Section 117B”)

“ ...

(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.”

16. The question whether it is reasonable to expect a child to return to his or her home country was considered by the Supreme Court in KO (Nigeria). The relevant paragraphs are as follows:

“[16] It is natural to begin with the first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DP5/96 it contains no requirement to consider the criminality or misconduct of a parent as a balancing factor. It is impossible in my view to read it as importing such a requirement by implication.

[17] As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is 'reasonable' for the child. As Elias J said in *R (MA (Pakistan)) Upper Tribunal (Immigration and Asylum Chamber)* [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).

[18] On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd of Duncansby in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245, para 22:

'In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made'.

[19] He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874 at [58]:

'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 in the country of origin?'

To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* [2016] 1 WLR 5093, para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered other than in the real world in which the children find themselves."

17. Reference is there made to the Court of Appeal's judgment in MA (Pakistan). In that case, Elias LJ giving the lead judgment had made clear that he would have wished to adopt the interpretation eventually favoured by the Supreme Court in KO (Nigeria) but considered that he ought to follow the Court of Appeal's judgment in MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450. The approach in that latter judgment was overturned by the Supreme Court in KO (Nigeria). However, he went on to say the following about the correct approach to Section 117B (6) whichever interpretation of the reasonableness test was adopted:

"46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

47. Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interests assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so. The concept of "best interests" is after all a well established one. Even where the child's best interests are to stay, it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed he should return. What could not be considered, however, would be the conduct and immigration history of the parents.
48. In *EV (Phillipines)* Lord Justice Christopher Clarke explained how a tribunal should apply the proportionality test where wider public interest considerations are in play, in circumstances where the best interests of the child dictate that he should remain in the UK (paras. 34-37):

‘34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

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.

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.’

49. Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.”

18. The primacy of the consideration of best interests is now well settled in case-law. It is however helpful to remind myself what the Supreme Court said about the importance of those interests in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 as follows:

"Applying these principles

29. Applying, therefore, the approach in *Wan* to the assessment of proportionality under article 8(2), together with the factors identified in Strasbourg, what is encompassed in the "best interests of the child"? As the UNHCR says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in *EB (Kosovo)*, it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away.

...

31. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community (as might have been the case, for example, in *Poku*, para 20, above). But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.

...

33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is at least as strong a case as *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979, where Simon Brown LJ held that "there really is only room for one view" (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer."

I have omitted the passages which relate to children who are British citizens as the children in this appeal are not. As is evident from the passages cited, there is a degree of overlap between the assessment of the children's best interests and the reasonableness of return which is now encompassed separately in the Rules and statute.

19. I have regard to other relevant case-law to which I was directed by the Appellants in the course of my discussion below.

Evidence, Findings and Discussion

20. Although, as I have indicated, the Appellants' cases stand and fall with that of [HAT] and [MIT], it is necessary for me first to say a few words about the position of the First Appellant as, as was said in KO (Nigeria), the best interests of those children (and also their younger sister) and the reasonableness of return have to be considered in the "real world" which encompasses the immigration status of the child's parents.
21. On the evidence before me, the children have been raised by the First Appellant alone. There is reference at [12] of the First Appellant's witness statement to the children's father having made contact with her about three months previously (and therefore in January 2019) and having sent £100 to the children via a friend. However, she goes on to say that she and the children have not received any other support from him. She says at [11] of her statement that he has not been in contact with the children since February 2016 which appears to be contradicted to some limited extent by what is said at [12] of the statement that he speaks to the children occasionally on the phone. Even if that is right, though, there is nothing to show that he could not maintain that sort of contact if the children were in Nigeria rather than in the UK. Moreover, as Mr Melvin pointed out, there is no evidence as to his current location or his status even if he does remain in the UK. I therefore proceed on the basis that the father of the children has no subsisting parental relationship with them and that such limited contact as there may be could continue if the children return to Nigeria. It may even be the case that he is in that country rather than in the UK (the children's birth certificates indicate that he is of Nigerian origin and there is no evidence that he has or ever had a right to remain in the UK).
22. Turning then to the immigration status of the First Appellant, she has lived in the UK for about twelve years but all apart from the first six months has been without any form of leave. If I was considering her position alone, therefore, without any consideration of the position of the children, she would have no basis of stay within the Rules and there would be a significant public interest in her removal, taking into account the unlawfulness of her position throughout her stay.
23. Mr Ntochukwu suggested in the course of his submissions that paragraph 276ADE(1)(vi) of the Rules has some application in this case as the First Appellant could not be expected to return to Nigeria as there would be very significant obstacles to her integration in that country.
24. The First Appellant's witness statement dated 1 May 2019 provides some information about the family's life in the UK and what she says would happen if they returned to Nigeria. That reads as follows (so far as relevant):

"[16] I was born at Akure in Ondo State of Nigeria. In Nigeria I have an elderly and frail mother and a brother. My father has passed away. I have no

real contact with my mother or brother in Nigeria. I am unable to keep contact with my mother because of lack of means and also due to the huge moral responsibility or pressure I feel of taking care of her and not been able to support her. I feel sad and depressed each time I think of my mother's poor health and lack of care. It terrifies me that I could lose her soon and at the same time being helpless.

[17] Although, my father had another wife apart from my mother, I have had no relationship with my father's 2nd wife or her children. And since my father died more than 5 years ago, there has been some serious family feud/problem which has worsened over the years over his house. As a result, the house I lived at with my mother whilst in Nigeria has been forcefully taken over by estranged step mother and her children and my mother chased away.

[18] Since my arrival to the UK in 2007, neither I nor my children have visited Nigeria. And whilst in Nigeria, I had only completed an 'O' Level. I was not working and had no further education or experience of working in Nigeria.

[19] We have no family house or property in Nigeria and no accommodation where the children and I could live if required to leave the UK. We would be destitute. And without any qualification, I will find it extremely harsh to find any meaningful employment in Nigeria to support myself and my children with 'O' level.

[20] I am concerned that I will not be able to find means to support my family as a single parent if removed to Nigeria. I am extremely worried that we would be destitute, which would seriously hamper the welfare and interests of my children.

[21] We no longer have any ties or connections to Nigeria. My children do not speak any local Nigerian language.

...

[23] My children are in different stages of their education in the UK. My children have been in education since they have been about 3 years old. They have settled well with their education and are progressing fine. They like to go to school and have made very good friends.

[24] [HAT] and [MIT] have developed the bond and emotional ties with their friends and their social connections including friends from the church. They look forward to meeting and spending time with them.

[25] [HAT], [MIT] and [MQT] on the contrary do not know my mum as their grandmother or my brother as their uncle because they are not known or in touch with them. My children only speak English language and do not speak or understand any Nigeria languages.

[26] In addition to my children's friendship with their own friends, they have developed deep affection and emotional attachment to Ms Omotehinse (the lady who took us in and gave us shelter and who we are currently living with). They spend regular time with her and call her 'grandma'.

[27] [HAT] and [MIT] are involved in extra school activities such as art work, football, hockey and other activities, which they enjoy and look forward to attending.

[28] I don't know of or in contact with any immediate relatives in Nigeria. The only close relative I have is my mother who is now very old and frail with poor health.

[29] Although I was born in Nigeria, I have lost ties and connection to Nigeria and I have never being back there for more than 11 years and have not travelled to any other country before.

[30] I can say that we have established a strong, family, social and cultural ties in the UK. My children turn to me for advice, instructions and support. They have lived all their lives in the UK and they know no other place than the UK and it is the place we call home. We really wish to remain in the UK and it would be in my children's best interest to continue their education in the UK and be brought up in an environment familiar to them.

[31] I would like to have the opportunity to study and/or work in the UK and to contribute to the economic wellbeing of UK while improving my knowledge and skills as well as to look after myself and take good care of my children.

[32] My immigration status is the source of great emotional distress to me and my children. I now suffer from depression and have sought medical attention for the stress I feel. I have also noticed limb pains as a result of the stress. I have trouble sleeping because of the distress and have difficulty explaining why I am emotionally upset to my children, who have noticed my distress. My sons [HAT] and [MIT] have not been able to undertake any school trips outside the UK and now ask me why they cannot travel or go on holidays.

[33] If required to return to Nigeria, my children and I will suffer hugely and will not be able to cope with life in Nigeria. We would face very significant and insurmountable obstacles to integrate into life in Nigeria in all aspects. To start with my children and I will be destitute as we will have no house to return to and no family, relatives or friends that we know of in Nigeria who is able to take us even temporarily.

[34] More so, because I left Nigeria more than 11 years ago and my children not ever being to Nigeria, we would not know how the system and society work as I believe a lot must have changed since my departure. It would be therefore extremely difficult for my children to start education or to fit in within the wider society. They will lose the support and stability they have accrued in the UK. Pulling them out from their settled life and education in the UK will be extremely disruptive."

25. The First Appellant came to the UK aged twenty-seven years. Her evidence fails to explain what she was doing in Nigeria up to that time if not working or studying. Furthermore, I do not accept her assertion that she has no ties there. On her own admission, she has a mother and brother there. Although her

unchallenged evidence is that her mother is elderly and frail which I therefore accept, she says nothing about the circumstances of her brother. There is an affidavit sworn by her mother at [AB/32] dated 10 March 2017. That undermines the First Appellant's evidence that she has no contact with her mother. The affidavit only deals with the loss of the First Appellant's birth certificates and makes no mention of her own situation in Nigeria. The affidavit states that she resides at an address in Akure. She makes no mention of having no home in Nigeria.

26. As the First Appellant explains in her statement, she has managed to live in the UK with no right to work for a period of twelve years by relying on the charity of the church community. She has no family members in the UK. The lady who accommodates the family is someone who the First Appellant says the children regard as their grandmother because they do not know their biological grandmother, but she is not related. She says that the children "have developed deep affection and emotional attachment to Ms Omotehinse". The closeness of that relationship is however undermined by the letter from that lady dated 10 March 2018 which appears at [AB/30] and reads as follows:

"I have accommodate [AOF] and her children for some months now, they have been living with me in my house.

She have three children age 8, age 7 and age 2

I have also been helping in caring for those children since the first day she move into my apartment.

As I write my flat is overcrowded to the extent I find it difficult to sleep when the children are awake.

I will be so grateful if something can be done about her stay in the UK as I am tired of the noise for the children.

I am ready to support her application, so I can have some peace in my house.

Am appealing to Home Office to kindly please grant this young mother of three a resident permit so she can start her life all over again, she is good lady, very hardworking, I know she will be a good benefit to the community if she is being grant leave to remain."

Although I accept that Ms Omotehinse speaks warmly of the First Appellant, put bluntly, this letter does not indicate any emotional attachment between her and the children as asserted. It appears that she would like the family to move out of her house as it is overcrowded.

27. The First Appellant says that she would like to work if permitted to remain in the UK. However, it is not clear to me how the First Appellant expects to obtain gainful employment if permitted to stay in the UK given her asserted lack of educational qualifications and work experience or why that should be more of a barrier to employment there than here. I note that when making her application to the Respondent, she sought a waiver of the fee and also asked to be given leave

with recourse to public funds if allowed to remain. If she would therefore be obliged to survive as she has to date with the assistance of her church community, there is no reason why that support could not continue in Nigeria where, moreover, she has family members with whom she could reinstate contact (specifically her mother and brother) and who could help her and the children adapt to life in Nigeria in the short-term. On the First Appellant's own admission, she feels guilty about not being able to provide assistance to her mother. Return to Nigeria would enable her to provide that assistance.

28. The Appellants are being supported in the UK by their church community. The letters of support show that, so far as stated, those persons are originally from Nigeria. They may well also have connections in Nigeria which the Appellants could use to obtain some assistance.
29. In any event, the test is no longer whether a person has "ties" to their country of origin but whether they could be expected to integrate there. In the case of Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813, the Court of Appeal described the test in the current version of the Rules as follows:

"[14] In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

That was said in the context of the Rules relating to deportation, but the wording is the same. I have already noted that the church community in which the First Appellant plays an active part is largely of Nigerian origin. There is no reason why she could not find a similar church community to assist her in Nigeria. Having regard to the fact that the First Appellant was born, raised and educated in Nigeria and the lack of detailed evidence about the problems which she faces in that country on return, I am not satisfied that she has discharged the burden of showing that there would be very significant obstacles to her integration in Nigeria. There is accordingly no reason why she could not return to her country of origin.

30. I turn then to consider the best interests of the children. As was said in ZH (Tanzania), the best interests of a child are a primary consideration although not

paramount. For the reasons I have identified above, based on what is said in KO (Nigeria), those interests have to be assessed based on the position in the “real world”. For the reasons given above, therefore, the best interests of the children have to be assessed on the premise that, but for their position, their mother would be returning to Nigeria. The children are all aged under ten years. At that age, they clearly require the care of their parents. In this case, as I have already found, the parental relationship is with their mother only. The best interests of all the children therefore require that they remain with their mother. The real issue is whether their best interests are to remain in the UK or to return to Nigeria.

31. The two eldest children are in primary school education. The youngest attends nursery part-time. Documents relating to their education appear at [AB/9-27] and [AB/50-73]. There are some photographs of the children individually and together with teachers, classmates and their mother. The children appear from reports to be doing reasonably well at school. There is some evidence that [MIT] was performing below expectations but there is no indication that this is due to any developmental or learning difficulties and the evidence suggests that the situation is improving.
32. The high point of the evidence in relation to the two eldest children are two letters from their primary school dated 5 March 2018. Those are signed off “pp M Thompson” on behalf of “[M] School Office”. The first ([AB/8]) relates to [HAT] and reads as follows (having noted that he joined the school on March 2016):

“[HAT] is in year three. He is currently working at age expected level in English and maths. He is well liked amongst his peers and gets on with the adults in his class. He takes part in extra-curricular activities and is a keen footballer.

[HAT] is settled and happy at [M] school and has made significant progress in his learning this academic year. It would be detrimental to his education if this were interrupted”
33. The second letter in relation to [MIT], again referring to his admission date as March 2016 reads as follows:

“[MIT] is in year two. He is very eager to learn and engages well in lessons. He is a confident member of the class and actively contributes to class discussions. He is very popular and has established secure friendship groups. [MIT] is currently working just below age expected level in English and at age expected in maths.

I believe that it would not be in his best interest if he were to leave [M] Primary school as he is settled and making good progress with his learning. If he were to leave the school or the country I feel this would have a detrimental effect on his academic progress and his emotional wellbeing.”
34. The children’s school reports overall show that they are polite and popular with their peers. There is however very limited evidence as to their independent lives in the UK which can be gleaned from these documents. It is difficult to place much weight on the two letters which I have cited above since the writer of them

does not say how the children are known to him/her or his/her qualifications to provide an opinion on the children's best interests and future development. Even taking those letters at highest, it shows that the two children are doing reasonably well in education at a primary school which they have attended now for some three and a half years and that they have made friends.

35. As indicated by the extract from EV (Philippines) which I have cited in the passage from MA (Pakistan) at [17] above, the relevant factors to be considered when assessing where a child's best interests lie relevant to their own lives (including their education) are their age, the length of time that they have been in the UK, how long they have been in education, the stage their education has reached, the extent to which they are distanced from their home country and whether they can renew a connection, any language, medical or other difficulties.
36. In this case, both children have been in education since 2016 in their current school and there is an indication that they were at nursery before then. The First Appellant says that they were in education from the age of about three so the eldest will have been in education for about six years and [MIT] for about five years. At primary school level, however, they have not yet reached a crucial point in their education. [HAT] will be obliged to move schools in a couple of years when he moves to secondary school. Whilst both children have formed friendships, those friendships may well not survive a move to their next school and in any event, there is no reason why they cannot continue to write to friends in the UK and to make new friends in Nigeria. The youngest child has only recently started nursery school and there is no evidence aside the report to which I refer below, and which does not indicate that this child has yet formed any independent life (as would be expected to be the case as she is only aged three years).
37. The First Appellant says that the children do not speak the languages spoken in Nigeria. I reject that evidence for the following reasons. First, English is widely spoken in that country. Second, as appears from the reports from the youngest child's nursery at [AB/68-69], "English and Yoruba are spoken at home". There is therefore no reason why, if the youngest child can speak Yoruba, the two eldest children will not be able to speak it also.
38. There is evidence that all Appellants are registered with a GP. There is no evidence that any of the children have medical problems. I note as an aside that the First Appellant says that she has had depression, physical pains as a result and that she suffers from sleep problems and has sought medical assistance for stress. However, there is no evidence of any medical intervention. The GP's letter at [AB/29] simply states that the family is registered with the surgery.
39. I accept that none of the children has visited Nigeria. Although the First Appellant has obtained Nigerian passports for all of them (of which I only have the first page of each document), I anticipate that this was for the purpose of

making the application which led to the decision under appeal. I also accept therefore that they will have little familiarity of Nigerian customs and ways of life. They may know something about their country of nationality from their association with others of Nigerian origin who attend their church, but I accept that this will be limited, and they will be more familiar with the British way of life, particularly the eldest two children who are in full-time education.

40. However, I do not accept the First Appellant's categorisation of the children's life in the UK as stable. They are living in a house which is described by its owner as overcrowded and are dependent on the charity of their church community.
41. I accept, as stated in MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC) that a child's position independently of his/her parents will develop over time. However, as I have indicated, there is limited evidence of the development of the independent lives of [HAT] and [MIT] in the six and five years that they have been in education. [MQT] has only recently started school. I have regard to the guidance given by this Tribunal in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC) as follows:
- "i) 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 than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable."
42. The assessment of what is in the best interests of a child is inherently fact sensitive and to be carried out on the evidence before the Tribunal. Having regard to what I say above about that evidence, although I accept that [HAT] and [MIT] are reasonably well settled in education and have been here for more than seven years, I cannot accept that it is other than marginally in their best interests to remain in the UK. Their best interests and those of [MQT] are more strongly to remain with their mother wherever she is living.

43. The next question to be determined, however, is whether it is reasonable to expect them to return to Nigeria. When considering reasonableness, the children's best interests are not determinative. However, as said in ZH (Tanzania), "[w]here the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them". Here, although I have found that it is in the best interests of the Second and Fourth Appellants to remain in the UK because they have been here for seven years and are in education here, I concluded that this was only marginally the case and that their interests were more strongly favoured by remaining with their mother. My conclusions in relation to best interests are relevant to the issue whether it is reasonable for the children to be expected to return to Nigeria but, because their best interests do not clearly favour staying in the UK, that conclusion is not determinative of the reasonableness issue.
44. When carrying out the assessment whether it is reasonable to expect the Second and Fourth Appellants to return to Nigeria, I must consider only the position of the children. I ignore the position of the First Appellant. I take into account what is said in MA (Pakistan) concerning the weight to be given to the length of residence of a child. The Respondent has formulated a rule and given statutory effect to the need to have regard to a period of seven years as being of significance.
45. However, as with best interests, the significance of that period in terms of what is reasonable to expect has to be assessed on the facts and evidence. Here, the children are reasonably well settled into the English education system, but they have not been at school for any lengthy period. There is likely to be some disruption caused by a move to a different education system, but they are not at a critical point in their education. They may well have formed some friendships with their classmates but there is little evidence that they have formed any independent lives or integrated substantially into the British way of life such that any disruption would be other than minor.
46. I accept that the children have never visited Nigeria. However, they have family members there. They have no family in the UK and are currently living in unstable conditions. It is likely that the children will take a little time to adjust to life in Nigeria, but they will have their mother to help them. I have already explained why I do not accept that there are very significant obstacles to her integration in that country. She will be able to look to family members to assist her and may also be able to obtain some support from persons associated with her church community. That community has been generous in its assistance to the family whilst they have been in the UK and there is no reason why that support could not continue in Nigeria whilst the First Appellant finds employment and accommodation. Although there is likely to be a period of readjustment for the children, looking at the evidence as a whole and taking account of the children's best interests, it is reasonable to expect the children, in particular the Second and Fourth Appellants (to whom this issue is relevant), to return to Nigeria.

47. It follows from the foregoing, that the Second and Fourth Appellants do not meet paragraph 276ADE(1)(iv) of the Rules. There is no other provision of the Rules which applies in this case (see my finding above in relation to paragraph 276ADE(1)(vi)). They are not therefore qualifying children for the purposes of Section 117B (6).
48. For the sake of completeness, I consider the case also outside the Rules. I have already set out the evidence concerning the interference with the private lives of the Appellants. The family will be removed as a whole and there is therefore no interference with their family lives. I have already found that the children have no contact other than indirect with their father (by telephone from time to time). The First Appellant has no contact with him and does not even know where he is. I have rejected the First Appellant's evidence that the children have formed an emotional attachment as family members with the lady who currently accommodates the family. Conversely, the family will be able to re-establish contact with their family members in Nigeria (the children's grandmother and uncle). The evidence as to interference with the family's private lives is thin. I have already made findings in relation to what that shows about the level of interference with the family's private lives and I do not repeat those findings. In any event, applying section 117B (4), I can give their private lives little weight.
49. Although the Appellants may not have had recourse to public funds to date, that is only because they are not entitled to them due to the unlawfulness of their status. They have been reliant on assistance from their community. They sought recourse to public funds when making their application. I have already pointed out that, if the First Appellant does not have qualifications enabling her to work in Nigeria, she may find it difficult to find work in the UK either. She has no experience of working in this country any more than she does in Nigeria as she has not had permission to work. The Appellants are not financially independent. That too weighs against them and in favour of the public interest (section 117B (3)).
50. The First Appellant has been in the UK unlawfully for most of her period of residence. Although the other Appellants do not have the right to remain either, as the children of the First Appellant, they have had no option but to stay here. However, the fact that, as I have found, they cannot meet the Rules and are here without leave also weighs against them in the public interest (section 117B (1)). The effectiveness of immigration control is undermined where, as here, a family seeks to stay in the UK having remained unlawfully with no basis of stay within the Rules in order to gain an advantage based on the children's length of residence.
51. Although I have accepted that removal will interfere with the family's private lives and that there will be a period of readjustment to life in Nigeria, when that interference is balanced against the strong public interest in removal of those with

no right to be in the UK and who have no basis of stay within the Rules, the decision to remove the Appellants is not disproportionate.

CONCLUSION

52. For the above reasons, the appeals are dismissed. The Second and Fourth Appellants are not entitled to leave to remain under paragraph 276ADE(1)(iv) of the Rules as it is reasonable to expect them to return to Nigeria with their mother and sister. The First Appellant cannot therefore succeed under section 117B (6). There are no very significant obstacles to the Appellants' integration in Nigeria. They have no basis of stay under the Rules. Outside the Rules, balancing the interference with their private lives against the public interest, the decision to remove them is not disproportionate.

DECISION

I dismiss the appeals on the basis that removal of the Appellants does not breach Section 6 Human Rights Act 1998 (based on Article 8 ECHR).



Signed
Upper Tribunal Judge Smith

Dated: 28 August 2019