



**Upper Tribunal  
(Immigration and Asylum Chamber) Appeal Number  
IA/41333/2013**

**IA/41340/2013**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12 December 2014**

**Decision & Reasons promulgated  
On 15 December 2014**

**Before**

**Deputy Judge of the Upper Tribunal I. A. Lewis**

**Between**

**Secretary of State for the Home Department**

**Appellant**

**and**

**(1) Noah Olumde Okunromade  
(2) Olubusola Olanrewaju Okunromade  
(Anonymity orders not made)**

**Respondents**

**Representation**

For the Appellant: Mr. L. Tarlow, Home Office Presenting Officer.  
For the Respondents: Ms. M. Hannan of Corban Solicitors.

**DECISION AND REASONS**

1. These are linked appeals against the decisions of First-tier Tribunal Judge Juss promulgated on 8 July 2014, allowing Mr and Mrs Okunromade's appeals against the Secretary of State's decisions dated 4 October 2013 to refuse to vary leave to remain and to remove each of them from the UK.

2. Although before me the Secretary of State is the appellant and Mr and Mrs Okunromade are the respondents, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr and Mrs Okunromade as the First Appellant and Second Appellant respectively, and the Secretary of State as the Respondent.

### **Background**

3. The Appellants' personal details and immigration histories are a matter of record on file, and are to a substantial extent, reproduced in the cover sheet to the Respondent's bundle before the First-tier Tribunal, and in the body of the decision of the First-tier Tribunal. It is unnecessary to reproduce those histories herein: I make reference as is incidental for the purpose of this Decision.
4. The First Appellant made an application for indefinite leave to remain on 30 October 2012 on the basis of having resided in the UK for 10 years, having first entered on 22 September 2002. The Second Appellant made a similar application on 2 April 2013. Both applications were refused with reference to paragraph 276A because there had been an interruption in the periods of leave enjoyed by the Appellants between 31 January 2006 and 18 April 2006.
5. The Appellants appealed to the IAC. Their appeals were allowed for reasons set out in the decision of the First-tier Tribunal, and with particular reference to the circumstances of their children who were born in the UK on 24 April 2004 and 22 November 2006. In respect of the older child there was evidence before the First-tier Tribunal that he had made an application for registration as a British citizen (see determination at paragraph 17), and the Judge characterised him as being "*on the cusp of being granted British nationality*" (paragraph 20).
6. The Respondent sought permission to appeal. Permission to appeal was initially refused by First-tier Tribunal Judge Denson on 1 August 2014 on the basis that he considered the application to have been made out of time and he refused to extend time. However, on 29 October 2014 Upper Tribunal Judge Kopieczek determined that the application had been made 'in-time', and further granted permission to appeal.

### **Consideration**

7. At the commencement of the hearing before me Mrs Hannan brought to my attention that the Appellants' son had been registered as a British citizen on 6 June 2014, and provided the original (and copies) of his Certificate of Registration. I pause to note that such registration occurred between the date of the

hearing before Judge Juss (28 May 2014), and the promulgation of his determination (9 July 2014).

8. In light of this development – fully anticipated by Judge Juss – Mr Tarlow, in recognition of the inhibiting effect of the grant of citizenship on any argument based on the reasonableness of expecting a child to leave the UK, without withdrawing the Respondent’s challenge indicated that he wished to do no more than rely upon the grounds as drafted in support of the application for permission to appeal.
9. I have carefully considered the Respondent’s grounds: I am not satisfied that they demonstrate that the First-tier Tribunal Judge materially erred in his approach to the Appellants’ appeals.
10. The First-tier Tribunal Judge recorded in his determination that it was conceded on behalf of the Appellants that they could not satisfy the requirement of 10 years lawful continuous residence, and so their applications had been appropriately refused under the Immigration Rules (determination at paragraph 7). The Judge accordingly, identified that the Appellants relied upon Article 8 (paragraph 7), and in this context also identified that they could not succeed under the provisions of Appendix FM, and so necessarily had to rely upon a consideration of Article 8 outside the parameters of the Rules (paragraph 22).
11. The Judge found the First Appellant to have been a credible witness (paragraph 20) , and accepted that he had been in the UK for 10 years and had two children who were born and brought up here with the eldest being 10 and *“on the cusp of being granted British nationality”*. In respect of the children the Judge had very particular regard to section 55 of the Borders, Citizenship and Immigration Act 2009 and jurisprudence in respect of ‘best interests’ (paragraphs 23-25).
12. The Judge addressed the first two of the **Razgar** questions (without expressly so identifying them) at paragraph 27, and answered them in the Appellants’ favour. It seems to me that such answers were inevitable and I do not understand the Respondent to dispute as much. The Judge also at paragraph 27 answered the third **Razgar** question in the affirmative – *“I accept the interference is in accordance with the law”*.
13. Perhaps more controversially, the Judge answered the fourth **Razgar** question negatively – *“it is not necessary in a democratic society in the interests of the rights and freedoms of others, and the maintenance of immigration control”*. Be that as it may, in the alternative, the Judge also addressed his mind to the fifth **Razgar** question – proportionality – and concluded that *“the interference is not proportionate to the legitimate public end, that is sought to*

*be achieved in circumstances where the children have been here for over seven years, are settled in this country, are doing well at school, and do not know life in Nigeria and speak English as their primary language”.*

14. Complaint is made that the Judge failed to have regard to the requirements of paragraph 276ADE(iv) in considering the private lives of the children. Emphasis is placed by the Respondent in the grounds on the ‘reasonableness test’ now to be found in 276ADE(iv), and it was submitted that the Judge had failed to have regard to this provision as a relevant consideration.
15. It seems to me that the ‘reasonableness test’ is no more than an echo of the proportionality test - appropriately incorporated into a rule that is seeking to give effect to the private life aspect of Article 8. In substance the Judge’s observations on proportionality at paragraph 29 of the determination would readily inform a consideration of the reasonableness test. I am unable to accept on the facts of these particular cases that having had regard to proportionality it may sustainably be argued that the Judge materially erred by not also having regard to reasonableness under paragraph 276ADE.
16. Moreover, in this context I note that the reasonableness test under 276ADE(iv) arises by reason of an amendment to the Rules which had effect from 13 December 2012. Prior to the amendment the rule was simply drafted as a requirement that the applicant be *“under the age of 18 years and [have] lived continuously in the UK for at least 7 years (discounting any period of imprisonment)”*. The application herein was made prior to that amendment. The Judge, of course, was not concerned, directly with an application under 276ADE(iv) but, it is suggested by the Respondent, should have had regard to such a provision as part of evaluating the typical benchmark in an Article 8 case involving a child. Mr Tarlow acknowledged that in circumstances where the relevant application by the Appellants had been made prior to the amendment to the rule, any reliance upon the ‘reasonableness test’ subsequently incorporated into the rule was weakened.
17. In all the circumstances I find no substance in this line of challenge as indicative a material error of approach by the First-tier Tribunal.
18. Nor am I attracted to the pleading to the effect that the Judge failed to have regard to the parents’ immigration status when determining proportionality or reasonableness in respect of the children.
19. It is to be noted that the Appellants have an extremely good immigration history. Although there is a brief gap in continuity following on from the rejection of an application and the time

taken to submit an alternative application and secure favourable decision, it is to be noted that the grant of leave, subsequent to that irregularity, and the subsequent grants of successive leaves thereafter, are all powerfully indicative that the Respondent had never considered the brief interruption to be a matter of significant concern in immigration terms. Moreover, it is the case that the Appellants' immigration leave only came to a conclusion by reason of the rejection of the applications herein. The Second Appellant was still studying when she made her application for indefinite leave to remain, and but for making that application would have been in a position to apply for further leave as a student. In my judgement there is nothing adverse in the immigration histories that should weigh significantly in a proportionality balance either specifically in respect of the children, or more generally in respect of the Appellants and their family.

20. Further in this context although the consideration of Judge Juss pre-dated the coming into force of the amendments to Part 5 of the Nationality, Immigration and Asylum Act 2002 introduced by the Immigration Act 2014 at sections 117A-117D, I note by way of general observation that it cannot be said of these Appellants or their children that private life has been established in the UK at a time when they were here unlawfully, or even with precarious status.
21. Moreover, whilst recognising section 117B was not of direct application before the First-tier Tribunal, I also note in respect of section 117B(2) that the Appellants and their children speak English; and in respect of section 117B(3) that at all relevant times the Appellants have been self-supporting, and indeed provided substantial supporting evidence as to their employment and financial soundness (e.g. mortgage documents). These factual circumstances substantially undermine the Respondent's submission that the First-tier Tribunal Judge materially erred in failing to have regard to effective immigration control as a facet of legitimate state interest in the economic well-being of the country. This point is further undermined by the fact that the Judge did refer to "*the legitimate public end that is sought to be achieved*" (paragraph 29) immediately after having referenced "*the maintenance of immigration control*" (paragraph 28). On the facts of this particular case I see no merit in this line of challenge which Mr Tarlow declined to develop before me.
22. In all such circumstances I reject the Respondent's challenge to the decisions of the First-tier Tribunal. I find that the decisions of the First-tier Tribunal Judge contained no material errors of law and stand accordingly.

### **Notice of Decision**

23. The decisions of the First-tier Tribunal Judge contained no material error of law and stand.
24. Appeal IA/41333/2013 remains allowed.
25. Appeal IA/41340/2013 remains allowed.

**Deputy Judge of the Upper Tribunal I. A. Lewis 12 December  
2014**