



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/32473/2015  
IA/33136/2015  
IA/33146/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
Heard on 3<sup>rd</sup> January 2018**

**Decision & Reasons Promulgated  
On 30<sup>th</sup> January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

**Between**

**MRS E O- 1<sup>st</sup> Appellant  
JO -2<sup>nd</sup> Appellant  
SO - 3<sup>rd</sup> Appellant  
(Anonymity order made)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Ms Y Alabi, Solicitor

For the Respondent: Mr P Nath, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellants**

1. The Appellants are citizens of Nigeria. The first Appellant to whom I shall refer as the Appellant is the mother of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. She was born on [ ] 1975, JO was born on [ ] 2000 and SO was born on [ ] 2002.

They appealed against decisions of the Respondent dated 14<sup>th</sup> of September 2015 refusing to grant them leave to remain. Their appeals were allowed by Judge of the First-tier Tribunal Freer sitting at Taylor House on 18<sup>th</sup> of November 2016. The Respondent appealed with leave against that decision and for the reasons which I have set out in more detail below, see paragraph 16, I have set aside the decision of the First-tier Tribunal and have re-made the decision in this appeal. Although the appeal came before me in the first place as an appeal by the Respondent, I have for the sake of convenience continued to refer to the parties as they were known in the First-tier.

2. The Appellant arrived in the United Kingdom in 2006 after, she states, she had separated from her husband in Nigeria. She was then granted entry clearance valid for two years from 31<sup>st</sup> of January 2007 until 31<sup>st</sup> of January 2009, it appears as a visitor. She and her children overstayed thereafter. The two children have received schooling here since arrival.
3. The Respondent refused the application stating that it was in the best interests of the children that they should return to Nigeria in the company of the Appellant as they had all failed to meet the requirements of the Immigration Rules. The Appellant had spent 30 years residing in Nigeria prior to her arrival in this country and there was no evidence of very significant obstacles to her reintegration back into life in Nigeria.
4. The Appellants appealed against that decision on two grounds. The first was under the Immigration Rules paragraph 276ADE (iv) that the two children had lived continuously in the United Kingdom for at least 7 years and it would not be reasonable to expect them to leave the United Kingdom. The 2<sup>nd</sup> ground was outside the Immigration Rules under Article 8 jurisprudence taking into account section 117B (6) of the Nationality Immigration and Asylum Act 2002 (which is broadly to the same effect as the Rules).

### **The Appellants' Case**

5. The Judge summarised the Appellant's claims at [22] to [25] of the determination. The Appellant had established a private life, she had made a significant contribution to her church community and her character was commended by a letter from her church, the Redeemed Christian Church of God. She had been in the United Kingdom for over 10 years and had resided with the writers of the letter of commendation without recourse to public funds. The writers pledged to continue to provide accommodation, feeding, transportation and whatever else was needed to avoid recourse to public funds. JO was intelligent, fully settled here in terms of his private life and was about to take his final examinations. His GCSE results showed passes mostly at grade B and with a grade A in religious studies. There was no information about A-level subjects or future plans beyond the bare information that JO was in his A-level class preparing for university. Both children had won several

awards and were active in sport and committed to football. They were members of an under 17 club. JO was at a crucial stage in his education and it would be devastating to his emotional well-being to send him back to Nigeria. The lives of others would be affected by the Appellants' removal.

### **The Decision at First Instance**

6. The Judge accepted the credibility of the evidence given to him with one exception, he found no proof of any entry into the United Kingdom prior to 2007. All of the family members were in the United Kingdom not in Nigeria. Removal would not lead to any constructive contact with the biological father of the children. He was not a family member in terms of contact or parenting. Against the Appellants it was not unduly harsh to remove an overstaying family from London to Nigeria after 10 years. English is widely spoken in Nigeria and football was very popular there.
7. The Judge took into account the policy of the Respondent contained in the Immigration Directorate Instructions (IDIs) which required strong reasons in favour of removal of qualifying children otherwise removal would not be reasonable. The Appellant could not succeed on her own merits either inside or outside the Rules. She would succeed behind the children as a family unit or not at all.
8. The Judge criticised the wording of the refusal letter at [39] which he found had made a number of errors of fact. This was evidence of the Respondent's failure to take account of all material considerations. The Appellants would be readily employable in Nigeria and their experiences in the United Kingdom would be a positive addition to their CVs. Their use of education and healthcare in this country had been a burden on the state which was solely the fault of the Appellant. At the dates of application, decision and hearing JO had resided for more than half of his life continuously in the United Kingdom which when he attained the age of 18 years in June 2018 would trigger the private life provisions of paragraph 276 ADE (1)(v). This was a case of a "near miss". SO was 4 years old at date of entry into United Kingdom and had resided for more than half of his life continuously in the United Kingdom at the dates of application, decision and hearing. JO was not prepared to take examinations in Nigeria but there was more time for SO to adapt to the different syllabus there using skills learned in this country.
9. Section 55 of the Borders Citizenship and Immigration Act 2009 had not been properly considered by the Respondent. It was not reasonable to expect JO to leave the United Kingdom now and follow the Appellant to Nigeria but to leave it, if at all, only after he had finished school in this country. Great weight had to be given to JO's position in the proportionality exercise outside the rules. Removal to Nigeria would sabotage the school work completed by JO and to a lesser extent by SO. In order to avoid splitting a parent from minor children it was right that

the Appellant should be allowed to stay at least until JO had completed schooling or reached the age of 18 years.

10. The Appellant had spent most of her life in Nigeria and since then had been continuously involved with the Nigerian diaspora in London. It went against her that she was not financially independent as required by section 117B. It was not unduly harsh or disproportionate to remove her but for the considerations which related to the children. The Respondent's decision was not pursuant to a legitimate aim because of the unlawful elements in the decision letter which the Judge had referred to at [39]. No strong reason had been identified in favour of removal.

### **The Onward Appeal**

11. The Respondent appealed against this decision arguing that the Judge had treated the reasonableness assessment as one relating solely to the private life of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants JO and SO. The Judge had failed to put the educational ties relied upon into a real-world setting. The Appellant had no basis for staying in the United Kingdom herself and the children had no future right to education. It would not be unreasonable for them to return to Nigeria with the support of the Appellant with whom they resided and retained a cultural nexus. The Judge had only focused on those ties which the Appellants had established in the United Kingdom and did not consider whether private life could be reconstituted in Nigeria. There was no finding that the children could not pursue their education in Nigeria should they wish to do so. The Judge had failed to undertake the relevant balancing exercise and only considered those factors which fell in the Appellant's favour without recognising the need for effective immigration control and the importance of the economic well-being of the United Kingdom.
12. The application for permission to appeal came on the papers before Designated First-tier Tribunal Judge McCarthy on 25<sup>th</sup> of October 2017. In granting permission to appeal he extended time to the Respondent. The grounds were late because the Respondent had attempted to fax them to the Tribunal but had been unable to do so because of administrative difficulties at the Tribunal's end. The Designated Judge noted that the principal argument advanced was that the First-tier Tribunal had failed to engage with the Court of Appeal decision in **MA (Pakistan) v SSHD [2016] EWCA Civ 705** when assessing the reasonableness of removal. It was unclear what weight the Judge had given to the failure of the Appellants to comply with immigration control and the public interest in maintaining effective immigration control.
13. The Judge had implied that he did not need to assess the public interest. Although he had extensively examined the personal circumstances of the Appellants and the best interests of the children it was arguable whether he had properly assessed the public interest factors. If he had not done so the proportionality assessment was arguably flawed. There was a

further point not raised by the Respondent but described by the Designated Judge as obvious. This was the apparent inconsistency between the Judge's finding that the Appellant could not meet the Immigration Rules and his decision that her appeal was allowed under the Rules.

### **The Hearing Before Me**

14. For the Respondent the Presenting Officer relied upon the grounds of onward appeal. **MA** was authority for the proposition that one had to look at the immigration history of the Appellant when determining the reasonableness of expecting the children to leave the United Kingdom. It was a one-sided argument in the decision made by the Judge without carrying out a balancing exercise. The Judge had looked at the Appellants' ties without considering their mother's immigration history. The case of **MA** now superseded the Upper Tribunal authority of **Azimi-Moayed [2013] UKUT 197**.
15. For the Appellant it was argued there was no material error of law in the decision. The Judge had noted the relevant case law. The children had arrived at the ages of 5 and 3 respectively. JO was now in the final year of his A-level course which he would sit in June. SO would be embarking on his GCSEs next year. The Judge had looked at the length of the Appellant's residence, they had lived here for a substantial number of years, well over 7 as they had been here for 11 years. Apart from their educational achievements they had social ties to the country playing football for a local club. These were facts which the Judge had analysed in detail. It was not just a question of education. The decision should be upheld.

### **Findings**

16. The first issue I have to decide is whether the Judge made a material error of law such that the decision should be set aside and re-made. For the reasons I give in more detail below I do set it aside as it is not at all clear from the determination that the Judge has assessed the public interest in immigration control when carrying out the balancing exercise outside the Immigration Rules under Article 8.
17. Although the Judge indicated that the Appellant's appeal was allowed under the Immigration Rules, as the Designated Judge pointed out in granting permission to appeal this contradicted what the Judge had said at [37] that the Appellant could not succeed on her own merits either inside or outside the Rules. It appears that the Judge's decision to allow the Appellant's appeal under the Rules is a typographical error but for the reasons given by the Designated Judge in granting permission to appeal cannot be corrected under the slip rule. I find that there was a clear error of law in the decision to allow the Appellant's appeal under

the Rules and I set that decision aside since that is obviously not what the Judge intended to say.

18. That means that the appeals of all three Appellants fall to be determined outside the Rules under the Article 8 jurisprudence taking into account the Respondent's own policy guidance (see **SF Albania**). The Judge appears to have come to the view that he did not need to take into account the public interest because of his criticisms of the refusal letter. The Judge took three points against the refusal letter. The first was that it referred to the Appellants entering United Kingdom in 2007, the 2<sup>nd</sup> is that there was an error in stating the children's ages at date of entry and thirdly there was reference to a partner when there was no support that the Appellant could rely upon. On closer examination these difficulties in the refusal letter are not such as to make the Respondent's decision unlawful under section 55 or otherwise.
19. Firstly, the Judge himself acknowledged that the Appellants may have entered in "early 2007". Secondly, it would not necessarily have been obvious to the Respondent at the date of decision that the father of the children had no part to play in their lives. Thirdly, whilst there was an error in that at the date of entry the children were not 11 and 14 but rather 5 and 3 a careful reading of the refusal letter shows that the Respondent was aware of the ages of the children at date of decision see for example the first line of page 5 (of 10) of the refusal letter. The Judge fell into error in deciding that the Respondent's decision was by reason of the errors "irrational at its core" as he put it.
20. The Judge also criticised the Respondent for not taking into account her own policy but did not consider whether the policy applied where there had been a serious breach of Immigration Rules as there was in this case by the Appellant. It was necessary for the Judge to consider the public interest factors when carrying out the proportionality exercise outside the Rules. There is no evidence from the determination the Judge did in fact do that and that is a clear material error of law. I therefore set aside the decision of the Judge.
21. I canvassed with the parties whether there was any further evidence in this case but it appears that that is not necessary, the Judge's assessment of the facts having been described by the Appellant's solicitor as full. I therefore proceed to remake the decision in this case on the basis of the facts as found by the First-tier Tribunal which were not in dispute.
22. The Appellant can only succeed if her children do. She is not financially independent and consequently fails under section 117B (3) of the 2002 Act. Her status here was unlawful and little weight if any could be given to it in the balancing exercise. The Appellants JO and SO rely primarily on the length of time they have been in this country and the need for their education to be completed. The Judge himself appeared to leave open

the possibility that it would be reasonable for the children to return to Nigeria once their education was completed see for example [58]. The Judge referred to the preparation of the children for independent life as adults. Many children, he wrote, leave their parents at around the age of 18 years in order to start an undergraduate course at university. The Judge found this was a natural stage at which to expect the Appellant to arrange the departure of the family if they were not lawfully present in the United Kingdom by then.

23. The Respondent's counterargument is that there is no obligation on the United Kingdom to educate persons who are in this country unlawfully (see **EV Philippines**) and the children's future educational needs are not of such significance that they outweigh all other considerations (contrary to what the Judge appeared to conclude in his proportionality assessment). There is force in this argument particularly as JO's education appears to be coming to its end and SO can adapt to education in his country of origin.
24. In remaking the decision in this case, I must consider as a primary consideration, although not the primary consideration, the best interests of the children. Their best interests are undoubtedly to remain with their mother and to continue their education for the time being in this country. As the Judge pointed out there was no evidence of any long-term plans for education. They have social ties as one would expect given the length of time they have been here but as was pointed out the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants could continue their sporting interests in Nigeria. There was little if any evidence before the Judge that their playing of sports was of such importance that great weight could be placed upon it.
25. On the Respondent's side of the balance is the legitimate aim of immigration control. The Appellant has a bad immigration history, she has overstayed her visit visa by a substantial period of time and has had substantial access to public funds in the form of both education and healthcare (the Judge does not give any particular details of the latter but refers to it in general terms). She is not financially independent and it is difficult to gauge the reliability of the future support she put forward (in letter form only) that she would continue to be supported by the charity of others. The children have been here for a substantial period of time, 11 years, but JO is only a few months away from completing his schooling and SO, the Judge found, would be able to adapt to education in Nigeria.
26. The Court of Appeal authority of **MA** confirms that very strong reasons are needed to remove children who have been here for more than 7 years. As the Respondent pointed out in submissions, it also states that when assessing the reasonableness of removing children one can take into account the immigration history of the adult parent. In considering whether children who had lived in the UK for over seven years could be removed, it is inherent in the reasonableness test in section 117B (6) of the 2002 Act and paragraph 276ADE(1) that the Court should have

regard to wider public interest considerations, particularly the need for effective immigration control, see **AM [2017] EWCA Civ 180**.

27. The burden of establishing the very strong reasons required by both the IDIs and **MA**, rests on the Respondent to the usual civil standard of balance of probabilities. Those very strong reasons are bound up with the Appellant's poor immigration record. The Appellant has evaded the immigration authorities whilst taking advantage of scarce public resources. In my view these are very strong reasons why the Appellant and the children should be removed as a family unit to Nigeria. The children cannot be a trump card. They have had the benefit of an education in this country and the Judge himself at [43] fully expected that the Appellants would be readily employable in Nigeria. The Appellants do not have a right to a further education in this country while their status here is unlawful. The children cannot of course be blamed for the actions of their parent but her actions can be taken into account in assessing the overall reasonableness of expecting the children to leave.
28. The Appellant and the children have been able to live in this country because the Appellant has evaded the attention of the authorities. The argument that the children might have been able to meet the provisions of paragraph 276 ADE in a few months' time and thus the case was a "near miss" is not a valid argument. There is no such thing as a near miss under the Immigration Rules, one either meets the Rules or one does not. None of these Appellants could meet the Rules and their argument for succeeding outside the rules was the length of time they had been here and their engagement with the educational system in this country. That has to be balanced against the legitimate aim of immigration control and in the circumstances, I find that the scales weigh more heavily on the Respondent's side of the balance than on the Appellants' side.
29. The children can continue with their education in Nigeria and utilise the skills they will have obtained in this country. The Appellant who lived the first 30 years of her life in Nigeria and who has remained in the cultural diaspora whilst in the United Kingdom will have no difficulties in readjusting to life in Nigeria and can no doubt assist the children should they require any assistance in the future. I therefore set aside the decision at first instance and remake the decision by dismissing the Appellant's appeals against refusal to grant leave.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision by dismissing the Appellants' appeals

Appellants' appeals dismissed



I continue the anonymity order in relation to the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. I make no anonymity order in relation to the first Appellant as there is no public policy reason for so doing.

Signed this 22nd of January 2018

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Judge Woodcraft  
Deputy Upper Tribunal Judge

**Direction Regarding Anonymity - Rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court direct otherwise the 2<sup>nd</sup> and 3<sup>rd</sup> 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.

**TO THE RESPONDENT**  
**FEE AWARD**

As I have set aside the decision at first instance on the grounds of material errors of law, I set aside the decision to make fee awards in this case. As the appeals have been dismissed I make no fee awards.

Signed this 22nd of January 2018

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Judge Woodcraft  
Deputy Upper Tribunal Judge