



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

**Appeal number: IA/00553/2015
IA/00557/2015
IA/00559/2015**

THE IMMIGRATION ACTS

Heard at Manchester

**Decision and Reasons
Promulgated**

On October 6, 2015

On October 13, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MA
AOA
FAA**

(ANONYMITY DIRECTION)

Respondents

Representation:

Appellant

Mr Harrison (Home Office Presenting Officer)

Respondent

Mr Singh (Legal Representative)

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The appellants are all nationals of Nigeria. The background to this case is that the first-named appellant entered the United Kingdom illegally on February 6, 2002. She subsequently married in 2005 and gave birth to the second-name appellant on September 27, 2006 and the third-named appellant on July 31, 2008.
3. In January 2010 she married an EEA national and on September 24, 2011 she applied for a residence card for herself and her two children as dependents. This application was rejected on February 17, 2012 and she separated from her husband.
4. On May 19, 2012 she made an application for leave to remain on human rights grounds but this was refused on April 12, 2013 without a right of appeal.
5. A further application was made on October 14, 2013 but this was also refused on February 17, 2014 without a right of appeal. That decision was judicially reviewed and in a consent order dated October 3, 2014 the respondent agreed to reconsider her decision.
6. In a decision dated December 8, 2014 the respondent refused the appellants' applications. Removal decisions were issued in respect of each appellant and the appellants appealed those decisions on December 22, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.
7. The matter was listed before Judge of the First-tier Tribunal Birrell on March 23, 2015 and in a decision promulgated on April 8, 2015 she allowed the first and second-named appellant's appeals under the Immigration Rules (Paragraph 276ADE) and the third-named appellant's appeal under article 8 ECHR.
8. The respondent applied for permission to appeal on April 23, 2015 submitting the Tribunal had erred by failing to factor the public interest in maintaining firm and fair immigration control.
9. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Zucker on June 8, 2015.
10. A Rule 24 response was filed by Mr Singh in which he argued there was no material error.
11. The First-tier Tribunal made an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I extend that order.

ERROR OF LAW ISSUES

12. Having read the Tribunal's decision and having sought the views of Mr Harrison I am satisfied that there is no error in law.

13. The first-tier Tribunal was fully aware of the background and in particular the first-named appellant's immigration history.
14. The respondent's representative at the First-tier hearing, Miss Horren, referred the Tribunal to the adverse immigration history of the first-named appellant and the fact that she had been in the United Kingdom illegally since she arrived in 2002 and she argued the family could return to Nigeria together.
15. The Tribunal properly acknowledged that the children's interests were a primary consideration but not determinative to the case. The Tribunal accepted it was in their best interests to remain with their mother as their father had played no role in their life. The Tribunal was fully aware of the first-named appellant's poor immigration history but took into account how long the first-named appellant had been here as well as the fact the children had been born here and the eldest had lived here over seven years as at the date of application.
16. The challenge to the Tribunal's decision was that the Tribunal had failed to fact the public interest when considering the maintenance of firm and fair immigration control. The grounds noted that the first named appellant's adverse immigration history could (not must) amount to strong reasons to counter the presumption that the child should be allowed to remain.
17. The Tribunal correctly identified that the first-named appellant could only satisfy Section EX.1 of Appendix FM of the Immigration Rules. Referring itself to the IDIs the Tribunal reminded itself that stronger reasons would be required to refuse a case with continuous residence of more than seven years.
18. From paragraph [42] onwards of its decision the Tribunal considered those circumstances and concluded that although the first named-appellant had been here illegally the respondent must also share some of the blame for her being here so long because she had failed to remove the appellant either in April 2013 or February 2014.
19. The Tribunal then had regard to the fact that the eldest child had been born in the United Kingdom and was in full-time education and had demonstrated that she was well settled, had many friends and was well liked by her teachers. She noted language and cultural issues.
20. The Tribunal found, with reasons, why the first and second-named appellants should succeed under the Rules (Section EX.1 and paragraph 276ADE respectively). The reasons she gave were clearly open to it. The public interest test is a test more appropriate to an article 8 ECHR proportionality assessment. By allowing the first-named appellant's appeal under Section EX.1 (an exception to the Rules) the Tribunal correctly did not let the first named appellant's adverse immigration history affect her decision under paragraph 276ADE.

21. The findings the tribunal came to in respect of the first and second appellants was clearly open to it. It therefore follows that the finding in respect of the third named appellant was also open to it because it would be disproportionate to require the youngest sibling to leave.
22. In the circumstances there was no material error. All findings were open to the tribunal and I therefore dismiss this appeal.

DECISION

23. There was no material error. I uphold the original decision.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT
FEE AWARD**

I make no alteration to the fee award as the respondent's appeal has been dismissed.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis