



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

Appeal Numbers: IA/16004/2013  
IA/16023/2013  
IA/16030/2013  
IA/16040/2013

**THE IMMIGRATION ACTS**

**Heard at Bennett House, Stoke  
On 12<sup>th</sup> January 2015**

**Decision & Reasons Promulgated  
On 16<sup>th</sup> March 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GARRATT**

**Between**

<b>PI</b>	<u>First Appellant</u>
<b>MI</b>	<u>Second Appellant</u>
<b>RI</b>	<u>Third Appellant</u>
<b>OI</b>	<u>Fourth Appellant</u>
<b>(ANONYMITY DIRECTION MADE)</b>	

**and**

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

**Respondent**

**Representation:**

For the Appellants: Ms J Campbell of Counsel, instructed by 1<sup>st</sup> Call Immigration Services

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Before the Upper Tribunal the Secretary of State becomes the Appellant. However, for consistency I shall continue to refer to the parties as they were before the First-tier Tribunal.

2. At the error of law hearing in the Upper Tribunal on 8<sup>th</sup> October 2014 I decided as follows also setting out the background to the appeal:

- “2. On 30<sup>th</sup> January 2014 Designated Judge of the First-tier Tribunal Woodcraft gave permission to the respondent to appeal against the decision of Judge of the First-tier Tribunal V A Osborne in which she allowed the appeals on human rights grounds against the decisions of the respondent to refuse to vary leave to remain as a Tier 1 (General) Migrant for the first appellant and to refuse leave to remain for the second appellant as her dependent partner and for the third and fourth appellants as her dependent children.
3. In granting permission Designated Judge Woodcraft noted that the judge had allowed the appeals under Article 8 finding that the third and fourth appellants' academic progress would deteriorate upon return and also taking into consideration that the third appellant had lived in the United Kingdom for at least seven years thus qualifying in her own right for leave to remain. However, in paragraph 30 of the determination, the judge found that the children were young enough to adapt to a different environment and there was no reason why they could not satisfactorily make the adjustment to leaving the United Kingdom despite an initial period of disruption and disappointment. Nevertheless, the judge had found in favour of the appellants by arguably placing too much emphasis on the benefits to the children of completing their education when there was insufficient attention to the weight to be given to the legitimate aim being pursued.
4. The grounds of application by the respondent had also contended that the family could have no legitimate expectation that they would be able to remain in the UK outside the Immigration Rules and that they would need to show circumstances that were exceptional or compelling before consideration of leave outside those Rules. Further, the interests of the children, whilst a primary consideration, were not *the* primary consideration.
5. At the hearing before me, Mr McVeety argued that paragraph 30 of the determination showed that the judge had not found any compelling circumstances which suggested that the matter should have been considered outside the Rules. Further, in paragraph 31, the judge also found that the parties had not lost their ties to Nigeria, indeed, this conclusion was repeated in paragraph 37. However, the conclusions in paragraph 35 were inconsistent with those other conclusions. The judge appeared to have allowed the appeal on the basis of educational facilities for the appellants, yet in the Court of Appeal decision in *EV* [2014] EWCA 874 at paragraph 60, it was concluded that the desirability of being educated at public expense in the United Kingdom could not outweigh the benefit to children of remaining with their parents.
6. Ms Campbell agreed with me that the approach to human rights issues recommended by the Tribunal in *Gulshan (Article 8 – new Rules – correct approach) Pakistan* [2013] UKUT 640 (IAC) had now been overruled by the Court of Appeal in *MM & Ors* [2014] EWCA Civ 985 and thus the identification of compelling circumstances to justify consideration outside the rules was not appropriate. However, she contended, the judge had found that the oldest child had been in the United Kingdom for seven years and therefore the provisions of section EX.1 could have been applied to the child's parents or, alternatively, the private life provisions in paragraph 276ADE would have benefited that child. Ms

Campbell conceded that the judge had not considered the specific provisions of the Immigration Rules although paragraph 26 of the determination shows that she was aware of them. Nevertheless, she thought that the judge's error was not material because focus had been placed on the seven year Rule for the child and the judge conducted a comprehensive balancing exercise taking that into account.

7. After considering the matter for a few moments I announced that I was satisfied that the determination showed an error on a point of law such that it should be re-made. My reasons for that conclusion follow.
8. This appeal was heard on 6<sup>th</sup> December 2013 in the First-tier Tribunal and the determination sent out on 9<sup>th</sup> January 2014. Thus, the judge cannot be blamed for failing to take into consideration the guidance of the Upper Tribunal in *Gulshan* when considering the appeal within the Immigration Rules and on human rights grounds outside the Rules. In any event, the guidance set out in *Gulshan* has been overturned by the Court of Appeal in *MM* so that it is no longer necessary for the judge to conduct an intermediary test to identify compelling circumstances which would lead to a good arguable case for consideration of the appeal outside the Immigration Rules.
9. Thus, the judge's consideration of human rights issues apparently outside the Rules by applying the five stage test set out in *Razgar* [2004] UKHL 27 and by making the best interests of the third and fourth appellants a primary consideration does not appear to reveal a material error on a point of law. However, the determination does not show that the judge gave comprehensive consideration to the relevant parts of the Immigration Rules before conducting her analysis of Article 8 issues outside them. Additionally, the judge reached conclusions, particularly those in paragraphs 30 and 31 of the determination, which are in contradiction to her overall conclusion that all appeals could be allowed on human rights grounds principally because of the effect a change of culture and education would have on the child appellants without conducting a deeper proportionality analysis.
10. Whilst paragraph 26 of the determination shows that the judge was aware of the provisions of Appendix FM of the Immigration Rules and the private life provisions set out in paragraph 276ADE, the determination does not reveal that she considered the application of section EX.1 of Appendix FM in respect of the interests of the first and second appellants as parents of a child who had been in the United Kingdom for over seven years in addition to the similar private life provisions for that child set out in paragraph 276ADE. Had she done so, applying the appropriate provisos in the Rules about whether or not it would have been reasonable to expect the child to leave the United Kingdom, then it might have been unnecessary for her to conduct an analysis of human rights issues outside the Rules. Further, it is evident that, in adopting her approach, the judge concluded, on the one hand, that the children could return with their parents to Nigeria but, on the other, that cultural and educational differences which would be experienced by both children if returned would lead to an infringement of their Article 8 rights. Such factors alone are not recognised by the Articles of the Human Rights Convention and should not have tipped the balance in favour of the appellants in the light of the judges other findings. The determination therefore shows errors on points of law such that it should be re-made."

3. Following the making of the above decision I also gave directions for the resumed hearing to take place before me on the basis that the matter could be re-heard by way of submissions only taking into account evidence already submitted.

### **Re-Making the Decision**

4. The matter proceeded before me as indicated in the preceding paragraph.
5. Ms Campbell pointed out that, in addition to the two children who are the third and fourth appellants in this appeal, the first and second appellants also have a third child who is not the subject of the present proceedings. Ms Campbell also reminded me that the third and fourth appellants are Nigerian citizens but had both been in the United Kingdom for over seven years. The third appellant came in 2005 when aged 3 and is now 12 years of age. The fourth appellant was born in the United Kingdom in 2006 and is now 8 years of age. She also emphasised that the first appellant, who is the mother of the children, had continuous leave to be in the United Kingdom from 2004 to the date of the application for further leave to remain on 10<sup>th</sup> January 2013, the refusal of which forms the subject of this appeal.
6. I was reminded of the background situation for the appellants which is set out in the first appellant's statement of 29<sup>th</sup> November 2013. In this the first appellant explains that, when she married the second appellant in 2000, he was living in Italy where he had been since January 1994. She joined him there in January 2001. They both gained residency permits in Italy (although it is not argued that either is an Italian citizen). The third appellant, RI, was born on 18<sup>th</sup> October 2002 and she, too, gained a residency permit in Italy. The first appellant came to UK in October 2004 as a student. She renewed her leave up to 15<sup>th</sup> January 2013. She has been back to Nigeria twice for short stays since May 2001 and has also returned to Italy for holidays. She claims she obtained a first degree in Nigeria and subsequently obtained an LLM from Nottingham Trent University. Her last two visas, respectively, were as Tier 1 (Post-Study) Migrant and Tier 1 (General) highly skilled migrant. She claims that the second and third appellants, who joined her in UK in July 2005, have been her dependants since that date and the fourth appellant, who was born in UK on 22<sup>nd</sup> August 2006, has only left the UK on two occasions, once to Italy and on another occasion to Nigeria for three weeks in 2009.
7. The first appellant claims that, when visiting Nigeria, both of her children were "very disturbed" because of the atmosphere there with armed police. They were also bitten by mosquitoes and other insects which resulted in them receiving treatment from their GP on return. Both her children regard UK as their home. As to RI, she understands her situation but is stressed by it. Both children achieve well at school and have many friends. The family also attends church regularly and is integrated into its community. Both children have now been in UK for over seven years.
8. Ms Campbell argued that, in the circumstances claimed, both children should be granted status as a result of their private life under the provisions of paragraph 276ADE of the Immigration Rules. That is because they had each lived continuously in the United Kingdom for at least seven years. She commented that, in the event that the exception in section EX were to apply to the first and second appellants, then

it would not be reasonable to expect the children to leave the UK. As to the present situation, she also pointed out that neither the third nor fourth appellants could speak the local languages of Nigeria. The second appellant has not worked or lived in Nigeria since 1994. Although he has a degree in engineering from that country he was doing unskilled work in Italy but does not work in UK at present.

9. Mr McVeety contended that, although the two child appellants meet the residency requirements of paragraph 276ADE(iv), it could not be said to be unreasonable to expect them to leave the United Kingdom. He also emphasised that the public interest considerations set out in Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) imposed the same test in sub-Section (6)(b). As to the best interests of the children he made reference to the Supreme Court case of *Zoumbas* [2013] UKSC 74 and the decision of the Court of Appeal in *EV (Philippines)* [2014] EWCA Civ 874. He argued that the Nigerian child appellants could not claim to remain just because of their continuing education. The children's interests were not the only prime consideration. In *Zoumbas* the Supreme Court had concluded that the fact that children were not British citizens and thus had no right to future education and healthcare in the United Kingdom, their interests in remaining in the United Kingdom did not outweigh considerations of the public interest. In *EV* the Court of Appeal had also made it clear that it was irrelevant to consider whether an educational system abroad was worse than that in the United Kingdom. Lord Justice Lewison, in particular, was unable to find that the desirability of being educated at public expense in the UK could outweigh the benefit to children of remaining with their parents.
10. Ms Campbell concluded her submissions by referring me to the tests set out in paragraph 35 of *EV*. She argued that, in all the circumstances and making the children's best interests a primary consideration, their private lives would be infringed by the respondent's decision. She also reminded me of the Upper Tribunal decision in *Azimi-Moayed (Decisions affecting children; onward appeals)* Iran [2013] UKUT 197 (IAC) which concluded, amongst other things, that children who have seven years' residence in UK from the age of 4 are likely to be more significantly affected by removal than in the first seven years of life. Ms Campbell pointed out that both children regarded themselves as British and had no significant experiences of Nigeria. She therefore argued that the respondent's decision was disproportionate.

## **Conclusions**

11. In immigration appeals the burden of proof is on the appellant and the standard of proof is a balance of probabilities. I take into consideration the circumstances appertaining at the time of the hearing before me.
12. Where human rights issues arise, as in this case, I have first considered whether or not the Immigration Rules can avail the appellants and then, if not and the circumstances permit, I have considered human rights issues outside the Rules making the best interests of any child appellants a primary consideration and following the five stage approach recommended in *Razgar* [2004] UKHL 27.

13. There has been reference to the potential application of section EX of Appendix FM of the Immigration Rules for the benefit of the first and second appellants on the basis that they are partners in the United Kingdom. However, as the refusal for the first appellant of 23<sup>rd</sup> April 2013 makes clear, the exceptions set out in paragraph EX.1 of Appendix FM cannot apply where the exemption requirements set out in paragraph E-LTRP.1.2 of Appendix FM apply to the partnership. Neither first nor second appellants are British citizens present and settled in the United Kingdom or with refugee leave or humanitarian protection. Section EX.1 is not a stand alone section so where the appellant is not eligible under the substantive rule, section EX.1 cannot apply.
14. The relevant provisions of the Immigration Rules are those set out in paragraph 276ADE particularly sub-paragraph (iv) which states as follows in relation to minor applicants:

“(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK.”
15. The above provision caters, potentially, for the interests of the third and fourth appellants. It is not claimed that the first and second appellants can benefit from the other provisions in paragraph 276ADE bearing in mind that neither has lived continuously in the UK for twenty years. However, the first and second appellants may be able to benefit from the statutory provision relating to the public interest set out in Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended) which states that the public interest does not require a person's removal where there is a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. The test in respect of all appellants is, therefore, essentially the same.
16. As to whether or not it would be reasonable to expect the third and fourth appellants to leave the United Kingdom I take into consideration the relevant factors which have been identified in evidence and submissions as follows.
17. Both children have been in the United Kingdom for over seven years. The third appellant came here in July 2005 with her father from Italy to join the first appellant and so has been here for over nine years. The fourth appellant was born here on 22<sup>nd</sup> August 2006 so has been here for over eight years. There is also another child of the family born here on 16<sup>th</sup> June 2011 although not an appellant in these proceedings. Both third and fourth appellants are in education in the UK.
18. I take into consideration the decision of the Upper Tribunal in *Azimi-Moayed* which, although concluding that the best interests of children are to be with both parents, defines that the seven years from the age of 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable. I therefore accept that any move to Nigeria for, in particular, the third appellant would be significant. However, that does not automatically mean that the best interests of that appellant require that she should remain in the United Kingdom as the respondent's decision in relation to her and her family is disproportionate.

19. Considerable emphasis has been placed on the benefits of education in the United Kingdom for both child appellants although, as was made clear in *EV (Philippines)*, the desirability of being educated at public expense in the United Kingdom should not outweigh the benefit to children of remaining with their parents. Whilst both children have been to Nigeria with their parents and expressed some dislike for life there that does not mean that it would be unreasonable to expect them to go there. They are Nigerian citizens. Both parents are educated and could I conclude, obtain reasonable employment in that country without significant difficulty. In particular, both are graduates and have worked in the country in the past. It is not suggested that they have no contacts in the country and indeed that must be the case as return visits have taken place. Neither child suffers from any illness which would inhibit return. Although both children have established friendships in the United Kingdom I conclude that relationships can also be established by them in Nigeria. Whilst it is argued that the children do not speak any local languages, the fact is that the main language spoken in Nigeria is English. I also bear in mind that, although the first appellant has been in the United Kingdom since 2004 and in Italy from 2001, it is quite evident that they have not given up their ties to Nigeria. Neither had good reason to expect that they could remain in the United Kingdom indefinitely.
20. Therefore, having regard to the factors I have identified in the preceding paragraphs, it is my conclusion that the third and fourth appellants cannot benefit from the provisions of paragraph 276ADE in respect of their private lives in UK because it is reasonable to expect them to remain with their parents as a family unit and to return to Nigeria with them.
21. As I am not satisfied that the Rules cannot avail any of the appellants I have to consider the proportionality of the respondent's decision against the statutory provisions set out in Section 117B of the 2002 Act alongside which I have considered their claims making the best interests of the children a primary consideration and applying the five stage *Razgar* approach. In doing so I can apply the factors which I have already identified in relation to my consideration of the application of the Immigration Rules.
22. It is clearly in the best interests of the children that they remain with their parents. I have already identified factors which assist me to conclude that it would be reasonable to expect the children to go to Nigeria, of which country they are citizens, with their parents. This may disrupt the education particularly of the third appellant but both children can be educated in English in Nigeria and establish friendships there. This will cause some difficulty but it is not unreasonable to expect them to return with their parents who have always known that their status in this country was tenuous. The test set out in Section 117B(6) is, in essence, the same as that already examined under the Rules save that it can, potentially, benefit the first and second appellants whose removal is not required where it would not be reasonable to expect their children to leave the United Kingdom. But I am not satisfied that the section can assist the first and second appellants for the reasons I have already given.
23. Applying the *Razgar* five stage tests I accept that the proposed removal of the appellants to Nigeria will interfere with their right to private and family life and the interference will have consequences of such gravity as potentially to engage the

operation of Article 8. On the basis that such interference is in accordance with the law I decide, however, that the respondent's decision is not disproportionate in the interests of immigration control.

**Notice of Decision**

The decision of the First-tier Tribunal involved an error on a point of law such that it should be re-made. I re-make the decision by dismissing the appeal.

**Anonymity**

As this appeal involves the interests of children I make the following direction:

**DIRECTION REGARDING ANONYMITY – RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date **6<sup>th</sup> March 2015**

Deputy Upper Tribunal Judge Garratt

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

As I have dismissed this appeal there can be no fees award.

Signed

Date **6<sup>th</sup> March 2015**

Deputy Upper Tribunal Judge Garratt