



Upper Tier Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/20516/2014  
& IA/20517/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 15 September 2015

Decision and Reasons Promulgated  
On 16 September 2015

**Before**

**Deputy Upper Tribunal Judge Pickup**

**Between**

**Adebisi Oyindamola Famakinwa  
David Oluwadara Famakinwa  
[No anonymity direction made]**

Appellants

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the appellant: Mr A Akindele, instructed by A&A Solicitors  
For the respondent: Mr P Nath, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellants, Adebisi Oyindamola Famakinwa, date of birth 17.4.63, and her son, David Oluwadara Famakinwa, date of birth 18.9.00, are citizens of Nigeria.
2. These are their linked appeals against the decision of First-tier Tribunal Judge Ghani promulgated 2.4.15, dismissing their appeals against the decisions of the Secretary of State, dated 30.4.14, to refuse their applications made on 6.3.14 for leave to remain in

the UK on the basis of private and family life, and to remove them from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 6.3.15.

3. First-tier Tribunal Judge Reid granted permission to appeal on 6.7.15.
4. Thus the matter came before me on 15.9.15 as an appeal in the Upper Tribunal.

### **Error of Law**

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Ghani should be set aside.
6. The relevant background can be briefly summarised as follows. The first appellant has two children, a daughter born in 2002 in Ireland, and the second appellant, born in 2000 in Canada. The first appellant's husband passed away in 2006. She is well educated with a Master's degree and worked for 3M in Nigeria before leaving that employment to come to the UK in 2014. The daughter experienced developmental and behavioural problems and had an initial diagnosis of ADHD in 2009. Friends of the first appellant offered to help, and suggested bringing the daughter to the UK, which happened in December 2011. The daughter was placed in a private fostering arrangement, but that did not work out and the first appellant's friends were unable to cope with the daughter beyond December 2013. According to the respondent, the first appellant came to the UK on 25.1.14 as a visitor, accompanied by her son the second appellant. The grounds of appeal suggest she came in September 2013. In any event, she has remained here since that time and on 6.3.14 made application for leave for her and her son to remain on the basis of private and family life.
7. It is common ground that the appellants cannot meet the requirements of either Appendix FM or paragraph 276ADE of the Immigration Rules, but sought to rely on article 8 ECHR. The judge went on to consider article 8, making an assessment of the best interests of the children as a primary consideration and pursuant to section 55 of the 2009 Act. Ultimately, the judge reached the conclusion that the decision of the Secretary of State was proportionate to the rights of the appellants and the first appellant's daughter.
8. In essence, the grounds of appeal submit that the judge made mistakes of fact material to the outcome of the appeal, including the COI report findings on care of people with autism in Nigeria, when the first appellant's daughter does not have autism but ADHD and a severe learning disability. It is also asserted that the judge failed to take material evidence into account and failed to reconcile apparent conflicts of evidence. Further, it is argued that the judge failed to take account of the concession by the Secretary of State that the daughter, who is not a party to the appeal, does not have to leave the UK because she is a citizen of Ireland and therefore a citizen of an EU member state.
9. In granting permission to appeal, Judge Reid found it, "arguable that the judge did not make adequate findings in respect of the immigration status of the first appellant's daughter and failed to demonstrate the factors which he had taken into

account in assessing the complex needs of the child and her best interests. It is arguable that the judge's findings were unclear. The grounds disclose no arguable error of law."

10. The Rule 24 response, dated 16.7.15, assert that there is no merit in the grounds of appeal. The reliance by the judge on autism is not material as severe learning difficulties and ADHD are both co-morbidities that exist on the Autism Spectrum Disorder scale. I agree with this submission. Whilst Mr Akindele suggests that there is no evidence before the Tribunal to this effect, it is also true to state that the appellant has adduced no evidence to demonstrate that the judge was factually wrong. In the circumstances, the appellant has failed to demonstrate that there is an error of law in this regard.
11. It is the contention of the appellant, set out at §3 of the grounds that there was a concession by the Secretary of State's representative at the First-tier Tribunal appeal hearing that as the daughter is an EU citizen (Ireland) there is no requirement for her to leave the UK and thus no removal directions were issued for her.
12. This concession is not referred to in the decision of Judge Ghani, but is addressed in the Rule 24 response, which submits that the concession of the Secretary of State that EEA children will not be removed, except on public policy grounds, does not change the law that they may reasonably be required to leave the UK with their parents and thus does not affect the outcome of the appeal.
13. I was unable to obtain any clarity at the error of law hearing as to the nature of the concession. It was not clear to me that what was being referred to was a specific concession at the hearing, or whether reference was being made to a concession of the Secretary of State that EEA children will not be removed. It seems more likely to be the former.
14. At §16 the judge stated that the daughter was entitled to come to the UK as an EU citizen. However, if it is the case that the daughter is exercising Treaty rights in the UK as a student (regulation 6 of the Immigration (EEA) Regulations 2006), and cannot be removed, that is highly relevant to both the assessment of the best interests of the child and to the proportionality of removing the mother and sibling. Clearly, the best interests of the child are to remain with her mother and sibling in the family unit and the mother and sibling will not be removed if the child is remaining in the UK.
15. There are situations where the reasonableness of expecting a child to leave the UK is considered theoretically for the purpose of assessing whether a parent should be removed. For example, under regulation 15A consideration is given as to whether a British citizen child would have to leave the UK if a non-EEA primary carer is to be removed. Under both section 117B(6) of the 2002 Act and paragraph 276ADE, there is the identical assessment as to whether it would be reasonable to expect a qualifying child to leave the UK, where qualifying means a child who is a British citizen, or one who has lived in the UK for at least 7 years. Similarly, there may be an assessment as to whether it is reasonable to expect a British citizen or settled partner to leave the UK to continue family life with the non-British or settled partner outside the UK.

However, even though there was not a EEA application or appeal, it appears to me to be inappropriate to assess either the best interests of that child pursuant to section 55, or indeed the proportionality of the removal decision in respect of the two appellants without taking account of the status of the child. Not only was that not done by the First-tier Tribunal, but the best interests or exceptional circumstances consideration in the decisions of the Secretary of State made no reference to the nationality or residence rights of the daughter of the first appellant.

16. In the circumstances, I find that there were errors of law in the decision of the First-tier Tribunal such that it must be set aside. In remaking that decision, I find that the decision of the Secretary of State was flawed and not in accordance with the law for failure to consider as part of the best interests of the children the daughter's nationality and the implications of removal of the parent and sibling where the child could not be removed.
17. I am further concerned that the decision of the Secretary of State did not carry out an adequate best interests consideration of the daughter's circumstances consistent with section 55. I have carefully considered the decisions of MK and JO and others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC). MK held that the burden is on the appellant to demonstrate on the balance of probabilities that there has been a breach of section 55 by the Secretary of State, and this issue was not raised by the appellant at all. As stated in Zoumbas v SSHD [2013] 1WLR 3690, it is important to have a clear idea of a child's circumstances, and what is in a child's best interests before considering whether the force of other considerations outweighs those interests. There is no substitute for a careful examination of all relevant factors when the interests of a child are involved.
18. Further, I am concerned as to whether the decision of the Secretary of State was taken with the statutory guidance in mind. JO held that the duty imposed by section 55 requires the decision maker to be properly informed of the position of a child affected by the discharge of an immigration function. "Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors."
19. It is not clear to me that the Secretary of State was alive to the issue of the EEA state nationality of the daughter. It may be that it was not raised in the application, but I can see that it did form part of the grounds of appeal to the First-tier Tribunal and thus by that stage at least the Secretary of State was on notice.
20. In the circumstances, the appropriate course in remaking the decision in the appeal is to allow the appeal to the limited extent that the decision of the Secretary of State is not in accordance with the law and that it remains for the Secretary of State to make a decision which is compliant with the law.

### **Conclusions:**

21. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I allow the appeal to the limited extent that I find the decision of the Secretary of State was not in accordance with the law and that it remains for the Secretary of State to make a decision that is in accordance with the law.



**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**

### **Anonymity**

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an anonymity order. Given the circumstances, I make no anonymity order.

### **Fee Award**

**Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal is allowed only to the limited extent that the decision of the Secretary of State is not in accordance with the law. The appellants may well bear responsibility for not informing the Secretary of State of the issue of the child's nationality and EEA status prior to the making of the decision.



**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**