



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

Appeal Number: IA/39460/2014  
IA/39467/2014  
IA/39472/2014  
IA/39473/2014

**THE IMMIGRATION ACTS**

**At Field House  
On 3<sup>rd</sup> July 2015**

**Decision & Reasons Promulgated  
On 7<sup>th</sup> September 2015**

Before

**DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY**

Between

**MR A.S.B and others**  
(ANONYMITY DIRECTION MADE)

Appellant

And

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

Respondent

**Representation:**

For the Appellant: Mr S.Karim, Counsel, instructed by MA Consultants.  
For the Respondent: Ms Julie Isherwood, Home Office Presenting Officer.

**DECISION AND REASONS**

**Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.**

Introduction

1. The proceedings before the First tier Tribunal were anonymised. No application has been made to change this and so this should be maintained. I am influenced by the fact that there are children affected by this decision.
2. Although it is the respondent who is appealing for convenience I will continue to refer to the parties as they were in the First-tier Tribunal.
3. The basic facts are not in contention. All of the appellants are Nigerian nationals. The first appellant came to the United Kingdom on 1 June 2002 on a visit visa valid until 9 October 2002. He overstayed. The second appellant came to the United Kingdom in 2004 on a visit visa. They subsequently met and married here. They have two children, C, born in 2007 and S, born in 2008. The second appellant is expecting their third child. The children were born in the United Kingdom and have lived all their lives here.
4. Various applications were made by the first named appellant from 2004 to secure an immigration status, all of which were unsuccessful.
5. On 27 August 2014 he applied for leave to remain on the basis of family and private life. He referred to various medical conditions and the danger posed by the Ebola virus in Nigeria. This application was refused on 15 September 2014 and a decision to remove the family was made.

#### The First tier Tribunal

6. Their appeals were heard by First-tier Immigration Judge Dickinson on 30 January 2015. At the hearing it was accepted on behalf of the appellants that appendix FM could not be satisfied. C's appeal was allowed under rule 276 ADE of the immigration rules and the appeals of the other family members under Article 8.
7. The judge focused on the position of C and rule 276 ADE (iv). At the date of application she had been in the United Kingdom for more than seven years. At paragraph 17 of the decision the judge said the issue was whether it would be reasonable to expect her to leave.
8. At paragraph 18 the judge referred to taking into account her age, the length of time she had been in the United Kingdom, her education and her connection with and ability to adapt to life in Nigeria. The conclusion was that it would be unreasonable to expect her to leave. Paragraphs 19 to 21 contain the Judge's reasons:

“19. Firstly, the third appellant has lived in the United Kingdom since May 2007 and as a matter of common sense, is not in the category of a child entering the United Kingdom as a baby and spending her early years here, emotional attached only to her family with their knowledge of the world seen through that prism. She has been wholly educated in the United Kingdom and, for example, through friendships with school friends will have

started to develop significant ties with the United Kingdom outside of the family unit.

20. Secondly, I am not satisfied that it would be in her best interests to transfer from the current educational system which she has been accustomed because she clearly is benefiting from the same, as highlighted by her performances. Further whilst she is only seven years of age and thereby still at the early stages of her education I do not accept that she will benefit from engaging in another educational system and I am satisfied that by doing so this could hinder her future educational development.

21. Thirdly, whilst I accept that English is a commonly spoken language in Nigeria and that the 3rd appellant will therefore have little difficulty in communicating with others I am not satisfied that even with the support of her parents and sibling she would be able to readily adjust to the culture of the country because she has been in the United Kingdom since 2007 and as such will have become integrated into a totally different way of life and culture. Whilst she has never visited Nigeria and to all intents and purposes her outlook is British.”

9. Considering Article 8, the judge followed the sequential approach of Razgar. On the proportionality question :

“32. I have weighed in the balance the need to maintain the integrity of the system of immigration control as being a means of protecting the economic well-being of the country and that this in itself might justify an interference with family life. I remind myself of Huang (at paragraph 6) that I as the decision-maker should bear in mind several factors, including “the general administrative desirability of applying known rules. If a system of immigration control was to be workable, predictable, consistent and fair as between one claimant and another ...”

33. Factors weighing against the first appellant is the fact that he entered into the United Kingdom on a temporary basis, and as such, would have always known that his immigration status in the United Kingdom was limited. However “HL must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent “(Zoumbas).

34. Primary consideration is given to the interests of the children and welfare – S.55 Borders Citizenship and Immigration Act 2009. The appellant's childrens’ best interests are served by them remaining /living with their parents.

35. It is clearly in the best interests of the third appellant that he should remain in a family unit with her parents and younger brother and as I have found that she is entitled to remain in the United Kingdom under paragraph 276 ADE, I have little difficulty in finding that it would be a disproportionate interference with the family life of the third appellant to separate her from her parents and brother. Accordingly all these three appeals succeed under Article 8 ECHR.”

10. The decision does not mention section 117B of the 2002 Act as amended but in the final paragraph the judge states:

“36. I acknowledge that there will be an undermining of immigration control in allowing the appeals. However, on balance, the need to maintain family

life in the United Kingdom for the reasons given above outweighs the economic well-being of the country.”

### The Upper Tribunal

11. Permission to appeal to the Upper Tribunal was granted on the basis it was arguable the judge gave insufficient reasons as to why it was unreasonable for the family to return to Nigeria.
12. At hearing, Miss. Isherwood continued to rely upon the grounds in the application for leave. The application stated that the assessment by the judge of the reasonableness of expecting C to leave was flawed. The focus was upon her current studies rather than placing her situation in the context of the family’s immigration status. It was contended the judge had not adequately considered the possibility of her returning to Nigeria with her parents and availing of the educational system in place there. On return she would have the support of her family and that the culture in Nigeria would not be totally alien given her parent’s background. It was contended the public interest lay in the family's removal. She submitted this was a close family unit who could all return together. Ms Isherwood referred to the lack of detail in relation to the medical conditions referred to but in any event, as with education, the family had no right to medical treatment because of their lack of status.
13. Ms Isherwood submitted that the judge’s conclusions were at odds with the relevant case law. On the facts of those cases the children were older than C and had not succeeded. She argued that the judge had failed to look at the whole position; to adequately consider the public interest in immigration control and that the family have abused immigration control. She referred me to paragraph 13 of AM (S.117B) Malawi [2015] UKUT 260(IAC):

“... The mere presence of the children in the United Kingdom, and their academic success, was not a “trump card” which their parents could deploy to demand immigration status for the whole family ...”
14. Mr Karim submitted that the respondent was simply dissatisfied with the outcome and was seeking to have the decision looked at again on its merits. He acknowledged that a different judge might have reached a different conclusion on the same facts but this was not the issue. He submitted it was not so much the age of the children that was relevant but the length of time they had spent here. He submitted that what was reasonable for the purposes of 276ADE (iv) amounted to a modest threshold. He referred to paragraph 18 where the judge set out the factors taken into consideration. He submitted the educational system in Nigeria was inferior. He pointed out the judge referred to the difficulties the children would face with integration into Nigeria, having lived in the United Kingdom all their lives. Referring to section 117B(6) he submitted it was not in the public interest to remove the parents given C’s situation.

15. In response, Ms Isherwood pointed out the issue was not the quality of the educational systems in the United Kingdom and Nigeria or the medical facilities. The family had no right to be here and they were `piggybacking' on C's position. She highlighted that section 117B(6) requires not only that there is a genuine and subsisting parental responsibility with the qualifying child but also that it would not be reasonable to expect the child to leave.
16. I indicated I was reserving my decision and asked for views about disposal should I find an error of law. Ms Isherwood suggested I could progress to determine the merits of the appeal without reconvening and she submitted the outcome should be a dismissal. Mr Karim suggested that the matter should be remitted for a *de novo* hearing. He said this would facilitate presentation of any new evidence, particularly as there will be another child.

### Consideration

17. I was assisted by the representatives and the cases cited provided invaluable guidance on the approach to be taken when considering the issues arising in the present appeal. I refer firstly to Zoumbas -v- SSHD [2013] UKSC74. The parents were described as having an unedifying immigration history. The father had been illegally in the United Kingdom since 2001 and was joined by his wife in 2002. They had a child in 2004. His wife and their child were removed in 2005 and returned illegally the following year. Refugee claims were unsuccessful. They went on to have a second child in 2007 and a third child in 2011. The appellant's representative argued that what is determined to be in a child's best interests should customarily dictate the outcome of the case and it would require substantial moment for a different result. The Supreme Court, referring to ZH (Tanzania), pointed out that the children there were British and the benefits of British citizenship was an important factor in assessing whether it was reasonable to expect a child with such citizenship to live in another country. Lord Hodge at paragraph 13 of his judgement in Zoumbas referred to the need to assess the question of proportionality in the particular circumstances in which the decision is made. There was no hard edged or bright line rule. Paragraph 24 of the judgement is very relevant to the circumstances in the present appeal:

"24. There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as healthcare and education which the decision maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and healthcare in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly

in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being.”

18. In the present appeal the children have the benefit of the educational; health facilities; and future employment that this country offers. All things being equal, it is possible to say that their best interests are served by remaining here with their parents. However, the children are not British. Their parents do not have any right to be here. It is in their best interest to be with their parents. If their parents cannot remain here in the interests of immigration control then the next best for the children is for them to leave as a family unit.
19. Similar considerations arose in EV (Philippines) and others -v- SSHD [2014] EWCA Civ 874. The Court of Appeal considered how a tribunal should approach the proportionality question in cases involving the best interests of children. It had been argued that once the tribunal had found that the best interests of the children lay in their continuing with their education only the most cogent countervailing considerations could justify the removal of the family. Paragraph 35 of the judgement sets out factors in evaluating the best interests of the children, which include their age, the length of time here, how long they have been in education, what stage their education is at and their ties with the country to which they may be returned and any linguistic, medical or other difficulties in adapting. Similar factors are referred to in the present appeal at paragraph 18 in relation to C.
20. In EV (Philippines) and others -v- SSHD the first appellant came to the United Kingdom in June 2007 under the work permit scheme. The following year she was joined by her husband as her dependant. They were then joined by their three children who at that stage were eight, seven and five. The first appellant's leave was to expire in February 2011. She was unsuccessful in obtaining further leave to remain. Her employers had been underpaying her and she could not meet the rules. Unlike the present case the family had an initial legal basis for being together in this country. As here, the children were doing well at school. The First-tier Judge found that the best interests of the children lay in remaining with their parents and continuing their education in the United Kingdom. However, the need to maintain immigration control outweighed this. The judge bore in mind the parents would be employable in their home country; the family would not be homeless; there was an extended family; and the children had only been in the United Kingdom for a limited time. There was also education in the Philippines: the fact it was not to the same standard was not determinative. There are differences in the background facts from the present case but the approach of the First-tier Tribunal was not faulted in the Court of Appeal.
21. Lord Justice Lewison at paragraph 49 stated :

“... In the real world, the appellant is almost always a parent who has no right to remain in the UK. The pair thus relies on the best interests of his or her children in order to “piggy -back” on their rights.”

In the present appeal this is precisely what occurred. The decision indicates the only reason the appeal was allowed under Article 8 for the remaining appellant's was because C was succeeding. Paragraph 58 of Lord Justice Lewison’s judgement states:

“... In my judgement, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus, the ultimate question will be: is it reasonable to expect the charges follow the parent with no right to remain in the country of origin?

60. None of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interest to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world.”

These comments are particularly pertinent to the present appeal.

22. Judge Dickinson does not refer to section 117 B of the 2002 Act. In Dube (ss.117A-117D) [2015] UKUT 90 (IAC) the Upper Tribunal pointed out the statutory obligation to have regard to the considerations set out in the section. These considerations are not exhaustive. The Upper Tribunal said that what mattered was substance not form and it was not an error of law to fail to refer to the sections. It is not apparent from the decision in the present appeal that the judge took into account these considerations when allowing the appeals under Article 8. Rather, the decision indicates that the Article 8 appeals succeeded by ‘piggybacking’ on the allowance of C’s appeal.
23. I was also referred to AM (S117B) Malawi [2015] UKUT 260 (IAC). This decision is particularly relevant in relation to C’s appeal because of the comparison of section 117 B(6) and 276ADE(1) (iv) . In that case the father came with entry clearance as a student in September 2006 and was joined by his wife and elder daughter the following year. A second child was born in 2011. His leave expired on December 2012 and he overstayed and made various unsuccessful applications. In an unsuccessful asylum claim the focus was upon the consequences of return on his elder daughter’s education. His appeal to the First-tier Tribunal was unsuccessful. Amongst other matters, the Upper Tribunal considered his daughter’s situation. The

Upper Tribunal pointed out that paragraph 276 ADE(1)(iv) and section 176 B (6) raise the same question, and repeated that the mere presence of a child in the United Kingdom and their academic success was not a trump card which the parents could deploy to demand immigration status for the whole family. At paragraph 39 the Upper Tribunal stated:

“... There was no reason to infer that any interruption to the education of the elder child upon return to Malawi would be any more significant than that faced by any child forced to move from one country to another by virtue of the careers of their parents. Nor should the difficulties of a move from one school to another become unduly exaggerated. It would be highly unusual for a child in the UK to complete the entirety of their education within one school. The trauma, or excitement, of a new school, new classmates and new teachers is an integral part of growing up. In too many appeals to the FtT is presented arguments whose basic premise is that to change a school is to submit a child to a cruel and unduly harsh experience...”

### Conclusions.

24. It is clear from reading the decision of Judge Dickinson that the position of C was central. Having allowed her appeal on the basis it was not reasonable to expect her to return to Nigeria the appeals of the other family members were allowed under section 8 because of this. There is no elaboration of any other features in relation to section 8. There was no reference to or a setting out of the factors to be considered in section 117.
25. In relation to C the judge refers to general considerations at paragraph 18. The specific features are that she has been living in the United Kingdom from her birth for over seven years. There is a reference to her education, with the conclusion at paragraph 20 that it would not be in her best interests to transfer to another educational system. At paragraph 21 the judge refers to her integration into the United Kingdom and concludes she could not readjust to living in Nigeria. No explanation as to why not is given beyond stating she has never visited there.
26. Having looked at the decision as a whole my conclusion is that it must be set aside as it materially errs in law. This is not a situation where the outcome was justified, albeit a different judge could have come to a different conclusion. The decision places excessive weight upon the situation of C and does not adequately balance the other relevant considerations. Article 8 is not a general dispensing power. The judge did not indicate adequate consideration of the family's immigration history and the need for immigration control. Bearing in mind the case law above, the judge has given insufficient reasons for concluding it would be unreasonable for C to return to Nigeria with her parents or why their appeals and that of her brother should be allowed under Article 8. There has been a failure to set out adequate reasons to justify allowing the appeals on the largely undisputed facts.



## Disposal

27. Given that there is no dispute about the factual matrix I see no need to reconvene or remit. I remake the decision. The appellant's immigration history is accepted. The children are progressing at school. There has been mention of health considerations but the evidence is limited and does not indicate any major health issues. For instance, there is reference to the first appellant being borderline hypertensive and an issue about his cholesterol. Whilst important health factors they are not urgent. C has been referred for an orthotic appointment and referred to the paediatric ophthalmology department. There is no indication of any major medical issues.
28. As has been pointed out the issue is not whether the United Kingdom has better medical or health facilities. The refusal letter contains information about the educational system in Nigeria and that education from 6 to 15 years of age is free and compulsory. The poor attendance is attributed in many cases to children being kept at home by their parents.
29. There is nothing to indicate a claim of any weight based upon medical conditions. Information was provided about the medical treatment available in Nigeria and this includes public hospitals.
30. Regarding Ebola, the World Health Organisation not recommend travel restrictions and the respondent concluded that the risk of contracting the virus was outweighed by the need for immigration control. The first appellant provided a statement in which he states his wife's family have disowned her for marrying him and that he has no family left in Nigeria. However, there is no apparent reason why he and his wife could not provide for themselves and their family in Nigeria.
31. The first appellant came for a temporary purpose, namely a visit and then overstayed. His future wife subsequently came to this country on a temporary basis. They had no reason to believe they would be entitled to remain. There are various applications were unsuccessful. The lives they have established here were against this background. Meantime, their children have availed of the benefits of education and healthcare. These are not rights available to them. The parents are from Nigeria and have an awareness of life there. Their children must have some understanding of their parent's home country through them. They are at an age when they can adapt. Whilst they have their own friendships the centre of their life is their parents. No evidence was learned that the family would not be a burden upon the State.
32. It is not unreasonable for C and her family to be returned to Nigeria. I find that she cannot succeed under paragraph 276 ADE and the family cannot succeed under the immigration rules. It is in the children's best interests that they are returned to Nigeria with their parents. Regarding Article 8, it is accepted that the determinative question relates to the proportionality

of the decision. I have born in mind the factors set out in section 117. My conclusion is that no breach of Article 8 occurs.

33. The Secretary of State's appeal in the present proceeding is allowed. I set aside the decision of Judge Dickinson and remake the decision, dismissing the appeals of all the family members.

Decision.

The decision of the First-tier Tribunal did involve the making of a material error of law.

I set aside the decision.

I remake the decision dismissing the family's appeals.

Signed

Deputy Upper Tribunal Judge Farrelly

Anonymity is maintained.

Deputy Upper Tribunal Judge Farrelly

1<sup>st</sup> September 2015