



IAC-PE-SW-V1

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

Appeal Number: IA/41535/2014  
IA/41543/2014  
& IA/41549/2014

**THE IMMIGRATION ACTS**

**Heard at Manchester  
On 5<sup>th</sup> October 2015**

**Determination Promulgated  
On 27<sup>th</sup> January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCCLURE**

**Between**

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

Appellant

**And**

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**(ANONYMITY DIRECTION MADE)**

Claimants

**Representation:**

For the Appellant: Mr Aghayere of Melrose Solicitors

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

**DETERMINATION AND REASONS**

1. The appellant, hereinafter the SSHD, is seeking permission to appeal against the decision of First-tier Tribunal Judge Mitchell. For the purposes of this decision I have identified the appellants in the First-tier Tribunal as the claimants.

2. The claimants are mother and two minor children. These proceedings concern the status and interests of children. In order to protect the child and those interests I make an anonymity direction.
3. This is an appeal by the SSHD against the determination of First-tier Tribunal Judge Mitchell promulgated on 14<sup>th</sup> May 2015, whereby the judge allowed the claimants' appeals against the decisions of the SSHD to remove each of the claimants from the United Kingdom having refused them leave to remain in the United Kingdom.
4. In essence the claimants were seeking to remain in the United Kingdom on the basis of the length of time that they had been in the United Kingdom including the fact that the two minors claimants had been born in the UK; on the basis of their integration into United Kingdom life; and on the basis of the private life that they had developed in the United Kingdom. The claimants were seeking to rely on The Immigration Rules or alternative on the basis of Article 8 family and private life rights acquired whilst they were in the United Kingdom.
5. The judge had allowed the appeals. In respect of the two minor claimants under the Immigration Rules, specifically paragraph 276ADE(iv). In respect of the first claimant of the basis of her Article 8 of the ECHR family life with the two minor claimants.
6. By decision made on the 13th of July 2015 leave to appeal to the Upper Tribunal was granted. Thus the matter appears before me to determine in the first instance whether or not there is an error of law in the original determination.
7. The grounds of appeal submit that: --
  - a) the judge has materially misdirected himself in law by allowing the appeal on the grounds that it would be unreasonable for the two minor claimants to leave the United Kingdom
  - b) the judge has materially erred by finding that it would be unreasonable for the two minor claimants to leave the United Kingdom because of their continuing education.
  - c) the judge has material erred in allowing the appeals on the basis of ongoing education in the United Kingdom.

## **Factual Background**

8. The first claimant is a citizen of Nigeria and she claims to have come to the United Kingdom on 30 September 2004. She claims that she was a visitor and that her leave expired in 2004 or early in 2005. There was no evidence that she had ever had a visit visa, there were no records and the claimant has not produced any documentary evidence in support of her claim such as her passport. There is no evidence of the identity of the person she came to visit.

9. In her evidence she stated that she did not return to Nigeria because of compassionate circumstances. No details were given as to what exactly those circumstances were. The judge noted that the first claimant's mother has visited her in the United Kingdom on more than one occasion and her stepdad is alleged to have supported her financially to enable her to undertake educational courses in the United Kingdom. Thus whatever the compassionate circumstances were, they cannot have related to her relationship with her mother and her stepfather at the time and with whom she appears to have been living prior to leaving Nigeria.
10. With regard to her finances as noted by Judge Mitchell again there is no evidence, other than the claimant's oral evidence, as to how the educational courses have actually been paid for. The claimant's evidence was to the effect of that her family were supporting her. By the time of the hearing the first claimant was alleging that she had fallen out with her mother, who was still alive living in Nigeria.
11. It is to be noted that whilst the first claimant came into the United Kingdom in September 2004 she was having her first child in the United Kingdom on 19 December 2005. The birth certificate for the eldest child indicates that her father was in the UK working as a care worker or support worker [pages 125 & 126 appellant's bundle]. Sometime shortly after entry the first claimant must have commenced a relationship with the father of her children and that relationship certainly lasted until 2008 and the birth of the second child. No evidence was given as to the whereabouts of the father of the children or his immigration status. The first claimant does say that the father has extremely limited contact with the children and does not play any part in their life at all. The first claimant therefore has sole responsibility for them. It is unclear whether the father makes any financial contribution to the support of the two minors.
12. Having entered the United Kingdom the first claimant shortly after entry commenced relationship with the gentleman from Nigeria and remained in that relationship for a number of years. From the documents that have been produced it appears that the appellant gave birth to the two minor claimants during the course of the relationship at national health hospitals.
13. I note that within paragraph 27 to 31 there are references to the first claimant undertaking courses in the United Kingdom. Whilst at paragraph 24 there is reference to the fact that the first claimant alleged that she was educated privately in Nigeria, it is to be noted that in paragraph 28 she was undertaking a course in adult numeracy. The two do not seem to sit together easily. There is no evidence as to who paid for any of these courses, although the appellant has claimed that her stepfather did. There is no evidence of money transfers. There is no documentary evidence as to how the first claimant was supporting herself throughout the whole of the period she has been in the UK.

14. As noted by the judge in paragraphs 35 and 36 there is no evidence that she has contributed to the United Kingdom by paying tax or national insurance. The first claimant was noted to have worked illegally on market stalls, selling items on the internet and working voluntarily for the Salvation Army, although the judge suggests that the latter was a benefit to her as she was able to take clothes that had been donated and sell the clothes herself. There is reference to the fact that the first claimant has been buying and selling on eBay. Again there is no evidence to support such.
15. It was noted that the first claimant suggested that she would not be able to trade in Nigeria and that she was extremely disparaging about the Nigerian economy. The judge by comparison refers to the fact that the Nigerian economy is the largest in Africa and appears to be booming. At various stages the judge having noted the evidence from the first claimant draws attention to other evidence and facts which clearly contradict it.
16. The first claimant also claimed that Nigeria was not safe because she was a Christian. The judge noted that she came from Lagos, which is in the south of the country and it was mainly in the North that there were problems for Christians. It was noted that she had a mother that was living in Nigeria along with a sister. The judge was satisfied that there was no credible evidence that the family could not safely return to Lagos.
17. The judge at paragraph 35 finds that the first claimant cannot meet the requirements of the Immigration Rules. The judge at various stages refers to the first claimant embellishing her evidence and refers to parts of her evidence before discounting such.
18. The first claimant had used medical services and educational services including educational services for herself, the second and third claimant without making any contribution to society. She has not produced any evidence of income and has not disclosed how she manages to support herself. There is no evidence from the father of the children and no evidence that he provides any support to his family. It is clear that the judge was less than impressed by the first claimant and did not find her evidence credible in material respects. Had the matter been solely concerned with the first claimant then it is likely that the judge would not have allowed the appeal. However it was in that context, that is that the first claimant 'should' be removed from the United Kingdom, that the judge had considered the position of the children.
19. In that regard, although not drawn to the judge's attention, I draw attention to the Immigration Directorate Instructions 'is Family Migration: Appendix FM Section 1.0b *Family Life (as a partner or parent) and Private Life: 10 Year Routes*' gives the following guidance:  

'11.2.4 Would it be unreasonable to expect a non-British Citizen child to leave the UK?

The requirement that a non-British Citizen Child has lived in the UK for a continuous period of at least seven years immediately preceding the date of the application, recognises that over time children start to put down roots and integrate into the life in the UK to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse the case with continuous UK residence of more than seven years.'

20. It has to be acknowledged that different considerations may apply depending upon circumstances. Where for example the parents are being removed because of serious criminal behaviour, the issue of reasonableness has to be considered in that context. By comparison where a parent is a British citizen or where the parent has a right to remain such has to be taken account of in assessing the reasonableness exercise.
21. I also draw attention to the case of EV (Philippines) v SSHD [2014] EWCA Civ 874 in which LJ Clarke sets out criteria for assessing the best interests of the child:-

"A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens."

22. LJ Lewison in EV (Philippines) v SSHD [2014] EWCA Civ 874 at paragraph 58

"In my judgment, 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 child to follow the parent with no right to remain to the country of origin?"

23. In looking at the Decision it is correct to say that the judge appears to have started with looking at the position of the first claimant. However that has to be considered in context if the mother had a right to remain in the United Kingdom then the position of the children would be that much stronger. If the parent has no right to be in the United Kingdom than the position of the children has to be considered in that context that is if the parents are to be removed what other factors within the best interests of the children and in the private life of the children would render it unreasonable to remove the child.

24. In so doing the judge considered the circumstances that the children would face on being returned to Nigeria a country of which they have no experience. The judge at paragraph 41 identifies that these are two minor children who have lived in the United Kingdom the whole of their lives. The judge is well aware of the age of the children having set the dates of birth out in paragraph 1 of the decision. The judge clearly examines whether the children have any significant knowledge or contact with Nigeria. He notes that English is a common language within Nigeria. The judge considers whether or not there would be available support for the family in Nigeria and clearly questions the first claimant's assertion that she has fallen out with her mother. It is at that stage that the judge again made reference to the fact that the first claimant has a tendency to exaggerate and embellish her account. The judge then considers the possibility of there being available support from the first claimant working and then again refers to the fact that he gives little account for the first appellant's observations about the lack of opportunities in Nigeria and the unavailability of work.
25. The judge takes account of the conduct of the first claimant in overstaying and clearly flouting immigration laws. He acknowledges that the children, whilst being innocent of responsibility for such being totally dependent upon their mother, they are likely to reap benefits from such by reason of the length of time that they have been in the UK. The judge also considers the circumstances of the family in the United Kingdom. The judge assesses whether or not there is evidence of work or ability to support themselves in the United Kingdom.
26. The judge goes on to assess the fact that the children have friends; have settled lifestyle and appear to be thriving in their respective schools. He acknowledges that whilst there may not receive the same level of education in Nigeria, education will be available in the home country.
27. As a final matter the judge emphasises that the longer that a child has been in the United Kingdom the more it becomes unreasonable for the child be removed. The judge notes that both children have crossed the threshold of seven years and that that was the threshold set by Parliament.
28. It has also to be noted that within paragraph 38 the judge has taken account of Section 117B of the 2002 Act. That assessment clearly impacts on the first claimant because as noted by the judge Section 117B (6) makes the point that public interest does not require a person's removal where they have a genuine and subsisting relationship with the qualifying child and it would not be reasonable to expect the child to leave the United Kingdom.
29. Whilst in coming to a conclusion in this matter the judge has within paragraph 44 referred to the fact that the best interests of both these minor claimants will be to remain in this country and not to disrupt the

education he continues by linking that to their private life. The judge clearly says taking into account all the factors set out above the cumulative effect is that the consequence of those factors renders removal of the two young claimants unreasonable.

30. They reference in paragraph 45 to the case of Zoumbas is merely emphasising those factors which have to be considered in assessing the best interests of the children. Whilst it is in the context of Article 8 it is still relevant to show what factors should be taken account of in assessing the best interests of children.
31. Having determined that the minor claimants succeed under the Immigration Rules in part on the basis that it would be unreasonable to expect them to leave the United Kingdom the judge has then clearly considered the position of first claimant. There is clearly a family life between the appellant and the children and that family life will be interfered with if the first claimant is removed. Clearly the decision is in accordance with the law and ostensibly for the purposes of maintaining immigration control. As a final factor the judge has to consider whether or not the decision is proportionately justified. In making that assessment the judge has to consider the provisions of Section 117B (vi). The judge having considered all of the evidence was entitled to come to the conclusion that the decision to remove the first claimant in light of the fact that it was unreasonable to remove the two minor claimants was in the circumstances not proportionately justified. Accordingly the judge was entitled to allow the appeal in respect of the first claimant on the basis of Article 8 of the ECHR.
32. I am satisfied that the judge has considered all of the appropriate criteria in coming to his decision. This is not a situation in which the judge has merely allowed the matter on the basis of the educational position of the two minor claimants. I am satisfied that the judge has taken account of their age, the fact that they have spent such a significant period of time in the United Kingdom, nine years in respect of one child and more than seven years in respect of the other; that they have never been to Nigeria; and have spent all of their lives in the United Kingdom. In those circumstances the decision is one that was open to the judge on the facts and it is certainly one which the judge justified on the basis of the evidence presented.
33. There is a no material error of law in the determination. I uphold the decision to allow the appeals.

Signed

Date

Deputy Upper Tribunal Judge McClure