



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/11160/2015
IA/11163/2015
IA/11168/2015
IA/11171/2015
IA/11175/2015

THE IMMIGRATION ACTS

Heard at Field House
On 18 September 2017

Decision & Reasons Promulgated
On 2 October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

- (1) MARTINS [A]
- (2) KIKELOMO [A]
- (3) DOROTHY [A]
- (4) [D A₁]
- (5) [D A₂]

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Gilbert, Counsel, instructed by Lighthouse Solicitors
For the Respondent: Mr Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of a decision of First-tier Tribunal Judge Geraint Jones QC, promulgated on 4 July of 2016. After a somewhat complex process, the decision was set aside by me on 16 June 2017. For convenience my decision on error of law is annexed to this determination.

Background

2. I can take the background briefly as the factual findings of the First-tier Tribunal have been preserved and I incorporate them by reference herein. The five appellants comprise a family unit: the first appellant being the father, the second appellant the mother, and the third, fourth and fifth appellants their three daughters. The third appellant was aged 8 when she arrived in the United Kingdom and is now 18. The fourth appellant was 6 on arrival and the fifth appellant was 4. All three daughters were born in Washington DC and I am told are entitled to American citizenship.
3. The immigration history of the first and second appellants does not make happy reading and is recorded in full in the decision of the First-tier Tribunal. The first appellant arrived in the United Kingdom on 18 September 2007 with a student visa valid until 30 May of 2009. The second appellant joined the first appellant as his wife/dependant in September of 2007 bringing with her the three daughters. At the expiration of his visa, the first appellant applied for further leave to remain, such application being rejected on 3 September 2009. On 8 September 2009 he submitted a further application to remain as a Tier 4 Student which was refused on 13 October of 2009. He remained in the United Kingdom illegally notwithstanding these refusals.
4. On 8 March 2010 a pre-action Protocol letter was sent threatening judicial review and on 5 May 2010 the first appellant asked for his application to be reconsidered. It was and the refusal was maintained on 26 May 2010. On 9 December 2010 the first appellant submitted a further student visa application. This was granted after some considerable delay on 7 July of 2013 with a resultant visa valid until 1 November 2013.
5. On the expiry of that student visa the first appellant made an application for leave to remain as an entrepreneur. That was refused on 31 March of 2014 with no right of appeal. Both the first and the second appellants have remained in this country notwithstanding this catalogue of adverse determinations of a succession on visa applications and, subsequently, a removal direction. On 29 January 2015 each appellant made an application for leave to remain on the basis that their human rights would be breached if they were required to leave.

Updating evidence

6. In the light of the preservation of the factual findings of the First-tier Tribunal, the additional evidence was limited to some updating material from the appellants. It

was served late in breach of the directions made at the error of law hearing, but no objection was taken on the part of the Secretary of State.

7. I heard from the third, fourth and fifth appellants, each of whom adopted their written statements, all dated 14 September of 2017. Those statements deposed to the level of integration of each of the three daughters in the United Kingdom through education and community ties. They gave oral evidence supplementing what was contained in their written statements and were briefly cross-examined.
8. The third appellant indicated that she had found the last year particularly stressful. Although she had been predicted securing four grade A's at A level, she in fact achieved grades A, B, D and E. In consequence she was unable to take up her place for a degree course in engineering at Surrey University. She was offered instead an access course involving mathematics and physics which she turned down, preferring instead to remain at school, retake two modules and reapply to university. She described being disappointed and sad at the prospect of going to Nigeria having lived in the United Kingdom for as long as she can remember. All her friends are here and most are moving on to university. She finds it really hard that she is not heading to university with them. She says she has no contacts with anybody in Nigeria.
9. In cross-examination she suggested the poor performance in not achieving her potential in her A levels resulted from stress but she is confident she can achieve better results in the two modules which she is retaking. She spoke of having bad headaches since July of last year which developed into migraines and that continued into the exam season this spring. She stated she takes codeine and when the pain is particularly bad attends the accident and emergency department. She accepted that there is no medical evidence before the Tribunal to support those claims. She is too young to remember her early years in Nigeria and has not investigated the education system in Nigeria, particularly the university teaching of engineering. She has not explored it because she did not want to contemplate the prospect of having to go to Nigeria.
10. The fourth appellant describes her feelings of being scared and nervous at going to Nigeria. She said her whole life is in England and she has her social life and her friends here. Recently attending open evenings at other sixth form colleges she was troubled at the prospect that she might not still be in the country when the time comes for her to take up a place. She is confident she can do well academically and socially. She wants to build her life here. She said she loves her country, has a British accent and entirely British friends. She is comfortable here and she says this is the place for her to be.
11. In cross-examination she indicated that she wished to move to a separate sixth form college for her A level study. She indicated that today was her 16th birthday and that

she would be taking her GCSEs in May and June of 2018 with the intention of changing schools thereafter. She thinks it is better for her not to be at Sacred Heart School but somewhere which will teach economics and biology. She wants to become fully independent and believes herself to be somewhat sheltered at an all-girls school. She indicated that several of her friends are also looking to move school but hopes that they will still stay in touch. She says she knows of no members of her extended family in Nigeria and cannot remember when last she was there.

12. The fifth appellant stated that virtually her entire childhood has been in this country. She was raised here and she would be very distraught to leave. She had built up her character here and she would be leaving a bit of herself behind. She says she cherishes her friendships and it would be very sad for her to go. She is building towards GCSEs, she speaks of her life plan which she has set herself and that she would feel diminished if that were taken away: it would upset her very much. She set herself goals from key stage one, moving through to GCSEs, sixth form college and university. If she were to leave she would miss out on all the prospects which she has set herself.
13. I received written submissions in advance from Mr Melvin for the Secretary of State and on the morning from Mr Gilbert for the appellants. The each made brief supplemental submissions orally.

Secretary of State's submissions

14. Mr Melvin submitted that in adopting the approach commended by the Court of Appeal in **MA Pakistan [2016] EWCA Civ 705**, the Tribunal should look first at the best interests of each child and secondly at the reasonableness of the proposed return to Nigeria, the second matter being in the form of a proportionality assessment.
15. Mr Melvin made particular reference to the following paragraphs of **MA Pakistan**:

[54] There are issues which arise in these cases relating to the best interests of the children. First as I have said Mr Gill submits that once the best interests have been determined that necessarily resolves the reasonableness question. For reasons I have given I reject that submission. There is nothing intrinsically illogical in the notion that whilst the child's best interests are for him or her to stay, it is not unreasonable to expect him or her to go. That is so even if the reasonableness test should be applied so as to exclude public interest considerations bearing upon the parties.

[88] The second ground was this: having established that it would be in the children's best interest to stay in the UK the judge's findings are entirely contrary to the guidance in the Supreme Court case of **Zoumbas** at paragraph 10.7 that a "child must not be blamed for matters for which he or she is not responsible such as the conduct of a parent." I would accept that the judge did contradict that principle when he treated the children's status as precarious, but reading the judgment as a whole it is plain that this was not a significant element in his reasoning. He focused on the very powerful public interest in removing the fathers and their precarious status certainly was material to the proportionality analysis. For reasons I have

explained above paragraphs 41 to 42 the conduct of the parents is relevant to their own situation which bears upon the wider public interest and does not amount to blaming the children even if they may be prejudiced as a result.

[101] But for reasons I have given that is not the test. The court can have regard to the wider public interest including the immigration history of the applicant and his parents. The question therefore is whether the judge was entitled to conclude having regard to these considerations and all other aspects of the public interest that it would not be unreasonable to require the child to return to Pakistan.

[114] As to the reasonableness question, the appellant's principal submission was that the judge did not focus as he should have done on the position of the child but instead looked at wider public interest considerations including the immigration history of the parents and the fact that as a consequence the child's status was precarious. For reasons I have given the application of the reasonableness test requires the judge to have regard to the wider public interests and they require consideration of the immigration history and status of the parents. The judge was not therefore in error in applying the reasonableness test with a broad brush in a manner akin to an Article 8 proportionality test.

16. Mr Melvin made reference to the decision in **EV Philippines and the Secretary of State for the Home Department** [2014] EWCA Civ 874. In particular

[36] In a sense the Tribunal is concerned with how emphatic an answer falls to be given to the question is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain but only on balance (with some factors pointing the other way) the result may be the opposite.

[37] In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic wellbeing of the country and the fact that, ex hypothesi the applicants have no entitlement to remain. The immigration history of the parents may also be relevant for example if they are overstayers or have acted deceitfully.

[60] That is a long way from the facts of our case. In our case 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 interests 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 United Kingdom 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.

17. Mr Melvin also referred me to **Treebhawon and Others** (NIAA 2002 Part 5A **compelling circumstances test**) [2017] UKUT 00013 (IAC), which, he submitted, was substantially similar on its facts to the present one. He took me to the third point in the head note which indicates that mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience even where multiplied are unlikely to satisfy

the test of very significant hurdles in paragraph 276ADE of the Immigration Rules. More particularly, he cited paragraphs 50 and 51

[50] Next we are mandated by Section 59 of the Borders, Citizenship and Immigration Act 2009 to give primacy to the best interests of the third, fourth and fifth appellants as all are children. We consider that the best interests of these children will primarily be served by the maintenance of the family unit, as already noted this will predictably occur. The second dimension of these three appellants' best interests is that on balance they would be better off in certain respects in particular economically if the family were to remain in the United Kingdom. This we must take into account in the balancing exercise as a primary consideration.

[51] Our balancing of the salient features of the appellants' cases with the public interests engaged, all as set forth above, yields the conclusion that the public interests must prevail. The appellants' cases in combination unquestionably possess a certain appeal and various attractions. No reasonable or humane court or Tribunal could, in our judgment consider otherwise. Furthermore we must accord a primacy of importance to that aspect of the third to fifth appellants' best interests identified above. However we consider that the effect of contemporary immigration law is that this superficially seductive case falls short measurably so of overcoming the threshold necessary to demonstrate a disproportionate interference with private life rights under Article 8 ECHR. The most sympathetic view of the appellants' combined cases - which we have adopted - does not warrant any different conclusion in law. While we are mindful that the Article 8 private life claim of each of these appellants has its distinctive personal features, given their different ages and circumstances we find nothing to warrant a different conclusion in respect of any of the appellants individually [emphasis added].

18. Mr Melvin drew my attention to the tremendous cost to the British public in having to house, feed, clothe and educate this family and in providing medical treatment as and when required. He placed emphasis on the immigration history and the contempt which the adult appellants have shown. He referred me also to the case of **Kaur** (children's best interests/public interest interface) [2017] UKUT 14 (IAC) and in particular to paragraphs 12, 18 and 41:

[12] The Tribunal next gave consideration to the strength of the children's ties with the United Kingdom, noting in particular that the older child had lived here for the seven years of her life. The Judge made the conclusion in my judgment both unavoidable and unremarkable that the best interests of these two young children lie in remaining with their parents. The question of whether it would be reasonable to expect the children to accompany the parents to the country of origin was then examined. Following an outline of material aspects of the evidence this yielded the conclusion at 65 "having considered all the evidence in the round I do not find that it would be unreasonable to expect the children to leave the UK with their parents". Finally in considering the issue of proportionality, the Tribunal recognised the established private life in the United Kingdom of all four family members. In concluding that the impugned decision represented an interference with the private life protected by Article 8 ECHR, the Tribunal stated at 73 "any private life the Appellant has established in the UK should be given little weight because it was established at a time when she remained as an overstayer and the children have no rights to remain.

[18] Secondly the assessment of a child's best interests must focus on the child, while simultaneously evaluating the reality of the child's life situation and circumstances. Factors such as parental immigration misconduct must not intrude at this stage. See **EV Philippines** at

33. This requires care and discipline on the part of decision makers and judges. The child's best interests, once assessed, are an important component of the overall proportionality balancing exercise. However, they have a freestanding character. Avoidance of error is likely to be promoted if the best interests assessment is carried out first. Parental misconduct typically takes the form of illegal entry, unlawful overstaying or illegal working. Factors of this kind may legitimately enter the equation at a later stage of the overall proportionality balancing exercise as they are clearly embraced by the public interest in the maintenance of immigration control. This is the stage at which a child's best interests, though a consideration of primary importance can potentially be outweighed by the public interest.

[41] Ultimately I accept the submission of Ms Patry that properly and fairly analysed the decision of the FtT neither infringes the seventh principle of the **Zoumbas** code nor contravenes the approach espoused in **MA Pakistan**. As the passages quoted in paragraphs 11 to 12 above make clear the judge focused particularly on the issues of where the children had been born, their lack of British citizenship, the strength of their ties with the United Kingdom and whether it would be reasonable to expect them to accompany their parents upon departing the United Kingdom. There is no identifiable blemish in this approach. The burden of the argument underpinning the draft amended ground of appeal is expressed thus in Mr Alam's written submissions 'it is submitted that the FtT focused heavily upon the precarious immigration history of the children which in effect penalises the children for their parent's behaviour'. For the reasons explained above I consider that the analysis of the decision of the First-tier Tribunal is untenable. In the judicial exercise being conducted the principal error of law to be avoided was that of permitting the issue of parental misconduct to intrude at the stage of assessing the parents' best interests. I consider that this error was indeed avoided.

19. In concluding, Mr Melvin drew attention to the fact that the first appellant is a wealthy businessman with resources both in Nigeria and elsewhere as was found to be the case in the First-tier Tribunal. Such facts having been preserved he indicates there can be little difficulty relating to finding accommodation and schooling. He submits that the appeal should be dismissed under the Immigration Rules, and when Article 8 is considered outside the Rules.

The appellants' submissions

20. Turning then to the submissions of Mr Gilbert on behalf of all five appellants, he agrees that the two-stage approach is appropriate: first looking at the best interests of the children; and secondly what is reasonable.
21. He submitted that regard should be had to the Secretary of State's policy. Such arguments may carry less force when children are very young, but here all three appellants have been in the United Kingdom for the greater part of their lives and are at a more advanced and crucial stage of their schooling. Mr Gilbert further cited the decision in the case of **Azimi-Moayed & Others (decisions affecting children: onward appeals) [2013] UKUT 197 (IAT)**, particularly the observation that seven years from age four is likely to be more significant to a child than the first seven years of life. Mr Gilbert submitted that all three children are "fully formed British" in substance and outlook. He also referred me to **EV Philippines** at paragraph 33:

... the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.

22. Next Mr Gilbert took me to **PD and Others (Article 8 conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC)** and to paragraph 39

[39] We remind ourselves that the test to be applied is that of reasonableness. Other legal tests which have gained much currency in this sphere during recent years – insurmountable obstacles, exceptional circumstances, very compelling reasons – have no application in the exercise we are performing. Self-evidently the test of reasonableness poses a less exacting and demanding threshold than that posed by the other tests mentioned.

23. Mr Gilbert also took me to the decision in **MA Pakistan** (above) and in particular to paragraph 46, under the sub-heading “Applying the reasonableness test”, and paragraph 49 in which Elias LJ states:

[46] Even on the approach of the Secretary of State the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled family life (as a partner or parent) and private life: ten year routes in which it is expressly stated that once the seven years’ residence requirement is satisfied there need to be strong reasons for refusing leave, para 11.2.4. These instructions were not in force when the cases now subject to appeal were determined but in my mind they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families but the disruption becomes more serious as they get older. Moreover in these cases there must be a very strong expectation that the child’s best interests will be to remain in the UK with his parents as part of a family unit and that must rank as a primary consideration in the proportionality assessment. [emphasis added]

[49] Although this was not in fact a seven year case, on the wider construction of Section 117B(6) the same principles would apply in such a case. However the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first because of its relevance to determining the nature and strength of the child’s best interests and second because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.

24. Mr Gilbert says the third, fourth and fifth appellants are well-adjusted, fully integrated young women; they are at important – indeed crucial – stages of their education and removal now would have a significant and disruptive influence in their lives returning them to a country with which they have no meaningful connection. They have been in the United Kingdom since the early stages of their childhood.
25. Mr Gilbert refers me to certain aspects of their education, in particular that the third appellant, having arrived in the United Kingdom at the age of 8 attained 11 GCSEs

with three A*, seven As and one B, she was designated as gifted and talented. She won a place at a selective sixth form and was predicted to get four As in her A level maths, physics, English and art. She had an offer of a university place to study engineering. She believes that the disruption of these proceedings has hampered her progress. She is retaking her exams to achieve higher marks. School reports describe her as a superb young woman with enormous potential; she excels academically, is an outstanding student, and a role model to younger students.

26. It is submitted that removal would have a significant adverse impact on the third appellant's emotional wellbeing. A letter from her school states that if she were to be uprooted at this stage it would have a profound impact on her future due to her social and academic progression. It points to her being involved in the school choir, netball and ruby teams and indicates that she was founder and president of the engineering society at her school.
27. Similarly, Mr Gilbert submits that there is much in the documentation to support the contention that the fourth and fifth appellants are equally academically gifted, and strong in competitive sports and other activities. He observes that their formative years having been spent entirely in the United Kingdom and there is nothing to suggest they will return to a stable home in Nigeria.
28. Mr Gilbert also took me to the case of Kaur which I have already cited. He makes the distinction between the ages of the children in Kaur and the ages of the third to fifth appellants in this case. He further makes the point that there is not a natural break in the children's education notwithstanding the fact that the third appellant intends to go to university next year and the fourth appellant intends to move to a sixth form college at the end of the current academic year.
29. In Mr Gilbert's submission, Nigeria is an entirely foreign place for these three children and it would be wholly unreasonable to expect them to relocate.
30. Mr Gilbert says that in making the separate and distinct Article 8 assessment a factor to be considered and given weight in the proportionality assessment is that since the date of application, the third appellant has obtained her majority and would now satisfy paragraph 276ADE(1)(v), being a person "aged 18 years or above and under 25 years and has spent at least half of her life living continuously in the United Kingdom". He submits this is a factor the Tribunal should take into account when looked at in the family situation as a whole.
31. Mr Melvin indicated that in the event that this appeal were to fail it would be open to any of the appellants (but the third and fourth in particular) to apply to the Secretary of State to defer removal to the end of the academic year. I invited Mr Gilbert's submissions on this discrete point. He said it would be speculation as to whether or not any application would be made (he had no specific instructions) or, if made,

whether one would be granted. He did not, however, dissent from the proposition that such a course would be open to the appellants.

Assessment

32. Although Mr Melvin and Mr Gilbert cited case law at some length, they were broadly agreed on the relevant principles, differing only as to its application to the particular facts of this case. The Court of Appeal decision in **MA Pakistan**, which has helped clarify the approach to be adopted, was handed down some three days after the First-tier Tribunal in the present case was promulgated.
33. It is common ground that the claims of the first and second claimant are individually without merit and Mr Gilbert does not challenge the clear and robust language adopted by the First-tier Tribunal in its fact-findings in this regard. The claims are parasitic on those of their three children, the third to fifth appellants, which require prior determination.
34. Turning first to the Immigration Rules, the relevant provisions of paragraph 276ADE(1) state that leave to remain on the grounds of private life in the United Kingdom will be granted if the applicant "(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years ... and it would not be reasonable to expect the applicant to leave the UK". It was accepted that at the time of application all three children were under 18 and satisfied the seven year condition. Whilst the third appellant has subsequently obtained her majority, Mr Melvin and Mr Gilbert were both in agreement that the matter falls to be determined on the facts as they were at the date of application.
35. In relation to the best interests of the children, while I recognise that each must be considered separately, the evidence in relation to them is very similar in nature and content and leads to the same conclusions. In my judgment these three children are intelligent, articulate, well-presented young women who are ambitious for themselves and worldly-wise. They have undoubtedly settled well in the United Kingdom. They have made a significant contribution to their school lives and their various other activities. They will doubtless be high achievers in the future. They have little in terms of continuing connections with Nigeria. Virtually their entire life experience has been gained living in England. In my judgment, their best interests individually - and collectively as a trio - are that they remain in the United Kingdom.
36. The next matter to be addressed in this two-stage process is whether it is reasonable for each of the third to fifth appellants to leave the United Kingdom. There are factors pointing both for and against. Whilst I have made a finding that their best interests are served in their remaining in the United Kingdom, I do not consider that this is a case where that is overwhelmingly the case. The very fact that these are articulate high performing individuals suggests that they are likely to adjust well to a

new and challenging environment and that they have both the emotional and financial resources to ensure that they will do so. There is no suggestion that educational opportunities at secondary or tertiary level would be inadequate. There is no argument that any of the third to fifth appellants have special educational needs or health concerns which cannot be met in Nigeria. For example, it is open to them, should they wish to attend particular British universities, to do so as overseas students

37. Mr Gilbert did not pursue the suggestion in paragraph 29 of his skeleton argument that the family would have no home or assets to return to in Nigeria, the first appellant having relinquished his business before leaving Nigeria. It is of significance that solicitors acting for all the appellants wrote to the UK Border Agency on 9 December 2010 stating in clear terms that the first appellant had businesses in Nigeria and had acquired property in the United Arab Emirates. A recurring feature of this case has been the capacity of the first appellant to advance mutually contradictory arguments at various times in the past in the hope that he and his family might be advantaged by his dishonesty. An example of this trait was picked up in the First-tier Tribunal in relation to his claim that the third to fifth appellants would not be entitled to Nigerian citizenship.
38. Notwithstanding the ages of the third to fifth appellants, their assimilation into British society, their educational and social achievements, their lack of familiarity with Nigeria, to all of which I give considerable weight, I am nonetheless satisfied that there are powerful countervailing reasons why it is reasonable for them to leave. There is no problem with language, there are no cultural, ethnic, educational or health concerns. The family seems to be entirely reliant on state benefits, and financial support from the London Borough of Ealing, notwithstanding the first appellant's apparent wealth, assets and businesses overseas. Whilst not seeking to visit the sins of the father on his daughters, the appalling immigration history in this case is a relevant consideration in balancing what is reasonable. So also are the implications for the public purse, past, present and future, in supporting the family, and funding the educational, social and healthcare needs of the various appellants.
39. Although Mr Gilbert made much of what he considered to be the critical stage of the education of the appellants, I do not consider this to be a decisive factor. It is not uncommon for children to move at key points in their schooling. It is inconvenient and challenging but it is one of the vicissitudes of life which are to be faced stoically. All three children are articulate, robust and self-assured. They presented at the hearing with enormous poise, self-confidence and assertiveness. I am in no doubt that they will cope well with changes in their life style and education which will result from leaving the United Kingdom, whether it is to Nigeria or onwards to the United States of America should they prefer.

40. Turning finally to Article 8 outside of the Rules, I note that family life will be promoted and preserved by all five appellants leaving the country together as a family unit. To the extent that there is a separate free-standing private life claim, whilst undoubtedly there would be some disruption to that social or private life by relocation, when regard is had to the public interest in the maintenance of immigration control the proportionality assessment comes down, for the reasons already discussed, in favour of removal.
41. I do not consider that the fact that the third appellant may now have accrued an alternative basis of advancing a claim for leave to remain under paragraph 276ADE (1)(v) on the basis that she “is aged 18 years or above and under 25 years and has spent at least half of [her] life living continuously in the UK” is such as to affect the outcome of the proportionality assessment. It is not an exceptional circumstance for granting leave outside the Rules, whether the third appellant alone, or all the appellants collectively.
42. In all the circumstances of the appellants’ appeals fail both under the Immigration Rules and under Article 8 outside the Rules.

Notice of Decision

- (1) Upon the decision of the First-tier Tribunal having been set aside it is remade as follows.
- (2) The appeal of each of the five appellants is dismissed under the Immigration Rules and on human rights grounds.
- (3) No anonymity direction is made.

Signed *Mark Hill*

Date 29 September 2017

Deputy Upper Tribunal Judge Hill QC

ANNEXE

ERROR OF LAW DECISION



IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

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(ANONYMITY DIRECTION NOT MADE)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

Respondent

Representation:

For the Appellants: Mr A Gilbert, Counsel, instructed by Lighthouse Solicitors
For the Respondent: Mr P Armstrong, Home Office Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. This is an appeal from a determination of First-tier Tribunal Judge Geraint Jones QC, promulgated on 4 July 2016. This particular matter has a lengthy and complex procedural history which I do not propose to rehearse for the purposes of this determination. It relates to a family unit, mother, father and three children all of whom come from Nigeria. The first and second appellants, namely the parents, are citizens of Nigeria and it would appear that the children, the third, fourth and fifth appellants, are citizens of the United States.
2. Although permission to appeal was refused by Upper Tribunal Judge Allen on 19 December 2016, that decision became the subject of proceedings in the Administrative Court. On 14 March 2017, permission to proceed by way of judicial review was granted by HHJ Jarman QC sitting as a Judge of the High Court and the decision of the Upper Tribunal was subsequently quashed on 7 April 2017. Thereafter the Vice President of the Upper Tribunal formally granted permission to appeal on 10 May 2017.
3. The First-tier Tribunal decision is a lengthy one running to some 39 paragraphs but ultimately coming to the view that both the children's appeals under Article 8, and the parasitic appeals of the parents be dismissed.
4. The judge recognised that each of the children was a "relevant child" for the purpose of the relevant legislation. The difficulty, however, as I raised in argument is the lack of clarity and apparent conflation of legal issues in addressing and reconciling (1) the best interests of the children under the section 55 considerations; (2) the weight to be afforded in the balancing exercise the seven year residence of the children and (3) the poor immigration history of the parents.
5. I have been taken at some length to the now familiar case of **MA (Pakistan) [2016] EWCA Civ 705** and in particular to the clarification which the Court of Appeal gave to its earlier judgment in **EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874** and an apparent dissonance between the approach Lord Justice Lewison and Lord Justice Christopher Clarke. In paragraph 53 of **MA (Pakistan)**, adopting the language of Lord Justice Christopher Clarke in **EV (Philippines)**, it is clearly stated by Lord Justice Elias that the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent. This approach was either misstated or misapplied by the First-tier Tribunal Judge in this instance, whose decision predated

that of **MA** by some three days. Paragraph 27 of the determination recorded that stated that the Section 55 considerations must necessarily be considered on the basis of the background of the immigration status of the child's parents.

6. However one looks at this case, a reviewing Tribunal cannot be satisfied that the judge properly identified and applied the proper test when determining the matter. Mr Armstrong, for the respondent, submits that had the tests been properly applied or been applied with greater clarity and transparency then the end result would have been exactly the same. That is of course a distinct possibility and it is important that the appellants, all of whom are present today, realise that that may very well be the eventual outcome of the appeal. But they are entitled to have this aspect of the decision remade in the clear and transparent way which was denied them in the First-tier Tribunal.
6. It therefore follows that, having found an error of law, I set aside the decision of the First-tier Tribunal and order that the Article 8 assessment be remade in this Tribunal. The underlying factual findings, which were largely uncontentious, can be preserved.
7. If the matter can be re-listed before me, that would perhaps be preferable, but it is not essential and I do not reserve it to myself. I will direct that an entire day be allocated. This may well prove excessive, but I wish to avoid the possibility of the matter going part heard. I make the following directions in relation to the resumed hearing.

Notice of Decision

- (1) Having found an error of law, the decision of the First-tier Tribunal is set aside.
- (2) The matter is retained in the Upper Tribunal and adjourned to the first open date after 3 weeks for the decision to be remade. Time estimate of 1 day.
- (3) The adjourned hearing is to be listed before Deputy Upper Tribunal Judge Hill QC, if available, but not reserved.
- (4) The appellants are to be at liberty to put before the Upper Tribunal any updating evidence provided it is filed and served at least 14 days prior to the resumed hearing date and there will be an opportunity, should the Secretary of State so wish, for the deponents of those statements to be cross-examined.
- (5) Both parties to produce skeleton arguments on the law together with copies of all decision to be relied upon at least 3 clear days prior to that resumed hearing.

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IA/11168/2015
IA/11171/2015
IA/11175/2015

(6) No anonymity direction is made.

Signed *Mark Hill*

Date 16 June 2017

Deputy Upper Tribunal Judge Hill QC