**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/04868/2016

**THE IMMIGRATION ACTS**

| **Heard at Glasgow** | **Decision & Reasons Promulgated** |
|---|---|
| **On 9 May 2018** | **On 14 May 2018** |

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**KEHINDE [O]**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr S Tampuri, of Tamsons Legal Services, Stratford
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. First-tier Judge Agnew dismissed the appellant's appeal on human rights grounds by a decision promulgated on 7 August 2017.

2. The appellant's grounds of appeal to the UT are set out in her application to the FtT dated 10 August 2017. The points advanced are at the following paragraphs of the grounds:

¶16 – 18 – failure to follow *SF and others* (Guidance, post 2014 Act) Albania [2017] UKUT 00120, which should have led to a different outcome.

¶19, failure to consider the rights of the appellant's UK citizen partner and children, contrary to *PD and others* (Article 8 – conjoined family claims) [2016] UKUT 108.

¶20, failure to make a clear finding on ¶EX.1 [of the immigration rules]; jumping to the circumstances of the appellant's partner; deviating from the main issue in the appeal.

¶21, finding no evidence it would be unreasonable for the appellant's children and partner to go to Nigeria, and referring to the original Nigerian nationality of the appellant's partner "an element of bias … as in effect asserting the outcome would be different if the appellant's partner had no connection with Nigeria".

¶22, the findings under s.55 of the 2009 Act and s.117B(6) of the 2002 Act "are flawed. If no evidence was placed before the judge as stated [at ¶30 of her decision] how the judge came to the conclusion that it would be reasonable for the whole family to decamp to Nigeria" *[sic]*.

3. In the FtT, the appellant had representatives experienced in this jurisdiction, while the respondent was unrepresented. The judge was not referred to *SF and others* or to *PD and others*. The appellant changed representatives after the hearing. Her current representatives are the authors of the grounds of appeal to the UT.

4. Mr Tampuri referred to ¶7 of *SF and others* and to the policy there excerpted:

> "Mr Wilding, however, has with the fairness which Presenting Officers always attempt to apply, drawn our attention to an important guidance document. It is the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes". It is the edition of August 2015 and therefore not in force at the date of the decision under appeal, but it was in force at the date of the First-tier Tribunal hearing and decision, and is still in force. It contains important guidance about the following topic at 11.2.3: *Would it be unreasonable to expect a British Citizen Child to leave the UK?* We will set out the relevant parts, they are as follows:
>
> > "Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice Judgment in Zambrano.
> >
> > …
> >
> > Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.
> >
> > In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided

> that there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.
>
> The circumstances envisaged could cover amongst others:
>
> - criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
> - a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.
>
> In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision."
>
> We were not specifically referred to any other part of this document and we do not need to set any more out."

5. *SF* goes on to hold that where guidance clearly demonstrates what the outcome of an assessment by the SSHD would have been, that should normally be applied by a tribunal.

6. Mr Tampuri submitted that applying the policy to the facts as they stood before the FtT, the judge should have found that ¶EX.1 (a) and (b) of the rules was satisfied, and should have allowed the appeal on human rights grounds.

7. Mr Govan submitted that the terms of the policy could justify the removal of the appellant and the possibility of her separation from the children in this case, but I was unable to see how that could be accommodated. I indicated that the decision of the FtT would be reversed.

8. The respondent's decision was reached on the basis that the three children of the appellant were not UK citizens. On the facts as then perceived, the appellant had no likely case.

9. Before the FtT, however, the facts were that the father and the two older children were all UK citizens.

10. The status of the third child remained unclear, but that does not affect the outcome.

11. The judge held that there was nothing before her to show that it would be unreasonable for the children to live in Nigeria with their parents.

12. Simply on the evidence before the FtT, that would appear to be a legitimate outcome; but unfortunately, the judge was not referred to the respondent's policy, or to *SF*.

13. This was not a case where the UK citizen children would be *forced* to leave the UK, because one option is for them to remain here with their father. However, it is a case which must be assessed on the basis that it would be *unreasonable* to expect the children to leave with their mother. There are no "circumstances of such weight as to justify separation". There is no history of criminality. The immigration history is poor, in that the appellant overstayed on a visit visa, which was a deliberate breach of the rules, but it could not reasonably be said to be "very poor".

14. Once the policy is identified and applied, it dictates the outcome, even in absence of any evidence that the departure of the children in family to Nigeria would in fact be significantly adverse to their interests.

15. I have referred also to the policy as updated and published on 22 February 2018. It is to the same effect.

16. It is unnecessary to deal with the rest of the grounds, and there were no submissions thereon. However, I would record that I do not see any merit in the suggestion of an element of bias. The Nigerian origins of the father would obviously be relevant in assessing whether it was reasonable to expect the family members to relocate to Nigeria. (It seems likely that he retains Nigerian nationality, and that is shared by all five family members; but in terms of policy, that is trumped by co-existing UK nationality.)

17. The decision of the FtT is set aside, and the following decision is substituted: the appeal, as originally brought to the FtT, is allowed.

18. No anonymity direction has been requested or made.

9 May 2018
Upper Tribunal Judge Macleman