



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27600/2015
IA/27602/2015
IA/27604/2015
IA/27606/2015

THE IMMIGRATION ACTS

Heard at Field House
On 21 December 2017

Decision & Reasons Promulgated
On 15 January 2018

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

MARY [A]

JAMES [A]

[E A]

[O A]

(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:

Ms A Childs, Counsel, instructed by Rashid and Rashid Solicitors

For the Respondent:

Mr L Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are a family unit of parents and children. They are Nigerian nationals born respectively on [] 1972, [] 1972, [] 2004 and [] 2011. The first three appellants are all visitor over-stayers having arrived here in January 2006; the fourth appellant was born here. The appellants have made various applications to remain all of which were refused. The most recent application was rejected on 21 July 2015 and that refusal gives rise to these proceedings.
2. The respondent refused the application because she found that the first and second appellants did not meet the requirements of the partner route because neither had leave to remain and they did not meet the parent route because it would not be unreasonable for their children to leave the UK. The third and fourth appellants did not meet the requirements of the child route under Appendix FM because their parents had no leave to remain and they did not meet the requirements of paragraph 276ADE as the fourth appellant had not lived here for seven years and it was reasonable for them both to return to Nigeria. The respondent found there were no exceptional circumstances which warranted a grant of article 8 leave outside the rules.
3. The joint appeals against the respondent's decision were heard by First-tier Tribunal Judge Adio at Hatton Cross on 22 December 2016 and allowed on human rights grounds by way of a determination promulgated on 20 January 2017. The respondent sought and obtained permission to appeal on the basis that the judge had failed to factor in public interest grounds when assessing proportionality and the matter then came before me on 25 September 2017. In a determination promulgated on 3 October 2017, I set aside the First-tier Tribunal Judge's determination for the following reasons (at 10-13 of my determination):

"I have carefully considered whether there is merit in the respondent's complaint that the public interest factors were disregarded by the judge when he conducted the proportionality assessment. I have had regard to the fact that he commenced his findings of fact with an acknowledgement that the adult appellants had no legal status in the UK (at 14 and 19). However, for the following reasons I do not accept Ms Daykin's submission that this was sufficient to discharge the duty on him to consider the public interest.

Whilst there was reference to MA Pakistan [2016] EWCA 705 at paragraph 20 of the determination, it would appear that the judge did not correctly apply its principles and did not appreciate that there are two issues requiring consideration: the best interests of the child(ren) and whether it is reasonable to expect them to leave the UK. In the first matter, the conduct of parents is irrelevant (as per the Supreme Court cases of ZH (Tanzania) and Zoumbas). However, in the second, wider public interest factors are to be weighed in the balance, including the conduct and the immigration status of the parents.

The respondent argues that there was no consideration at all of the public interest when considering reasonableness and that this was particularly problematic given the heavy reliance placed on the use of public resources by these appellants. I have

to concur with that criticism. Whilst the findings are somewhat muddled and do not address the issues in an orderly fashion, the judge only deals with the reasonableness issue at paragraphs 20 and 21. Those sections of the determination focus entirely on the two children and their needs. There is no consideration whatsoever of the public interest in this section and that is an error of law. It is material because consideration of these matters may have led to a different outcome. The best interests' assessment does not automatically resolve the reasonableness question (MA; paragraph 47).

It is correct, as the respondent complains, that the judge has focused entirely on the needs of the children, particularly the third appellant, and that he has been swayed by her special needs when making his decision. Whilst such a decision might have been open to him, it must be made after all the relevant factors have been considered and in this case they were not. The only s.117 consideration referred to in the determination (at 19) is the maintenance of immigration control and even that has not been examined in any meaningful way."

The Hearing

4. At the hearing before me, I heard oral evidence from the two adult appellants followed by submissions. At the commencement of the hearing I brought to the attention of the parties an incomplete witness statement/letter and queried whose statement it was (the second page was missing from the bundle). Ms Childs was able to confirm, after instructions, that it was written by the third appellant and that attempts would be made to obtain a full copy from the solicitors. In the event, the solicitors did not have the document and the third appellant, who was present in the building, re-wrote the missing page from memory.
5. I first heard evidence from Mary [A], the principal appellant. She confirmed her address and the contents of her statements as true and accurate. She confirmed that her daughter had written the letter referred to above. She was then tendered for cross examination.
6. In response, to Mr Tarlow's questions, the appellant stated that her daughter had hearing difficulties. She explained that they had not realised this until they came to the UK when the child was some 18 months old and someone at church asked why she was not speaking. They took her to see a doctor and after tests were carried out at a healthcare centre she was referred to St Thomas' Hospital where she was diagnosed as having severe hearing loss on the left side and moderate hearing loss on the right. She now had hearing aids. She had check-ups every 6 months and although she was in a mainstream school she and another student received extra support. Whilst at school she also wore a radio aid; that remained at the school. She was progressing well with her education.

The support teacher encouraged the two students with hearing difficulties to have confidence and explained anything they did not understand.

7. The appellant stated that she did not believe that her daughter would receive support in Nigeria. She said she had never seen anyone there wearing hearing aids. She admitted she had not made any enquiries.
8. The appellant stated that she had entered the UK in 2006 as a visitor. She confirmed that her husband had applied for an EEA card in 2008 which was refused in August 2009 and that three subsequent human rights applications had all been refused. She said that they had decided to overstay when they realised their daughter had hearing problems. They had not sought to extend their leave as they did not know how to do so. When asked who they had come here to visit, the appellant said: "*a person, like a sister, a friend*". She said she no longer knew where she lived as they had lost contact. When asked who the EEA sponsor had been, she said she did not know much about that and that a lawyer had advised her husband. That completed cross examination. There was no re-examination.
9. I then heard evidence from the second appellant, James [A]. He too confirmed his address and adopted his statements.
10. He was then cross-examined. He stated that he had realised his daughter was deaf about six months after they came here as visitors in January 2006. They had no idea that she had hearing problems in Nigeria. They did not return to Nigeria when their visa ran out. He did not recall whether they had been given entry for six months. He did not have his passport. It had expired.
11. The appellant stated that he had applied for an EEA residence card. His sponsor was his father's brother's son and he was a German citizen.
12. The appellant was asked why they had not returned to Nigeria. He stated that there was a lot of insecurity there; secondly, his daughter had a hearing problem and thirdly there was unemployment. He was a graduate but it had taken him 5-7 years to find work. He said his daughter would not receive health care in Nigeria. He had not made enquiries but had checked on the internet and there were "*no better facilities*" there. He had never seen anyone wearing a hearing aid.
13. In re-examination, the appellant stated that he was not aware of any special schools. It was not common that people used hearing aids.
14. I then put some questions to the appellant for clarification. I asked how the family was supported. He said that he taught at the church and was paid by the students. I asked him for the reason of his visit. He said they came for a holiday. He had been in work for two years prior to arrival but then lost his job. I asked

whether his wife knew his cousin. He asked which one. I clarified I meant the one who had acted as his sponsor in the EEA application. He said she did not. I asked what family he had in Nigeria. He told me that he had six siblings of whom five were in Nigeria along with his mother. His wife had five siblings and her parents. He and his family lived in Lagos. He graduated in mathematics and statistics and worked in a bank. His wife was a graduate in computer science but had been unable to find work.

15. Neither party had any questions arising and that completed the oral evidence. I then heard submissions.
16. Mr Tarlow submitted that there was a public interest in maintaining immigration control in circumstances where the family had overstayed and made use of facilities at public expense. The adult appellants had spent the majority of their lives in Nigeria, were familiar with the language and customs and they both had large families there. There was no reason why the family could not return. Hearing aids could be taken with them. Reliance was placed on the refusal letter. I was asked to dismiss the appeal.
17. Ms Childs relied on her skeleton argument. She submitted that no issue had been taken with the findings of the First-tier Tribunal Judge regarding the best interests of the children and submitted that they should stand. Ms Childs relied on paragraph 276ADE(1)(iv) in respect of the third appellant and submitted that she had been here for eleven years. She submitted that the child would have developed a private life of her own which should not be diminished by a lack of leave. She relied on Azimi Moayed (decisions affecting children; onwards appeals) [2013] UKUT 00197 and MA Pakistan [2016] EWCA Civ 705 and submitted that there were no powerful reasons to require her to leave. The family spoke English and had not received state benefits. She submitted that the third appellant's physical and moral integrity would be affected by removal. She submitted that taking the hearing aids to Nigeria was not a solution. They were moulded to the ear and had to be programmed and regularly replaced. Furthermore, she was in a school with support. It was important for her to stay in mainstream education and not to show her deafness. She wanted to become a midwife when she grew up. Her parents would also be able to work and pay something back to the NHS and the school system. The child had over seven years of residence and health issues. The poor immigration history of her parents could not outweigh her strong private life. Schools in Nigeria had no funding and few were able to offer support. It was unlikely that the parents would have known about their daughter's hearing defect in Nigeria as hearing was not tested there. Even if it was the case that they had stayed just to get treatment for the child, that should not prejudice her position. She only spoke English and her ability to integrate would be impeded. The appeal should be allowed.

18. At the conclusion of the hearing, I reserved my determination which I now give.

Legal Framework

19. Paragraph 267ADE(1) sets out the requirements which, when met, lead to a grant of leave. This states:

The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

- (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and*
- (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and*
- (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or*
- (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or*
- (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or*
- (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.*

20. Sub paragraph (i) sets out grounds on which an applicant may be refused leave even if the requirements are met. None of these are applicable to the circumstances of this case. Sub paragraph (iv) is relied on for the third appellant; it is argued that she is a qualifying child and that it would not be reasonable to expect her to leave the UK.
21. Sections 117A and 117B of Part 5A of the Nationality, Immigration and Asylum Act 2002 relate to public interest considerations and apply in all cases where a court is required to determine whether a decision made by the respondent breaches the applicant's rights under article 8.
22. Sections 117A sets out the following:
- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –*

- (a) *breaches a person's right to respect for private and family life under Article 8, and*
 - (b) *as a result would be unlawful under section 6 of the Human Rights Act 1998.*
- (2) *In considering the public interest question, the court or tribunal must (in particular) have regard –*
 - (a) *in all cases, to the considerations listed in section 117B, and*
 - (b) *in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.*
- (3) *In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).*

23. Section 117B sets out the considerations referred to in 2(a) above as:

- (1) *The maintenance of effective immigration controls is in the public interest.*
- (2) *It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –*
 - (a) *are less of a burden on taxpayers, and*
 - (b) *are better able to integrate into society.*
- (3) *It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –*
 - (a) *are not a burden on taxpayers, and (b) are better able to integrate into society.*
- (4) *Little weight should be given to –*
 - (a) *a private life, or*
 - (b) *a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.*
- (5) *Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*
- (6) *In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –*
 - (a) *the person has a genuine and subsisting parental relationship with a qualifying child, and*
 - (b) *it would not be reasonable to expect the child to leave the United Kingdom.*

24. Section 117D sets out the definition of a qualifying child as:

a person who is under the age of 18 and who –

(a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more;

25. Both paragraph 276ADE(iv) and section 117B(6) require seven years' residence of a child and that it be unreasonable to expect that child to leave the UK. Although the period for the assessment is stated differently in each, it was held in MA Pakistan that as a result of section 85(4) of the 2002 Act, it was the date of the hearing that was the correct date for assessment (at paragraph 13). It was also pointed out that only the child could apply under paragraph 275ADE(iv) which covered private life, whereas section 117B was concerned with article 8 applications covering private and family life and under which both parents and children could apply. It was held that the question of whether it was reasonable to expect a child to leave should be approached in the same way in each context.

26. At paragraph 21 the court held:

"It does not, however, necessarily follow from the fact that section 117B(6) exhaustively identifies all the factors which a court can take into account that the wider public interest criteria, including those identified in section 117B(1) to (5) are of no relevance to applications which fall under that subsection. That depends upon the meaning and application of the term "reasonable" in the context of asking whether it would "not be reasonable to expect the child to leave" in paragraph (b). The Secretary of State submits that even if the subsection is self-contained, the concept of reasonableness brings back into play all potentially relevant public interest considerations, including the matters identified in section 117B. On this analysis, it is a matter of no real consequence whether section 117B(6) is self-contained or not. The same range of considerations falls to be considered when determining an application under section 117B(6) as in any other article 8 determination. Construing the section in this way, the only relevance of the seven year period is that once a child has been in the UK for that length of time, this is a factor which should be given particular weight when assessing whether it would be reasonable for the child to leave the UK or not."

27. The court distinguished the current legislation from the respondent's DP5/96 (7 year) policy, noting that the current provisions fall short of the starting point of the policy which was that a child with seven years' residence should be refused leave to remain only in exceptional circumstances (at 44). It held that the long residence of the child had to be given significant weight when the proportionality exercise was carried out (at 46) but that even if the focus were only on the child, it would not follow that leave must be granted whenever the child's best interests were in favour of remaining. Thus even where a child's best interests were to stay, it may still be reasonable to expect the child to leave.

Such a decision would involve an assessment of the nature and extent of links with the UK and in the country to which return is proposed (at 47).

28. A similar point was made in EV (Philippines) [2014] EWCA Civ 874 where the court analysed how a court should approach the question of removal where one or both parents had no right to stay in the UK and how the proportionality test should be applied where wider public interest considerations were involved and where the best interests of the child dictated that they should remain. Several factors were identified as being relevant when assessing a child's best interests. These were: (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 (at 35). The court held that: *"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"* (at 36). It noted that factors to be taken into account on the other side of the balance included the strong weight to be given to *"the need to maintain immigration control in pursuit of the economic well-being 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 e.g. if they are overstayers, or have acted deceitfully"* (at 37). However, when assessing the best interests, those should be determined without reference to the immigration history or status of the parent(s).
29. Section 55 of the Borders, Citizenship and Immigration Act 2009 establishes an obligation to have regard to the welfare of all children present in the UK, whether lawfully or not. This was emphasised in ZH (Tanzania) [2011] UKSC 4 where the court held that the best interests of a child were a primary consideration which had to be taken into account in all cases where children were involved. This is, of course, relevant when applying the reasonableness test. The respondent's guidance provides for the wishes and feelings of children to be taken into account where practicable.
30. In Zoumbas [2013] UKSC 74, the court set out seven principles to be considered when assessing the best interests of a child. These were paraphrased as:
- (1) *The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;*
- (2) *In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the*

child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

31. Applying the guidance of these cases, the court held in MA Pakistan that the seven-year residence of a child should be given significant weight in the proportionality exercise for two reasons: first, because it is relevant to the determination of the nature and strength of the child's best interests and secondly because it establishes the starting point that leave should be granted unless there are powerful reasons to the contrary (at 49). It found, however, that the best interests did not necessarily resolve the reasonableness question. The court held that: "*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*" (at 54).
32. I have had careful regard to this guidance and all these principles in reaching my decision.

Findings and conclusions

33. I have given careful consideration to all the evidence, both oral and written, presented in the three bundles from the appellants and in the respondent's bundle. I would say at this stage that the documentary evidence has not been properly presented. The photocopying of many documents is poor and some, especially the photographs, are illegible either partially or in full. Many documents are duplicated (in Bundles A and B) which made the examination of the evidence even more time consuming. Some documents have missing pages.

The index to the bundles also could have been more detailed (for example in Bundle B pp 38-176 are unhelpfully and lazily listed as “*evidence for the 3rd appellant*”). I have regard to the facts as at the day of the hearing and to the balance of probabilities being the appropriate standard of proof to be met by the appellants. I also have regard to the submissions of the parties and the case law relied on : MA Pakistan [2016] EWCA Civ 705, Azimi Moayed [2013] UKUT 00197 and EV Philippines [2014] EWCA Civ 874. Given that there is an issue over the best interests of the two child appellants, I propose to approach the proportionality assessment by assessing their best interests and then, undertaking the balancing exercise. First, I set out the facts that are established by the evidence.

34. It is evident from the papers before me that the first three appellants arrived here on 26 January 2006 as visitors. Whilst their visas were valid for entry for a two-year period from 5 July 2005, they would have received six months leave to enter which meant that their leave expired towards the end of July 2006. They then overstayed. The second appellant applied for a residence card as an extended family member of an EEA national in December 2008 but this was refused in August 2009. He then made a human rights application with his wife and daughter as his dependants in November 2010 but that was refused in January 2011. The fourth appellant was born in November 2011. On 18 March 2013, the third appellant then made a human rights application with her parents and brother as dependants but this was rejected in May 2013. On 12 March 2014, the first appellant then made a human rights application with the rest of the family as dependants. This was refused on 12 October 2014 without a right of appeal. On 10 December 2014, the appellants filed an application for permission to bring judicial review proceedings arguing that article 8 had not been considered and that the third appellant’s condition had not been given due consideration. The matter was disposed of by consent on 10 June 2015 with the respondent agreeing to reconsider the case. The result, however, was another negative decision dated 21 July 2015 but with an in country right of appeal and is the basis of the current challenge. It is incorrect as maintained in the skeleton argument and the chronology that the appeal is brought against the October 2014 decision.
35. The third appellant who accompanied her parents to the UK in January 2006 has bilateral sensorineural hearing loss. This was diagnosed when she was about 2 ½ years old. Although the skeleton argument and witness statement refer to her being at a special needs school, the evidence of the first appellant was that it is a mainstream school with support for the appellant. Whichever it is, plainly [EA] receives one to one support from specialists. According to evidence from the school support centre, she receives weekly speech and language therapy for hourly sessions. She has had bilateral hearing aids since 2008 and has the added assistance of a radio aid whilst at school. The latest report from the Audiology Centre at St Thomas’ Hospital is dated 31 March

2016 and indicates that there have been no recent changes and that the third appellant generally hears well. It is reported that whilst she wears her hearing aids at school she takes them off at home. She is in good health. Data logging revealed average use of five hours a day. An earlier report dated 9 December 2015 confirms no changes noted at that stage either but that some adjustments were made to the hearing aids.

36. The fourth appellant, [OA], was born here in November 2011 and has never travelled to Nigeria. He is at primary school.
37. I do not accept Ms Childs' submission that there were no issues taken with the findings of the First-tier Tribunal Judge as regards the best interests of the children. The respondent's grounds specifically challenge these (at paragraph 4). As errors of law were found with the manner in which the assessment was undertaken, those findings were not and cannot be preserved.
38. I now proceed to assess the best interests of both children although the evidence and submissions essentially focus on [EA]. My assessment will be somewhat repetitive of what is said above as I incorporate those facts into it.
39. [EA] was some 18 months old when she accompanied her parents to the UK. She has not returned. That means she had been in the UK for 11 years at the date of the hearing before the First-tier Tribunal and 12 years at the date of the present hearing. That is a significant period of time. In July, she will turn 14. She lives with her parents and her younger brother and attends school. I have no reason to believe that she is not well cared for. By all accounts she is an intelligent child, a fast learner and she appears to be content although there is mention of being argumentative with class mates. She also attends church where she is active in the choir although I have no further details of that. In the letter dated 17 December 2017, she prepared in support of the appeal, [EA] states that she wants to be a midwife when she grows up, she has just started her GCSE subjects, that she is settled here and has friends. I take her letter into account. It expresses her feelings.
40. [EA] has bilateral hearing difficulties. She has received a great deal of support here since 2007 when she was first taken to an audiology clinic. At present, she attends what her mother described as a mainstream school which has special support for children with hearing impairment. She receives weekly therapy in language. She wears her hearing aids in class and also uses a radio aid. At home, she tends to remove the hearing aids. The reports confirm she manages without them, although there are references to the volume of the television having to be turned up loud and to her family having to repeat things to her until she hears them. The medical reports confirm that [EA] had problems with her speech but that has greatly improved with the support she has received. She is otherwise in good health. She appears to receive a lot of love and support from her parents and from the church community.

41. [OA] is the younger of the two children of the family. He is now just over 6 years old and attends primary school. He was born in the UK and has never been to Nigeria. He too has friends here and appears to be doing well at school. He has been tested for hearing difficulties and has been given a clean bill of health. He too, has prepared a letter in support of the appeal although the letter is plainly not in a child's handwriting and uses phrases such as: "*I have integrated into society*" and "*Please tender (sic) mercy with justice*" which I do not accept a six-year old would use. Nevertheless, I accept that [OA] enjoys parks and gardens and that he has friends at school. He too lives with his family and attends church. He appears to be well settled and is doing well in school.
42. On the evidence I have seen, and taking account of the guidance in the judgments referred to earlier in my determination, I find that it is in the best interests of both children to remain with each other and with their parents, to receive an education and to have access to health care. For [EA], the latter is particularly important. Given the length of time they have been here, their integration into society here, their lack of contact with family in Nigeria and because of the support [EA] has received with respect to her hearing loss over the past eleven years, I further find that their best interests would be to remain in the UK.
43. I now consider whether it would be reasonable to expect [EA] to leave the UK and return to Nigeria. [OA] has not lived here seven years or more and so is not a qualifying child although he is less than a year short of becoming one. The reasonableness test does not, however, arise in respect of his circumstances at the moment.
44. The guidance provided by the courts is that where a seven-year period of residence has been achieved, there must be powerful factors which would make it reasonable for the child to leave the UK. In this case the main factor for removal and against the appellant is the conduct of her parents. Plainly that does not factor into the consideration of best interests but is a relevant consideration when I consider the issue of reasonableness and the proportionality of removal.
45. It is a fact that the adult appellants have not behaved well. They have deliberately chosen to flout the immigration laws. No good explanation was given by either of them for why no attempt was made to extend their leave before it expired. Indeed, there have been several periods of unlawful residence. The first period of leave would have expired in July 2006 but no application was made to regularize leave until the application for a residence card in 2008 about which the first appellant claimed to know nothing, not even the sponsor, and which was refused on 27 August 2009. The next application was not made until 4 November 2010, 15 months later. That was rejected on 13 January 2011 but still the appellants remained and the first appellant

subsequently became pregnant and gave birth to the fourth appellant in November 2011. The next application was made on 18 March 2013, over two years after the refusal of the previous application. It was refused on 22 May 2013 and then there was then a further delay of nearly a year until another application was made in March 2014. The adult appellants plainly have no respect for the laws of the UK and have blatantly disregarded the Immigration Rules. That is a matter I take account of and which is an important public interest factor. Whilst it is accepted that the sins of the parents should not be visited upon the children, that principle does not lessen the importance of immigration control (as per paragraph 42: MA Pakistan).

46. They have also worked without authority and failed to pay taxes or national insurance. I do not accept that the only work done was teaching in church as the evidence before me shows that Mrs [A] was noted as working as a support worker for a care company and that Mr [A] was a security guard and kitchen assistant. They have taken from the state in the form of substantial use of the health care system, to which they were not entitled, and the use of the educational system for two children over a number of years. Whilst it is argued for them that they did not claim benefits they plainly have drawn heavily on state resources which are already stretched. They have also shown themselves to be lacking in integrity and honesty, contrary to what their letters of support from church members have said. They are plainly not of good character as far as a respect for the laws and rules are concerned and have not shown themselves to be good role models to their children. It is difficult to see how Mr [A] is considered a suitable person to be teaching morals and good behaviour to children at his church. It is certainly a matter of concern that the pastor and other church officials appear to give no importance at all to the fact of his unlawful residence in this country and describe him and his wife as "*law abiding*" and of "*good character*" in spite of their lack of status and abuse of the rules over many years.
47. I do not accept for a moment that Mr and Mrs [A] genuinely intended just a holiday when they came here. The evidence is that Mr [A] had lost his job and it makes no sense at all that the family would take on the huge expense of a trip to London at such a time and especially only to visit someone whom Mrs [A] could not even identify and with whom they no longer have any contact. I also do not believe that they were totally unaware that their daughter could not hear. I consider it would have been clear to them that they had a child who could not hear anything. I find that they came here specifically to find work and to get help for [EA] and that they had no intention of leaving. They are wholly undeserving of status here and were there no children involved in this appeal, I would have no hesitation in dismissing it.
48. The fact remains, however, there are two children involved and they are not responsible for their parents' bad and dishonest behaviour. [EA] has been here

since she was eighteen months old and most likely recalls nothing about Nigeria. [OA] has been here 6 years and two months and has never left the country. Whilst it would appear that the church community is largely or completely made up of Nigerians, the children plainly interact with others of a different background at school and have grown up essentially viewing this country as their home. There is no evidence that any of their extended family have been here to visit them and so their links with Nigeria and the family there are tenuous.

49. [EA] has progressed well in her studies and her speech thanks to the facilities of the NHS. It is unlikely that she would have made the same progress in Nigeria. I have taken account of the respondent's submission that she could take her hearing aids with her to Nigeria. Contrary to the appellant's submission that there are no facilities that would support [EA] in Nigeria, I find the evidence shows that there are centres for those with hearing impairment although, of course, the quality of those facilities would not compare to those she enjoys here and there is a question of cost. I should point out, however, that much of the information provided is out of date and the sources relied on in the articles are largely from the 1980s and 1990s. The situation may well have improved since.
50. I am also not impressed by the claim that [EA] would be stigmatised or even harmed because of her disability. That is speculative and I was not referred to any evidence in support of such a claim. The background material I have examined does not indicate that such treatment would be reasonably likely, particularly in the cities and I note that the family come from Lagos. I also consider it speculative that Mrs [A]'s family would put pressure on her to try traditional healing for [EA]. There is no suggestion that her family or her husband's family have ever said or done anything to support such a contention. In any event, both parents are well educated and capable of standing up to any views taken by their families with which they disagree. I was not referred to any evidence to support the contention that children such as the appellant are badly treated in Nigeria.
51. Nevertheless, [EA]'s hearing difficulties are but one factor to consider. Her lengthy period of residence is the most substantial factor and the basis of which this appeal essentially turns. I accept that both children consider the UK as their home. I accept in [EA]'s case that there can be no recollection of anything else and that for [OA] there never has been any other home. Whilst [OA] is still young and could adapt to life outside the UK in due course, the situation is different for [EA] who has now been here for twelve years; twelve formative years. I also note that she is now in secondary school and has just started on her GCSE subjects. She is therefore at a crucial stage in her education.

52. The question then is whether the conduct and behaviour of the parents, their poor immigration history, their heavy reliance on state resources and unlawful employment constitute powerful reasons for removal. To put it another way, do the public interest issues take priority over the positive factors I have identified above in respect of [EA]. I find that they do not. However deplorable I consider the conduct of the parents to be, [EA] is an innocent victim. I find that balancing all the factors for and against removal, it would not be reasonable to expect her to leave everything she has here to return to Nigeria. Although both adult appellants have family there and would have support on return until they could establish themselves, the children have not had contact with their extended family and would face huge disruption having to integrate and to adjust to a completely different environment.
53. I accept also that [EA] would have difficulties in learning another language although I do not accept her mother's evidence that she has no knowledge of Yoruba. I note that several of the reports in the bundles refer to Yoruba being spoken at home but I accept that it is possible that [EA] does not have fluency in the language and would struggle to learn it well enough to pursue an education in it.
54. Another relevant factor mitigating against the public interest of removal is the lack of any attempt on the part of the respondent to remove this family much earlier on. Steps could have been taken to remove them after they overstayed their visit leave, or after the suspect EEA application was made (it is simply not credible that Mrs [A] would know barely anything about it had it been genuinely made) or after any of the ensuing human rights applications. Had enforcement action been taken years ago, there would have been no seven-year period of residence and no consequential issues of removal to decide. The lack of action on the part of the respondent also counts against attributing more weight to the public interest in maintaining immigration control where two children are involved.
55. Having therefore considered all the evidence, the public interest factors and those factors relevant to the best interest of the children and the reasonableness of removal, I conclude that this appeal must be allowed. The third appellant meets the requirements of paragraph 276ADE (1)(iv) and in that context removal of the family would be disproportionate.

Decision

56. The decision of the First-tier Tribunal was found to contain material errors of law and was set aside. I now re-make the decision and allow the appeal under the Immigration Rules and on article 8 grounds.

Anonymity order

57. I was not asked to make an anonymity order and there is no reason to do so.

Signed

A handwritten signature in black ink, appearing to read "R. Keke-E" followed by a period.

Upper Tribunal Judge

Date: 12 January 2018