Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/47222/2014**

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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 February 2016	**On 17 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE H J E LATTER

Between

AB
PKB
HB
PriKOB
PryKOB
(ANONYMITY ORDER MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Harris, counsel
For the Respondent: Mr S Kotas, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal by the appellants against a decision of the First-tier Tribunal (Judge Henderson) dismissing their appeals against the respondent's decisions dated 14 November 2014 refusing the their applications for leave to remain on human rights grounds.

Background

2. The appellants are all citizens of Nigeria. The first appellant born on 13 February 1971 is the mother of the second to fifth appellants born respectively on 22 July 2000 in Nigeria, 6 November 2005 in the UK, 18 August 2001 in Nigeria and 7 April 2012 in the UK. The children all have the same father, the first appellant's husband also a Nigerian citizen.

3. The first appellant, the second and fourth appellants arrived together in the UK on 7 October 2005 as visitors with leave to remain in until 7 April 2006. The third appellant was born in November 2005 a month after their arrival. Further applications for leave to be granted outside the Immigration Rules were refused on 11 May 2006 and 11 November 2011. On 10 November 2011 the first and fourth appellants were served with removal papers. The fifth appellant was born in the UK in April 2012 and on 27 September 2012 a further application was made for leave to remain on human rights grounds. This was refused on 25 September 2013 and an appeal subsequently dismissed. A further application was made on the basis of family and private life and this was refused on 27 October 2014. The decision was reconsidered but the refusal of leave was maintained on 14 November 2014.

4. It was the respondent's view that it was not unreasonable for the children to leave the UK with their mother and younger sister as a family unit. The second and fourth appellants had been born in Nigeria and the first appellant had spent the majority of her life there and would be able to assist the children adapt to Nigerian culture. The respondent was not satisfied that the appellant could meet the requirements of the Rules and having considered her duties under s.55 of the Borders, Citizenship and Immigration Act 2009 found that there were no exceptional circumstances which would warrant consideration of a grant of leave outside the Rules.

The Findings of the First-tier Tribunal Judge

5. The judge heard oral evidence from the first appellant and she had witness statements from the second, third and fourth appellants together with a bundle of documents including medical reports and letters from the

children's schools. The judge found the first appellant to be a credible witness overall on most points and although some of the evidence she gave lacked plausibility, she found no reason to doubt her credibility generally. Her evidence about her marriage was that it was a turbulent relationship. Her husband had initially helped to support her and the children and she had lived with him sometime in 2009 when he was in the UK studying for his Master's degree [27]. She had last seen him in June or July 2011 when she was pregnant with the fifth appellant. She had received a letter from her husband's lawyers asking for a divorce but she had not replied because she had heard that he was living with another woman in Nigeria and she had not wanted to co-operate with the divorce [28].

6. The first appellant confirmed that she and the children were in good health, although she herself was suffering from stress and had been losing her hair. The witness statements from the second to fourth appellants said that they were well-established at their schools and had lots of friends. They had no ties to Nigeria, they loved living in the UK and were afraid of returning to Nigeria because of the things they had heard about that country.

7. The judge found that the first appellant had not shown that there were any "very significant obstacles" to prevent her from integrating into Nigeria. She was well educated, had previously run a successful retail business and had lived in Nigeria for most of her adult life. She considered the test relating to the children under appendix FM EX.1. She noted that the children did not have any health issues which would make it unreasonable for them to leave. They all did well at school and had settled well into life in the UK. She took note of what they said in their witness statements that they were apprehensive about going to live in Nigeria because of negative things they had heard of that country but that was not enough to make it is unreasonable for them to leave the UK [39].

8. The judge went on to consider article 8 taking into account the provisions of s.117B. She also considered the decision in EA (article 8-best interests of child) Nigeria [2011] UKUT 315. She concluded her decision as follows at [46]:

> "The first appellant's evidence was essentially that she believed it was best for her children to live and be educated in the UK and that she had done all she could to ensure this. Whilst I understand that as a mother she wants what is most beneficial for her children, that is not the test I am required to apply. On applying the factors set out in Zoumbas, I find that the best interests of the children in this case must be to remain with their mother and siblings; those best interests are not at odds with the assessment that the removal of their mother would be proportionate under article 8 (2). I, therefore, find that any interference by the respondent's decisions with the appellants' rights under article 8 ECHR, is proportionate to the legitimate public end sought to be achieved."

The Grounds of Appeal and Submissions

9. In the grounds it is argued that the judge misdirected herself in law, made no adequate findings, failed to give adequate reasons, failed to take relevant matters into consideration and reached an unreasonable conclusion. It is argued that a number of relevant factors were left out of account in assessing whether there were very significant obstacles to the family returning to Nigeria particularly in the light of the fact that the first appellant had been found to be a credible witness. It is further argued the judge failed properly to consider issues under s.55 and generally had acted contrary to the principle of natural justice by making a decision based on one side of the story.

10. Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal (UTJ Bruce) on the basis that there was an arguable concern about the tribunal's approach to para 276 ADE of the Rules as it could be inferred that the children had advanced their own cases on their private lives. Further, the question of whether it was reasonable for the children to leave after more than seven years residence had only been assessed through the prism of EX.1 and it was arguable that in taking this approach the relevant case law and guidance was obscured and that the Tribunal did not ask itself whether there were "strong reasons" for these children now to be refused leave.

11. Mr Harris focused his submissions on whether the judge had properly considered para 276 ADE in so far as the children were concerned. She had not properly analysed their private life in the UK, so he argued, failing to give proper weight to their ties established by their lengthy presence in the UK or to give proper weight to their best interests. Further, she had failed to consider whether there were strong reasons justifying their removal with their mother. The judge had commented at [44] that the s.117 factors were fairly evenly balanced. In such circumstances he submitted that it was difficult to see why there were strong reasons justifying removal.

12. Mr Kotas submitted that in substance the grounds raised two issues, whether para 276 ADE had been properly considered and whether the question of reasonableness had been properly assessed in the light of the children's best interests. He submitted that the judge had properly directed herself and reached findings properly open to her. She had made clear findings on credibility taking into account the children's ages and their evidence. She was entitled to note that the children's witness statements were very similarly drafted. This was a case where further leave to remain had been refused on a number of occasions. There was no proper basis, so he submitted, for interfering with the judge's decision.

Assessment of Whether there is an Error of Law

13. I must consider whether the First-tier Tribunal erred in law such that its decision should be set aside. The first main argument is whether the judge properly considered the private lives of the children as distinct from their family life with their mother. The judge set out in [38] why she was not satisfied that the first appellant was able to meet the requirements of para 276 ADE(1)(vi) but she did not expressly consider the children under sub-para (iv) which relates to children under the age of 18 who have lived continuously in the UK for at least 7 years and it would not be reasonable to expect them to leave the UK. It is not clear whether or not that submission was made to the judge but it is clear that she considered the issue of reasonableness when looking at the position under Appendix FM EX.1. I am not satisfied that there is any difference in the test set out in that provision or for that matter as set out in s.177B (6), where again the issue is whether it is reasonable for a child to be expected to leave the UK.

14. I am satisfied that on the evidence before her the judge was entitled to find that it had not been shown that it would not be reasonable to expect the children to leave the UK. The judge was aware of their ages and the fact that they were at school in the UK. She took into account their witness statements, which are expressed in similar and general terms. She also took into account the guidance in EA and in particular the comment that, absent other factors, a period of substantial residence as a child may become a weighty consideration in balancing the competing factors. When granting permission to appeal UTJ Bruce identified as arguable that the issue of whether it was reasonable for the children to leave the UK after more than seven years residence had only been assessed through the prism of EX.1 and without considering whether there were "strong reasons" for the children now to be refused leave.

15. This is a reference to the guidance in the Immigration Directorate Instructions, November 2014 which refers at 11.2.4 to the fact that the longer a child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case with continuous UK residence of more than seven years. It is not clear whether this IDI was referred to at the hearing but, nonetheless, I am satisfied that the judge was fully aware that the length of residence was an important factor and there is no reason to believe that this was left out of account. The fact that the judge used the phraseology “weighty consideration” in [43] indicates that she was well aware that in cases where children had lengthy residence, strong reasons would be required. I am not satisfied that the judge left out of account the length of the children’s residence or erred in her approach to assessing the issue of reasonableness.

16. It is also clear that the judge properly took into account the best interests of the children as a primary consideration. She set out the guidance from the Supreme Court in Zoumbas [2013] UKSC 74 and there is no reason to

believe that she did not take it properly into account. In the grounds it is argued that having found the first appellant to be credible, the judge failed to give proper weight to the impact on removal to Nigeria when assessing whether there were significant obstacles to integrating on return. However, whilst the judge accepted the first appellant's general credibility she did find that some of the evidence she gave lacked plausibility [24]. There is no reason to believe that the judge left any relevant matters out of account when considering the impact of a return to Nigeria.

17. In substance, the grounds challenge the weight given by the judge to the various factors identified in her decision. I am satisfied that she reached findings and conclusions properly open to her for the reasons she gave. It was for her to balance the importance of effective immigration control, particularly in a case where none of the appellants had had leave to remain since April 2006 and subsequent applications had been unsuccessful, with the interference the decision to remove would have on the private and family life of all the appellants. The comment that the factors under s.117 were equally balanced does not indicate any error of approach. The judge was entitled to take into account the other considerations set out in [44]-[46] including the fact that the family would be returning as a unit and to conclude that the respondent's decisions were proportionate to the legitimate public end sought to be achieved. In summary, I am satisfied that the judge reached findings and conclusions properly open to her for the reasons she gave.

Decision

18. For these reasons I am not satisfied that the First-tier Tribunal erred in law and its decision stands. An anonymity order was made by the First-tier Tribunal and no application has been made to vary or discharge that order.

Signed H J E Latter

H J E Latter
Deputy Upper Tribunal Judge

Date: 1 March 2016