IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-005031
UI-2024-005032
UI-2024-005033
UI-2024-005034
First tier number: PA/64986/2023
PA/64998/2023
PA/64995/2023
PA/64993/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 13th of February 2025

Before

UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE SINGER

Between

Secretary of State for the Home Department

Appellant

and

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SO
FEO
FFO
(anonymity order made)

Respondents

Representation:

For the Secretary of State: Mr Whitwell, Senior Home Office Presenting Officer
For the Respondents: Mr Bundock, Counsel instructed by Southwark Law Centre

Heard at Field House on 6 January 2025

Anonymity

Unless and until a tribunal or court directs otherwise, the Respondents to this appeal are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies to, amongst others, both the Appellant and the Respondents. Failure to

comply with this direction could lead to contempt of court proceedings

DECISION AND REASONS

1. On the 9th of September 2024, the First-tier Tribunal (Judge Wilsher) allowed the linked appeals of the Respondents on human rights grounds. The Secretary of State now has permission to appeal against that decision.

Background and Decision of the First-tier Tribunal

2. The First Respondent is a Nigerian national born on the 12th March 1984. The remaining Respondents, also Nigerian nationals, are her three children: C1 born in 2007, C2 born in 2010 and C3 born in 2020.

3. The First Respondent, C1 and C2 arrived in the United Kingdom on the 7th of August 2019 in possession of valid visit visas. The First Respondent's husband, the father of all three children was already here. The First Respondent and her children did not return to Nigeria when the visit visas expired: they stayed here with him. C3 was born in the United Kingdom. The Respondent and her husband separated in 2021. The First Respondent made a claim for protection. This was refused on 29 November 2023.

4. By the time that the matter came before the First-tier Tribunal the asylum aspect of the appeals had been abandoned. It was submitted on behalf of the family that the private lives that they had developed since their arrival in the United Kingdom were of such strength and quality that it would today be disproportionate to expect them to return to Nigeria. Particular emphasis was placed on the best interests of the three children, all of whom had spent a considerable period of time in the United Kingdom. In evaluating the evidence of the Respondents, information provided by their schools and a report by Laurence Chester, an Independent Social Worker, the Tribunal was asked to have regard to the following matters:

    - By the date of the appeal C1 and C2 had spent five years in the United Kingdom
    - C3 was born in the United Kingdom and knew no other environment
    - In each case those five years covered a crucial stage of the child's development
    - C1 has completed a BTEC level II in engineering and at the date of the appeal was looking forward to starting level III. During his summer break he had taken part in activities for his Duke of Edinburgh Silver award
    - At the date of the appeal C2 was about to start her GCSEs, and had been admitted to an extracurricular chemistry course at the London Academy of Excellence
    - The system in Nigeria was very different and moving them now would be significantly disruptive to their education

- All of the children have close friendships at school that are very important to them
- It was Mr Chester's evidence that the children would likely "suffer significant emotional harm" as defined by s31(9) Children Act 1989 should their appeals fail and they be returned to Nigeria, thus disrupting their established private lives in the United Kingdom
- The children had already experienced the breakup of their parents' marriage and further instability would be contrary to their best interests
- In 2021, when the family were being accommodated in a hotel by the Home Office, C2 was sexually assaulted by a man in the corridor. This has had a long-term impact on C2. In her statement she explains that even though she is still affected, she feels safer in the UK because of the immediate involvement of police and social services following the incident. She believes that in Nigeria no one would have taken her seriously. She is also aware that things like counselling are not available there. In his report Mr Chester stressed that the best response to this early childhood trauma would be ongoing stability in a safe place to enable C2 to achieve a full recovery. It is not clinically advisable to refer a child to trauma therapy whilst she feels herself to be in an uncertain situation. In his experience survivors of sexual abuse can be 'triggered' to re-experience trauma when they undergo unrelated adverse life events. C2 may perceive forcible removal to Nigeria as such an event.
- C1 and C2 both averred to feeling very afraid of returning to Nigeria citing lawlessness and interreligious violence as a particular concern. One matter relevant to this fear is that their mother converted from Islam to Christianity in order to marry their father.

5. The First-tier Tribunal's decision contains a number of findings that are plainly adverse to the Respondents' cases. At its paragraph 2, the Tribunal notes that the First Respondent was not able to clearly explain why she had come to the United Kingdom in 2019, or why she had decided to overstay her visa. Reviewing at its paragraph 6 the evidence about the situation that the First Respondent might face in Nigeria, the Tribunal notes that she has extensive family ties and retains contact with these family members, who own property. This is not a poor or uneducated family. She has previously run her own successful business there. She also has a brother in the United Kingdom who would be able to send funds to her if she needed it. There was therefore no real risk that she would be left destitute on return. Applying the facts to the rules, the Tribunal further recognises that none of the children can succeed under paragraph 276ADE, because they have not yet completed seven years residence in the United Kingdom: see paragraph 10. Nor could any of the Respondents succeed on family life grounds: at paragraph 11 the Tribunal proceeds on the basis that the father will leave the UK with them. That being the case, this is a matter in which the public interest considerations set out at section 117B of the Immigration and Asylum act 2002, must weigh against the family. At its paragraph 12 the Tribunal takes those matters into account.

6. The reasoning on why the appeals should nevertheless be allowed is focused exclusively on the best interests of the children. The Tribunal notes that the report by Mr Chester paints a broadly positive picture of three happy, healthy and

flourishing children who maintain a very close loving relationship with both their parents. They are settled and doing well at school. Having interviewed C1 and C2 Mr Chester records their "genuine enjoyment" of their lives here, in the "relative safety" of the UK. The children are fearful of returning to Nigeria. C2 is particularly vulnerable due to the assault. Although they would not be facing destitution on return to Nigeria the educational and economic opportunities would be much less favourable there; having had regard to country background evidence the Tribunal concludes that the children will not realistically be able to access higher education there if returned. That same evidence spoke to other challenges such as the cost of healthcare, and the high levels of violence and discrimination faced by women and girls. The Tribunal accepts that the level of risk of harm from these kind of factors is clearly much higher than in the UK, and that this must form part of the overall welfare assessment.

7. Drawing all of these factors together, in the context of the public interest in maintaining immigration control, the Tribunal concludes that although this is a "finely balanced" case, it would be disproportionate to "remove" C1 and C2. As they are minors the Tribunal finds that the family unit should be preserved that the remaining appeals must therefore also be allowed.

The Secretary of State's Challenge

8. The grounds of appeal are that the First-tier Tribunal erred in making perverse or irrational findings, failing to give reasons or any adequate reasons, and misdirecting itself in law. The particulars of this challenge, fleshed out before us by Mr Whitwell, are as follows.

9. The judge has placed significant weight on the potential disruption to the children's education, and this is a misdirection, and/or irrelevant factor. In granting permission to appeal, Deputy Upper Tribunal Judge Parkes observed that Article 8 does not guarantee a person's right to remain in the United Kingdom in order to pursue an education: see Patel [2013] UKSC 72. Mr Whitwell submitted that the judge has effectively allowed this appeal on the basis that the children have a better education here than they would in Nigeria. This is simply not a factor that is capable of outweighing the public interest in circumstances where neither child is qualifying. The Secretary of State submits that the Tribunal failed to have regard, in its best interest assessment, to his own finding that the children will return to an extensive family network of support in Nigeria. It had rejected any suggestion that these children would face harm or deprivation there, but this does not appear to have been taken into account in the final balancing exercise. Mr Whitwell further suggested that the structure of the reasoning reveals an error in approach: instead of beginning from the starting point that the public interest lies in refusing the appeals, the judge was looking for reasons to allow it. In particular he puts the cart before the horse by beginning with the best interests of the children. He submitted that it was "arguably irrational" to do so. Whilst acknowledging that the best interests of the children must be a primary consideration, Mr Whitwell submits that in cases 'outside of the rules', the clear

position is that these must be evaluated in the "real world". He places reliance on KO (Nigeria) [2018] UKSC 53 [at §18] where Lord Justice Carnwath says this:

> "it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them".

Discussion and Findings

10. We begin with Mr Whitwell's submission about the structure of this decision. He contends that the starting place for consideration of these appeals should unambiguously have been the fact that this was a family who could not meet the requirements of the immigration rules. The "real world" in which these children were living was a world in which their mother was a long-term overstayer who had deliberately sought to obfuscate the reasons why she had come to the United Kingdom. To paraphrase Lord Justice Carnwath, it would normally be reasonable for the children to be with her, where she was supposed to be.

11. In his oral submissions in response Mr Bundock suggested that KO Nigeria contained no such presumption. Following the hearing, he sought and was granted permission to make further brief submissions on the point in writing[1]. He drew our attention to the decision of the Court of Appeal in NA (Bangladesh) [2021] EWCA Civ 953 in which the Lord Justice Underhill (with whom all agreed) analysed the effect of paragraph 18 of KO. He found that this passage does no more than reflect the natural expectation that children will remain with their parents. It does not contain, or introduce, a presumption either way about where that should be. At §30:

> "It represents no more than a common-sense starting-point, adopted for the reasons given at paras. 18-19 of his judgment. It remains necessary in every case to evaluate all the circumstances in order to establish whether it would be reasonable to expect the child to leave the UK, with his or her parents. If the conclusion of the evaluation is that this would not be reasonable, then the "hypothesis" that the parents will be leaving has to be abandoned and the family as a whole will be entitled to leave to remain".

12. Whilst we are grateful to both parties for their submissions on this point, we are not sure how helpful they are to our decision in the present appeals. In both KO and NA the matter under consideration was whether it would be 'reasonable' for a qualifying child to leave the United Kingdom, the test then contained in paragraph 276ADE(1)(vi) of the Immigration Rules, and remaining in s.117B(6) NIAA 2002. NA was specifically concerned with what is referred to therein as the 'strong reasons doctrine', a presumption adopted for many years in Home Office

[1] The Secretary of State was given five working days to respond; we received no further submissions.

policy to the effect that once a child has been in the United Kingdom for seven continuous years there would have to be "strong reasons" to refuse them leave to remain. By the time that those appeals were decided, the presumption had disappeared from policy, and for the reasons explained by Lord Justice Underhill in NA, its residual force did not survive the analysis in KO. That being the case, reasoned Underhill LJ, there was no presumption either way. Here, however, none of the children are qualifying, so none of the eminent discussion to which we have been referred is directly relevant.

13. The test to be applied in these appeals was simply whether the decision to refuse this family leave is proportionate. Relevant to that consideration will be the strong public interest in refusing to grant leave to those who do not meet the requirements of the rules. Whether or not we think of that consideration in terms of a 'presumption' or a 'starting point' matters not. The statutory scheme, and the jurisprudence, requires that it be placed in the balance.

14. Looking at the decision of Judge Wilsher, we are quite satisfied that he understood this to be the case, and that he gave this factor due weight. He begins his judgment by setting out the First Respondent's immigration history, noting that she is in overstayer [§1 FTT]; she admitted that parts of her asylum claim were untrue and was unable to give a clear explanation of why she had come to the UK in the first place [§2]; these matters are reiterated at §5. These facts form the backdrop to all the analysis that follows. The Tribunal, quite properly in our view, identifies that the *only* possible factor capable of outweighing those matters is the best interest of the children. It then goes on to balance its findings in that regard against the public interest considerations. Having directed itself to section 117B NIAA 2002 at its §10, the Tribunal then says this [at §11]:

> "The public interest in maintaining immigration control is very important. The first appellant sought to remain here without any real basis for doing so. She has used public funds and made a false asylum claim. These are matters of grave concern. No one should profit from such morally opprobrious behaviour…"

15. It seems to us reasonable to assume that when the specialist tribunal used the phrase "very important" to describe this public interest consideration, this was simply another way of saying that this was a matter which had attracted significant weight in the balancing exercise. We are unable to accept the Secretary of State's case to the contrary.

16. We now turn to more specific criticisms made of the decision by Mr Whitwell.

17. He submits that the Tribunal failed to have regard to the fact that this was a family who would not face any real material difficulty in relocating to Nigeria. This is in our view unarguable for the following reasons. The family had, before Judge Wilsher, sought to suggest that they would face social, practical and even security difficulties in Nigeria. He rejects much of that case. He finds that they have family there, that they would have access to funds, and that they could be accommodated in property owned by the First Respondent's father. He rejects any suggestion that they would face destitution, and at his §10 expressly finds

that there are not very significant obstacles to the First Respondent's reintegration in that country. At §11 he finds that the children "have not lost all connection with Nigeria because they retain family links there and are in contact with relatives". These passages illustrate, in our view, that the Tribunal had in its mind at all times the point that the grounds here make.

18. It was further submitted that there was an undue emphasis in the decision on the children's education. In his oral submissions Mr Whitwell went so far as to suggest that the only reason the appeal was allowed was because the Tribunal thought that they would have a better education in the United Kingdom. He reminded us of Judge Parkes' reference to the decision in Patel, to the effect that there is no human right to have a British education. With respect to our colleague Judge Parkes, we did not find the reference to Patel apposite. Patel concerned an adult student who sought to remain in the United Kingdom in order to pursue tertiary education. The Supreme Court reached the unsurprising conclusion that this was not a basis upon which to advance human rights claim. Here the situation is quite different. These are minor children, whose personal investment in the British school system is not limited to their educations: although the method of teaching and curriculum are no doubt something they value, 'school' is at present a cipher for their entire private lives outside of the home. Their friends, interests and other relationships are all found in school, and it was in this context that Judge Wilsher attached significant weight to the benefits they would derive from maintaining this status quo, and the detriment they would suffer should it be interfered with. This much is clear from the Tribunal's §11, which refers to the fact that the two eldest children have spent their "key developmental years here", that they are "integrated" here, that they are at a "crucial stage in their education" and that they would "face significant emotional harm" should they have to leave all of this behind and return to Nigeria.

19. Finally we address what Mr Bundock described as the Secretary of State's "bare rationality challenge", the contention that applying the relevant case law, these are appeals which no rational judge could have allowed. We certainly agree with Mr Whitwell that many, if not most, judges would have dismissed them. We are not however persuaded that the facts were so starkly weak that the decision to allow falls outwith the range of reasonable responses. We would in that regard observe that it was open to the Secretary of State to certify these claims under section 94 of the Nationality Immigration and Asylum Act 2002, but she did not do so.

Decisions

20. The decision of the First-tier Tribunal is upheld and the Secretary of State's appeal is dismissed.

21. There is an anonymity order in place in this case, imposed to protect the identity of the Third Respondent, as the victim of a sexual assault.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
14th July 2024