UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBERS:**
AA/03009/2014

AA/03118/2014
AA/03119/2014
AA/03120/2014

THE IMMIGRATION ACTS

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Heard at: Field House	**Decision and Reasons Promulgated**
On: 20 January 2015	**On: 6 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS OLUWATOYIN OMOLARA ALBERT SHOYOMBO
MASTER OLAJIIRE ALBERT SHOYOMBO
MASTER OLUWAFIKUNMI ALBERT SHOYOMBO
MASTER OPEYEMI ALBERT SHOYOMBO
NO ANONYMITY DIRECTIONS MADE

Respondents

Representation
For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondents: Ms N Bustani, counsel (instructed by Paul John & Co)

DECISION AND REASONS

1. For the sake of convenience I shall refer to the appellant as “the secretary of state” and to the respondents as “the claimants.”

2. The first claimant is the mother of the other claimants. She entered the UK on 13 May 2005 as a visitor together with her two sons, Olajire and Oluwafikunmi. They overstayed their leave which expired on 29 October 2005. She became pregnant with her third child. Opeyemi, who was born on 20 March 2010. She maintained that she has lost contact with her husband.

3. In a determination promulgated by First-tier Tribunal Judge Afako on 22 June 2014, he allowed the appeals under Article 8. He found that the first claimant could not make good a claim by reference to the immigration rules. She was unable to derive any benefit from the provisions of EX.1 (a) (ii)(cc) and (ii) as she had overstayed in the UK for a significant period, having entered as a visitor. Nor could she meet the requirements for private life under paragraph 276ADE.

4. He then had regard to “Article 8 consideration” [31]. This was an appropriate case in which to consider Article 8 by reference to “the national jurisprudence.” He stated that “the considerations are whether it is reasonable to remove the mother of two children who are settled in this country in circumstances where the mother has primary responsibility for the upbringing of the children.”

5. Judge Afako had already found that the second and third claimants were entitled to indefinite leave to remain here by reference to paragraph 276ADE of the rules [26]. The secretary of state has not sought to appeal against that finding.

6. In considering the mother's appeal with regard to Article 8 as well as the youngest child, he stated that the focus must be on the children, whose best interests constitute a primary consideration. The claimants live as a family unit. There are uncertainties in the evidence regarding the children's father. He does not have leave to remain in the UK and his stay is precarious. He did not find the evidence of the first claimant in relation to her husband to be credible. She sought to downplay the level of contact she has with him in this country [32].

7. Both parties accepted that the Judge erred in stating that the first claimant's appeal under Article 8 “by reference to the national jurisprudence” was to be considered on the basis of whether it is reasonable to remove her as the mother of two children settled in the UK where she has primary responsibility for their upbringing.

8. However, in granting permission to appeal First-tier Tribunal Judge Brunnen stated that the Judge may have posed an incorrect threshold for the Article 8 assessment in this case. The Judge did not identify circumstances that were compelling or which rendered the result of the mother and children's decisions under the Immigration Rules unduly harsh.

9. I found that the Judge did not properly assess the circumstances which would render their removal with their mother to be “unduly harsh” as opposed to merely unreasonable. The decision of the First-tier Tribunal was accordingly set aside following a hearing on 18 September 2014.

10. The parties submitted that the Upper Tribunal should make a fresh decision, subject to preserving the findings of fact. Various directions were made including the filing and serving of any updating evidence.

Hearing on 20 January 2015

11. The claimant attended the hearing and gave evidence.

12. I drew the parties' attention to Appendix FM, with regard to section EX: Exception.

13. Section EX is an exception applicable in cases where the other requirements of the section are met. It is provided with regard to the immigration status requirement (ELTRPT.3.2) that the applicant must not be in the UK in breach of the immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1 applies.

14. At the hearing I drew the parties' attention to E-LTRPT: Eligibility for Limited Leave to Remain as a Parent. R-LTRPT.1.1 sets out the requirements to be met for limited or indefinite leave to remain as a parent. All the requirements from 2.2 to 5.2 must be met. The relevant part of E-LTRPT.2.3 provides that the applicant must have sole responsibility for the child or the child normally lives with the applicant and not the other parent (who is a British Citizen or settled in the UK).

15. In this case, the claimant had to meet the relationship requirements and in particular E-LTRPT.2.4 (a), namely that she provides evidence that she has sole responsibility for the child, or that the child normally lives with them and that she is taking and intends to continue to take an active role in the child’s upbringing.

16. For this appeal to succeed, I must be satisfied on the balance of probabilities, the burden being on the claimants, that they meet the relevant requirements under the immigration rules or, if appropriate, under Article 8 of the Human Rights Convention.

17. Ms Bustani produced a written statement from Mrs Shoyombo with regard to the requirements of E-LTRPT 2.3.

18. Ms Oluwatoyimo Omolara Albert Shoyombo attended the hearing and gave evidence. She adopted her further witness statement dated 20 January 2015. She has set out her address. She also adopted her earlier witness statement at pages 1-5 of the bundle before the First-tier Tribunal. That statement is dated 6 June 2014.

19. She lives with her three children and claims to be solely responsible for their upbringing. It is she who chose the school which they attend (Coboury Primary School, which is now Bacon's College in respect of Olajire, the second claimant). She has contact insofar as their schools are concerned.

20. She shops for them, cooks for them and takes them to the GP when they are ill and is responsible for meeting all their day to day needs.

21. When she entered the UK in May 2005, she did so together with Olajire and Fikunmi. Her husband was not with her and they were not in contact.

22. She did meet him again in the UK in 2009. They were together for one day. Her husband was attending a conference and promised he would return to the family afterwards. This never happened and there has been no further contact until she met him again through the church in 2012. At that point she decided that she could not trust him and that he would not make a reliable father.

23. Her third child, Opeyemi, was born on 20 March 2010. He was conceived on the day she met him in 2009 “for one day.”

24. Her husband does not live with them and has no role in the children's upbringing. He does see the children on average every month. This used to be every two months and is now on a monthly basis. She allows this contact as she thinks it would be good for the boys to have some relationship with their father. However, he does not feature greatly in their lives and does not assist financially or practically.

25. She does not have much of a relationship with him and does not know about his personal life. She feels greatly let down by him and cannot trust him after previous promises, especially having regard to his absence when she gave birth to Opeyemi.

26. Opeyemi, her youngest son, has been diagnosed with a speech and language problem and is currently undergoing regular and intense therapy. She referred to various NHS letters. He presented abnormal behavioural traits such as tantrums, difficulties in communication, aggression and introverted behaviour.

27. She said that she informed her eldest child of the reasons for refusal of their application to remain. His father was there at the time. This was his birthday, and his father had come to see him.

28. In cross examination, she stated that she did not know what her husband's status is. She does not know whether he is a British citizen or settled in the UK

29. She does not speak to him much during the children's contact with him each moth because of the grief he gave her.

30. In her witness statement dated 6 June 2014, she stated at paragraph that she has a subsisting relationship with the father of her children in the UK. She was referred to that paragraph. She claimed however that she corrected her statement that day. She pointed this out to her representative before she came to court. She meant she had a good rapport and relationship then.

31. She referred to paragraph 12 of the determination of the First-tier Tribunal where it is expressly noted that she adopted her witness statement with the corrections, clarifying that she and her husband did not have a subsisting relationship and that he only came to see the children and they did not live together. She said that she amended her witness statement prior to adopting it.

32. She was asked what impact in their lives her husband had had in the UK. He only comes to see them and nothing else. She said she does not know whether he lives in the UK. Because he sees them each month, she stated that he must be living here.

33. She was asked whether he stays in the house when he sees the children. She leaves them alone with him and she remains in the kitchen.

34. She has not asked him for money for the children. She does not want to “collect anything from him.” She obtains vouchers from a food centre in Peckham. The voucher does not have a value. It is only for food. She did catering for the church and members of the church helped her with her material things[1].

35. She has not applied for benefits. The children do not obtain Child Benefit.

36. She was asked why, if she has lived on handouts, she has not asked the children's father for money. That is because she did not trust him any longer as he let her down.

1 She also stated that before the First-tier Tribunal as recorded in the determination.

37. The children are all at school. She chose the schools. She obtained her first choice. She never discussed this with her husband. Further, she is the only registered parent in respect of each child at the school. Her contact at the school is Abeola Yusuff, a family friend. She is registered as their carer.

38. In re-examination, she identified various statements from her friends. These include letters from Ms Yusuff dated 8 June 2014 – p.57. The claimants are church going. At page 47, there is a letter from the Speech and Language Therapist dated 4 June 2014 with regard to Opeyemi. Reference is made to his attendance at groups where his mother is engaged with the activities set out.

39. There is a letter from Bacon's College in Rotherhithe from the Pastoral Officer dated 4 June 2014, sent to Mrs Shoyombo alone at the address she disclosed in her evidence. The letter confirms that Olajire has attended since September 2013. There is a further letter from Bacon's College to the first claimant alone dated 23 April 2014 from the Assistant Head Teacher. Olajire's attendance has been “excellent.”

40. She said that nothing is addressed to the father. There are no photographs of their father. She referred to the respondent's bundle containing the application form. At section 2 there are questions asked in respect of any partner living with the claimant in the UK who are applying with her for an extension of stay as her dependants. It is mandatory to complete that section. She has entered “not applicable” with regard to her partner's full name, nationality and place of birth, including date of birth and gender.

41. It is also asked whether she and her partner are living together, to which she has replied “not applicable.” All the other questions regarding the partner, including his status, are answered “not applicable.”

42. Finally, she referred to a letter at page 58 from Mrs Animashaun dated 6 June 2014 who “confirmed” that the claimant and her children are known to her for more than eight years. She has been supporting them financially, spiritually and materially.

Submissions

43. Mr Duffy relied on the reasons for refusal. There it is stated that the secretary of state was not satisfied that she could meet the requirements of E-LTRPT 3.2 and EX.1(a) and (b). It is accepted that the children have been admitted to English state education and have resided here for at least seven years. However, they could re-adapt to life in Nigeria with their mother “and may become reunited with their father” who is also a Nigerian businessman.” It is accordingly reasonable for them all to return to Nigeria as a family unit.

44. Mr Duffy relied on the finding by the First-tier Tribunal Judge with regard to sole responsibility. He submitted that the evidence given at the hearing before the Upper Tribunal is not credible. There are a number of indications suggesting that the father may be on the scene. As a mother she would have been more active in her awareness as to, for example, where he works and lives. He referred to “the negative pull of the lies.” Accordingly, s.EX.1 falls away.

45. He submitted with regard to s.55 best interests and Article 8. He referred to EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 at paragraph 58. Regard must be had to the “facts in the real world.”

46. Looking at the matter outside the rules, the relationship to Nigeria is a factor to be taken account in the balance. As to the proportionality of the interference there are adverse findings in respect of the claimant. She has a poor immigration history. Although this is not the children's fault and does not ‘factor into the s.55 interests’, it does affect the proportionality in respect of all the claimants.

47. When looked at as a whole the best interests of the children are to remain with their mother (or father). If their mother has no independent right, the best place for them to be is in Nigeria. Notwithstanding relationships made in the UK, it would not be disproportionate in the circumstances for them to be removed. These are capable of being replicated abroad.

48. On behalf of the claimants, Ms Bustani relied on her skeleton argument. She submitted that there is no challenge as to the second and third claimant's appeals which were allowed outright under paragraph 276ADE(iv). There has thus been no appeal against that finding and the decision stands.

49. With regard to the first claimant, she relied on EX.1 (a) of Appendix FM. It had been contended before the Upper Tribunal that the First-tier Tribunal Judge's finding that the provisions of EX.1 did not apply to the claimant as she had been an overstayer at the time of her application [27] was an error. She referred to the wording of paragraph 3.2 (b) of the requirements relating to eligibility for limited leave to remain as a parent. The applicant must not be in the UK in breach of the immigration laws unless paragraph EX.1 applies.

50. With regard to sole responsibility, she noted the First-tier Tribunal Judge's concerns relating to the father's role set out at paragraphs 31-37, namely that she had sought to downplay the level of contact she has had with him in the UK. The Judge found at paragraph 31 of his determination that the mother had primary responsibility for the upbringing of the children.

51. There was no mention of the father in their applications. The secretary of state noted in the refusal letter that the appellant had claimed to have lost

contact with her husband although briefly meeting by accident in 2008 and had spent time together. This resulted in her becoming pregnant with Opeyemi, who was born on 20 March 2010. The absences of the father on the scene were also questioned by the First-tier Tribunal Judge [16-17].

52. She referred to paragraph 16 of the determination, where the First-tier Judge referred to evidence from the claimant's witness, Mrs Akibor, who said that in 2012, she became aware that the family had overstayed when she asked for a letter of support. The church has been supporting the family. The claimant got vouchers and members of the church helped them with food and clothes. Her husband used to come off and on, once in a while. The witness however was not sure that she would be able to recognise the claimant's husband. She could not really say when they had last met. She was not aware of where her husband was at the moment.

53. A further witness, Ms Lawrence, stated that she had not met the claimant's husband [17].

54. There is also evidence that the husband is not so involved in the children's upbringing. She referred to the documents, including the school letters and the GP letter to the claimant. That included the letter at page 47, with regard to Opeyemi's language therapy groups. His mother is engaged with the activities.

55. Accordingly, she submitted that it has been shown on the balance of probabilities that it is their mother who has been involved in their upbringing.

56. With regard to EX.1, the rules do not seek to reward a person who has overstayed in contravention of the immigration rules. The rules recognise the former policy known as DP/5/96.

57. Moving on to Article 8, the threshold is “reasonableness.” The two children have been recognised to qualify for leave to remain. They are entitled to stay. It would be unfair and inappropriate to make them choose. It is not simply because they have been here for a number of years. They are in school. The two older children have social connections as well.

58. The situation is that the family unit has spent just under ten years in the UK. The two elder children arrived here aged just under three and one. They are now 12 and 10 respectively. They have never attended school in Nigeria and life in the UK is the only life they are familiar with. They both are doing well at school and have formed social links outside the family unit. The youngest child has spent his entire life here and will be five years old very shortly. He is receiving treatment for speech problems.

59. She submitted that the three children are settled. They know of no other way of life. They have no connections with Nigeria. Lengthy periods of

time spent by children in the UK in this way have resulted in the formation of a private life which, absent countervailing factors, it would not be reasonable to interfere with.

60. She submitted that the First-tier Tribunal Judge also appropriately took account of the views of the eldest child.

61. She referred to the decision of the Upper Tribunal in Moayed v SSHD [2013] UKUT 00197 (IAC). Both the second and third claimants have completed more than seven years since the age of four. That was identified in Moayed as likely to be more significant to a child than the first seven years when they would be more adaptable.

62. She submitted that if their mother does not have sole responsibility, the appeal should be considered in accordance with Article 8.

63. She submitted that the mother's appeal succeeds on human rights grounds as the mother of two minor children who have spent nearly ten years of their lives in the UK.

Assessment

64. I have had regard to the submissions by Mr Duffy that the claimant's evidence must be carefully considered and in particular her claims made in respect of her husband, the father of the children. This must be carefully assessed.

65. There is no dispute that the claimant's two sons were under the age of 18 and had lived in the UK continuously for at least seven years immediately preceding the date of application, as required by EX.1 (a)(i)(aa) – (cc). Their appeals have been allowed under the rules. There has been no attempt made by the secretary of state to challenge the finding of the Judge that they are entitled to remain in the UK.

66. The First-tier Tribunal Judge stated, when considering Article 8, whether it is reasonable to remove the mother of two children who are settled here in circumstances where the mother has “primary responsibility” for the upbringing of the children [31]. Ms Bustani recognises that that is not the wording of Appendix FM where sole responsibility is one of the relevant requirements applicable in this case. The immigration status of the children’s father is unknown.

67. It is a requirement for limited leave to remain as a parent that the applicant must meet all the requirements of E-LTRPT: Eligibility for Leave to Remain as a Parent, and in her case, that she meets the requirements of paragraph E-LTRPT.2.2 -2.4 and E-LTRPT.3.1 and paragraph EX.1 applies. In this case, the claimant must show that she has sole responsibility for the children.

68. The meaning of “sole responsibility” has given rise to a body of case law, including cases decided before the Court of Appeal. In TD (paragraph 297(i)(e)): “Sole Responsibility” Yemen [2006] UKAIT 00049, the Tribunal examined the case law relating to the notion of “sole responsibility” in considerable detail. It concluded that “sole responsibility” is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he or she had abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. However, where both parents are involved in a child's upbringing, it would be exceptional that one of them will have “sole responsibility”.

69. The Tribunal noted that the Court of Appeal saw “sole responsibility” as a practical rather than an exclusively legal exercise of “control” by the UK based parent over the child's upbringing, including whether what is done by the carer is done “under the direction” of their parent.

70. The Tribunal set out the proper approach to questions of sole responsibility under this rule (paragraph 52). It emphasised that the term “responsibility” in the Immigration Rules should not be understood as a theoretical or legal obligation, but rather as a practical one which, in each case, looked to who in fact is exercising responsibility for the child. That responsibility may have been for a short duration in that the present arrangements may have begun quite recently. Wherever the parents are, if both parents are involved in the upbringing of the child, it would be exceptional that one of them would have sole responsibility.

71. In paragraph 52(ix), the Tribunal stated that the test is not whether anyone else has day to day responsibility, but whether the parent has continuing control and direction of the child's upbringing, including making all the important decisions in the child's life. If not, responsibility is shared and so not “sole”.

72. Mr Duffy has pointed out that the evidence of the claimant should be carefully considered, having regard to the misgivings expressed by First-tier Tribunal Judge regarding the children's father. In particular, he found that the claimant had sought to downplay the level of contact she has with him in the UK.

73. I have however had regard not only to the claimant's evidence regarding her assertions as to the children’s upbringing but also to the documentary evidence produced in support of her assertion that it is she who has been responsible for the making of all important decisions in their lives.

74. That includes decisions relating to their schooling, their health needs and evidence from other sources, including acquaintances and friends, who have referred to or at least implied the absence of the father from their lives.

75. I have had regard to the letters from the school regarding the claimants' attendance; the NHS letters with regard to the speech and language therapy given to Opeyemi and letters from the church and friends.

76. The evidence from these sources provide support for the mother's contention that it is she who has participated in their schooling. It is she alone who has been sent documentation from the school. The letters are sent to her in her name only. That is the position with regard to the medical evidence including the treatment received. There is no reference at all to any participation by their father.

77. I have noted the claimant's evidence that the father has, to a limited extent, had contact with the children, at least once a month. However, that does not appear to be regular or predictable.

78. She also stated that the father has never provided any financial or other support for the children. The evidence as to their support has been confirmed by a letter in which reference is made to the supply of food vouchers and the like to the family.

79. There is no evidence from any source suggesting that their father has been jointly responsible for important decisions relating to the children's welfare and needs. The claimant has contended that she does not have much of a relationship with their father. She does not know about his personal life. She particularly feels let down by him and cannot trust him after he has made promises in the past. He particularly disappointed her having regard to his absence when she gave birth to Opeyemi.

80. Having regard to the evidence as a whole, I am accordingly satisfied that the sponsor has shown on the balance of probabilities that she has had sole responsibility for her children's upbringing.

81. I accordingly find that she has satisfied the requirements under the Immigration Rules, and in particular EX.1 which applies to her in the circumstances. Her two sons were under the age of 18 and have lived in the UK continuously for at least seven years immediately prior to the date of application.

82. I accordingly find that she is the mother of the second and third claimants and having regard to their status in the UK, it would not be reasonable to expect them to leave the UK – EX.1(a)(i)(cc)and (ii). Insofar as the youngest child is concerned, he is four years old and his status is, I accept,

"intertwined" with that of his mother as contended by Ms Bustani. He is her dependant.

83. I have also considered in the alternative the appeals of the claimants under Article 8.

84. I have had regard to the recent authority from the Court of Appeal, including MM and Others v SSHD [2014] EWCA Civ 985. Ms Bustani relied on the judicial review decision by the Upper Tribunal in R (on the application of Oludoy and Others) v SSHD (Article 8 – MM (Lebanon) and Nagre) 1 JR [2014] 00529 (IAC).

85. Having reviewed the authorities, Upper Tribunal Judge Gill found that there was nothing in Nagre, Gulshan or Shahzad that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the immigration rules and which could lead to a successful Article 8 claim.

86. These authorities should not be read as qualifying or fettering the assessment of Article 8. There is no utility in imposing a further intermediate test – paragraph 128 of MM, supra, as a preliminary to a consideration of Article 8 claims beyond the relevant criterion based rule.

87. In assessing the issue of proportionality, I have had regard to the former policy of the secretary of state referred to by Ms Bustani which attaches significant weight to the fact that a child may have spent a period of seven years in the UK – DP5/96. That policy was withdrawn. The ministerial statement in that regard - statement by Mr Phil Woolas, December 2008 - noted that the original purpose of and the need for the concessions has been overtaken by the Human Rights Act and changes to the Immigration Rules.

88. The fact that a child has spent a significant period of their life in the UK will continue to be an important factor to be taken into account by case workers when evaluating whether the removal of their parent is appropriate.

89. I have also considered the Upper Tribunal decision in Moayed, supra, which considered the issue of the likely nature of any private life formed by a young child. As already noted, the Tribunal found that seven years from age 4 is likely to be more significant to a child than the first seven years. The younger child is more likely to be focused upon their parents and would not have formed social bonds outside the family unit. The older child, however, is more likely to have formed social networks with peers and others. The impact of removal upon the "older" children's private lives is therefore likely to be more disruptive.

90. In this context I have also had regard to the need to consider the best interests of the children pursuant to s.55 of the 2009 Act.

91. Having directed myself in accordance with Razgar, I find that the first four questions are answered in the affirmative.

92. I accordingly move to question 5 of Lord Bingham's questions, where I am required to, and do, conduct a balancing exercise under Article 8. I consider all the factors already referred to including the personal circumstances of the claimant, her children and the consequences for them of a return to Nigeria. I consider the cumulative impact of such factors.

93. The two elder children have had a lengthy period of stay in the country, as noted by the First-tier Tribunal Judge. The children are 12 and 10. I have had regard to their school report. I have also considered the statement by Olajire himself who has written about the impact of the decision that he is to be removed. He received this news on his birthday.

94. The youngest child was born in the UK. As already noted he has been diagnosed with speech and language difficulties. The documentation testifying that he has been undergoing regular and intense therapy under the NHS has been produced. His problems would be likely to be exacerbated were he to be removed from the UK.

95. Moreover, the children have never attended school in Nigeria. They arrived here when they were three and one years old. Both have not only done well in school but have formed social links outside the family unit. The youngest child will be five in two months.

96. I find no countervailing factors to displace the recognition by the respondent's policy that lengthy periods of time spent by children in the UK result in the formation of a private life, in respect of which it would not be reasonable to interfere. I have taken into account the legitimate aim of proper immigration control.

97. However, the inevitable result of removing the mother from the UK would be that her two elder children who have indefinite leave to remain in the UK, would follow her.

98. Having regard to the cumulative impact of the adverse effects of removing the claimant and the lives of her children, I find that the proposed interference is disproportionate in the circumstances.

Notice of Decision

I dismiss the secretary of state’s appeal.

No anonymity direction is made.

Signed Dated 3 February 2015

Deputy Upper Tribunal Judge Mailer