IAC-PE-SW-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/24405/2014

**THE IMMIGRATION ACTS**

**Heard at Manchester**
**On 7th January 2015**

**Decision & Reasons Promulgated**
**On 20th January 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LEVER**

**Between**

**MR ADEYINKA ADEBAYO**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Miss Pledger
For the Respondent: Mr McVeety

**DECISION AND REASONS**

**Introduction**

1. The Appellant born on 31st July 1969 is a citizen of Nigeria. The Appellant was represented by Miss Pledger of Counsel. The Respondent was represented by Mr McVeety, a Presenting Officer.

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**Substantive Issues under Appeal**

2. The Appellant had made application to remain in the United Kingdom on Article 8 grounds and that application had been refused by the Respondent on 22nd May 2014. The Appellant had appealed that decision and his appeal was heard by Designated Judge of the First-tier Tribunal Baird sitting at Manchester on 1st September 2014. The judge dismissed the Appellant's appeal.

3. The Appellant had made application for permission to appeal on the basis that the judge had erred by applying the wrong legal test. Firstly it was said that the Appellant was the parent of a qualifying child and the statutory provisions of Section 117B(6) were satisfied and the public interest did not require the Appellant's removal from the UK. Secondly it was said the judge had erred in finding there was no evidence that it would be unreasonable for the Appellant's children to accompany him to Nigeria given that the Respondent had already granted discretionary leave to the Appellant and his children.

4. Permission to appeal was granted by Upper Tribunal Judge Deans on 30th October 2014. The judge found that it was arguable that no findings had been made as to the best interests of the children in the UK and other grounds were arguable. The Respondent had opposed the permission on 5th November 2014. Directions were issued that the matter should come before the Upper Tribunal firstly to decide whether an error of law had been made or not. The matter therefore comes before me in accordance with those directions.

**Submissions on behalf of the Appellant**

5. Miss Pledger said that the Appellant had a qualifying child in the sense that there was a child who had been in the UK for more than seven years and therefore Section 117B(6) was clear that there should be no removal unless it was reasonable to do so. it was submitted that the assessment of reasonableness made by the judge had not gone far enough in particular in circumstances where the Respondent had given discretionary leave to the Appellant and his children and therefore the proper inference was the Respondent had found it would be unreasonable to remove. It was further submitted that a period of discretionary leave had been given in 2010 for three years and that had been renewed on 14th November 2013 giving the Appellant and his two children a further three years' discretionary leave.

6. It was further submitted that on the renewal of the discretionary leave application in November 2013 very little medical evidence relating to the child Genesis had been submitted and therefore discretionary leave was unlikely to have been based solely or mainly on the medical evidence of the child. It was said that that schedule of evidence was before the First-tier Tribunal Judge.

**Submissions on behalf of the Respondent**

7. Mr McVeety noted that the decision disclosed that there were no real problems at the date of hearing in respect of the child Genesis. Mr McVeety referred me to the case

of **Zoumbas** and **EV (Philippines)** as case law demonstrating that the UK does not provide education or medical facilities for people throughout the world. It was further submitted that as the Appellant and her children had discretionary leave it was not a question of forcing them to go back nor was the judge deciding whether they should be removed and the discretionary leave curtailed but merely whether at the date of hearing it was reasonable for the children to accompany the Appellant.

8. At the conclusion of the hearing I reserved my decision to consider matters and I now provide that decision with my reasons.

**Decision and Reasons**

9. This is not an easy case. The Appellant had first entered the United Kingdom on 5th October 2005 on a family visit visa valid until 28th December 2005. Thereafter he appears to have remained unlawfully until an application for leave to remain as a dependent spouse was made on 23rd February 2009 which was then withdrawn in May 2009. In June 2009 his leave to remain application was refused.

10. On 18th April 2012 the Appellant made a further application to remain outside of the Immigration Rules under Article 8 of the EHCR. That application was refused on 5th June 2013. Thereafter there were a number of representations from the Appellant's solicitors and requests for evidence from the Home Office which culminated in the refusal letter of 22nd May 2014. The Respondent has considered the Appellant's family and private life under Appendix FM of the Immigration Rules but found that he was neither married to his partner nor did he meet the partner requirements having failed to provide sufficient evidence of cohabitation for two years or more. The Respondent had looked at the basis of the Appellant's claim to remain as a parent but found his evidence that he was the main carer as stated by him on 18th April 2012 to be in conflict with the evidence submitted by his partner in support of her application for discretionary leave to remain. Together with other evidence the Respondent therefore concluded that the Appellant did not have a genuine and subsisting parental relationship with the two children and furthermore therefore did not fall within the terms of paragraph EX1. In terms of private life the Respondent had noted that the Appellant was 44 years of age and had lived in the UK for eight years and further found that he had social, cultural and family ties in Nigeria including two children in that country and therefore did not meet the criteria of paragraph 276ADE of the Rules. The Respondent had further considered the best interests of the children and whether there were any exceptional circumstances.

11. The judge had outlined in summary the relevant immigration history, the concerns raised by the Respondent and the evidence that was provided to her at the hearing. It was noted by the judge at paragraph 25 that the Appellant's representatives accepted the Appellant did not meet the requirements of Appendix FM. The Appellant's representatives as noted within the skeleton argument submitted to the judge relied upon paragraph 276ADE and Section 117B(6) of the 2002 Act.

12. In terms of background the Appellant had lived with his partner between 2005 and 2009 and thereafter had been separated from her for two or three years. There were

two children in the UK of that union namely Genesis born on 26th June 2007 and Hope born on 4th May 2010. The Appellant's partner and the two children were granted discretionary leave to remain for a three year period by the Home Office in 2010. No published reasons were provided to any party so far as can be seen as to the basis for granting discretionary leave in 2010. However the evidence submitted in respect of a request for discretionary leave together with a Home Office file note would indicate that it was on the basis of the medical condition of the eldest child Genesis and potentially mental health problems suffered by the Appellant's partner. There have been no applications submitted by the Appellant at the same time as his partner and their two children. The Appellant's partner and her two children were then given further discretionary leave to remain in or about November 2013 until 2016. Again so far as can be seen there were no published reasons given for the grant of discretionary leave in 2013. As a matter of policy it is regrettable that when granting discretionary leave the Home Office generally choose not to provide reasons for that decision. Whilst it is accepted that it is a matter of discretion for the Home Office as a matter of openness it would seem appropriate that the reasons behind the grant of discretionary leave are provided or are a matter of record. That is particularly important where those who have been granted discretionary leave seek to regularise their stay in some other capacity or the basis of discretionary leave may be germane in other proceedings.

13. The judge was aware that the Appellant's partner and two children had been granted discretionary leave in 2010 and that had been renewed in November 2013 for a further three years. She had asked the Appellant's partner as to the basis of discretionary leave granted in November 2013 and the Appellant's partner's evidence was that it was on the basis of the medical treatment being given to her son. It was submitted by Miss Pledger that in fact the documentary evidence provided to the Home Office in support of that application for discretionary leave relied very little on the medical evidence of Genesis but in the absence of any reasoning provided by the Home Office it is extremely difficult for any party or representative to know with any clarity the basis upon which that discretion was given. It is certainly understandable why the Appellant's partner would assume it was based on the medical condition of her son as that had clearly played a significant part in the granting of discretionary leave in 2010. There is a clear inference from the judge's decision that she had presumed given the evidence provided by the partner that discretionary leave had been granted essentially on the basis of Genesis's medical condition and at paragraph 22 it is noted that she had questioned his condition and at paragraph 26 whilst noting that he was currently suffering from an illness requiring treatment in the UK there were no submissions made that that treatment would not be available in Nigeria. She further noted that there was very little medical evidence, prognosis or any real indication of the child's condition or the difficulties this condition may cause him. It is not suggested the judge was wrong in her assessment of the medical condition or the state of evidence relating to the medical condition of Genesis.

14. The judge accepted that the Appellant played a part in family life with his wife and two children. She had been specifically referred to paragraph 117B(6) of the

Nationality, Immigration and Asylum Act 2002. That essentially states that 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.

The thrust of the submissions made on the Appellant's behalf was that as the Home Office had decided that the wife and two children should be granted discretionary leave they must have concluded that it would have been unreasonable to expect the removal of the wife and children and accordingly when looking at Section 117B it could therefore be said that it would not be reasonable to expect the child to leave the United Kingdom under the terms of Section 117B(6)(b).

15. There is some force in that argument raised. However there are other factors of some relevance. The judge from her decision had accepted the Appellant had a genuine and subsisting parental relationship with his two children Genesis and Hope. Those children were born in 2007 and 2010 and one therefore resided in the UK for a sufficient period of time to be a qualifying child. Secondly as outlined above there has never been produced so far as can be seen to any party any reasoning behind the Home Office decision to grant discretionary leave to the wife and two children in 2013. It is difficult therefore to know what factors were looked at by the Home Office, what assessment they had made, if any, in respect of reasonableness and what formed the basis of the conclusion to grant discretionary leave. There was nothing therefore before the judge in terms of a reasoned decision by the Home Office that would have allowed her to have assessed those factors. The only evidence before the judge as to what may have been the basis for discretionary leave was that which she was told by the wife namely the medical condition of the son Genesis and that was evidence that she had considered as at the date of hearing and as set out in paragraph 26 of her decision. Further the judge was not being asked to review or curtail the discretionary leave granted to the wife and two children but merely to decide upon the removal or not of the Appellant who had never been granted discretionary leave at any stage.

16. The judge had noted that the Appellant and his wife were both Nigerian citizens as were the two children in the UK. She had also noted that the Appellant and his wife had two other children in Nigeria who for circumstances described in paragraph 26 of the decision were not eligible to make application to come to the UK. The judge had found that the Appellant did not meet the requirements of the Immigration Rules and that much appears to have been conceded. She was therefore looking at the Appellant's case outside of the Rules in terms of the appropriate case law referred to at paragraph 23 of the determination namely **<u>Gulshan</u> [2013] UKUT 640** and **<u>MM</u> [2014] EWCA Civ 985**. The judge found as noted at paragraph 28 that there was nothing exceptional or compelling that would warrant a finding that the Appellant's removal would be disproportionate. She was entitled to reach that

finding in respect of the Appellant. In terms of the effect on the wife and children she had also concluded there were no insurmountable obstacles to his wife accompanying him to Nigeria which was a conclusion open to her on the evidence. In respect of the children and the interplay with Section 117B(6) of the 2002 Act she was entitled to conclude that it would not be unreasonable for the children to accompany him to Nigeria. Firstly she had concluded that there was no evidence of any real problems from a medical point of view in Genesis going to Nigeria. Secondly she had noted that the Appellant and his wife had two other children in Nigeria and accordingly therefore a removal to Nigeria would result in the unification of the family. Further as indicated above the judge was not being asked to review the reasons behind the grant of discretionary leave to the wife and children and to reassess the factors and evidence taken into account by the Home Office in reaching their conclusion to grant discretionary leave. That was not the task of the judge in this appeal of the Appellant and furthermore it would in any event have been an impossible task for her to perform given the total absence of any reasons by the Home Office in that decision. The question the judge needed to answer was whether on the evidence presented it would or would not be reasonable to expect the children to leave the UK. The judge concluded that it was not unreasonable which was a conclusion open to her.

17. It was noted in the permission to grant an appeal that the judge had failed to consider the best interests of the children. It is true that she did not specifically refer to Section 55 of the Borders Act 2009 but she had considered the documentary evidence that had been produced together with the oral evidence. It is clear that she had assessed the medical evidence relating to Genesis and indeed at paragraph 16 had noted the up-to-date medical report stating that the child's general health was excellent and that there had been an improvement in his behaviour. She had accepted that there was a family life existing between the Appellant, his wife and the two children. Whilst not explicitly stated given the ages of the children in particular the youngest Hope it is a proper presumption in the absence of any evidence to the contrary of which there was none that their best interests were to be with their parents. The judge had also noted that those two children in the UK had two siblings in Nigeria and the judge has specifically said that it would be best interests of those two children in Nigeria to be reunited with the rest of the family who were in the UK. Again whilst not explicitly stated it is a proper inference that the reverse is also true that it would be the interests of the two children in the UK to be reunited with their siblings in Nigeria.

18. Whilst the judge could perhaps have provided more detail or analysis relating to the best interests of the children in the UK it is clear that she had considered all of the documentary evidence provided, had assured herself of the current medical condition of Genesis and had noted the not insignificant feature of the reunification of siblings to form one family. In those circumstances whilst it could be argued it was erroneous not to have provided more reasoning it could not be said that the decision reached by the judge would have been any different simply on the basis of a somewhat lengthier assessment or reasoning. To that extent if there was an error of law it was not material.

**<u>Notice of Decision</u>**

19. I find no material error of law was made by the judge in this case and I uphold the decision of the First-tier Tribunal.

Signed Date **19th January 2015**

Deputy Upper Tribunal Judge Lever