Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24324/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
on 24 July 2017	**On 31 July 2017**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

A E ENINAMAWOMA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, instructed by Latta & Co, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent refused the appellant leave to remain, for reasons explained in a decision dated 18 June 2015.

2. First-tier Tribunal Judge Farrelly dismissed the appellant's appeal for reasons explained in his decision promulgated on 6 April 2017.

3. The one ground of appeal to the UT is as follows:

> Error in finding that the tribunal was not satisfied that it would be in the best interests of the children to remain in the UK.
>
> The tribunal erred in law at paragraph 16 [by] failing to exercise anxious scrutiny and take into account material evidence. The tribunal says that the children "are at an age that they can readily adapt to life [in Nigeria]". In *EA v SSHD* [2011] UKUT 315 at ¶41 it is noted that long residence after the age of 4 is likely to have greater impact on the child. The tribunal failed to fully consider:

- the proximity of the child's age to the significant age of 7;
- the fact that she has never left the UK.

The tribunal therefore also erred in law by failing to apply *EA*. An exercise of anxious scrutiny would have resulted in these factors been fully considered together with the subjective evidence lodged.

4. Mr Winter referred to the decision at ¶12, which says that the rules are designed to be article 8 compliant, and that features justifying consideration outside the rules "must be exceptional". He submitted that was an error of legal approach, since illustrated by *Agyarko* [2017] UKSC 11. He further submitted that at ¶15 there is another error, "The need to consider the best interests of the children is separate from the proportionality question", was another error, as such assessment is well established as an essential part of the exercise, and that the errors were material, as on a correct approach, the same result was not inevitable.

5. Mr Matthews submitted thus. The ground of appeal is narrowly drawn. There was no reason to think the tribunal left out of account the obvious facts before it. The ground was essentially only a "near miss" argument. In any event, the 7-year mark would not dictate the outcome. There had been nothing to show any significant detriment to the children through leaving the UK. Nothing said in *Agyarko* made the appellant's case a better one. The decision was consistent with the case law. There was no basis on which to interfere.

6. I reserved my decision.

7. *Agyarko* deals with "exceptional circumstances" at ¶54 – 60. At ¶57 the Court says that ultimately a tribunal:

> … has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

8. It is ever more plain that the word "exceptional" should be avoided by Judges; see this week also *Vishal Suri v SSHD*, [2017] CSIH 48, where Lord Glennie, giving the opinion of the Court, said:

> It may be that references to exceptionality … are apt to over-complicate … We would suggest that use of that word in describing the test is better avoided in the future.

9. That said, every decision which uses the word is not thereby wrong as a matter of law. The test for a case to succeed outside the rules has been variously described,

with "exceptional" moving in and out of the definitions, and used in different senses; but the standard for a case to succeed outside the rules has not changed, and remains high. I see no error of law in the judge's self-direction at ¶12 which might have made even a slight difference to his assessment on the facts.

10. The first sentence of ¶15 is badly put, but decisions must be read fairly and as a whole. The judge meant that the best interests of the children had to be assessed independently from the demerits of the appellant's immigration position, because that is what he proceeded to do. It is equally plain that he then factored that assessment into the proportionality outcome. Having found no significant detriment to the children through departure to Nigeria, the outcome was properly justified.

11. The above two points do not arise from the ground of appeal, which is, as Mr Matthews pointed out, a narrow one. It asserts that the facts were not considered when they clearly were, and that case law should have dictated another outcome, when it did not. It is simply a disagreement.

12. The judge reached a decision which was open to him, taking account of the best interests of the children. It did not turn on any subtle distinction in the law, but was firmly rooted in the facts. The appellant has demonstrated no error which would entitle the UT to interfere.

13. The decision of the First-tier Tribunal shall stand.

14. No anonymity direction has been requested or made.

28 July 2017
Upper Tribunal Judge Macleman