Upper Tribunal
(Immigration and Asylum Chamber)

E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC)

THE IMMIGRATION ACTS

Heard at Field House | **Determination Promulgated**
On 12 July 2011 | **22 July 2011**

Before

MR JUSTICE BLAKE, PRESIDENT
SENIOR IMMIGRATION JUDGE JARVIS

Between
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Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Rudd, instructed by Gulbenkian Andonian Solicitors
For the Respondent: Ms D Cantrell Senior Home Office Presenting Officer

(i) *The correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Where it is in the best interests of a child to live with and be brought up by his or her parents, then the child's removal with his parents does not involve any separation of family life.*

(ii) *Absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family*

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unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case.

(iii) *During a child's very early years, he or she will be primarily focused on self and the caring parents or guardian. Long residence once the child is likely to have formed ties outside the family is likely to have greater impact on his or her well being.*

(iv) *Those who have their families with them during a period of study in the UK must do so in the light of the expectation of return.*

(v) *The Supreme Court in ZH (Tanzania) [2011] UKSC 4 was not ruling that the ability of a young child to readily adapt to life in a new country was an irrelevant factor, rather that the adaptability of the child in each case must be assessed and is not a conclusive consideration on its own.*

DETERMINATION AND REASONS

The Facts

1. The appellants, citizens of Nigeria, whose dates of birth are given as 6 January 1968; 14 April 2005; 8 November 2006, and 2 April 1979 respectively, shall be referred to as the first, second, third and fourth appellants in this determination. They appeal against decisions of Immigration Judge Gurung-Thapa, who dismissed the appellants' appeals on human rights grounds pursuant to Article 8 ECHR, in a determination issued on 31 January 2011.

2. The immigration history of the appellants is this. The first appellant entered the UK on 30 November 2004 as a student. The second and fourth appellants entered the UK on 27 October 2005 in possession of valid entry clearance as the dependents of their student father/husband, with leave until 4 February 2006.

3. The first, second and fourth appellants were granted periods of leave to remain as a student and his dependent family until 31 August 2008, as was the third appellant, following her birth in the UK on 8 November 2006.

4. A further period of such leave was granted to the appellants from 17 September 2008, when the first appellant was granted leave as a tier 1 post study work migrant under the points based system (PBS), to 17 September 2010.

5. The fourth appellant is qualified as a lawyer in Nigeria where she had worked as a lawyer before coming to the UK in 2005. She took steps to take the Qualified Lawyers Transfer Test (QLTT) to enable her to practise as a solicitor in England and Wales, passing the necessary examinations and then seeking the required work experience. She did not, however, complete the necessary period of work experience as Lloyds bank, for whom she had been working, were unable in the event to sponsor her as a tier 2 PSB applicant. As it was too close to the expiry of her leave by the time she discovered the inability of Lloyds to sponsor her, she made the application that became the subject of her appeal. The Immigration Judge finds that it was by no means certain that the fourth appellant would have succeeded in a tier 2 application even if there had been a sponsor and sufficient time in which to lodge it.

6. The Secretary of State refused applications for an extension of stay on 26 October 2010. The respondent was not satisfied that leave to remain was being sought for a purpose covered by the Immigration Rules or that there were any exceptional, compelling or compassionate circumstances to justify granting leave to remain outside the Rules so that the applications fell to be refused under para 322(1) of HC 395 (as amended). She went on to consider the applications under article 8 ECHR, taking the view that whilst the appellants may have established a private and family life in the UK, they would all be returning home together as a family. The state having the right to control entry of non-nationals into its territory, it did not follow that an individual could choose where to enjoy private life, and any interference with the private lives of the appellants was justified in the interests of immigration control.

The Immigration Judge's decision

7. The Immigration Judge noted that the first appellant had failed to produce any certificates to show that he had been awarded an MSc Information Technology as claimed. In addition, she took into consideration that the appellants were all granted leave to remain on the strength of the first appellant's claimed qualification of post graduate diploma in business management dated July 2008 (p62 appellants' bundle) from the Cambridge College of Learning (CCOL). He also lodged a transcript of his academic record at CCOL which states that he commenced the course in October 2007 and finished in July 2008. The judge took into account the guidance of the Tribunal in NA and Ors (Cambridge College of Learning) Pakistan [2009] UKAIT 00031 in which it was held that the CCL never ran any such course and that a person relying upon a certificate of such an award will be making a false representation and will fall foul of para 322(1A) of the Immigration Rules. Without going so far as to find that the first appellant does fall foul of para 322(1A), the judge concludes that the case law guidance is contrary to his evidence and that his credibility is thereby adversely affected.

8. The Immigration Judge took into consideration the evidence going to private life outside of work in the UK. The first and fourth appellants are said to be active members of the Lovesoul Choir and have raised money for charity. The first appellant is said to be a volunteer teacher at Covenant Life Ministries where the second and third appellants attend Sunday school. The second appellant has been a pupil at the Holy Family Catholic Primary School, Southampton, since 3 September 2009. The third appellant has attended the Trust Taplins Childcare Learning Centre nursery since 2 February 2009.

9. The Immigration Judge concluded that the first and fourth appellants are well educated individuals. The first appellant has worked for a considerable period of time in Nigeria in the IT field. He has a registered business in the UK, but it is not operational. He has a business in Nigeria in partnership. The first appellant is qualified as a lawyer and has been employed as such in Nigeria. She has added to her work experience whilst in the UK. Both have their parents in Nigeria and the appellants have visited Nigeria since having come to the UK. There are siblings,

most of whom appear to be abroad. There was no reason why the first and fourth appellants would not be able to take up work again in Nigeria, whether in their own businesses or as employees.

10. As for the second and third appellants, the judge deals with their appeals at para 29 of her determination. She was referred by the respondent to the case of Holub and Anor v SSHD [2000] EWCA Civ 343, stating that it was held that a child's right to education whilst in the UK does not carry with it the right to stay here. The Immigration Judge noted that whilst the respondent must take into consideration any educational difficulties it is said that a child will suffer if returned to the country of origin as part of the compassionate grounds for granting exceptional leave, she is not obliged to take a view as to whether the child's right under article 2 of Protocol 1 will be infringed there.

11. The Immigration Judge noted that the second appellant was in her first year at primary school and that the third appellant, (who was at nursery), was born in the UK. However, noting that the whole family would return home together, she finds that the second and third appellants are of an age where they will be able to re-adapt to life in Nigeria. There are English speaking schools and they would attend such a school or schools, following which, any problems they may have had in understanding the accents of their grandparents in the course of visiting Nigeria, or visits by the grandparents to the UK, would soon be overcome.

12. The Immigration Judge concluded that the respondent's decision entailed no breach of family and private life rights of any of the appellants.

13. The First-tier Tribunal granted permission to appeal on 7 April 2011 only in relation to ground 2 of the grounds:

> "Ground 2 refers to *ZH* (Tanzania) [2011] UKSC 4. It is arguable that in her assessment of the effect on the children of removal the Immigration Judge does not give effect to the principle of the centrality of the welfare of the children as set out in *ZH*(Tanzania), and to that extent it is arguable that the Immigration Judge made a material error of law."

Appellants' Submissions

14. Mr Rudd on behalf of the appellants submitted a written skeleton argument dated 12 July 2011 on which he relied. It was accepted that the appellants had no claim under the immigration rules. Father had run out of study leave and mother had no sponsor for a tier 2 application. The grant of permission was in relation to article 8 and the appellants assert that the following facts are relevant to the assessment of the article 8 rights of the children and consequently the family:

    a. Nigeria is a foreign country to the children
    b. The second appellant arrived in the UK when she was six months old
    c. The third appellant was born in the UK

d. Neither child knows nor has any recollection of Nigeria
e. The children do not speak any of the native languages of Nigeria
f. The children have lived at the same address since their arrival and it is the only home they have known
g. The appellants have lived in the UK lawfully throughout their entire stay
h. The fourth appellant has an exemplary record of employment and effort toward qualifying as a solicitor in the UK and is in a difficult position due to the inability of her employer to make good assurances given to her that they would sponsor her as a tier 2 migrant
i. The appellants have complied with all conditions attached to their stay
j. The first and fourth appellants have made substantial financial, personal and professional investments toward the settlement and integration of the family in the UK and a significant contribution to British society through their voluntary and charitable work.

15. There was an error of law because the Immigration Judge did not give effect to the centrality and primacy of the welfare of the children when considering the proportionality of the interference with their acknowledged article 8 ECHR rights and this was a material error of law. The Supreme Court in ZH (Tanzania) establishes that the best interests of the children are a primary consideration and although they will not always determine the outcome of a case, no other factor should be given more weight. The best interests of the children must be considered first (Lady Hale para 26). Mr Rudd also referred to Lord Kerr's judgment at para 46.

16. Mr Rudd submitted that the best interests of the children in this case are clearly served by allowing them to remain in the UK, the only country they have known and that they consider home. It goes further than the time that they have spent in the UK. Nigeria is alien to them. They would be taken away from their home, school, friends and all they have known, to live in an essentially foreign country.

17. As to countervailing reasons, the immigration history of the parents in this case does not bear comparison with those in ZH (Tanzania) and the only countervailing factor was the maintenance of firm and fair immigration control. However, there were no reasons in this case to conclude that such a reason has the compelling force necessary to outweigh the best interests of the children. It was for the respondent to demonstrate that there were reasons of compelling force that outweigh the best interests of the children and such reasons did not, in his submission, exist so that the appeals should be allowed.

18. Ms Cantrell submitted that we should find that the determination disclosed no material error of law. All that could have been considered had been considered even when applying ZH (Tanzania). The judge does consider the children at para 29 and has considered all aspects relevant to their best interests including their wider family.

19. We reserved our decision which we now give with our reasons.

The decision in ZH (Tanzania)

20. Mr Rudd took us to paragraph 29 of the judgment where Lady Hale considers what might be encompassed in the 'best interests of the child' :

> "29. Applying, therefore, the approach in *Wan* to the assessment of proportionality under article 8(2), together with the factors identified in Strasbourg, what is encompassed in the "best interests of the child"? As the UNHCR says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in *EB (Kosovo),* it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away."

21. Further, at para 31, Lady Hale states:

> "31. Substituting "father" for "mother", all of these considerations apply to the children in this case. They are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community (as might have been the case, for example, in *Poku*, para 20, above). But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well".

22. Lord Kerr concurring said:

> "46. It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.

> 47. The significance of a child's nationality must be considered in two aspects. The first of these is in its role as a contributor to the debate as to where the child's best interests lie. It seems to me self evident that to diminish a child's right to assert his or her nationality will not normally be in his or her best interests. That consideration must therefore feature in the determination of where the best interests lie. It was also accepted by the respondent, however, (and I think rightly so) that if a child is a British citizen, this has an independent value, freestanding of the debate in relation to best interests, and this must weigh in the balance in any decision that may affect where a child will live. As Lady Hale has said, this is not an inevitably decisive factor but the benefits that British citizenship brings, as so aptly described by Lord Hope and Lady Hale, must not readily be discounted."

Did the immigration Judge make an error of law?

23. The appellants rely on the failure of the Immigration Judge to apply the guidance in ZH (Tanzania) and in particular to fail to treat the best interests of the second and third appellants as a first and a primary consideration.

24. We note that she does not appear to have been helped in her task, as although she determined the appeals on 31 January 2011, a few days before the judgment in ZH (Tanzania) was issued on 4 February 2011, neither party referred her to the existing guidance of the Upper Tribunal in LD (Article 8-best interests of child) (Zimbabwe) [2010] UKUT 278 (IAC), and in particular to paragraph 3 of the guidance:

> *"3. The interests of minor children and their welfare are a primary consideration. A failure to treat them as such will violate Article 8(2)".*

25. In addition, s. 55 of the Borders, Citizens and Immigration Act 2009, that provides a safeguarding duty in all immigration decision making, as is referred to by the Supreme Court in ZH (Tanzania), was in force at the time of the hearing and no regard was had to it, although again the judge does not appear to have been referred to it by the parties (there is no mention, for example, in the appellants' skeleton argument that was before the Immigration Judge).

26. Although the child appellants before us are not British citizens and although the immigration decision under appeal does not contemplate the separation of a family, we recognise that an application for discretionary leave by children who have resided in the United Kingdom for five and four years and the youngest of whom was born here and has lived here all her life, engages a claim to respect for the private life of the child under Article 8(2) and thus requires an assessment of the best interests if the children and the impact of the decision under appeal on their welfare.

27. The case of Holub and Anor, relied on by the respondent is of limited assistance. The question is not whether the child has a right to stay to continue with education under Protocol 1, Article 2 of the ECHR but: first, whether private life is being interfered with; second, if so, whether the interference is sought to be justified for reasons of national security, public safety or the economic well-being

of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others; and third, whether the interference was necessary, that a fair balance of the competing interests and proportionate having regard to the interests of the child as a first and primary consideration.

28. The Immigration Judge notes that the second appellant is in year one at primary school. She then notes that the third appellant was born in the UK. The fact that the third appellant attends nursery education is overlooked, and the Immigration Judge then moves straight to making a general conclusion unsupported by reasons, that: "However, both are of an age where they will be able to re-adapt to life in Nigeria," and in so doing, overlooks that the second appellant left Nigeria aged six months so will have little or no memory of life there, and that the third appellant was born in the UK and has never lived in Nigeria.

29. We are satisfied that there was a material misdirection, and that analysis of the best interests of the children entirely through the prism of the right to education was too narrow an approach. The error might well be a material one and we will accordingly set aside the decision and remake it in the light of the evidence before the judge and the submissions made to us.

Our conclusions

30. In immigration appeals the burden of proof normally rests with an appellant, the standard of proof being the balance of probabilities. In coming to our determination, following s. 85(4) of the 2002 Act, we may take into account evidence about any matter which we think relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision. We will assume that where the Secretary of State is proposing to refuse to grant applications for exceptional discretionary leave to remain made when the applicants each have leave to remain she should look ahead to any compassionate factor that would be relevant if making a removal decision as well as making an Article 8 assessment.

31. Mr Rudd founds upon his central submission that the second and third appellants have been in the UK for some 5 or 6 years, therefore the UK is their home and Nigeria is a foreign country, from which it follows that they should be allowed to remain in the UK, where they are at school. There are no countervailing factors he submits, because, like the children, their parents have good immigration histories and are integrated into their community.

32. It will be recalled that former policy DP5/96, which came to be referred to as 'the Seven Year Child Concession' was said to strike a balance between safeguarding the interests of children who have established close connections with the UK over a significant period of time and the need to ensure that no incentive is provided to parents to seek to circumvent and abuse the system of immigration control. In withdrawing the policy on 9 December 2008 it was acknowledged by the Minister

that a child's residence in the UK will continue to be an important relevant factor in removal decisions that would in future be decided under article 8 ECHR

33. Apart from a reference to 7 years residence as a basis for granting leave to remain in the absence of countervailing factors, the policy made reference to other matters but these were not to be treated as exhaustive and each case still had to be considered on its individual facts:

> "Whilst it is important that each individual case must be considered on its merits, the following are factors which may be of particular relevance:
>
> - (a) the length of the parents' residence without leave;
> - (b) whether removal has been delayed through protracted (and often repetitive) representations or by the parents going to ground;
> - (c) the age of the children;
> - (d) whether the children were conceived at a time when either of the parents had a leave to remain;
> - (e) whether return to the parents' country of origin would cause extreme hardship for the children or put their health seriously at risk;
> - (f) whether either of the parents has a history of criminal behaviour or deception."

34. In addition, there is a Criminal Casework Directorate 'Children and Family Cases Process Instruction' in which the UKBA acknowledges its duty to carry out its safeguarding instruction in removal cases. The duty is defined as protecting children from maltreatment; preventing impairment of children's health or development; ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully.

35. In our judgment, putting together the various sources of guidance noted above, the correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Here the parents and the children are Nigerian. The parents came here for the temporary purpose of study by the first appellant and neither they nor their children had any basis of expectation that they would be allowed to make their future home here. The children have no connection with the United Kingdom by way of nationality or any other nexus independent or their residence as being part of the parents household.

36. It is clear from the evidence and findings of the Immigration Judge that this is a family unit that functions effectively, the parents having been well-educated, in employment, providing properly for the needs of their children, parenting them appropriately, and there is no evidence that shows or tends to show that the interests of the children or either of them is best served by separating them from their parents. There is no evidence to suggest that the return of these children to

Nigeria with their parents places them at any risk of harm or prejudice to their welfare.

37. The third appellant has been resident in the United Kingdom for five years and her younger sister four years at the date of the respondent's decision. A further nine months residence has taken place since the decision has been under appeal. Neither under the former DP/5/96 nor any other source of guidance referred to us would residence of that duration suggest the whole family should now be permitted to remain here.

38. We recognise that these periods represent most of the second appellant's and all of the third appellant's life, and that there might come a time when it would be contrary to their best interests and disproportionate in maintaining social order through the enforcement of immigration control to refuse them permission to stay or require them to leave. We accept that there is no criminal conduct or breach of the immigration laws here, albeit that the first appellant's basis of permission to remain as a CCL student must be highly questionable.

39. Absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case.

40. In the cases of these children we conclude that whilst they have been in the UK for a considerable period of time, the nature and degree of private life that they have forged is such that it is still of a very personal, intra-family nature in the main, with the focus on the home and family, although they have begun to take their first tentative steps toward socialisation and the world outside the family. They have just begun primary and nursery school respectively. The letters from their schools do no more than confirm that they have been attending since September 2009 and there is no evidence to suggest that either has any particular difficulty, special educational needs, special ability, or particular dependency on any provision made by their schools. Nor is it said that there are any health problems of any kind. They are also attending Sunday school classes at church. It is not clear for how long they have been doing that, but it is difficult to see that it can have been for long given their young ages.

41. There is no evidence to show that the second and third appellants or either of them has as yet formed any deep, strong friendships outside the family and given their young ages it is not to be expected that this would be the case. During the period of residence from birth to the age of about four, the child will be primarily focused on self and the caring parents or guardian. Long residence after this age is likely to have greater impact on the well being of the child.

42. Whilst we recognise that a move to Nigeria will require some adaptation to a new home, new school and church, we see no reason why that should not be a positive experience for the children who will be supported by their parents. English is a language spoken in Nigeria. As the Immigration Judge observed there are good educational facilities there, and the skills of both parents suggest they have the capacity to give to their children a high quality of life. Further, we note that apart from their parents, the second and third appellants have no family members in the UK, whereas they have both sets of grandparents and no doubt other relatives in Nigeria, although the siblings of their parents, or certainly some of them, appear to be living outside Nigeria at present.

43. It is important to recall that although the appellants may all have been here lawfully, they came to the UK for a temporary purpose with no expectation of being able to remain in the UK. The third appellant happened to be born in the UK whilst her parents were here for a temporary purpose. The expectation was that they would all return to Nigeria once the first appellant's studies were completed. Those who have their families with them during a period of study in the UK must do so in the light of that expectation of return.

44. Mr Rudd relied upon paragraph 31 of ZH (Tanzania) and he highlighted parts of that paragraph that state that:

> **"It is not enough to say that a young child may readily adapt to life in another country**.That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community (as might have been the case, for example, in *Poku*, para 20, above). **But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know** and will be separated from a parent whom they also know well".

45. We are not persuaded that this passage leads to the conclusion that discretion was wrongly exercised in this case or that the interference with private life is disproportionate. Here the Immigration Judge has found and we agree that the children would readily adapt. The Supreme Court was not ruling that this was an irrelevant factor but adaptability was not conclusive against the claim on its own. Here the expectation has always been that they would in due course have to change their place of residence and adapt. They have no real links with the UK other than residence whereas there are substantial links through nationality and family with Nigeria.

46. Equally we do not conclude that the fact that the children have lived in the UK all or most of their lives and are being expected to move to a country they do not yet know, makes that move disproportionate. There must be individual consideration and assessment of best interests in each and every case. By contrast with ZH (Tanzania) the move to Nigeria from the UK does not involve separation from a carer or the country of nationality. These decisions do not interfere with the enjoyment of family life on the part of any of the appellants.

47. Having assessed the best interests of the second and third appellants as a first and primary consideration and found that they favour the course of remaining within the family unit, whether that be in the UK or in Nigeria where, on the evidence produced, each of the appellants would be able to thrive and continue attending school, work, church, and doing charitable works; we move to consider whether requiring the appellants to go to Nigeria is a necessary, proportionate and a fair balance between the right to respect for the private life of the appellants and the particular public interest in question.

48. We have no doubt that it is. The purpose for which the first appellant came to the UK has been fulfilled. It was always a temporary purpose and there was no expectation that he or any of his dependents who joined him here or were born here would be able to remain indefinitely in the UK and no reasonable expectation that the fourth appellant would be enabled to qualify as a solicitor in England and Wales. The reasonable requirement of firm and fair immigration control consistently applied between one like case and another is that he and his family would leave the UK on completion of his studies. There is no evidence in these appeals to show that the factors referred to in the polices mentioned above are relevant here so as to demand a grant of leave, nor does the evidence show that there are any compelling or compassionate or other reasons why the public interest in the maintenance of firm and fair immigration control should not prevail.

49. We conclude that requiring the appellants to leave the UK and to go to Nigeria is justified by the public interest identified in these appeals and is a proportionate measure and a fair balance between the competing interests.

50. We remake the decisions by dismissing the appeals of all the appellants against the decisions of the respondent dated 26 October 2010.

Signed

Senior Immigration Judge Jarvis
Judge of the Upper Tribunal