



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/12910/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at: Manchester  
On: 11 October 2017**

**Decision Promulgated  
On: 12 October 2017**

**Before**

**UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

**EA  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the appellant: Ms Bashow, Greater Manchester Immigration Aid Unit  
For the respondent: Mr McVeety, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant.*

1. I have made an anonymity order because this decision refers to the circumstances of the appellant's three children. The appellant has four dependents: her husband, KA and their three children, V, born in 2004 (13), E, born in 2005 (12) and J, born in 2009 (8).

## Background

2. The appellant and her dependents are citizens of Nigeria. KA entered the UK in March 2005 as a visitor and overstayed his visa. The appellant entered the UK in May 2008 with her two elder children as visitors and also overstayed. The youngest child was born in the UK.
3. In a decision dated 10 January 2017, the First-tier Tribunal dismissed the appellant's appeal on human rights grounds and concluded that it would be reasonable to expect the children to return together with their parents to Nigeria. In a decision dated 25 July 2017 First-tier Tribunal Judge Hodgkinson granted permission to appeal, having identified arguable legal errors in the First-tier Tribunal's assessment of the issue of reasonableness.

## Hearing

4. At the beginning of the hearing Mr McVeety conceded that the First-tier Tribunal committed a material error of law in failing to attach significant weight to the length of residence of the children in the UK, and in the premises erred in law in its approach to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). For the reasons I outline below, the respondent was clearly correct to make this concession.
5. Both representatives agreed that I could and should remake the Article 8 decision.
6. After hearing brief oral evidence from the appellant and submissions from both representatives I reserved my decision, which I now provide with reasons.

## Error of law discussion

7. The correct approach to the reasonableness test in 276ADE and section 117B(6) of the 2002 Act has been considered in MA (Pakistan) V SSHD [2016] EWCA Civ 705 (7 July 2016). The Court of Appeal found that the significance of section 117B(6) is that where the child has been in the UK for seven years, this is a factor of weight leaning in favour of leave to remain being granted [45]. Elias LJ said this:

"46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such

a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

...

49...However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."

8. When the First-tier Tribunal decision is read as a whole, there is no clear indication that it attached significant weight to the children's length of residence when considering the reasonableness test or carrying out the proportionality exercise. The First-tier Tribunal was clearly mindful of the length of residence and that lengthy residence is a relevant factor, but that is different to attaching significant weight to it.
9. Although the First-tier Tribunal referred to the respondent's policy at [24], it failed to take into account its full ambit and failed to acknowledge that this provides that once the seven years' residence requirement is satisfied, there need to be "*strong reasons*" for refusing leave. In adopting the approach it did, the First-tier Tribunal erred in law and the decision needs to be remade.
10. There is an additional material error of law in the First-tier Tribunal decision. I address this in summary form only given the agreement that the decision needs to be remade in any event.
11. The approach to the findings of fact made by the First-tier Tribunal in a decision dated 17 October 2014 is flawed. The legal framework to be applied had substantially altered by the time the First-tier Tribunal considered the evidence at the hearing on 30 November 2016. In 2014 the children had all resided in the UK for a period under seven years. By 2016 they all had over seven years residence in the UK. This significantly altered the entire approach to be taken to the children pursuant to both policy and law. In these circumstances, the First-tier Tribunal's search for "*a material change in circumstances*" at [21-23] was unnecessary and unhelpful. As acknowledged by Mr McVeety, the correct approach was to consider whether or not it would be reasonable to expect the children to reside in Nigeria by reference to the evidence available as at the date of hearing, and the 2014 First-tier Tribunal findings of fact were merely a

starting point in that process.

## **Re-making the decision under Article 8**

### *Approach to the evidence*

12. I heard from the appellant very briefly. She explained that E is very settled at the specialist school and would find it very difficult to change schools given his need for stability and familiarity. She explained that he kept asking to return to school over the summer holidays, and the school had to prepare a special visual calendar to explain why he was not at school and when he would return.
13. Mr McVeety acknowledged that the underpinning factual matrix is not disputed. He accepted that E's autism together with the length of the children's residence render this a finely balanced case. Mr McVeety quite properly acknowledged that the legal landscape had changed substantially since the 2014 decision and the correct approach to section 117B(6) is to consider whether the accepted facts as at the date of hearing are such that it would not be reasonable to expect the children to live in Nigeria with the parents, when all the relevant countervailing circumstances are considered.
14. Ms Bashow invited me to find that the children's return to Nigeria would be unreasonable, even when the parents' immigration history is factored in.
15. After hearing submissions from both parties I reserved my decision, which I now provide with reasons.

### *Best interests*

16. I begin the Article 8 assessment by evaluating the primary consideration of the interests of the appellant's three children. I accept that their length of residence in the UK is a weighty factor, to which significant weight should be attached.
17. I also accept that V and E have resided in the UK at a particularly significant and formative time in their lives: ages 4-13 and 3-12 respectively. All three are settled in school. E is autistic and is happier and more settled since commencing a specialist school to address his needs, in September 2015. Whilst it is regrettable that the specialist school was not asked to provide updated evidence on how E would cope with a change of school and return to Nigeria, when all the evidence is considered in the round I accept his mother's evidence that he would find this very difficult indeed. The evidence before the First-tier Tribunal consistently supports the proposition that E finds change very difficult indeed and the whole family suffer when

this is imposed upon him.

18. I acknowledge that the two elder children were born in Nigeria and it is likely that they have been brought up with an awareness of aspects of Nigerian culture, through their parents. In addition, EA has a family network in Nigeria and it is likely that they will assist in supporting the children there. Even with the support of their committed parents and the extended family in Nigeria, the children are likely to find a move to Nigeria difficult. It will be particularly difficult for the elder two given their ages and the undisputed fact that as far as they can recall their lives have been in the UK, and as such UK values, culture, friendships and education have played an important role in shaping them.
19. I note that the children and the family unit as a whole have demonstrated a degree of resilience in adjusting to a move from London to Manchester in 2012. The children were significantly younger then and likely to be much more dependent upon their parents. Moving to a different country and educational system at the ages of 12 and 13 is an entirely different proposition.
20. I accept that prior to settling into his current specialist school, E found school difficult and this made him unhappy. Although the country background evidence suggests that there are facilities and schools to address E's autism in Nigeria, any change in education and domestic circumstances is likely to have a serious adverse impact on E, particularly when accompanied by all the other changes inherent in a move from the UK to Nigeria. The evidence available makes it clear that E's autism is such that he relies upon a predictive routine and familiar adults and settings that take careful account of his sensory challenges. In addition, the particularly adverse impact of any move to Nigeria on E will inevitably also affect the two other children and the family as a whole negatively.
21. On balance, I conclude that the best interests of the children would be best served by remaining in the UK. Whilst they will have the support of their parents and family in Nigeria and may adjust with time, they are likely to find the short to medium term very difficult indeed. In my judgment, it is in the best interests of E to remain at his special school in the UK, and not to return to Nigeria, by a significant margin.

#### *Section 117B(6)*

22. Section 117B(6) of the 2002 Act states as follows:

“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."

23. It is undisputed that (a) is met – the appellant has a genuine and subsisting relationship with three qualifying children. It is agreed that the real question for me is the reasonableness of expecting the children to leave the UK in accordance with (b). I must take all the relevant factors into account when assessing reasonableness and not just the impact upon the children – see MA Pakistan (supra). Relevant countervailing factors include the parents' immigration history.
24. When considering reasonableness, it is also relevant to take into account the SSHD's policy. This has been addressed in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 120 (IAC) at [10] in which it was held that the Tribunal ought to take the respondent's policy into account if it pointed clearly to a particular outcome.
25. Mr McVeety acknowledged there was no question of any criminality but invited me to find that the parents have a very poor immigration history. The Appellant and her husband entered the UK as visitors and brazenly overstayed for an extended period, and wasted little time in enrolling their children into schools. On the other hand, they have sought to regularise their leave on the basis of their family and private life in the UK on two occasions. The first application was made in 2012 and they did not become appeal rights exhausted until April 2015. The second application to remain was made in August 2015, and these proceedings remain ongoing. When the second application was made it was correctly pointed out that V and E accrued seven years residence in the UK on 4 August 2015. This is relevant because it points to a serious application with prospects of success, as opposed to a hopeless and frivolous attempt to repeat reliance upon Article 8 that had already been rejected.
26. I also bear in mind that E's education will be at significant cost to the taxpayer. However, I am satisfied that a return to Nigeria for E would be very difficult indeed. He has not coped with moves in the past. Even if he is able to access specialist education in Nigeria he is likely to suffer greatly from the obvious differences in almost every aspect of his private life. His autism is at the more serious end of the spectrum and this is a factor of considerable weight.
27. In all the circumstances, even when the parents' immigration history and the additional public expense is factored in, it would be not be reasonable to expect the children to leave the UK and section 117B(6)(b) is met.

### *Balancing exercise*

28. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act. By section 117A(2) thereof I am obliged to have regard to the considerations listed in section 117B. I

consider that section 117B applies to this appeal in the following way:

(a) The public interest in the maintenance of effective immigration controls is clearly engaged. The appellant and her husband have deliberately and over an extended period of time flouted immigration rules and control.

(b) I am satisfied that the appellant and her dependents speak English and as such I do not find an infringement of the "English speaking" public interest.

(c) The economic interest is engaged. The appellant and her husband are not employed and their children rely upon state education. This includes specialist education for E.

(d) The private life established by the appellant and her husband during the entirety of their time in the UK qualifies for the attribution of little weight only.

29. In my judgment, when all of the above matters are considered together with the best interests of the children, the appellant's removal would constitute a disproportionate breach of Article 8. In all the circumstances, it would not be reasonable to expect the children to live in Nigeria.

30. Having applied the facts to section 117B of the 2002 Act and considered the general principles applicable in a case raising family and private life under Article 8 of the ECHR, I find that the appellant's removal from the UK would constitute a disproportionate breach of Article 8.

## **Decision**

31. The decision of the First-tier Tribunal contains an error of law and is set aside.

32. I remake the decision by allowing the appellant's appeal pursuant to Article 8 of the ECHR.

Signed: Ms Melanie Plimmer  
2017  
Judge of the Upper Tribunal

Dated: 11 October