Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU / 14029 / 2015
& HU / 14026 / 2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 26 July 2017	**On 01 August 2017**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

N H	First Appellant
H I H	Second appellant

(ANONYMITY DIRECTION MADE)

And

Secretary of State for the Home Department	Respondent

Anonymity

Given that this decision refers to members of the appellants' family who are minor children, I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the minor children. No report of these proceedings shall directly or indirectly identify them.
This direction applies to both the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.
The parties at liberty to apply to discharge this order, with reasons.

Representation:
For the Appellant: Ms N Nnamani, of Counsel, instructed by Samuel Louis Solicitors.
For the Respondent: Mr. L Tarlow, Senior Home Office Presenting Officer.

DECISION AND REASONS

Introduction and background facts:

1. The appellants have been granted permission to appeal to the Upper Tribunal against a decision of Judge of the First-tier Tribunal Herlihy who dismissed their appeals against the respondent's decision of 2 December 2015 to refuse their applications of 22 April 2015 for leave to remain on the basis of their rights to their family and private lives under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

2. The appellants are nationals of Nigeria. The first appellant, born on 18 March 1976, is the mother of the second appellant, born on 25 February 1998 (not 25 March 1998, as stated at para 34 of the judge's decision or in 1989 as stated at para 19 of the judge's decision).

3. As at the date of the hearing before the judge (20 March 2017), the appellants' family life claims were based on their relationships with the following individuals:

   i. A Mr A.H. (hereafter Mr H). He was present and settled in the United Kingdom and had permanent residence until 28 January 2015 on the basis of his marriage to an EEA national.

   ii. A child, K, born on [ ] 2001 in Lagos, Nigeria. She is the daughter of the first appellant and Mr H and sister to the second appellant. She came to the United Kingdom in 2004. As at the date of the hearing before the judge, she had leave as a dependant of an EEA national. This was granted in 2013 (para 38 of the decision).

   iii. A child, T, born in the UK on [ ] 2005. She is the daughter of the first appellant and Mr H and sister to the second appellant. As at the date of the hearing before the judge, she was a British citizen, having been naturalised on the ground that, being under the age of 18 years, she had lived in the United Kingdom continuously for at least 10 years. She had never had any leave (para 35 of the judge's decision).

   iv. A child, R, born in Ireland on [ ] 2008. He is the son of the first appellant and Mr H and brother to the second appellant. As at the date of the hearing before the judge, he had leave as a dependant of an EEA national. This was granted in 2013 (para 38 of the decision).

4. The first appellant and Mr H were the biological parents of the second appellant, K, T and R. The first appellant's evidence was that she and Mr H were married pursuant to a customary marriage. However, the first appellant said that they were subsequently "divorced" and that Mr H married an EEA national. At para 35, the judge recorded that the evidence before the respondent was that the first appellant and Mr H were living together with all four of their children. It was claimed before the judge that the first appellant and Mr H were estranged. The judge rejected this evidence, finding (para 35) that the first appellant and Mr H were living together with all four of their children and that K, T, R were in also in the care of the first appellant and also Mr H.

Relevant immigration histories

5. The appellants' evidence before the judge about their immigration history and that of members of their family was inconsistent. The following immigration history combines the undisputed facts and the judge's findings on the inconsistent evidence before her.

6. The first appellant claimed to have first arrived in the United Kingdom on 31 December 2004. The judge found that it is likely that she entered the United Kingdom illegally (para 41) with

her daughter, K. They remained without leave. The child, T, was born during this period of overstaying. In 2007, the first appellant returned to Nigeria leaving K and T in the United Kingdom in the care of Mr H (para 41 of the judge's decision).

7. The judge found that the first and second appellants then travelled to Ireland in 2008 (para 38 of the decision) as visitors. The first appellant was pregnant at the time with child R, who was born in Ireland. The judge found that the appellants and the child, R, arrived in the United Kingdom some time in 2009 (paras 32 and 41 of the judge's decision).

The grant of permission and the grounds

8. The grounds may be summarised as follows:

   i. There is no possibility of the entire family being returned to Nigeria together as Mr H is lawfully resident in the UK with the remaining three children. The family will therefore be separated for an indeterminate period. This was evidence of exceptional circumstances. The judge's decision was *Wednesbury* unreasonable, perverse and irrational.

   ii. In the alternative, the factual matrix amounted to compelling circumstances.

   iii. At para 44 of her decision, the judge took into account irrelevant matters. Given that Mr H and the remaining three children were lawfully resident in the United Kingdom, they were eligible to access the National Health Service.

   iv. The judge's credibility findings were unreasonable and unduly harsh. The appellants had given evidence in a frank and straightforward manner.

9. Upper Tribunal Judge Holmes granted permission. He made no reference to the grounds. He stated that the grounds were not well-drafted but that it was arguable that the appellants enjoyed family life at the date of the decision with individuals who were at least settled in the United Kingdom on the basis of evidence that the judge did not reject as untrue and that, if that is the case, then it was arguable that the approach taken to s.117A-D of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") was flawed.

The judge's decision

10. In summary, the judge found as follows:

   i. The first appellant could not bring herself within the ambit of Appendix FM of the Immigration Rules in relation to leave as a partner or on the basis of her private life (para 26).

   ii. The second appellant could not benefit from s.117B(6) of the 2002 Act (para 34).

   iii. The evidence before her concerning the immigration history of the appellants and members of their family was not credible (paras, 31, 32, 33 and 36)

   iv. The evidence of the appellants that the first appellant and Mr H were estranged was not credible (paras 33 and 35). As stated above, the judge found that it was very likely that the first appellant and Mr H were living together and that the remaining children, that is, K, T and R, were also in the care of Mr H (para 35).

   v. The judge said that she was struck by the very poor immigration history of the first appellant (para 31). At para 41, she said that the first appellant's presence in the United Kingdom had always been precarious and her immigration history an unedifying one, that she had made a conscious decision to develop family life in the United Kingdom knowing that she had no legitimate expectation that she and her family could do so and

that she made the decision presumably with the support of Mr H to leave K and T in the United Kingdom at a time when they had no lawful right to remain. At para 42, she said that the first appellant had gone to ground and made no attempt to regularise her stay, failing to do so even after Mr H and the other children had been granted EEA residency in 2013.

vi. The judge did not find the evidence of Mr H credible as to how he acquired his EEA residency and she did not find it credible that the appellants were unable to provide the name or nationality of the EEA national (para 36). She had earlier (at para 33) expressed surprise that Mr H had not come to court to give evidence and no evidence was submitted of his immigration history.

vii. The judge found that the first appellant had not given a truthful account of her family connections in Nigeria. She found it likely that the first appellant probably had at some stage worked in Nigeria (para 37). At para 38, the judge said that it was likely that the entire family had more family ties to Nigeria than subsist in the United Kingdom where they had not disclosed the existence of any family. At para 45, she found that the appellants are likely to be able to access support from friends and family in Nigeria.

viii. At para 38, the judge said that she was not satisfied that the appellants were in any way divorced from the culture and familial links that they have to Nigeria, that "*it was always open*" to Mr H and the remaining children to join the appellants in Nigeria, that the remaining three children were only granted EEA residency in 2013, that it was clear that the appellants had lived apart from the remaining family members for lengthy periods in the past, that she did not find that there were likely to be any serious difficulties on return to Nigeria, particularly with regard to language as English was so widely spoken, that there was no reason why the second appellant would not be able to continue his education in Nigeria, that there was no evidence that educational provision would not be available for the other children and that there was no evidence that any of the other children or the second appellant had any education or health difficulties.

ix. The judge accepted that the appellants had developed private lives in the United Kingdom but found that the first appellant's private life was largely in respect of her family and the second appellant's mainly limited to friends from school and college (para 39).

x. The judge noted that the first appellant had produced no evidence of their family's financial situation, income and resources or integration into the United Kingdom although there was some evidence of the income of Mr H who confirmed that he maintained the family (para 40).

xi. At para 44, she said that there were strong reasons for refusing the second appellant's leave to remain on the basis of 10 year's residence notwithstanding the significant weight that must be given to the period of residence. She took into account the fact that the actions of the second appellant's parents had shown complete and repeated disregard for immigration control and that the appellants and the remaining children had been the consumer of significant public support in terms of maternity, health and educational provision.

xii. At para 45, the judge found, inter alia, that the appellants would be returning as a family unit with the benefit of skills acquired in the United Kingdom to a country where the first appellant and Mr H had spent all their formative years and had lived for the majority of their lives, that the appellants are likely to be able to access support from friends and family in Nigeria, that family life could be continued in Nigeria, and that "*it is open*" to Mr H and the remaining children to join them in Nigeria so that the disruption to their family life will be minimal when balanced against the need for effective immigration control.

xiii. The judge concluded that the decision to remove the appellants would not be disproportionate (para 45). They had not disclosed sufficiently compelling and compassionate circumstances which would have justified the grant of discretionary leave by the respondent (para 46).

11. The above is merely a summary. It is important to have in mind the judge's reasoning in full, which is set out at para 25 onwards of her decision and which I now quote.

> "25. The appellants cannot raise a ground of appeal that the decision was not in accordance with the Immigration Rules as the decision was taken after 6 April 2015 and an appeal on this ground is no longer available. However consideration of the Immigration Rules and the extent to which the appellants do or do not meet them is relevant to the consideration of the proportionality of the decision under Article 8 of the ECHR. The In R (Amin) v Secretary of State for the Home Department [2014] EWHC 2322 (Admin) it was held that paragraphs 276 ADE – 276 DH and Appendix FM do not constitute a comprehensive Article 8 Code. Thus it is recognised that a claim based on Article 8 can, in principle, succeed either under the prescriptive Article 8 regimes within the Rules or outwith the Rules, residually. In MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985 the Court of Appeal, in effect, disapproved the suggestion in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin), at [29], that there is an intermediate hurdle to be overcome prior to consideration of Article 8 claims outwith the Rules.
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> 26. It is not disputed that the [first appellant] cannot bring herself within the ambit of Appendix FM of the Immigration Rules in relation to leave to remain as a partner or on the basis of her private life. However, it is claimed that at the date of the hearing the [second appellant] has now been in the United Kingdom for over 7 years and that it would not be reasonable to expect him to leave the United Kingdom albeit that he is now an adult. The Secretary of State for the Home Department's own guidance states that the longer the child has been in the United Kingdom the more the balance will swing in terms of it being unreasonable to expect the child to leave the United Kingdom and strong reasons will be required in order to refuse a case with continuous residence of more than 7 years. It is the Respondent's decision that it would be reasonable to expect the appellants to return to Nigeria and that they remaining family members could join them if they chose to do so.
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> 27. Section 117B of the Nationality, Immigration and Asylum Act 2002 as amended by Section 19 of the Immigration Act 2014 provides (6) in the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
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> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
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> (b) it would not be reasonable to expect the child to leave the United Kingdom.
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> 28. Accordingly the fact that a child has been here 7 years must be given significant weight when applying the reasonableness test and that there must be a strong expectation that the child's best interests will be to remain in the United Kingdom with his parents as part of a family unit which will rank as a primary consideration in the proportionality assessment.
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> 29. In considering this case, I have had regard to a number of leading decisions, the most important of which is the Supreme Court judgment in ZH (Tanzania) [2011] UKSC 4, subsequent decisions of AJ (India) and others v SSHD [2011] EWCA Civ 1191, together with a number of Tribunal decisions including LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 00278 (IAC), E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC) and MK (best interests of child) India [2011] UKUT 00475 (IAC). It has clearly been established that the interests of the child is a primary consideration in immigration cases and that the welfare of the child is an integral part of the Article 8 assessment. The primary interest of the child falls to be considered within the context of the particular family circumstances as well as consideration of the need to

maintain immigration control. I also note that the Tribunal held in EM and others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) at paragraph 308:

> "Even where neither the children nor the parents has the status of a British citizen, the welfare of the children is a primary consideration in administrative action affecting their future and accordingly the balance of competing interests under Article 8 must reflect this factor as a consideration of the first order, albeit not the only one (see LD… and ZH (Tanzania)…)."

30. In E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC) the head note to the decision states:

> "(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.
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> (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 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.
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> (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.
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> (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.
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> (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."

31. In considering the appeal before me I am struck by the very poor immigration history of the [first appellant]. It would appear that the [first appellant] was an over-stayer *[sic]*, having claimed to have initially entered the United Kingdom on the 31st December 2004. By this time she already had two children, [the second appellant] who she said she left in Nigeria in the care of a neighbour and her daughter [K] whom she says accompanied her to the United Kingdom and at the time was aged three. The [first appellant's] daughter [T] was born in the United Kingdom on 14 November 2005 during the period of the [first appellant's] unlawful stay in the United Kingdom following her entry in 2004.

32. The [first appellant] has claimed in her witness statement that she and [the second appellant] re-entered the UK in July 2007 aged 9, however this is clearly an incorrect claim as in her oral evidence she admitted that she and [the second appellant] had entered Ireland in 2008 where she had remained for over a year, at the time of her entry she was pregnant and expecting her son [R], who was born in Ireland on the 29th January 2008. [The second appellant's] own evidence was that he had attended school in Ireland for about a year and this is consistent with the [first appellant's] oral evidence that she, [the second appellant] and [R] entered the UK from Ireland sometime in 2009. The earliest evidence for the [second appellant's] presence in the UK is the certificate from [X Y School] claiming that he attended the school from March 2009 to July 2009. Accordingly at the date of the application [the second appellant] had not been in the UK for 7 years.

33. I can place no weight on the statement of the [first appellant's] husband, [Mr H], and [the second appellant's] father when he claims in paragraph 2 that [the second appellant] arrived in the United Kingdom in July 2007 as this is not borne out by the evidence of the [first appellant], [the second appellant] or the objective evidence. I am surprised the [first appellant's] husband did not come to give evidence and it is now claimed that the [first appellant] and her husband are estranged, (although he spends a considerable amount of time at the home). I am surprised there was no evidence submitted of the immigration history of the [first appellant's] partner and the history of their relationship.

34. [The second appellant] turned 18 on the 25th March 2016 I therefore find that at the date of the decision he had not lived in the UK for 7 years as a minor and that at the date of the hearing he was already an adult having now reached the age of 19. I do not find that [the second appellant] can benefit from Section 117B (vi).

35. In considering the appeal before me and the best interests of the [first appellant's] remaining children I note that one child is a British citizen on the basis of having been born in the United Kingdom in 2005 when the [first appellant] and her husband were both over-stayers *[sic]* and living in the UK illegally. The [first appellant's] daughter [T] has acquired British citizenship by virtue of her having lived 10 years in the United Kingdom having been born here, although she never had any leave. The remaining two children have leave as dependants of their father who himself was granted EEA permanent residence on the basis of his marriage to an EEA national. The evidence before the respondent was that the [first appellant] and her partner were living together with their 4 children including [the second appellant]. I find there is no objective evidence to support the claim by the [first appellant] and [the second appellant] that their father has become estranged from the family and I find it very likely that the [first appellant] and her partner are living together and that the remaining three children are also in the care of the [first appellant's] husband.

36. I have not found the [first appellant] to be an entirely credible witness with regard to the history of her immigration status and that of her husband as to how he acquired his EEA residency as it would appear that there are periods when the [first appellant] and her husband are in a relationship having had 4 children together but at the same time it is claimed that he is in a subsisting relationship and is married to an EEA national. Also I do not find it is not credible [sic] that the [first appellant] and [the second appellant] were unable to give any evidence about the EEA national who was the stepmother of the remaining children. They were unable to provide her name or nationality and I do not find it credible that the [first appellant] did not know this information if her children were living with their father and his EEA spouse.

37. I am not satisfied that the [first appellant] has given a truthful account of her family connections in Nigeria. It is clear from [the second appellant's] evidence that his father had his own watch shop in Nigeria and he has also spoken of his mother's sisters and grandparents in Nigeria. It is clear that the [first appellant] attended school and remained in Nigeria until coming to the UK in 2004 at the age of 27 and I find it likely that she probably had at some stage worked in Nigeria.

38. I accept that [the second appellant] and the [first appellant] have not lived in Nigeria since 2008 when they left to go to Ireland. However, I am not satisfied that they are in any way divorced from the culture and familial links that they have to Nigeria as they have been living with the [first appellant's] partner and [the second appellant's] father and their other children/siblings. I see no reason why the [first appellant] and [the second appellant] cannot return to Nigeria where [the second appellant] undertook his initial primary education and where the [first appellant] was educated and spent her formative life. **It is always open to the [first appellant's] husband and the father of [the second appellant] and their remaining children to join them with the rest of the family in Nigeria.** The remaining three children were only granted EEA residency in 2013 and it is clear that the [first appellant] and [the second appellant] have lived apart from the remaining family members for lengthy periods in the past. I do not find that on return to Nigeria there are likely to be any serious difficulties particularly with regard to language as English is so widely spoken and I see no reason why [the second appellant] would not be

able to continue his education in Nigeria. Although removal to Nigeria would cause some disruption in his education, there is no reason to suppose that he cannot achieve his potential. There was no evidence that educational provision would not be available for the other children in Nigeria if the decision was made by the family that they would all return as one unit. There was no evidence in respect of any of the younger children or [the second appellant] that they had any education or health difficulties and it is likely that the entire family will have more family ties to Nigeria than subsist in the United Kingdom where they have not disclosed the existence of any family.

39. Undoubtedly the [first appellant] and [the second appellant] will have developed private lives within the United Kingdom as have the remaining family members but there was no evidence with regard to those links and the extent of their links within the community outside of the family. I find that links that [the second appellant] has developed are likely to be mainly limited to friends from school and college and with regard to the [first appellant], largely in respect of her family.

40. In assessing the public interest under Article 8(2) I have kept in mind the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002 as amended by Section 19 of the Immigration Act 2014. The [first appellant] developed her family and private life in the United Kingdom at a time when she knew that the development and continuance of the same was dependent upon meeting the requirements of the Immigration Rules. The public interest provisions are now contained in primary legislation and are mandatory and Parliament has determined it is in the public interest while being in the United Kingdom that the person who seeks entry is financially independent because they will not be a burden on taxpayers. The [first appellant] produced no evidence of their financial situation, income and resources or integration into the United Kingdom although there was evidence of the income from the [first appellant's] husband who confirms that he maintains the family.

41. I find that the [first appellant's] presence in the United Kingdom has always been precarious from the outset and that her immigration history is an unedifying one in that she is likely to have entered the United Kingdom illegally in 2004 (she produced no evidence of lawful entry) with her daughter [K] and remained without leave until 2007 when she claims she returned to Nigeria alone leaving her daughter behind in the care of her husband. During her period of overstaying she had another daughter [T] born in November 2005. The [first appellant] and her husband knew that from 2004 that they had no lawful right to remain in the United Kingdom but remained to pursue their family and private life. The [second appellant] was born in Nigeria and brought illegally to the United Kingdom from Ireland by the [first appellant] in 2009 with the support of her husband (who she says paid for the costs of their travel from Nigeria to Ireland), accompanied by [R] who had been born in Ireland so that a conscious decision was made by [the first appellant] to develop a family life in the United Kingdom knowing that she had no legitimate expectation that she and her family could do so. She also made the decision, presumably with the support of her husband to leave her two children [K] and [T] in the United Kingdom at a time when they had no lawful right to remain.

42. I have taken into account the fact that the [first appellant] sought to develop her private and family life within the United Kingdom in the knowledge that her immigration status and that of [the second appellant] was precarious and unlawful. It is clear that that the [first appellant] appears to be someone who had gone to ground and made no attempt to regularise her stay; failing to do so even after husband and other children had been granted EEA residency in 2013. The appellants could have had no legitimate expectation of being allowed to remain and integrate.

43. In EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 it was held that despite finding, in a family's appeal against a decision to remove them, that the best interests of the children lay in continuing their education in the United Kingdom with both parents also remaining in the United Kingdom, the Tribunal had been entitled to find that the need to maintain immigration control outweighed the children's best interests.

> 44. I have also considered the decision in MA (Pakistan & Others) 2016 EWCA Civ 705 which expressly stated that once the 7 year residence requirement is satisfied there needs to be strong reasons for refusing leave. I find that there are strong reasons for refusing the [second appellant] leave to remain on the basis of 10 year's residence notwithstanding the significant weight that must be given to the period of residence. I accept that the leave to remain in breach of immigration control was not made by [the second appellant] as he was a minor at the time and that he must not be blamed for the actions of his parents. However, none of the appellants are British citizens and the action of [the second appellant's] parents has *[sic]* shown complete and repeated disregard for immigration control. The appellants and her remaining children have been the consumer of significant public support in terms of maternity, health and educational provisions, all of which have been incurred when the appellants had absolutely no entitlement to remain in the United Kingdom and these are relevant factors when considering the public interest and the proportionality exercise.
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> 45. I find that the appellants will be returning to Nigeria together as a family unit and with the benefit of skills acquired in the United Kingdom, to a country where the [first appellant] and her husband spent all their formative years and have lived for the majority of their lives and I find that the appellants are likely to be able to access support from friends and family in Nigeria. I find the decision to remove the appellants to Nigeria is not disproportionate given that family life can be continued by them in Nigeria and **that it is open to the [first appellant's] husband and remaining children to join them in Nigeria so that the disruption to the same will be minimal when balanced against the need for effective immigration control**.
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> 46. Having considered all the factors as part of my consideration of the appellants' Article 8 claims, I find that the appellants have not disclosed sufficiently compelling and compassionate circumstances which would have justified the respondent in the grant of discretionary leave.
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> 47. In the light of the above conclusions, I find that the decisions appealed against would not cause the United Kingdom to be in breach of the law or its obligations under the ECHR. I dismiss the human rights appeals.

(My emphasis)

Assessment

12. As at the date of the appellants' application for leave (22 April 2015), the second appellant was aged 17 years but had not lived in the United Kingdom continuously for a period of at least 7 years. He therefore did not qualify under the terms of para 276ADE(1) of the Immigration Rules which requires the minimum period of residence of 7 years to be satisfied as at the date of the application. Section 117B(6) of the 2002 Act taken together with the definition of *"qualifying child"* in s.117D(1) does not require the minimum residence period of 7 years to be satisfied as at the date of the application; it can be satisfied as at the date of the hearing. However, by the date of the hearing before the judge, the second appellant had turned 18 years of age and therefore did not satisfy the definition of *"qualifying child"* in s.117D(1) on that basis, as the judge (correctly) stated at para 34 of her decision.

13. The judge noted that child T was a British citizen and considered the best interests of K, R and T at paras 35 and 43.

14. At para 38, the judge said, inter alia, that:

> "It is always open to [Mr H] and [K, T and R] to join [the appellants] with the rest of the family in Nigeria. [K, T and R] were only granted EEA residency in 2013 and it is clear that [the appellants] have lived apart from the remaining family members for lengthy periods in the past…."

and at para 45,she said, inter alia:

> "… it is open to the [first appellant's] husband and remaining children to join them in Nigeria …"

15. At the hearing, Ms Nnamani and Mr Tarlow agreed that it was implicit in the judge's reasoning that the judge had accepted that the appellants enjoyed family life with Mr H and their remaining three children. The parties then addressed me on the issues I raised, which are described in the following paragraph. I record that Ms Nnamani did not address me on the grounds as lodged.

16. I asked the parties to address me on the following issues which were not raised in the appellants' grounds or in the decision granting permission:

    i. Whether the judge had implicitly considered whether it would be reasonable for T to leave the United Kingdom, given that she had referred to s.117B(6) of the 2002 Act and the issue of reasonableness and whether it could be inferred from the words "*open to*" at paras 38 and 45 that the judge had made a finding of reasonableness in relation to T or whether the judge had in fact applied the wrong test.

       Ms Nnamani submitted that the judge had not considered whether it would be reasonable for T to leave the United Kingdom and that saying that it would be "*open*" to a child to join family members in Nigeria was not the same as saying that it would be reasonable for the child to leave the United Kingdom. Mr Tarlow submitted that, if the judge's decision is considered as a whole, it is implicit that she had considered whether it would be reasonable for T to leave the United Kingdom and that it is implicit from the words: "*it is always open*" that the judge found that it would be reasonable for T to leave the United Kingdom.

    ii. Whether the judge had considered whether it would be reasonable for K, as a qualifying child, to leave the United Kingdom.

       Mr Tarlow accepted that the judge should have considered whether it would be reasonable for K to leave the United Kingdom and that she did not do so. However, he submitted that, given the judge's implicit finding that it would be reasonable for T to leave the United Kingdom and the very limited evidence that was before the judge, any oversight was not material. The judge could only have concluded that it was reasonable for K to leave the United Kingdom if she had considered the issue.

17. I have carefully considered the judge's decision. Whilst I accept Ms Nnamani's submission that, at para 44, the judge was considering the position of the second appellant, I have concluded that, in saying that it was "*open*" to the remaining children to join the appellants in Nigeria, the judge was in effect finding that it would be reasonable to expect the three remaining children (i.e. T, K and R) to leave the United Kingdom. She cannot have meant anything else, in my judgement. The judge had specifically reminded herself of the wording of s.117B(6) and demonstrated that she was aware that the question she had to decide is whether it was reasonable for a child to whom s.117B(6) applies to leave the United Kingdom. It is clear that she was aware that T was a British citizen. She made a specific finding that K came to the UK in 2004. She was aware that K had EEA residency granted in 2013. She was also aware that the best interests of a child need to be considered as a paramount consideration.

18. I have therefore concluded that the only proper inference is that, in stating that it was "*open*" to the three remaining children to join the appellants in Nigeria, the judge was making a finding that it would be reasonable for all three of the remaining children – i.e. T, K and R - to leave the United Kingdom. Indeed, her finding that it was always "*open*" to the remaining three children to join the appellants in Nigeria would make no sense otherwise, as it is

tantamount to saying that this experienced judge was saying that it was open to the children to leave the United Kingdom even if it was not reasonable for them to so.

19. The judge plainly took into account all relevant considerations that applied to all of the children in reaching her finding, which (in my judgment) she made implicitly, that it would be reasonable for T and K to leave the United Kingdom. She was also aware of the fact that, if a child had been continuously resident in the United Kingdom for 7 years or more, there had to be strong reasons for refusing leave (para 44). The judge made a specific finding that the entire family have more family ties to Nigeria than subsist in the United Kingdom (para 38). The judge also said there was no evidence that "*the remaining children*", i.e. including T and K, had any education or health difficulties and that there was no evidence that educational provision would not be available "*the other children*", i.e. including T and K (para 38).

20. It is plain that the judge took into account the fact that T was a British citizen and that she was aware of K's length of residence.

21. True it is that one would ordinarily expect a judge to engage with the evidence submitted concerning the private life ties of the child when considering whether it would be reasonable for the child to leave the United Kingdom and whether this would be in the best interests of each child. However, the evidence before the judge concerning the private life ties of T and K was extremely limited, as follows:

    i. In relation to T, Ms Nnamani drew my attention to the following evidence:

        a. A copy of her birth certificate (E12 of the respondent's bundle).

        b. A letter from her primary school dated 9 October 2005 (D1 of the respondent's bundle) which simply confirmed that T attended the school.

        c. A letter from the local council which confirms T's residence at her home (page E1 of the respondent's bundle).

        d. A school report for summer 2016 and one for summer 2014, at pages 28-31 of the appellants' bundle.

    ii. In relation to K, Ms Nnamani drew my attention to the following evidence:

        a. A letter dated 13 October 2015 from the academy attended by K, at page D2 of the respondent's bundle. This conforms that she was enrolled on their register in September 2012 and that she is currently in year 10.

        b. Copies of her passport, at pages E1 and E2 of the respondent's bundle.

        c. A letter from the local council which confirms K's residence at her home (page E1 of the respondent's bundle).

        d. Attendance record for the period from 1 September 2016 to 19 September 2016 at page 25 of the appellants' bundle.

        e. Her year 10 results at page 26 of the appellants' bundle.

22. I pause here to note that the the evidence concerning K's circumstances that was before the judge was even more limited than the evidence concerning T.

23. It was not suggested before me that there was anything in T's school reports that required specific consideration in reaching a decision as to whether it was reasonable for T to leave the United Kingdom. It was not suggested that there was anything in T's school reports that

was not adequately covered by the judge's finding that educational provision was available and that there were no difficulties experienced by T in her education. Accordingly, I have concluded that the fact that the judge did not mention T's school reports does not mean that she did not take them into account when reaching her finding, implicitly made, that it would be reasonable for T to leave the United Kingdom. There was no evidence before the judge of any private life ties established by T beyond her life in school.

24. Likewise, it was not suggested before me that there was anything in the evidence in relation to K that required specific consideration in reaching a decision as to whether it was reasonable for T to leave the United Kingdom. It was not suggested that there was anything in such evidence that was not adequately covered by the judge's finding that educational provision was available and that there were no difficulties experienced by K in her education. Accordingly, I have concluded that the fact that the judge did not mention the specific evidence submitted in relation to K does not mean that she did not take them into account when reaching her finding, implicitly made, that it would be reasonable for K to leave the United Kingdom. There was no evidence before the judge of any private life ties established by K beyond her life in school. Indeed, as stated above, the evidence in relation to K was even more limited than was the evidence in relation to T.

25. There was no specific evidence before the judge that the best interests of T or K as a paramount consideration required their remaining in the United Kingdom. The judge was left to make assumptions on the basis that educational and health provision in the United Kingdom is generally considered to be to a higher standard than in Nigeria. Her finding, that there was educational and health provision in Nigeria dealt adequately with this point, in the absence of specific evidence on the issue.

26. For all of these reasons, I have concluded that the judge did not err in law in reaching her findings, implicitly made, that it would be reasonable for T and for K to leave the United Kingdom.

27. I acknowledge that Mr Tarlow accepted that the judge had not made a finding as to whether it would be reasonable for K to leave the United Kingdom. However, I am unable to reach that conclusion for the reasons given above. I also acknowledge that para 4 of the Respondent's "Reply" under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 appears to accept that the judge "*would have had to consider [s.117b(6)]in relation to the [first appellant]*", which indicates that it was accepted in the respondent's "Reply" that the judge did not consider s.117B(6). However, the question whether the judge had made a material error of law is a question for me to decide. Having had the benefit of considering the judge's decision more fully since the hearing, I have reached my conclusions as set out above.

28. I should make it clear that, in reaching these conclusions, I have had very much in mind the clear importance of an individual assessment in the case of each child whether it would be reasonable for the child to leave the United Kingdom and individual consideration of the best interests of each child. I have nevertheless reached the conclusions I have reached given, as I have said, the very limited evidence before the judge concerning the circumstances of T and K. Such evidence as she did have (which was even more limited in the case of K than it was in the case of T) did not require specific mention by the judge, in my judgement. The judge was aware of the essential principles in relation to the best interests of children and the requirement for strong reasons for refusing leave where there has been continuous residence by a child in excess of 7 years.

29. However, even if I am wrong in reaching the conclusion I reached at my para 26 above and even if the judge did err in law by failing to consider whether it would be reasonable for T to leave the United Kingdom and/or whether it would be reasonable for K to leave the United Kingdom, any such error(s) are not material, for the reasons given above. There was, quite frankly, no evidence before the judge that, on any reasonable view, could have led her to

find, even if she had overlooked considering the issue of reasonableness in relation to T and/or K, that it would be unreasonable for T or K to leave the United Kingdom. The contents of the documents listed at my para 21 above were simply insufficient, given the judge's adverse reasoning in her assessment from para 25 onwards. This is more so in relation to K, given the more limited evidence before the judge in relation to K than was the case in connection with T and that K was not a British citizen.

30. I record that Ms Nnamani did not pursue the grounds of appeal in the application for permission to appeal, which I have summarised at para 8 above. The appellants lodged written submissions in reply to the respondent's Reply under cover of a letter dated 21 July 2017, which I have considered. There is no substance in these grounds, which I can deal with briefly as follows:

    i. To the extent that the grounds contend that the judge erred at para 44, they ignore the fact that EEA residency was only granted in 2013, whereas it is clear that K has received education in the United Kingdom since her arrival in 2004, R since his arrival in 2009 and T was born in the UK before she became a British citizen and has also accessed education prior to becoming a British citizen.

    ii. The remaining grounds, including the challenge to the judge's assessment of credibility, do not demonstrate any error of law in the judge's decision. They simply amount to no more than an attempt to re-argue the case.

Decision

The decision of Judge of the First-tier Tribunal Herlihy did not involve the making of any material errors of law.

Upper Tribunal Judge Gill Date: 31 July 2017