



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/00399/2016  
HU/00401/2016  
HU/00403/2016  
HU/00405/2016  
HU/00407/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 22 December 2017

Decision & Reasons Promulgated  
On 21 February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HELEN [A]

[A S A]

[E S A]

[A A]

[E A]

(NO ANONYMITY ORDER MADE)

Respondents

**Representation:**

For the Appellant:

Mr P Duffy (Senior Home Office Presenting Officer)

For the Respondent:

Mr J Rene (counsel instructed by Queen's Park Solicitors)

**DECISION AND REASONS**

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal allowing the appeals of Helen [A], a citizen of Nigeria, against the decisions of the First-tier Tribunal to allow the appeals of Mrs [A] and of her four dependent children: [ASA] (born [ ] 2003), [ESA] (born [ ] 2005), [AA] (born [ ] 2007) and [EA] (born [ ] 2009).
2. The refusal letter states that the family entered the United Kingdom on 6 October 2009, save for [EA] who was born in this country. Their applications were refused on the basis that the Rules addressing private and family life were not satisfied: the mother could not show very significant obstacles to her integration in Nigeria, none of the children had resided in the UK for seven years at the date of decision, and the children did not assist their mother to qualify under the “parent” route under Appendix FM as there was no parent with limited leave under Appendix FM or indefinite leave to remain upon whom such an application could found. There were no exceptional circumstances justifying the grant of leave given the childrens’ circumstances: they were to be removed with their mother who could help them to readapt to life abroad, they were nationals of Nigeria, the elder children had lived in Nigeria for their early years, and were not yet studying towards a recognised qualification. The mother would be able to live lawfully in Nigeria where she would have the legal right to work, and could rely on extended family for support.
3. In its decision of 24 March 2017, the First-tier Tribunal set out further information regarding the family’s circumstances. The childrens’ father, Mrs [A]’s husband, had been convicted of assaulting a child aged under twelve years in 2015 and was sentenced to six years’ imprisonment; once his sentence ended he faced deportation to Nigeria. Accordingly Mrs [A] did not wish the children to have any contact with him until they were older. She had completed a degree in Business Management in Nigeria, and a Masters in Human Resources in the United Kingdom; she volunteered at the local Citizens Advice Bureau here. She thought it would be difficult to find work for herself there.
4. The First-tier Tribunal first considered the appeals under the Immigration Rules. It found there were no significant obstacles to the mother’s integration in Nigeria, as she was healthy and could be expected to find work, and clearly had skills and experience that would help her make a living there, even though life might not be easy. She had social, cultural and family ties to the country. The Rules did not cater for the situation of the children. However, there were compelling reasons to consider their cases outside the Rules given the strength of their ties in this country, and as they had all lived in the UK for seven years by the date of the hearing, section 117B(6) of the Nationality Immigration and Asylum Act 2002 was highly relevant to the outcome of the appeal.

5. The whole family were actively involved in their church and had established community ties. Each child had established sufficient ties outside the family unit, in church and school, to amount to an independent private life of their own. The eldest child already attended boarding school. Having regard to the section 117B factors, they were proficient in the English language and were established as financially independent, given the evidence to that effect: accordingly these factors did not count against them, albeit they were otherwise neutral in the balancing exercise.
6. The First-tier Tribunal went on to look at the quality of the mother's residence and whether it was precarious, noting that the family unit had been resident in a category of the Rules that led to settlement. They accordingly had an expectation, in a broad rather than a public law "legitimate" sense, that they need not intend to leave the country at the end of their residence. The Tribunal also noted that despite the length of residence of the children, the Secretary of State had not taken their wishes into account when considering the applications.
7. Having regard to those considerations, the First-tier Tribunal evaluated the question of the reasonableness of the childrens' relocation abroad. The mother would be returning as a lone parent with four children to care for; whilst she might be able to count on some familial support, she had primary responsibility for their welfare, in circumstances where they would all be foreseeably suffering significant disruption from the loss of their friends, school and home. Having regard to the considerations identified in *MA (Pakistan)*, including the fact that seven years' residence of non-British citizen children had to be given significant weight in the proportionality balance having regard to the likelihood of their having put down roots over that period, and to the fact that three of the children had been resident for seven years after the age of four and thus at a time when they were particularly likely to be beginning to develop private lives of their own, it could not be said that the public interest mandated their exclusion.
8. Grounds of appeal from the Secretary of State submitted that the considerations identified in section 117A-D had not been considered, in either substance or form.
9. A judge of the First-tier Tribunal granted permission to appeal on 27 September 2017 on the basis that the judge's reasoning was "silent on section 117B".

## Findings and reasons

10. Unsurprisingly, Mr Duffy showed some reticence in pressing the appeal of the Secretary of State. The most cursory examination of the decision of the First-tier Tribunal demonstrates that section 117B of the NIAA 2002 was specifically cited in the part of the decision below that contains the Tribunal's material reasoning. Each of its relevant constituents is plainly assessed and identified over several closely

reasoned paragraphs. It is very hard to see how any person who had read the decision could possibly think otherwise, and one fears that the First-tier Tribunal granting permission to appeal simply acted on the Secretary of State's grounds of appeal without checking whether the decision impugned actually contained the asserted errors.

11. The First-tier Tribunal records that it was undisputed that the family was financially independent. The mother and children all spoke English. So those factors did not count against them when assessing the public interest under subsections 117B(2) and (3). They were not resident unlawfully, so section 117B(4) was not in play. Their residence had to be evaluated for any precarious quality: this was addressed in detail, the judge noting that they had always been present lawfully, within a settlement route. Given the requirement to assess precariousness on an "evaluative" basis, as observed by Sales LJ in *Rhuppiah* [2016] EWCA Civ 803, and the need to bear in mind all relevant circumstances as identified by Lord Reed in *Agyarko* [2017] UKSC 11 §53, the closely reasoned decision of the First-tier Tribunal can be seen to be fully in accordance with the governing authorities.
12. It is necessary for the Tribunal to express its extreme disapproval of the grounds of appeal in this case. They asserted in unequivocal terms that consideration of section 117B of the NIAA 2002 was absent from the decision. This was simply untrue. The First-tier Tribunal was seriously misled when it granted permission to appeal. As a result, the time and resources of the Upper Tribunal have been unnecessarily expended. The Respondents have been put to unjustified expense.

#### **Award of costs**

13. It is against this backdrop that the Respondents have made an application for a costs order on account of the approach to the litigation taken by the Secretary of State, which they argued was unreasonable. They gave notice in writing of this intention via the Rule 24 notice submitted on 24 October 2017, citing the relevant authorities. Mr Duffy had not appreciated this application had been made, although it appears to have been sent to the Secretary of State and is present on the Upper Tribunal correspondence file. He nevertheless dealt with it, arguing that the conduct of the Home Office draftsperson had been in good faith and should not be treated as "unreasonable".
14. The Tribunal Procedure (Upper Tribunal) Rules 2008 provide:  
**"Orders for costs(a)**  
10. – (1) The Upper Tribunal may not make an order in respect of costs ...  
except –  
...

(d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;

(5) A person making an application for an order for costs or expenses must—

(a) send or deliver a written application to the Upper Tribunal and to the person against whom it is proposed that the order be made;”

15. In *Ridehalgh v Horsefield* [1994] Ch 205, the Court of Appeal stated:

“... unreasonable also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner’s judgment, but it is not unreasonable ...”

16. I find that on the facts of this case, the Secretary of State has acted unreasonably. Active misrepresentation of the contents of an appealed decision goes far beyond legitimate written advocacy and can properly be considered vexatious. It cannot be equated to pleadings which are unduly optimistic. As explained in *Ridehalgh*, it is unnecessary to determine the motive of the draftsman, and whether they were driven merely by “excessive zeal” or not. Unfortunately, a serious misrepresentation of fact was made, and no reasonable explanation has been offered for the conduct of the draftsman of the grounds of appeal. The Secretary of State’s systems as they operated in this particular case plainly did not extend to reviewing the arguability of the grounds before the hearing or to making any enquiries as to why such unsatisfactory arguments should have been advanced.

17. None of this is any reflection upon the conduct of Mr Duffy before me; it is to his credit that he expended no more of the Upper Tribunal’s time than was minimally necessary to address the substance of the grounds and to briefly defend the grounds of appeal as falling within the bounds of reasonable litigation rather than constituting unreasonable conduct. However, I was unpersuaded by his submissions for the reasons already stated.

18. I accordingly find it is appropriate to award costs against the Secretary of State. That is my finding on liability for costs. The quantum remains to be determined.

Decision:

The appeal of the Secretary of State is dismissed.

The Secretary of State is to pay the Respondent's costs in defending this appeal, the amount of costs to be determined in line with the Directions below.

Directions:

The Respondent's representatives have produced a schedule of costs incurred in defending the appeal; these have been sent to the Secretary of State and to the Upper Tribunal. As that schedule was not available at the hearing, it is appropriate to give the Secretary of State the opportunity to make representations as to the extent of costs for which she is said to be liable.

- (1) The Secretary of State is to make written submissions within 14 days of the date that this decision is sent to her.
- (2) The Respondent may then have 7 days from the date those submissions are sent to her representatives to respond to those submissions.
- (3) The Upper Tribunal will then make a summary assessment of the costs based on the material before it.

Signed:

Date: 15 February 2018

A handwritten signature in black ink, appearing to read 'M. A. Symes', with a long, sweeping underline that extends across the width of the signature.

Deputy Upper Tribunal Judge Symes