



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02716/2017
HU/02738/2017
HU/02719/2017
HU/02725/2017

THE IMMIGRATION ACTS

Heard at Field House
On 2nd October 2018

Decision & Reasons Promulgated
On 17th October 2018

Before

JUDGE OF THE FIRST-TIER TRIBUNAL MONSON

Between

(1) COO (NIGERIA)
(2) FEO (NIGERIA)
(3) JEO (NIGERIA)
(4) CDO (NIGERIA)
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Jaufurally, Solicitor, Callistes Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal from the decision of First-tier Tribunal Judge Geraint James QC, who, in a decision promulgated on 11 May 2018, dismissed their human rights appeals which were primarily brought on the basis that the third and fourth appellants had accrued over seven years' residence in the UK as children, and hence it was not reasonable to expect them to leave the UK with their parents (the first and second appellants), who were overstayers. The First-tier Tribunal did not make an anonymity direction, but as the central issue in the appeals is whether the best interests of the minor children should or should not prevail over wider proportionality considerations, I consider it is appropriate to make an anonymity direction for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 13 August 2018 First-tier Tribunal Judge Doyle granted permission to appeal for the following reasons:

"2. The grounds assert that the Judge's proportionality assessment is flawed because he failed to take into account the length of time the two child appellants had been in the UK and did not follow the guidance in **MT and ET (Child's best interests; ex-temporary pilot) Nigeria [2018] UKUT 00088 (IAC)**.

3. It is arguable that the Judge had failed to take account of the best interests of the children and had failed to take into account the length of residence of the two child appellants in considering this case. It is arguable that the Judge did not make any proper findings in relation to the children's best interests, and there is no finding on the strong, powerful reasons which favour removal."

Relevant Background Facts

3. The appellants are all nationals of Nigeria. The first appellant, whose date of birth is 17 December 1971, is the husband of the second appellant, whose date of birth is 17 April 1981. They are the parents of the third appellant, [JEO], whose date of birth is 4 March 2006, and of the fourth appellant, [CDO], whose date of birth is 21 April 2008.
4. The first appellant entered the United Kingdom on or about 16 January 2008, with valid entry clearance as a student. He remained lawfully in the UK in the capacity of a student until 31 May 2011. On 31 March 2011 he applied for further leave to remain as a Highly Skilled (Post study work) migrant, and was granted leave in this capacity until 18 July 2013. On 10 July 2013 he applied for further leave to remain in the UK on the basis of family and private life established here. This application was refused on 12 August 2013, and his appeal against that refusal was dismissed by First-tier Tribunal Judge Nightingale on 29 July 2014. He applied for permission to appeal to the Upper Tribunal, but permission was refused on 14 August 2014, whereupon his appeal rights became exhausted.
5. On 16 September 2008 the remaining appellants joined the first appellant in the UK as his dependants. At all material times up and until 14 October 2014, the second to

fourth appellants were lawfully present in the UK as the dependants of the first appellant, save that for reasons which are unclear the fourth appellant was not included as an appellant in the appeal heard by Judge Nightingale.

6. Judge Nightingale also referred to the existence of two additional children, also not included in the appeal before her. There was a boy who had been born on 14 March 2011 in the UK, and another boy who had been born on 6 November 2013 in the UK.
7. At the time of the hearing before Judge Nightingale, [JEO] was aged 8. But she had been born in Benin, not the UK, and she had not yet accrued seven years' residence in the UK.
8. On 8 October 2015 the first appellant made a human rights application for leave to remain in the UK on the basis of family life as a partner and parent in the UK. By this time, both [JEO] and [CDO] had accrued over seven years' continuous residence in the UK.
9. On 31 January 2017 the respondent gave her reasons for refusal. She understood that the first appellant had two children in the UK. (The respondent appears to have been unaware that he had two additional children in the UK, making four altogether.) The two children declared in the application had both accrued over seven years' residence in the UK. It was not unreasonable to expect them to leave the UK as they would be returning to Nigeria with their parents as part of a family unit. It was generally accepted that the best interests of a child whose parents were facing removal from the UK were best served by that child remaining with their parents and being removed with them. This represented the centrality of a child's relationship with their parents in determining their well-being. The children were citizens of Nigeria and they would have full rights to live there and to continue to be supported by both parents.
10. The children were currently enrolled in education in the UK. However, Nigeria had a functioning education system which the children would be able to enter. He and his partner would be able to work legally and use the skills and experience they had gained in the UK to support job applications in Nigeria. It was both reasonable and section 55-compliant for both children to return to Nigeria with him.

The Hearing Before, and the Decision of, the First-tier Tribunal

11. The appellants' appeals came before Judge Jones QC sitting at Hatton Cross on 23 April 2018. There was no appearance on behalf of the respondent, but Mr Jaufurally appeared on behalf of the appellants.
12. The Judge received oral evidence from the parents, and in his subsequent decision he made the following findings of fact at paragraph [17]:

- (a) The second appellant had lied quite deliberately, when she claimed that her husband had ceased working in 2014. The first appellant traded and continued to trade in clothing, and in doing so he had chosen to flaunt the employment and immigration laws of this country.
 - (b) The children had had the advantage of publicly funded schooling in this country since becoming of school age. In the case of [JEO], that meant from sometime in or about 2011; and in the case of [CDO], it meant from some time in about 2013, when he would have been five years of age.
 - (c) The family lived in a rented house, and the rental outgoings were funded from the husband's income derived from illegal working.
13. The Judge continued: "*...I can make no findings concerning the nature and extent of any private life with any of the appellants in this country, because none of them has chosen to given any or any detailed evidence relating thereto. The only relevant evidence that I have related to private life relates to the fact that the third and fourth appellants attend school. As a matter of common sense, I proceed on the basis that each appellant is likely to have built up a circle of friends and acquaintances, but over and above that, I can go no further. None of the appellants has given evidence of involvement in things such as matters religious, romantic, political, cultural, sporting, charitable or just general social activity.*"
14. At paragraph [33], the Judge said that the essence of the appeals was whether it would be unreasonable to expect the third and fourth-named appellants, or either of them, to leave the UK. At paragraph [34], he said that those inward looking and rather precious about life in the UK might instinctively arrive at the knee-jerk response that it would be unreasonable to expect the children to leave the UK: "*Those who take a more global, adventurous view of life's opportunities and experiences may well take a different view. As the Court of Appeal has pointed out, I have to take a holistic, rounded view and keep in mind that it is not the duty of the United Kingdom to educate the world at public expense. In my judgment this is particular so where the first and second-named appellants have quite deliberately and cynically sought to manipulate themselves into a position where they believe that they would benefit from any such decision being made in favour or either or both of their children.*"
15. At paragraph [35], the Judge observed that children and adolescents, along with their respective families, move from city to city, county to county, country to country, and continent to continent with regularity. It was not some kind of novel event. Sometimes it occurred as a matter of choice - for example, when a family member sees an employment opportunity or wishes to relocate to a more congenial environment. It may arise as a matter of necessity, either economic or political. For most, such an event presented as an exciting new horizon, which itself could bring new opportunities and experiences to help develop a more worldly experience for a mature young person.

16. At paragraph [39], the Judge cautioned himself again as not to be influenced by the sins of the appellant's parents. Notwithstanding that *caveat*, he did not consider it unreasonable to expect the children to depart from the UK for Nigeria within the bosom of their nuclear family. He went on to give nine reasons for this conclusion. One of them was as follows: *"Despite the unspoken tendency in some decisions of the higher courts to assume that a person's best interests are best served by him/her remaining in the United Kingdom, any such sentiment, borne primarily of a consideration of the numerous material considerations which I have sought to identify above, is as vacuous as it is presumptuous."*

The Hearing in the Upper Tribunal

17. At the hearing before me to determine whether an error of law was made out, Mr Jaufurally developed the arguments advanced in the permission application. He submitted that the Judge had gone on a frolic of his own. He had not applied the guidance given by Elias L J in **MA (Pakistan) [2016] EWCA Civ 705**. He had failed to take into account that the children had been in the UK for nearly ten years, and both of them had established significant social contacts involving friends in school and outside. Powerful reasons had to exist for their removal from the UK in these circumstances, and the fact that their parents had decided to stay here without leave since October 2014 did not amount to powerful reasons.
18. In reply, Mr Whitwell submitted that the Judge had taken into account the length of residence of the children, as he had set out the immigration histories of all the appellants earlier in his decision. He drew attention to the fact that the Judge had highlighted the dearth of evidence relating to private life. In the circumstances, the Judge had given adequate reasons for finding that it was reasonable to expect the children to return to Nigeria with their parents.
19. Having heard from both representatives, I ruled that an error of law was made out. I gave my reasons for so finding in short form, and my written reasons are set out below.
20. I invited the representatives to make submissions on how the decision should be re-made. Mr Whitwell invited me to reach the same conclusion as the First-tier Tribunal. The fact that the 10-year watershed had now been passed did not make a material difference to the proportionality assessment. Mr Jaufurally submitted that the fact that the children had now accrued over 10 years' residence fortified the case that the appeals ought to be allowed, following the reasoning of the Upper Tribunal in **MT and ET**.

The Reasons for Finding an Error of Law

21. At paragraph [49] of **MA**, Elias L J said: *"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 a starting point that leave should be granted unless there are powerful reasons to the contrary."

22. I consider that the Judge identified powerful reasons as to why it was reasonable to expect the children to leave the country. But he fell into error in not visibly incorporating into his analysis the reasoning of Elias LJ set out above, or similar reasoning which is to be found in numerous other authorities, including **MT and ET**.
23. The Judge deliberately eschewed the two-stage "hypothetical" approach for the resolution of the question of reasonableness which was articulated by Clarke L J in **EV (Philippines) -v- SSHD [2014] EWCA Civ 874** at paragraphs [33]-[37], preferring the "real world" approach of Lewison LJ in the same case, at paragraphs [49] following.
24. The other Judge in the three-man panel agreed with both judgments, as Judge Jones noted. However, it was the hypothetical approach of Clarke LJ which was expressly approved and applied by Elias L J in **MA (Pakistan)**.
25. While the 'real world' approach operates satisfactorily in cases where children have not accrued seven years' residence, it is not an appropriate approach on a stand-alone basis in cases where the seven year Rule is in play. The starting point of the 'real world' approach is that it is in the best interests of minor children to return to the country of origin with their parents who have no leave to remain. Conversely, the required starting point in seven year Rule cases is that *prima facie* it is in the children's best interests to remain here, irrespective of the immigration status of their parents.
26. The upshot is that the Judge did not perform an adequate analysis of the children's best interests. He did not make a clear finding about where on the spectrum their best interests lay, before moving on to consider wider proportionality considerations.
27. Justice must not only be done, but must be seen to be done, and it is well established that the assessment of the best interests of minors facing removal must be properly performed. Accordingly, the decision must be set aside on the grounds of inadequate reasoning.

The Remaking of the Decision

Best Interest Guidance

28. A useful summary of the learning on the best interests of children in the context of immigration is to be found in **Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**:
 30. It is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances.

The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:

- (i) As a starting point in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
- (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
- (iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
- (iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than peers and are adaptable.
- (v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic wellbeing of society amply justifies removal in such cases.

The relationship between the Rules and Section 117B(6)

29. In **AM (S117B) Malawi [2015] UKUT 260 (IAC)** the Tribunal held that the duty of the First-tier Tribunal was quite clear. The First-tier Tribunal was required to have regard to considerations listed in Section 117B. It had no discretion to leave any of those considerations out of account, if it was a consideration that was raised on the evidence before it. The Tribunal continued in paragraph [13]:

There is also in our judgment no requirement that the FtT should pose and answer the same question more than once, simply as a matter of form. Thus since both paragraph 276ADE(1)(iv) of the Immigration Rules, and s117B(6), both raise the same question in relation to a particular child, of whether or not it would be reasonable to expect that child to leave the UK: it is a question that need only be answered once

The question of reasonableness

30. In **MA (Pakistan) and Others, R (on the application of) v Upper Tribunal (IAC) & Anor [2016] EWCA Civ 705** at paragraph [45] Elias LJ said:

In my judgment, the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the 'unduly harsh' concept under Section 117C(5), so should it when considering the question of reasonableness under Section 117B(6). ... The critical point is that Section 117C(5) is in substance a free-standing provision in the same way as Section 117B(6), and even so the court in **MM (Uganda)** held that wider public interest considerations must be taken into account when applying the 'unduly harsh' criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in Section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of Section 117B(6) is that where the seven year Rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted.

31. At paragraph [46] Elias LJ said that the published Home Office Policy guidance merely confirmed what is implicit in adopting a policy [the seven year rule] 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 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 to be 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.

32. At paragraph [48] Elias LJ cited with approval the explanation given by Clarke LJ in **EV (Phillipines)** at [34]-[37] as to how the Tribunal should apply the proportionality test where wider public interest considerations are in play, in circumstances where the best interests of the child dictate that he should remain with his parents. At [36] Clarke LJ said that if it is overwhelmingly in the child's best interests to remain, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite. Clarke LJ continued in [37]:

In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

Preservation of the Primary Findings of Fact made by the First-tier Tribunal

33. As will be apparent from my error of law ruling, the primary findings of fact made by the First-tier Tribunal Judge do not require to be revisited, and therefore they are preserved. The only potentially material development is that the children have now

accrued over 10 years' residence. I was told that [JEO] is now in Year 8 at secondary school.

Best Interests

34. [JEO] has the strongest private life claim, as she is the oldest child. The fact that she has now resided in the UK for 10 years does not have the same significance as it would if she had been born here, as in that event she would be eligible to apply for naturalisation as a British citizen. But the third and fourth principles of **Azimi-Moayed** clearly operate in her favour. Not only is she three years past the seven year watershed, but she has also accrued seven years' residence from the age of four, and she had embarked on her secondary school education. Although there is no specific evidence about any ties which she has formed outside the home, she can be expected to have established some significant social contacts involving friends in school.
35. However, she has not yet reached a significant milestone in her education. She is still a long way off from taking GCSEs. She is likely to receive an adequate education in Nigeria. With the support of her parents in adjusting to life there, and in common with her younger siblings, she will be able to enjoy all the benefits attendant upon her Nigerian citizenship, including being immersed in the social and cultural milieu from which both her parents spring. As Judge Jones put it at paragraph [39] of his decision, the children can enjoy the exciting prospect of being able to experience and/or embrace their natural culture and traditions.
36. In her decision, Judge Nightingale found that the first appellant was educated to degree standard in Nigeria and had considerable links with that country. He had acquired an MBA through his studies in the UK. She found that the second appellant had also been educated in Nigeria to GCSE standard. Both of them spoke excellent English and presented as intelligent and articulate individuals. She found that the family connections in Nigeria included two sisters and a brother of the first appellant, and a sibling of the second appellant. There was also family property. It was not suggested that the siblings would not assist the appellants, if necessary, in reintegrating into Nigeria.
37. Accordingly, relocation to Nigeria would carry the additional advantage of the children being able to enjoy family reunion with extended family members there, including uncles and aunts.
38. Nonetheless, I accept that the third and fourth principles outweigh the first and second principles in **Azimi-Moayed**, with the consequence that overall it is in her best interests to remain in the UK with her parents and younger siblings. The same applies to [CDO], albeit with slightly lesser force, as he has not accrued seven years' residence from the age of four.

39. However, while overall it is in the best interests of both children to remain in the UK, it is not overwhelmingly so. There are some factors pointing the other way, which are the ones identified in paragraphs [35] to [37] above.

Wider Proportionality Considerations

40. In order to answer the question of whether it is reasonable to expect the children to leave the UK despite being in their best interests to remain here, it is necessary to have regard to wider proportionality considerations. Both parents have adverse immigration histories. They are not mere overstayers. They have remained in the UK in defiance of the decision of Judge Nightingale that it was reasonable to expect them and the children to leave the country. The finding of Judge Nightingale was that the parents were in good health, as were all their children, and were quite capable of taking employment in Nigeria, earning a living and supporting their family. While the matter of educating their children might prove to be more expensive in Nigeria, she could not find that this should override the need to maintain fair and effective immigration control so as to safeguard the economic wellbeing of the UK: *"The education of four children at public expense is, in short, an expensive matter."*
41. So, the parents' continued presence in the UK has been, and will continue to be, a considerable burden on the taxpayer. There is also the aggravating factor that the parents have only been able to remain in the UK with their children since October 2014 through the first appellant working illegally. Judge Jones also made a finding of deceit against the second appellant. Whereas the first appellant acknowledged that he had been supporting the family by working illegally, she claimed in her evidence that since October 2014 a person called Sunni had paid their rent and utility bills and had provided *"pocket money"* for the entire family at the rate of £5,000 a month. The Judge found this to be a lie.
42. Mr Jaufurally submits that the immigration history of the parents is not as bad as that of the mother in **MT & ET**, and therefore, by parity of reasoning, he submits that the best interests of the children should prevail. However, I consider that the child in that case had a stronger private life claim than [JEO], as she was aged 14.
43. I do not accept that the legal effect of **MA (Pakistan)** is that 10 years' residence as a child is a trump card in the particular circumstances of this case. In **AM (Pakistan) [2017] EWCA Civ 180**, cited by Judge Jones at [29] of his decision, the Court of Appeal found that the FTT had not erred in dismissing appeals involving teenage qualifying children aged 16 and 13 – and hence, in the case of the oldest qualifying child, with a much stronger private life claim than [JEO].
44. In her decision, Judge Nightingale rightly applied the fifth principle of **Azimi-Moayed**, which is that those who come to the UK as students, and decide to found families while they are here, must not expect to remain here once they have finished their studies. Rather, they must expect to return to their home countries with their

children. Having regard (a) to the outcome of the appeals before Judge Nightingale, and the refusal of permission to appeal to the Upper Tribunal, and (b) the subsequent conduct of the parents, I consider that there are sufficiently strong reasons for expecting the children to leave the UK. While the first and second appellants have a genuine and subsisting parental relationship with their children, it is reasonable to expect all the children, including the third and fourth appellants, to leave the country. None of the other relevant public interest considerations arising under Section 117B of the 2002 Act militate against the proportionality of the removal of the family. The decision appealed against strikes a fair balance between, on the one hand, the rights and interests of the appellants and, on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought to be achieved, namely the protection of the country's economic wellbeing and the maintenance of firm and effective immigration controls.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellants' appeals on human rights grounds are dismissed.

Direction Regarding Anonymity

Unless and until a tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 4 October 2018

Deputy Upper Tribunal Judge Monson