



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/11534/2016  
HU/11536/2016  
HU/11539/2016  
HU/11541/2016

**THE IMMIGRATION ACTS**

**Heard at Liverpool Civil and Decision & Reasons Promulgated  
Family Court On 10<sup>th</sup> October 2018 On 23<sup>rd</sup> October 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**FRA  
OOA  
ODTAA  
ODAA  
(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mrs A Chaudhry of Counsel instructed by Crown & Mehria Solicitors

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

1. The Appellants appealed against a decision of Judge Saffer (the judge) of the First-tier Tribunal (the FtT) promulgated on 23<sup>rd</sup> October 2017.
2. The Appellants are Nigerian citizens. FRA and OOA are partners and are the parents of ODTAA and ODAA. The children were born in the UK on 6<sup>th</sup> June 2014 and 11<sup>th</sup> June 2010 respectively. FRA and OOA now have a third child who is not a party to these proceedings but who was born in the UK on 6<sup>th</sup> July 2017. OOA is the father of the children and FRA the mother.
3. On 21<sup>st</sup> October 2014 the first two Appellants submitted an application for leave to remain in the UK relying on family and private life. That application was refused on 6<sup>th</sup> January 2015. On 31<sup>st</sup> December 2015 the Appellants presented representations for the reconsideration of their human rights application for leave to remain based upon their family and private lives. These applications were refused on 13<sup>th</sup> April 2016.
4. The appeals were heard on 11<sup>th</sup> October 2017. The judge found that the Appellants could not satisfy the relevant Immigration Rules and was not satisfied that there were any compelling circumstances outside the rules which meant that Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) should be considered. In the alternative, if wrong in that conclusion, the judge went on to consider Article 8 and dismissed the appeals.
5. The Appellants applied for permission to appeal to the Upper Tribunal and permission was granted by Judge Ford on 9<sup>th</sup> April 2018. The grounds seeking permission contended that the judge had dismissed the appeals without proper scrutiny, failed to properly consider the best interests of the minor children, and had not properly considered Article 8 outside the Immigration Rules, but dismissed the appeals simply because the Appellants could not satisfy the Immigration Rules.

## **Error of Law**

6. On 27<sup>th</sup> July 2018 I heard submissions from both parties in relation to error of law. The Respondent contended there was no material error. The Appellants relied upon MA (Pakistan) [2016] EWCA Civ 705 on the basis that the fourth Appellant had more than seven years' continuous residence in the UK and the judge had not adequately considered whether it would be reasonable for her to leave the UK. It was also contended that the judge had erred in failing to consider section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).
7. Full details of the application for permission to appeal, the grant of permission, the submissions made by both parties, and my conclusions are contained in my decision dated 2<sup>nd</sup> August 2018, promulgated on 9<sup>th</sup> August 2018. I found that the judge had erred in law and set aside the FtT decision. I set out below paragraphs 20–34 of my decision, which contain my conclusions and reasons for setting aside the FtT decision;

- “20. I observed that the judge erred factually at paragraph 1 in recording that the children were born in Nigeria. The evidence indicates that they were born in the UK. The first and second Appellants have three children, although the youngest is not a party to these proceedings. The error in relation to the location of the birth of the children is not material as the judge accepted that the fourth Appellant had accrued more than seven years’ continuous residence in the UK. Mr Sills was correct not to rely on the first Ground of Appeal which has no merit whatsoever.
21. I find that the second and third grounds are in fact linked. In my view the judge erred in law in conducting an inadequate assessment of Article 8 outside the Immigration Rules.
22. The judge was wrong at paragraph 33 to conclude that Article 8 could not be considered outside the Immigration Rules unless there were compelling circumstances. However, the judge does make the point in paragraph 34, that if he was wrong in that conclusion, he will go on to consider Article 8 outside the Immigration Rules in any event. The correct approach is outlined in paragraph 48 of *Agyarko* [2017] UKSC 11 in which it is stated that if the relevant test within the Immigration Rules is not met, but refusal of the application would result in unjustifiably harsh consequences such that refusal would not be proportionate, then leave to remain could be granted outside the Immigration Rules on the basis of exceptional circumstances.
23. I find no error of law in the consideration by the judge of proportionality so far as the first, second and third Appellants are concerned. The error in my view relates to the fourth Appellant who it is accepted had resided in the UK for in excess of seven years at the date of hearing.
24. The judge makes reference to *MA* (Pakistan) and section 117B(6) of the 2002 Act at paragraph 29, but in my view errs in not adequately considering section 117B(6), and not considering and applying the guidance in *MA* (Pakistan). For ease of reference I set out below section 117B(6);
- (6) 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.
25. In this case the judge at paragraph 40 finds it reasonable to expect the children to go with their parents to Nigeria, and at paragraph 41 referring specifically to the fourth Appellant, states that
- ‘Even if I was to consider her case before that of her parents and excluding their behaviour I would reach the same conclusion regarding her best interest and the

reasonableness of requiring her to leave the United Kingdom for the reasons set out above’.

26. With respect, in my view the judge’s approach is incorrect. The best interests of the children should be considered as a primary consideration without any consideration of the behaviour of the parents. Having assessed the best interests, if the child is a qualifying child, the judge must then go on to consider whether it is reasonable to expect that child to leave the UK.
27. In considering reasonableness, the judge must take into account all factors relevant to the public interest, including the behaviour of the parents.
28. The judge has not correctly applied the guidance in MA (Pakistan) in considering reasonableness. At paragraph 46 it was stated in summary that the fact that a child has been in the UK for seven years must be given “significant weight when carrying out the proportionality exercise”. In cases where a child has been in the UK for seven years or longer, 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.
29. At paragraph 49 of MA (Pakistan) it is stated;
  - ‘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’.
30. The above guidance was not followed by the judge. The fourth Appellant had in excess of seven years’ residence, and therefore when considering whether it would be reasonable for her to leave the UK, the judge should have considered as a starting point that leave should be granted unless there are powerful reasons to the contrary. That was not the approach taken.
31. In considering powerful reasons, the judge did not have the benefit of MT and ET (Nigeria) [2018] UKUT 00088 (IAC) in which at paragraph 34 the President of the Upper Tribunal gave an example of the immigration history of a parent which would not amount to powerful reasons.
32. I therefore conclude that the judge erred in consideration of Article 8, specifically in relation to the fourth Appellant. The decision must therefore be set aside.
33. I do not find that it is appropriate to remit this appeal to the FtT. There are findings that have not been successfully challenged and can be preserved. Those findings are contained in paragraphs 20-27.
34. When I announced that I was reserving my decision in relation to an error of law, it was suggested that it may be appropriate to remit this case to the FtT, and that there should in any event be a

further hearing. In my view there should be a further hearing before the Upper Tribunal. The issue to be decided relates to the fourth Appellant. The Immigration Rules cannot be satisfied, but at the next hearing there will need to be a consideration of the best interests of the fourth Appellant, and consideration of section 117B(6), in particular whether in the circumstances it would be reasonable for the fourth Appellant to leave the UK. This will need to be assessed by considering the guidance in MA (Pakistan) and MT and ET.”

### **Re-making the Decision - Upper Tribunal Hearing 10<sup>th</sup> October 2018**

8. Mrs Chaudhry, on behalf of the Appellants, indicated that there was no further documentary evidence and no oral evidence would be called. There was no skeleton argument. I ascertained that I had all the documents to be relied upon, which were the documents before the FtT. These consist of the Home Office bundle dated 16<sup>th</sup> March 2017, an Appellants’ bundle comprising 28 pages, and the Appellants’ supplementary bundle comprising 3 pages. In addition, there is a bundle prepared on behalf of the Appellants comprising 38 pages which was prepared for the Upper Tribunal error of law hearing. This contains the FtT decision, and the Grounds of Appeal, and does not add anything to the Appellants’ case.
9. I heard oral submissions from Mr Bates on behalf of the Respondent. With reference to MT and ET Mr Bates pointed out that the comments made at paragraph 34 of that decision in relation to behaviour by a parent which does not amount to powerful reasons for finding it reasonable to remove a child, are not included in the head note to the decision.
10. Mr Bates pointed out that MT and ET was decided prior to new guidance issued by the Respondent in relation to family migration, which was issued on 22<sup>nd</sup> February 2018. I was asked to note that the first Appellant had arrived in the UK as a student and subsequently overstayed, and the second Appellant had arrived illegally and had never been granted leave.
11. In relation to the fourth Appellant, there was inadequate evidence of any medical issues as there was no diagnosis or prognosis, and no up-to-date evidence.
12. Mr Bates submitted that the best interests of the children would be served by remaining with their parents. It was submitted that the family would be returned to Nigeria together, and English is widely spoken in that country. Letters in support of the family, contained in the Appellants’ bundle, came from individuals now resident in the UK who originated from Nigeria.
13. I was asked to find that it was accepted that the Appellants had extended family in Nigeria, and that the family are not financially independent. Mr Bates submitted that there was significant public interest in maintaining effective immigration control.

14. I then heard submissions from Mrs Chaudhry on behalf of the Appellants. I was asked to note that the fourth Appellant has now resided in the UK continuously for in excess of eight years having been born in this country. She is in education. She is still undergoing medical tests. She is at an age where she is forming her own private life and does not rely exclusively upon her parents.
15. I was asked to follow the case law which indicates that it would not be reasonable to expect the fourth Appellant to leave the UK unless there are powerful reasons, and there are no such powerful reasons in this case.
16. Mrs Chaudhry submitted that Home Office guidance is in fact in line with the guidance in MA (Pakistan) in that it indicates that strong reasons will be required to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more.
17. I was asked to find that it would not be reasonable to remove the fourth Appellant, and therefore her parents' appeal should be allowed with reference to section 117B(6) of the 2002 Act.
18. At the conclusion of oral submissions I reserved my decision.

### **My Conclusions and Reasons**

19. I start by setting out the preserved findings of the FtT which are contained at paragraphs 20–27 of that decision;
  20. I am satisfied that when OOA came here in 2006 he did so using a visa that he was not entitled to as he had no intention of returning to Nigeria and he accordingly lied to the ECO or instructed the agent to lie to the ECO regarding his intentions.
  21. I am satisfied that when FRA came here in 2008 she did so to study as I have no real reason to doubt that.
  22. I am satisfied that the adults began a relationship in 2008 as I have no reason to doubt that. I am satisfied that, apart from a period in 2014/2015 when they had relationship issues, they have been in a genuine and subsisting relationship since 2008, and live in a relationship akin to marriage for two years as they have had three children, and I have no real reason to doubt them.
  23. I am satisfied that OOA has worked without permission given his acceptance that he has. I accept that family and friends have provided financial support as I have no reason to doubt that evidence.
  24. I am satisfied that the family involve themselves in church life as I have no reason to doubt that evidence.
  25. It is clear from the Respondent's guidance on public funds produced by Miss Hashmi that since 22<sup>nd</sup> April 2016 (nine days after the Respondent's decision) reliance on the NHS and the state education system has not been considered to be reliance on public funds. The test in section 117B however is whether they

are financially independent which they plainly are not given their reliance on family and friends for financial support, accordingly Miss Hashmi's submission does not assist the family.

26. FRA and OOA are both over the age of 18. Neither has been here for twenty years. They are both in good health. They both speak the languages used in Nigeria where they were educated and understand the cultural and social mores. They both have family with whom they are in touch. I do not accept they would be unable to work as there is no evidence of any such impediment. Whilst FRA currently has childcare responsibilities, OOA does not. There is no corroborative evidence to suggest that having children whilst unmarried carries anything like the societal approbation suggested. Nor has any evidence been adduced to support the assertion that there would be a real risk to them of kidnapping, ritual murder, or being robbed. The suggestion that their family could find them anywhere in Nigeria is plainly absurd given the sheer size of Nigeria and lack of evidence of any ability to get access to state computers that identify where people are (if there are such records) or a desire to search for them. Their ability to speak English here is a neutral factor. They are not financially independent. I reject the suggestion that the family and friends here will not continue to support them in Nigeria as none attended to give evidence to that effect. I am not satisfied that their application met the rules as ODAA had not been here for seven years at the date of application and there are no significant obstacles to them integrating easily back into life in Nigeria either with or without family support.
27. ODTAA is 3. He is Nigerian. He has not been here for seven years. He is healthy. He is not integrated in the education system given his tender years. He will be able to learn any language he needs in Nigeria. The suggestion he would be unable to integrate into life in Nigeria with the support of his parents, on whom he is entirely reliant is absurd. Given his age the 'reasonableness test' does not apply, but even if it did, it plainly would be decided against him. His application under the rules was hopeless. The same applies to ODGAA even though she is not a party to these proceedings".
20. It is accepted on behalf of the Appellants that they cannot satisfy the requirements of the Immigration Rules. I am asked to consider Article 8 of the 1950 Convention outside the rules. I find that Article 8 is engaged. The Appellants have established family life together, and private lives.
21. The factual matrix to some extent is set out in the preserved findings of the FtT. I find that the first Appellant entered the UK legally as a student on 22<sup>nd</sup> April 2008. Her leave expired on 31<sup>st</sup> August 2011 and she thereafter overstayed. The second Appellant entered the UK illegally in 2006 and has never had leave to remain.
22. The best interests of children must be considered as a primary consideration but not a paramount consideration. Factors relevant to

considering the best interests of children are set out in paragraph 35 of EV (Philippines) [2014] EWCA Civ 874. The factors involve considering the age of the children, the length of time they have been in the UK, how long they have been in education and what stage their education has reached. There must also be consideration of the extent to which the children have been distanced from the country where it is proposed they return, how renewable their connection with that country may be, and to what extent they would have linguistic, medical or other difficulties in adapting to life in that country, and the extent to which the course proposed would interfere with their private life or their rights (if they have any) as British citizens.

23. The FtT found, and the finding is preserved, that the best interests of the third Appellant who is now 4 years of age, and the youngest child who is not a party to the proceedings, would be to remain with their parents, and if their parents return to Nigeria, so should the children. If this appeal related only to the first, second and third Appellants, the appeals would be dismissed. That however is not the case, and I find that the appeals rest upon the position of the fourth Appellant.
24. I am satisfied that the fourth Appellant attends school although there was no up-to-date evidence. There is a letter at page 18 from the head teacher of the fourth Appellant's primary school which is undated. At the time the letter was written the fourth Appellant was in year 2. She is described as having lots of friends, working hard and making excellent progress.
25. Included within the Appellants' bundle at page 10 is a letter from Mr D'Souza, a consultant orthopaedic surgeon dated 12<sup>th</sup> May 2017. This describes the fourth Appellant has having swelling of the peripheral joints secondary to an inflammatory arthropathy. There is reference to blood tests being arranged but there is no more recent medical evidence on this issue.
26. There is a letter from Dr Watson, a consultant paediatrician, dated 7<sup>th</sup> April 2017 which refers to the fourth Appellant having bladder problems with the most likely diagnosis being overactive bladder. There is reference to the Appellant being referred to a specialist, but no updated medical evidence on this issue.
27. I must follow the guidance in MA (Pakistan). The guidance has been set out in part earlier in this decision. The fourth Appellant was born in the UK and has approximately eight years four months' continuous residence. She has never visited Nigeria. I find that her best interests, given her length of residence would be to remain in the UK if her parents were allowed to remain. That does not however mean that her appeal must be allowed. I must consider any other relevant considerations. I have had regard to the considerations in section 117B of the 2002 Act, which confirms that the maintenance of effective immigration controls is in the



public interest. The fourth Appellant has established a private life in the UK but has never had leave to remain in this country. I have had regard to the Respondent's guidance published on 22<sup>nd</sup> February 2018 at pages 74-76, which gives guidance on whether it would be reasonable to expect a child with seven years or more residence to leave the UK. At page 75 the guidance states;

"The longer the child has resided in the UK, and the older the age at which they have done so, the more the balance will begin to shift towards it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more".

28. I find that this is in line with the guidance in MA (Pakistan) which makes reference to powerful reasons being required to make it reasonable to remove a child with more than seven years' residence.
29. I have taken into account the guidance in Azimi-Moayed [2013] UKUT 00197 (IAC) in which it was found that seven years' residence from age 4 is likely to be more significant to a child than the first seven years of life as very young children are focused on their parents rather than their peers and are adaptable.
30. In considering whether it would be reasonable for the fourth Appellant to leave the UK the guidance in MA (Pakistan) is that I must not focus on the position of the child alone but must have regard to the wider public interest, including the immigration history of the parents.
31. Therefore, having found that the best interests of the fourth Appellant would be to remain in the UK where she was born and where she has resided for in excess of eight years, I must consider whether there are any powerful reasons which would make reasonable her removal from this country.
32. In considering powerful reasons I take into account the guidance in MT and ET (Nigeria) [2018] UKUT 00088 (IAC). The President of the Upper Tribunal was considering in that appeal a 14 year old child with ten years' residence in the UK. At paragraph 34 it was noted that the parent had received a community order for using a false document to obtain employment. The parent was an individual who had entered the UK as a visitor, overstayed, made a claim for asylum that was false, and thereafter pursued various legal means of remaining in the UK. The behaviour was not so bad as to constitute the kind of powerful reason that would render reasonable the removal of the child to Nigeria.
33. In this case, the parents do not have criminal convictions. They have abused the immigration laws of the UK, in the case of the first Appellant by remaining without leave since August 2011, and in the case of the second Appellant entering illegally and never having leave. In addition, the second Appellant has worked without permission.

34. However, applying MT and ET, I do not find that the behaviour of the parents amounts to powerful reasons for removing from the UK a child with in excess of eight years' residence. I therefore conclude that it would not be reasonable to expect the fourth Appellant to leave the UK.
35. It follows from that finding that the first and second Appellants must also succeed with reference to section 117B(6) as they have a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect that child to leave the UK. The public interest therefore does not require their removal.
36. That leaves the third Appellant who is 4 years of age, and the youngest child who is not a party to these proceedings. If the parents are allowed to stay in the UK together with the fourth Appellant, it must follow that it would be disproportionate to expect the two youngest children to return to Nigeria without their parents.
37. Therefore the appeals are allowed with reference to section 117B(6) and Article 8 of the 1950 Convention.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeals are allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

### **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. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made because the third and fourth Appellants are minors and is made pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date

11<sup>th</sup> October 2018

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT  
FEE AWARD**

I make no fee award. The appeals have been allowed because the fourth Appellant proves in excess of seven years' residence. That was not the case when the applications for leave to remain were initially refused by the Respondent.

Signed

Date

11<sup>th</sup> October 2018

Deputy Upper Tribunal Judge M A Hall