



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/15958/2016
HU/17200/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2 August 2018

Decision and Reasons Promulgated
On 30th August 2018

Before:

UPPER TRIBUNAL JUDGE GILL

Between

A A
D O
(ANONYMITY ORDER MADE)

Appellants

And

The Secretary of State for the Home Department

Respondent

Anonymity

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 appellant in this case. His mother has also been given anonymity in order to protect the minor's identity. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. 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 Appellants: Mr J Gajjar, of Counsel, instructed by Malik & Malik Solicitors.

For the Respondent: Ms. L Kenny, Senior Presenting Officer.

DECISION AND REASONS

1. The appellants are nationals of Nigeria. The first appellant, born on 1 April 1978, claimed to have arrived in the United Kingdom as a visitor on 19 December 2005. The second appellant is her son, born in the United Kingdom on 28 September 2009. Their appeals against decisions of the respondent of 9 June 2016 to refuse their applications for leave to remain in the United Kingdom on the basis of their rights under Article 8 of the ECHR were dismissed by Judge of the First-tier Tribunal K L James (hereafter the "judge") in a determination promulgated 21 December 2017 following a hearing on 27 November 2017.
2. By the date of the hearing before the judge, the second appellant had lived in the United Kingdom for 8 years 2 months and was therefore a "*qualifying child*" as defined in s.117D of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"). It was therefore necessary for the judge to consider s.117B(6) of the 2002 Act.
3. In their grounds of appeal to the Upper Tribunal, the appellants did not challenge the adverse findings of fact in relation to first appellant's evidence.
4. By a decision promulgated on 25 April 2018 (hereafter the "*error of law decision*") following a hearing on 18 April 2018, I concluded that the judge had materially erred in law, in that:
 - (i) she failed to consider whether it was reasonable for the second appellant to leave the United Kingdom for the purposes of s.117B(6) of the 2002 Act; and
 - (ii) she failed to apply the guidance in MA (Pakistan) [2016] EWCA Civ 705.
5. I therefore set aside the judge's decision and decided the extent to which her reasoning and findings in relation to the second appellant's appeal should stand. I also decided that, as the appellants had not challenged the adverse reasoning and findings of fact in relation to the first appellant's evidence, all of such adverse reasoning and findings shall stand.
6. The error of law decision is annexed to this judgment as an Appendix.
7. This is the re-making of the appellants' appeals. The error of law decision made it clear that the sole factual issue in the re-making of the decision was whether it is reasonable for the second appellant to leave the United Kingdom.
8. At the commencement of the hearing of the hearing on 2 August 2018, I put to Mr Gajjar and Ms Kenny, and they both agreed, that:
 - (i) if it is not reasonable to expect the second appellant to leave the United Kingdom, s.117B(6) of the 2002 Act applies. Furthermore, as the first appellant is the mother of the second appellant who is a minor, both their appeals would succeed under Article 8 in relation to their family life.
 - (ii) If it is reasonable to expect the second appellant to leave the United Kingdom, the appeals of both appellants would fail.

The preserved findings of the judge

9. In the error of law decision, I decided (paras 33-35 of the error of law decision) that the judge's reasoning and findings in relation to the first appellant's evidence shall stand, i.e. her reasoning and findings at paras 19-29, 31 and 33-36 of her decision.

10. The paragraphs in which the judge considered the circumstances of the second appellant were paras 30, 32 and 37.

11. In relation to the judge's findings concerning the second appellant's circumstances, I said as follows in the error of law decision:

"36. I turn to consider the extent to which the findings of the judge in relation to the second appellant should be set aside. I have considered paras 30, 32 and 37 very carefully. I have considered the nature of the findings made by the judge in relation to the second appellant and the fact that it is desirable for the Tribunal to be updated on his circumstances, if there is further evidence available. Having done so, I have concluded as follows:

- (i) As to para 30, there is no need to set aside the judge's finding that the second appellant has formed a private life during the period of his residence in the United Kingdom and that such private life is not independent life, unless there is new evidence showing that he has formed an independent private life (which is unlikely). The period of the second appellant's length of residence will, of course, be the period as at the date of the next hearing.
- (ii) As to para 32, any further evidence which touches upon the matters considered by the judge at paragraph 32 of her judgment will, of course, be considered.
- (iv) As to para 37, I set aside the following findings of the judge: (a) that the second appellant has minimal private life, on the basis that this is inconsistent with the judgment in MA (Pakistan); and (b) that it would not be unreasonable for the second appellant to leave the United Kingdom and return to Nigeria."

12. It is therefore necessary to quote paras 19-37 of the judge's decision, which read:

"19. During her oral evidence the mother confirmed that in 2005 she was asked to marry a man a lot older than herself and that this was the reason why she obtained a visit visa to the UK and left Nigeria. It was not alleged that any threats or forced [*sic*] was used by her family to effect this marriage. Little to no information was provided on this point in writing or orally. On 19 December 2005 the adult Appellant was 27 years of age. I doubt that a grown adult woman would have been forced to marry against her will at that age, considering the country background information in the COIR regarding Nigeria and her particular home circumstances. There is also no country background evidence submitted by the Appellants' in support of this assertion. Asked during her oral evidence if her family would be able to force her to marry on her return to Nigeria, the mother conceded no this would not occur now. As she is a single mother with a child, I doubt that a traditional forced marriage would occur in such circumstances, especially as the child's father is also Nigerian and possibly has now returned to Nigeria.

20. In regards to tribal marks, other than mere assertion this would occur upon return to Nigeria, no information was given as to how or why her family in Nigeria would force her son to have tribal markings; especially as the Appellant simultaneously claims to have not a single immediate or extended family member or any family member residing in Nigeria. This materially undermines her claim to fear her family on return to Nigeria (for either the forced marriage or the tribal markings). That her son is only 8 years of age, and is pre-pubescent, tends to also undermine her claims in regards to this marking taking place as part of a 'rites of passage' custom. In addition in her

application the Appellant confirms that she is also financially supported in the UK by family members here. It is difficult to marry up this claim with the simultaneous claim that these same members who refuse to financially support her on return to Nigeria but do so here in the UK, would also forced *[sic]* her son to undergo tribal markings as claimed. No witness statements or letters of support from these family members based in the UK are submitted, or from other family members based around the world as claimed by the Appellant. Also no reasons or explanations are given for why such easily accessible statements have not been submitted. In summary, *[sic]* did not find that the Appellant was a witness *[sic]* or truth and her 'scatter gun' reasons for not returning to Nigeria were credible, in the face of the singular lack of information or documentary evidence submitted in support of any of her claims, other than mere assertion, for the reasons stated herein.

21. The mother confirmed that she used deception in her visit visa to enter the UK, coming for a friend's wedding in 2005, but that she did not intend to return to Nigeria prior to entry due to her fear of Boko Haram. However at no point to date has the Appellant claimed asylum on this or any other basis, and I am not persuaded that this is a credible fear in 2005 or thereafter, as opposed to an embellishment to enhance her chances of success to remain in the UK. Again the Appellant has not claimed to have suffered any adverse experiences from Boko Haram in Nigeria, and this is a generic non-particularised feeling as opposed to anything adverse that occurred to her in her home country, or as the catalyst for these feelings.
22. The mother also claimed that she left Nigeria as she was in fear of a man she had taken money from there. However, on further explanation this was a man she borrowed money from in order to obtain the visit visa to enter the UK, in order to then obtain a UK work permit from him (presumably illegal work permit i.e. non-genuine, as it is difficult to see why the Appellant would pay him for a visit visa to come to the UK for a temporary short term holiday and then assume he could obtain a work permit for her), and whom she had not repaid since her arrival in 2005. Apparently this man, Shego Aduwale, took her passport from her and told her to get a job. I note that the Appellant applied for a national insurance number in 2013, some 8 years after her arrival here. Clearly she had either not worked prior to this date, or more likely not worked legally in the UK prior to this date (as she required money to live). However, Mr Aduwale apparently then immediately left the UK shortly after arrival and returned to Nigeria with the mother's passport, and called her from Nigeria stating he would not return her passport to her unless she repaid him the money he had given her. However the Appellant confirms that other than that single telephone call, he has not been in touch with her since then i.e. December 2005, the same month of arrival. Thus in his absence from the UK it is difficult to see how Mr Aduwale could threaten the mother or ensure she worked to repay the money she owed him for what she claims was an illegal entry into the UK. The mother appears not to have received any threats from him since the single telephone call of December 2005. Thus I am not persuaded that she fears returning to Nigeria for this reason, as claimed, especially as Mr Aduwale has made no efforts to contact her to obtain the debt for about 12 years. That the sum owed was only N400,000 (about £832 at today's rates) and the Appellant has failed to pay a single penny of this debt to Mr Aduwale is an indication of the lack of pressure she felt regarding the need to repay this debt, and in turn is also indicative of the lack of consequential fear on return based on this part of her claim.

23. In any event, it is open to the Appellant to relocate to another area of Nigeria as an independent mature adult woman who has been responsible for her own accommodation and maintenance, and that of her son's in the UK, and she can undertake these same responsibilities in Nigeria.
24. The Appellant also claimed that she was unable to obtain a passport, although when asked why she did not obtain one from the Nigerian Embassy in London said she did not know how to do so, even though she had obtained her first passport in Nigeria without apparent problem.
25. The Appellant obtained a national insurance number in 2013 and therefore I assume this was with the intention to obtain and undertake work in the UK 'legally', although she was fully aware she had no right to work in the UK. Although the birth certificate of her son confirms at that date that the mother was a kitchen assistant, the mother fails to submit a single page of any of her financial arrangements or income in support of her appeal (other than a single letter from a friend, [C. Adesiyani], who confirms he pays her £50 pcm but provides no bank statements or receipts and no evidence of his own income, or transfer to the Appellant). I have no bank statements, no rental agreement, no utility bills, no council tax, no payslips, no P60s, and no correspondence from HMRC to confirm that the Appellant is working legally (or illegally) and/or meeting her tax or national insurance contribution liabilities. I therefore have no confidence that she has worked in the UK with any intention of meeting such obligations. Nor am I persuaded that the Appellant is solely reliant financially on [Mr Adesiyani], especially as this is not a family member (or rather is not referred as such in the evidence) and no other family members the Appellant claims to be reliant on have written to support this appeal. It is more likely than not that the Appellant works 'off radar' to meet the costs of her own accommodation and maintenance, as well as her son's costs, whilst in the UK.
26. I have no evidence of the mother paying any NHS bills, and assume she used the NHS to give birth to her son, and that the child has the benefit of free schooling in the UK since September 2014, as confirmed by the school report submitted and the school letter.
27. The mother in her oral evidence confirmed that she worked for a living, and has done so since 2011. She gives no documentary evidence of how she paid for her accommodation and maintenance for herself or her son prior to that date for six years (although in her application form, she confirms she is funded by family and friends in the UK). The mother then confirmed that she had only worked for the last year, then claimed she had worked since 2012. Clearly the Appellant's oral evidence is so riddled with contradictions and discrepancies that her word cannot be relied upon. Nevertheless the Appellant claimed to be given money by her church (although no letters from a church are before me, and no letters of support from any member of the congregation is submitted, unless [Mr Adesiyani] attends the same church), and also from cooking for the church, and washing and cleaning the houses of church members. So it appears to me that the mother's work is 'off the radar' and she confirms she pays no tax or national insurance, not least as she confirms the DWP confirmed she is not allowed to use her national insurance number until her immigration status is settled. Hence in consequence she works 'off the books.' I am not persuaded that the Appellant is able to be wholly financially independent, as she is reliant on the funds received from her church, as well as claiming to receive funds from both family and friends, and I take this into account in regards to the economic limb of Article 8 ECHR and also s117 public interest

considerations. I accept that the Appellant speaks fluent English, not least, as it is the official language of Nigeria due to its colonial history.

28. The Appellant confirms she deliberately entered the UK knowing she was using deception (in regards to the conditions of entry for a visit visa which required her return to her home country, or non-working, in the illegal entrance as she claimed, as no visit visa is before me and no evidence of any travel itinerary is submitted). At all times the Appellant knew she had no right to remain in the UK from 2005 onwards, or from about June 2006 onwards i.e. a period of up to 12 years. At no point did the Appellant seek to regularise her status in the UK until she made an EEA application on 3 July 2013, a delay of about eight years. No reason is given for this delay. No reason is given why the EEA application was refused or why that is no longer being pursued. The FR(FP) application of 7 November 2015 was rejected and this current family and private life application was made on 27 January 2016. However the Appellant did not appeal the previous refusal.
29. From the lack of evidence before me, I am not persuaded that the Appellant had any legal right to enter the UK in 2005, or alternatively had had any right to remain in the UK since about June 2006. Thus she is either an illegal entrant or an overstayer. Either way the Appellant at all times was well aware she had no right to remain in the UK. Nevertheless she went on to have a child with a Nigerian national in the UK, knowing she had no leave to remain and that her presence and that of her child was precarious. In addition the Appellant knew that the father of her child had no leave to remain in the UK either. Her son also has no right to remain in the UK, albeit he is a minor and should not be held responsible for this omission.
30. The Appellant now states that she has sole responsibility for her son. The father is a Nigerian national (confirmed by the birth certificate) who apparently has no right to remain in the UK, and therefore the son can renew his relationship with his father who may now be back home in Nigeria, or when the father returns to Nigeria. The son had not been in the UK for the required seven-year period as at date of application, although I note he was born on 28 September 2009 and thus has resided here for eight years and two months. He has therefore formed a private life during this period, albeit not an independent life.
31. The mother fails to submit any letters of support, witness statements or any witness in support of her private life in the UK, from family, friends, neighbours, employers, church members or charities/NGOs (save for a single letter from [Mr Adesiyani]), although such documents would have been easily accessible. I thus assume her private life in the absence of such easily accessible documentation is minimal and primarily based on her residence in the UK due to passage of time, and illegal work undertaken. It is not claimed that she has attended college.
32. I accept the son has been attending reception school since September 2014 and has more recently entered mandatory infants schooling in the UK. However he is still young, highly dependent emotionally, socially and physically on his mother, so his private life formed is minimal and he is not at a critical stage of his school. His report confirms he is a bright social child who would thus integrate well into any society and community, including his home country of Nigeria, where he has access to education and health care. He is at a malleable age where he can integrate into his home country upon return, with the support of his mother, where English is one of the official languages, and it is in his best interests to remain with his mother upon their

return, to his ancestral land where his father comes from and where his father's extended family remain.

33. I do not accept that having attended a local church with members of the congregation from the Nigerian diaspora, that the Appellant has foregone all her cultural, religious, social, linguistic networks and ties to her home country; especially in light of her lack of credibility.
34. On the one hand the mother claims she is in fear of her many family members who reside in Nigeria who wish to force her to marry against her will and put tribal markings on her son, and on the other the mother also claims not to have a single family member residing in Nigeria. Both claims cannot be true or correct. I do not find it plausible that the Appellant is not in touch with the father or the family of her son's father in Nigeria, or her own extended family members in Nigeria, or that she is a single child as initially claimed, especially as she then later claimed in her oral evidence that her siblings, extended family members and her parents lived in various places such as Ghana, America and Australia.
35. That the Appellant has failed to submit a single piece of paper or letter of independent support for her claims, other than [Mr Adesiyah's] letter, tends to undermine them. That the Appellant fails to submit any documentary evidence in support of her claims, and also presents contradictory evidence that is replete with discrepancies and inconsistencies, means that her claims regarding not having family support upon her return to Nigeria or being at risk upon return (herself or her son) cannot be accepted. Clearly the mother is a resourceful woman who has kept herself and her son in accommodation and maintained themselves and can do so in Nigeria upon their return. The financial and emotional support of her church members can continue when the Appellants are in Nigeria, not least as her church also has a branch in Nigeria; as well as the financial support of [Mr Adesiyah] and her own family who she claims financially supports her in the UK.
36. Taking the totality of the evidence before me into account, I find that family life is not interfered with, as it is confirmed the father has no contact with the son and the mother has sole responsibility for her son, and this small family unit will return to Nigeria together.
37. In regards to private life, there is a minimum of evidence of the private life forged by the mother and son, which at all times was precarious and/or without leave. In all the circumstances of this case it is not unreasonable for the mother and son to leave the UK and return to their home country."

Documents submitted for the re-making

13. Given the limited scope of the re-making of the decisions in these appeals, I indicated to Mr Gajjar at the commencement of the hearing on 2 August 2018, and Mr Gajjar agreed, that:
 - (i) The first appellant's witness statement dated 26 July 2018, to the extent that she gave evidence about her own circumstances and her asylum claim, was irrelevant. Only her evidence in relation to the second appellant was relevant. This meant that only paras 26 to 29 of her witness statement dated 26 July 2018 and the third sentence of para 31 of her statement (which begins: "*My son's future is in London ...*") is relevant.

- (ii) Documents numbered 9 to 15 (pages 22 to 57) of the bundle of documents served under cover of a letter dated 24 July 2018 from Malik & Malik Solicitors were irrelevant.

Witness statements and letters of support

14. In his witness statement dated 17 July 2018, the second appellant states that he really likes his school. He is involved in competitions and the school choir. The school choir has performed at the O2 stadium before adults. He wants to join the tennis club after school. He enjoys a lot of subjects but his favourite subject is science. His school report says that he is above average. He has a good group of friends and he is really close to his best friends. He goes on school trips to museums and he loves school events such as disco parties. He gets involved in school events.
15. The second appellant is also a member of his church choir. He sings songs and reads the bible. He talks to his church friends. He really enjoys church and is really close to everyone at church.
16. The second appellant has never been to Nigeria. He was born in London and has a lot of friends here. He enjoys living in London with his mother and has not known any other life. He wants to do well in school and concentrate on his studies. He would be unable to do this if he returns to Nigeria with his mother.
17. The second appellant does not want to leave the United Kingdom as he is scared of leaving his friends and his school. He would not feel safe in Nigeria. He has heard that Nigeria is unsafe because of crimes like gun shooting.
18. The second appellant also feels scared as his mother has nothing to return to in Nigeria. His world would be turned upside down if he had to go to Nigeria.
19. There is a letter dated 13 July 2018 (page 9) from the second appellant's school which describes him as a "*star in his involvement in the youth programme*" and a letter of the same date (page 4) which confirms that he is an active member of the after-school choir. There is a school report for 2018 at pages 5-6 which states, inter alia, that he is able, articulate and enthusiastic learner who enjoys school and has a wide circle of friends.
20. The first appellant's witness statement dated 26 July 2018 is relevant to the extent explained at para 13 above.
21. In her witness statement, the first appellant said that the second appellant is happy in the United Kingdom. He loves attending school and is involved in extra-curricular activities such as the school choir. He has a lot of friends and goes on school trips with them. He has amazing reports at every single parents' evening. He is considered to be working to a level that is above expectations. He has big aspirations for this future life and he wishes to be a scientist. It would be unfair for the second appellant to relocate to Nigeria as he has established a life for himself in his primary school. There would be very negative consequences if he is taken away from his primary school now.
22. The first appellant said that the second appellant's main language is English and he cannot speak Yoruba which she says is one of the main languages in Nigeria. This would cause the second appellant language barriers and would affect his daily life in Nigeria. The second appellant needs to remain in a stable and settled environment so that he can achieve his best potential.

23. The first appellant said that the second appellant has never been to Nigeria and this would be a culture shock to him as the way of life in Nigeria is completely different. The education system in Nigeria is unstable and mostly privately funded. The only guarantee of education is if it is privately funded. She does not have the resources to fund his education privately. He would therefore have serious problems integrating into Nigeria. He would not be able to achieve his full potential in Nigeria. His education, social development, progress and wellbeing would be disrupted. It would not be possible for her to look after the second appellant in Nigeria and she would be exposing him to potential dangers such as trafficking and ritual activity.
24. The first appellant said that the second appellant's future is in London. He has formed social ties both in school and outside school and is well settled.
25. There is a letter dated 11 July 2018 at page 8 of the bundle from Mr S David in which he confirms that he provides welfare and support to the first appellant in the sum of £380 per month. He also provides her with "*other supports in the form of clothing and life needs support*" as often as possible. Mr David attends the same church.
26. There is a letter dated 13 July 2018 (page 12 of the bundle) from Mr C Adesiyen in which he states that he has been paying the first appellant £50 per month since 2014.
27. There are some photographs, mainly of the appellants together, but there are some photographs of the second appellant in the choir or at school.
28. I make it clear that I have taken into account all of the documents whether or not referred to specifically in this decision.

Oral evidence

29. The first appellant gave oral evidence. The second appellant did not give oral evidence.
30. In oral evidence, the first appellant said that the second appellant plays the violin in addition to being in the school and church choir. The school choir has performed at the O2 stadium. He participates in many activities in school.
31. Asked whether she has spoken to the second appellant about her culture, the first appellant said that, due to her own upbringing, she did not tell him about her culture in depth. He asked her about the marks she has. She told him that they were part of her tradition. He has seen a lot about things that go on in Nigeria through Facebook.
32. The first appellant said that the second appellant does not have any contact with his father.
33. The first appellant said that the main languages in Nigeria are English and Yoruba. People in the part of Nigeria that she comes from speak Yoruba more than English. The medium of instruction in the schools is the English language.
34. Asked whether the second appellant has any particular friends outside school, the first appellant said that he does. He went to the home of one of them the weekend before the hearing and played with his friend for a few hours.
35. The second appellant attends church and is involved in bible studies and in the church choir. The church also organises many activities and trips.
36. Asked whether she would attend church in Nigeria, she said she would. The church in Nigeria is the same church as the one she and the second appellant attend in the

United Kingdom. She gave the name of the church. It was an unusual name which, if revealed in this decision, may, when taken together with the second appellant's initials and his mother's initials, lead to the identification of the second appellant. I shall therefore refer to this church as the "XYZ Church". The second appellant has attended this church since birth.

37. In answer to questions from me, the first appellant said that the people who attend her church in London are mostly Nigerians but there are also English people who attend the church. There are a lot of Nigerian families who attend the church with their children. The second appellant has a lot of friends, both boys and girls, in the church. He speaks English to them.
38. The first appellant said that people do speak Yoruba in the church, including when they speak to the children. When Yoruba is spoken, the children whose parents speak Yoruba to them understand what is said. Asked whether the second appellant understands Yoruba, she said he does understand Yoruba.
39. Asked why it would be unreasonable for the second appellant to leave the United Kingdom, the first appellant said that the second appellant knows a lot of things here. She has not told him anything about Nigeria. All he knows about Nigeria is what he has seen on social media. She herself does not talk to anyone in Nigeria.
40. Asked why the second appellant will be unable to settle down in Nigeria, the first appellant said she does not even know how to start there.
41. Neither Ms Kenny nor Mr Gajjar had any questions arising from my questions.

Submissions

42. Ms Kenny submitted that the first appellant's very poor immigration history, as found by the judge, constitutes the "*powerful reasons*" required, pursuant to MA (Pakistan), for concluding that it would be reasonable for the second appellant to leave the United Kingdom. The decision of the Upper Tribunal in MT & ET (child's best interests; *ex tempore* pilot) Nigeria [2018] 00088 (IAC) states that the child's position in the wider world must also be considered.
43. The first appellant confirmed that the English language is the medium of instruction in schools in Nigeria and the second appellant understands Yoruba. The church they attend in the United Kingdom is the same church they would attend in Nigeria. Ms Kenny submitted that the second appellant does not have any significant private life in the United Kingdom that would make it unreasonable for him to leave the United Kingdom.
44. Ms Kenny submitted that the fact that the second appellant has lived in the United Kingdom for over seven years was not such a strong point in his particular case. This is because it is clear from the Upper Tribunal's decision in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197(IAC) that a period of seven years spent since the age of 4 years is likely to be more significant than the first seven years of a child's life. This is because very young children are focused on their parents rather than their peers and are adaptable.
45. Ms Kenny submitted that the second appellant's education in the United Kingdom will stand him in good stead in Nigeria. In relation to finances, she reminded me that the judge had found that the first appellant will be able to obtain employment in Nigeria.

46. Mr Gajjar reminded me of para 49 of MA (Pakistan) where the Court of Appeal said that the starting point is that leave should be granted unless there are powerful reasons to the contrary. He submitted that there was nothing more than in the instant case than the mother's poor immigration history for departing from the starting point. The applicant in MT and ET was considered by the Tribunal in that case to be no more than "*run of the mill*" immigration offender. There is no criminality in the instant case. The respondent had not relied upon para 322(5) of the Rules. There were therefore no allegations of dishonesty, albeit that the judge had found her evidence to be incredible.
47. Mr Gajjar submitted that the poor immigration history of the first appellant and the fact that she had been found to be incredible should not tip the scales against the second appellant. He will be 9 years old on 28 September 2018. Accordingly, he has passed the seven-year threshold by a significant margin. The second appellant was born in the United Kingdom and has never set foot in Nigeria. The extent of his ties with Nigeria is that his family is engaged with the Nigerian community in London through the church. However, he has other ties in the United Kingdom, through his school and his church. He has friends in school and in church and participates in activities in school and in church. The first appellant gave evidence that he has received high praise from his school. His ties to his school and his church were supported by the documents at pages 4-6 of the bundle.
48. With regard to finances, Mr Gajjar referred me to the letter dated 11 July 2018 at page 8 of the bundle from Mr S David in which he confirms that he provides welfare and support to the first appellant in the sum of £380 per month. He also provides her with "*other supports in the form of clothing and life needs support*" as often as possible. Mr Gajjar accepted that, if the appellants were to return to Nigeria, there is no reason why the support being given by Mr David could not continue.
49. Mr Gajjar also referred me to the letter dated 13 July 2018 (page 9) from the second appellant's school which describes the second appellant as a "*star in his involvement in the youth programme*".
50. Mr Gajjar referred me to the decision of the Upper Tribunal (by the former President, Mr Justice McCloskey) in Kaur (children's best interests / public interest interface) [2017] UKUT 00014 (IAC). I should consider the best interests of the second appellant. The mother's poor immigration history is not uncommon. The second appellant is fast approaching his ninth birthday. He has ties in the United Kingdom which cannot be replicated in Nigeria. He speaks English and has ties with the Nigerian community in the United Kingdom. Although the second appellant has accessed education in the United Kingdom, that is likely to be the case in every case. It was likely to have been taken into account by the Court of Appeal in MA (Pakistan).
51. I reserved my decision.

Assessment

52. Para 276ADE(1)(iv) of the Rules is not applicable. This is because the second appellant had not lived in the United Kingdom continuously for a period of at least seven years as at the date of his application, which was made on 27 January 2016.
53. However, as at the hearing before me, the second appellant has lived in the United Kingdom for a period of 8 years 10 months since his birth on 28 September 2009. The seven-year period of residence required for para 276ADE(1)(iv) to fall for consideration

must be accumulated by the date of application whereas there is no such restriction in relation to s.117B(6) which provides:

Section 117B

- (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.

Section 117D

"qualifying child" means a person who is under the age of 18 and who—

- (a) is a British citizen, or
- (b) has lived in the United Kingdom for a continuous period of seven years or more;

54. The sole factual question before me is whether it is reasonable of the second appellant to leave the United Kingdom.
55. It is therefore unnecessary to dwell unduly on the first three of the five -step approach explained at para 17 of the judgment in R (Razgar) v SSHD [2004] UKHL 27.
56. Plainly, the second appellant has established private life in the United Kingdom within the meaning of Article 8(1) (the first step). His removal will plainly have such consequences as potentially to engage the operation of Article 8 (the second step). Any interference is plainly in accordance with the law given that he has no leave to be in the United Kingdom (the third step). The real questions are the fourth and fifth steps, i.e. whether the interference is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others; and whether any such interference is proportionate to the legitimate public end sought to be achieved. The fourth and fifth steps are taken together. The question is therefore whether the second appellant's removal is proportionate.
57. In answering this question, I must apply the guidance in MA (Pakistan) and other relevant cases, some of which were referred to specifically by Mr Gajjar. In MA (Pakistan), the Court of Appeal held that in determining whether it is reasonable for a child to leave the United Kingdom, it is necessary to conduct a balancing exercise, taking into account not only factors that are in favour of the child remaining in the United Kingdom and the child's best interests but also what was in the public interest. The immigration history of a child's parent or parents is relevant and should be taken into account when deciding whether it is reasonable for the child to leave the United Kingdom.
58. In addition, the Court of Appeal considered that the fact that a child has lived in the United Kingdom continuously for a period of seven years should carry significant weight such that the starting point is that leave should be granted unless there are "*powerful reasons to the contrary*". Paras 46 and 49 of MA (Pakistan) are particularly important. They read:

- “46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.
49. Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. 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.”

(my emphasis)

59. Although Azimi-Moayed pre-dated MA (Pakistan), it is still the case that seven years from the age of four years is regarded as likely to be more significant to a child than the first seven years of the child's life. It follows that the strength of the “*powerful reasons*” required to depart from the starting point will not be the same in the following three examples:
- (i) a child of 11 years who has lived in the United Kingdom for seven years from the age of 4 years (as ET had in MT and ET);
 - (ii) a child of seven years who has lived in the United Kingdom for seven years from birth;
 - (iii) a child of just under 18 years who has lived in the United Kingdom for seven years from the age of just under 11 years.
60. Whilst child (iii) is likely to have some memory of life in his or her country of nationality, this will not be the case for child (ii) and child (i) is likely to have very little memory of life in his or her country of nationality. The strength of the private life ties established in the United Kingdom of child (ii) is likely to be less than child (i) or (iii).
61. In other words, the “*powerful reasons*” for departing from the starting point mentioned in the final sentence of para 49 of MA (Pakistan) is not a fixity.
62. The second appellant has lived in the United Kingdom for 8 years 10 months, nearly 9 years. Of that period, his private life would have been primarily focused on his mother for the first four years or so.

63. The second appellant's private life comprises of his relationships with children and adults (teachers/adult worshippers, as the case may be) in his school and his church and his involvement in activities in his school and his church. He is active in the school choir and also the church choir. He has friends in school and in church. Plainly, these relationships are important to him.
64. Clearly, the best interests of the second appellant lie in remaining with the first appellant in the United Kingdom. His best interests are a primary consideration.
65. The second appellant speaks and writes English. English is also spoken in Nigeria and is the medium of instruction in Nigeria. His education in the United Kingdom will stand him in good stead in Nigeria. Nigeria has a system of education that he will be able to access even if his mother is unable to pay for him to have private life education.
66. The first appellant gave evidence that many Nigerian families with children attend the XYZ church and that Yoruba is spoken by the adult Nigerians at the church to their children. When asked, she confirmed that the second appellant understands Yoruba but does not speak it. Although he does not speak Yoruba, the fact is that he understands the language and has been exposed to Nigerian culture through his attendance at XYZ church from birth. In addition, English is the medium of instruction in schools in Nigeria. I therefore reject the first appellant's evidence as incredible that the second appellant would experience language barriers to his integration in Nigeria.
67. The first appellant confirmed that, if removed to Nigeria, she would attend the same church in Nigeria. This will provide continuity and stability for the second appellant. He will be able to continue to meet regularly with people who share the same religious background that he and his mother have.
68. For the reasons given at para 66 above, I do not accept the first appellant's evidence that the second appellant does not know anything about Nigerian culture other than what he has seen on social media. To the contrary, I find that the second appellant has been regularly exposed to, and mixes with, members of the Nigerian community. This, together with the fact that he would be attending the same church in Nigeria and meeting churchgoers who share his religion, will help him greatly in integrating with society in Nigeria, especially as he will also have the help and support of his mother.
69. The second appellant has never been to Nigeria and thus he has not had any exposure to the country. On the other hand, he has had exposure to Nigerian culture through mixing with members of the Nigerian community in his church.
70. The second appellant's father is a Nigerian national. The judge found that he will be able to renew his relationship with this father who may be back in Nigeria or when the father returns to Nigeria. The judge rejected the evidence of the first appellant that she has no contact with the second appellant's father or the father's family in Nigeria or her own extended family members in Nigeria (para 34 of the judge's decision). Those findings stand. There is no credible reason why the second appellant will not be able to establish contact with his mother's and his father's extended families after his return from Nigeria, even if his father has not returned to Nigeria.
71. The judge rejected the first appellant's evidence that she is at risk in Nigeria or that the second appellant is at risk of being forced to have tribal markings. This finding stands. The mere fact that the first appellant has repeated in oral evidence before me the evidence she gave to the judge, that the second appellant would be at risk of ritual

activity as a result of which he would be given tribal markings, is not a sufficient reason to depart from the judge's findings of fact in this respect. The judge rejected the first appellant's evidence in this regard. There is no credible reason why the second appellant would be at risk of being trafficked when he would be looked after by the first appellant.

72. Although removal to Nigeria will mean that the second appellant's participation in the choir of his current school and of XYZ church will cease, he would be able to participate in the choir of the church and/or school in Nigeria that he attends, if they have a choir. There is no reason why he should not be able to play the violin in Nigeria. Whilst he will not be able to continue his relationships with friends he has made in the United Kingdom in the same way, he will be able to form new relationships and make new friends.
73. The second appellant is not at a critical stage in his education, in the sense that he is not due to sit for any important examinations.
74. The judge found that the first appellant will be able to secure employment in Nigeria. That finding stands. In addition, Mr Gajjar accepted that there is no reason why the financial support of Mr David should not continue if the appellants are removed. Mr David says he provides them with £380 a month. This sum will stand the appellants in good stead until the first appellant re-establishes herself in Nigeria. In addition, the judge did not accept the first appellant's claims of having no family support on Nigeria.
75. I note that the second appellant says that he feels scared because his mother has nothing to return to in Nigeria. However, this is what he has been told by his mother but his mother's evidence in this regard was found incredible by the judge.
76. As Mr Gajjar submitted, there are no considerations such as criminal convictions in this particular case, nor has the respondent applied para 322 of the Rules against the first appellant. There are no allegations that she has made false representations or used false documents.
77. In relation to financial independence and s.117B(3) of the 2002 Act, the judge did not have any letters of support from the first appellant's church before her other than a letter from Mr C Adesiyan. At para 25 of her decision, the judge said that Mr Adesiyan confirmed that he pays the first appellant £50 a month but that he had not provided any bank statements or receipts or any evidence of his own income. Mr Adesiyan has now provided another letter of support saying that he has given the first appellant £50 a month from 2014. However, once again, he has not provided any evidence to show that he has been making these payments or any evidence of his income. The mere fact that Mr Adesiyan has repeated his evidence does not improve the quality of his evidence.
78. The letter from Mr David was not before the judge. He says that "*presently*" he pays the first appellant £380 "*to meet her immediate commitments*" and that he also provides "*other supports in form of clothing and life needs support ... as often as possible*". He does not say how long he has been providing her with such support. He provides no evidence to show that he has been providing such support, in the form of bank statements etc, and no evidence of his income.
79. Neither Mr Adesiyan nor Mr David attended the hearing to have their evidence tested in cross-examination.

80. The evidence of Mr Adesiyani and Mr David is wholly insufficient to show that the appellants are financially independent. I find that they are not. The judge found that the first appellant has been working “*off the radar*” to support and accommodate herself and the second appellant and that she has not been paying taxes (para 25 of the judge's decision).
81. The judge said that she had no evidence of the mother paying any NHS bills, that she assumed that the mother used the NHS to give birth to the second appellant and that the second appellant has had the benefit of free schooling in the United Kingdom since September 2014. These findings also stand. However, as Mr Gajjar correctly said, the Court of Appeal would have been aware of the provisions of s.117B(3) when it decided MA (Pakistan). I take that into account as well.
82. The judge also found that the first appellant has a poor immigration history and that she never had the any legal right to enter the United Kingdom in 2005 or that, alternatively, she did not have any right to remain in the United Kingdom since about June 2006. Thus, she was either an illegal entrant or an overstayer. Although I take into account that she does not have any criminal convictions and that the respondent has not applied any of the general grounds of refusal under para 322 of the Rules, nonetheless her immigration history is a factor that weighs in favour of removal.
83. Mr Gajjar relied upon MT and ET where the Tribunal said that the poor immigration history of the parent was nothing more than the “*run of the mill*” immigration offender. However, it is important to note that the child, ET, in MT and ET, had lived in the United Kingdom for ten years from the age of four years. Azimi-Moayed states that residence from the age of four years is more significant than residence below that age. The second appellant's position is therefore distinguishable from the position of ET on two grounds. Firstly, whilst I do not discount his period of residence below four years, the fact that the period during which he would have become more aware of his place in the wider world and formed ties outside his ties with his mother was a period of about five years, as compared with ET's ten years. Secondly, during his time in the United Kingdom, he has been immersed with the Nigerian diaspora through his mother's and his own attendance at XYZ church and his activities with the church, including his participation in the church choir.
84. I acknowledge that ET also attended church in the United Kingdom and that ET's mother, MT, had committed a criminal offence and given a community order for using a false document. These are factors that pull in the second appellant's favour because the first appellant has not been convicted of any criminal offences and the respondent has not to applied the general grounds in para 322 of the Rules against her.
85. When I step back and consider the balancing exercise, starting with the starting point that leave should be granted unless there are powerful reasons to the contrary, I find that the strength of the “*powerful reasons*” required to depart from the starting position is reduced by two factors in this particular case. Firstly, the private life ties formed by the second appellant in the wider world have been formed over a period of about five years since the age of four years. Secondly, it is clear from the evidence that the ties he has formed in wider world include ties with Nigerian nationals; he has been exposed regularly to Nigerian culture and the Yoruba language and, indeed, he understands Yoruba.
86. The state's interests are the mother's poor immigration history, that she has worked illegally and that s.117B(3) of the 2002 Act applies in this case.

87. Giving each factor such weight as I consider appropriate and applying the guidance in MA (Pakistan), that powerful reasons are required to depart from starting position that leave should be granted and having taken into account the second appellant's best interests as a paramount consideration, I find that it is reasonable to expect the second appellant to leave the United Kingdom.
88. Accordingly, I have concluded that the first appellant does not qualify under s.117B(6) of the 2002 Act. Her appeal is therefore dismissed outside the Rules.
89. I therefore also dismiss the second appellant's appeal on the basis of his right to his family life with his mother under Article 8 outside the Rules. He and his mother will be removed together and thus there will be no interference with the family life they enjoy together.

Decision

The making of the decision of the First-tier Tribunal involved the making of an error of law sufficient to require it to be set aside. The decision on the appeals was set aside. The Upper Tribunal re-made the decisions on the appeals and dismissed their appeals against the respondent's decisions under Article 8 outside the Rules.

Signed
Upper Tribunal Judge Gill

Date: 20 August 2018

APPENDIX



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal numbers: HU/15958/2016
HU/17200/2016

THE IMMIGRATION ACTS

Heard at: Field House
On 18 April 2018

Decision promulgated

Before

Upper Tribunal Judge Gill

Between

A A
D O

Appellants

And

The Secretary of State for the Home Department

Respondent

Representation:

For the appellants: Mr J Gajjar, of Counsel, instructed by Malik & Malik Solicitors.
For the respondent: Mr P Nath, Senior Presenting Officer.

Decision and Directions

1. The appellants are nationals of Nigeria. The first appellant, born on 1 April 1978, claimed to have arrived in the United Kingdom as a visitor on 19 December 2005. The second appellant is her son, born in the United Kingdom on 28 September 2009.
2. The appellants appeal against a decision of Judge of the First-tier Tribunal K L James by which she dismissed their appeals on human rights grounds against a decision of the respondent of 9 June 2016 to refuse their applications of 27 January 2016 for leave to remain on the basis of their rights to their private lives under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

3. As at the date of the hearing before the judge, the second appellant had resided in the United Kingdom for a period of 8 years 2 months. Accordingly, it was necessary for the judge to consider s.117B(6) of the Nationality, Immigration and Asylum Act 2002 (the “2002 Act”) and apply the judgment of the Court of Appeal in MA (Pakistan) [2016] EWCA Civ 705 in relation to the weight to be given to the fact that a child has lived in the United Kingdom for a period of at least 7 years. Section 117B(6) and s.117D (insofar as relevant) provide:

Section 117B

- (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.

Section 117D

“qualifying child” means a person who is under the age of 18 and who—

- (a) is a British citizen, or
- (b) has lived in the United Kingdom for a continuous period of seven years or more;

4. The equivalent provision in the Statement of Changes in the Immigration Rules HC 395 (as amended) (hereafter the “Rules”) is para 276ADE(1)(iv) which provides as follows:

“276ADE(1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

- (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;”

(my emphasis)

5. Mr Gajjar accepted at the hearing before me that para 276ADE(1)(iv) did not apply because the second appellant had not lived in the United Kingdom for a continuous period of at least 7 years as at the date of his application (27 January 2016).
6. The issues before me are as follows:
- (i) whether the judge considered the guidance in MA (Pakistan) in reaching her finding (para 37) that it was not unreasonable for the appellants to leave the United Kingdom and return to their home country;
 - (ii) if she did not do so, then whether her failure to do so is material to the outcome.
7. As a result of the fact that the grounds contend that the judge had failed to apply MA (Pakistan), they implicitly challenge the judge's finding, at para 37, it would not be unreasonable for the second appellant to leave the United Kingdom. It is for that reason only that the grounds amount to a challenge to this finding.
8. The judge made several other adverse findings of fact which have not been challenged.
9. Although the written grounds contend that the judge failed to consider the second appellant's best interests, Mr Gajjar did not pursue this at the hearing.

The judge's decision

10. The paragraphs in which the judge considered the circumstances of the second appellant specifically are paras 30, 32 and 37. Para 37 is quoted at para 18 below. Paras 30 and 32 read:
- “30. The Appellant now states that she has sole responsibility for her son. The father is a Nigerian national (confirmed by the birth certificate) who apparently has no right to remain in the UK, and therefore the son can renew his relationship with his father who may now be back home in Nigeria, or when the father returns to Nigeria. The son had not been in the UK for the required seven-year period as at date of application, although I note he was born on 28 September 2009 and thus has resided here for eight years and two months. He has therefore formed a private life during this period, albeit not an independent life.
32. I accept the son has been attending reception school since September 2014 and has more recently entered mandatory infants schooling in the UK. However he is still young, highly dependent emotionally, socially and physically on his mother, so his private life formed is minimal and he is not at a critical stage of his school. His report confirms he is a bright social child who would thus integrate well into any society and community, including his home country of Nigeria, where he has access to education and health care. He is at a malleable age where he can integrate into his home country upon return, with the support of his mother, where English is one of the official languages, and it is in his best interests to remain with his mother upon their return, to his ancestral land where his father comes from and where his father's extended family remain.”
11. In the remainder of her assessment, the judge considered the first appellant's evidence, that she feared that she would be forced into a marriage against her will in Nigeria (para 19), that her family in Nigeria would force her son to have tribal markings (para 20), that she feared a man from whom she had borrowed money (para 22), that when she arrived in the UK as a visitor she did not intend to return to Nigeria due to her fear of Boko Haram (para 21) and that she was unable to obtain a passport and did not know how to (para 24). The judge made strong adverse credibility findings in respect of all these matters.
12. The judge then considered the evidence of the first appellant concerning the fact that she had obtained a national insurance number in 2013 and the evidence as to whether the first appellant had worked in the United Kingdom. She found that the first appellant had worked in the United Kingdom “*off the radar*” and that she had done so without any intention of meeting her obligations to pay tax or national insurance obligations (para 25). She found that the first appellant had used the NHS to give birth to her son and that the child has had free schooling in the United Kingdom since September 2014 (para 26).
13. The judge found that the first appellant's oral evidence was so riddled with contradictions and discrepancies that her word cannot be relied upon. She was not persuaded that the first appellant was able to be wholly financially independent. She accepted that the first appellant speaks fluent English (para 27).
14. At paras 28 and 29, the judge considered the first appellant's immigration history, noting that the first appellant had confirmed that she deliberately entered the United Kingdom knowing she was using deception (para 28). At para 29, the judge said that

she was not persuaded that the first appellant had any legal right to enter the United Kingdom in 2005 or, alternatively, that she had had any right to remain in the United Kingdom since about June 2006 and that she was either an illegal entrant or an overstayer. She found that the second appellant also had no right to remain in the United Kingdom, albeit that he is a minor and should not be held responsible for this omission (para 29).

15. At para 31, the judge found that first appellant's private life in the United Kingdom was minimal. At para 33, she said that she did not accept that the first appellant has foregone all of her cultural, religious, social, linguistic and networks and ties to Nigeria, given her lack of credibility.
16. At para 34, the judge rejected the first appellant's evidence that she was not in touch with the father or family of her son's father in Nigeria or her own extended family members in Nigeria or that she is a single child as she had claimed, especially as she had later claimed in oral evidence that her siblings, extended family members and her parents lived in various places such as Ghana, America and Australia.
17. At para 35, the judge noted that the first appellant had failed to submit any documentary evidence in support of her claims and that she had presented "*contradictory evidence that was replete with discrepancies and inconsistencies*" which means, the judge said, that "*her claims of not having family support upon her return to Nigeria or being at risk upon return (herself or her son) cannot be accepted.*"
18. The judge's concluding paragraphs were paras 36 and 37 which read:
 36. Taking the totality of the evidence before me into account, I find that family life is not interfered with, as it is confirmed the father has no contact with the son and the mother has sole responsibility for her son, and this small family unit will return to Nigeria together.
 37. In regards to private life, there is a minimum of evidence of the private life forged by the mother and son, which at all times was precarious and/or without leave. In all the circumstances of this case it is not unreasonable for the mother and son to leave the UK and return to their home country."

Submissions

19. Mr Gajjar referred me to paras 46 and 49 of MA (Pakistan), which read:
 46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the

UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

49. Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. 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."

(my emphasis)

20. Mr Gajjar submitted that MA (Pakistan) makes it clear that significant weight needs to be given to the fact that a child has lived in the United Kingdom for a period of at least 7 years. In the second appellant's case, he had lived in the United Kingdom for 8 years 2 months as at the date of the hearing before the judge. MA (Pakistan) also makes it clear that the fact that a child has lived in the United Kingdom for at least 7 years means that the starting point is that leave should be granted unless there are powerful reasons to the contrary. In his submission, the judge had simply failed to consider the guidance in MA (Pakistan), in terms or implicitly.
21. Mr Gajjar submitted that the Upper Tribunal could not be sure that the judge would have reached the same decision if she had applied MA (Pakistan). He submitted that it was arguable that there were no powerful reasons to the contrary, given that there was no decision under para 322(5) of the Rules and that the first appellant had not been convicted of any criminal offences.
22. In response, Mr Nath submitted that the judge had implicitly considered MA (Pakistan), if her decision is read as a whole and given that the judge had mentioned the fact that the second appellant had lived in the United Kingdom for a period of 8 years 2 months as at the date of the hearing. However, in the event that I decided that she had not considered MA (Pakistan), he submitted that the decision would inevitably have been the same, given the lack of evidence concerning the circumstances of the second appellant.
23. I reserved my decision.

Assessment

24. It is clear that the judge did not refer in terms to MA (Pakistan). This is not fatal because it is not necessary for judges to state in terms that they had applied the guidance in relevant judgments as long as they actually apply the guidance.
25. At para 30, the judge said:
- "30. ... The son had not been in the UK for the required seven-year period as at date of application, although I note he was born on 28 September 2009 and thus has resided here for eight years and two months. He has therefore formed a private life during this period, albeit not an independent life."
26. It is clear therefore that the judge was aware that para 276ADE(1)(iv) did not apply. The question is whether the judge's reasoning as a whole shows that she was aware that s.117B(6) fell for consideration and that she considered it. In my judgment, it is clear from the words from para 30 quoted above that the judge considered the

existence of the second appellant's private life by virtue of his residence of 8 years 2 months but there is nothing in these words or anything else said by the judge at paras 32 and 37 which show, expressly or implicitly, that she was aware that s.117B(6) fell for consideration and, more importantly, that she considered it.

27. This is supported by the fact that the judge did not mention anywhere in her reasoning in relation to the second appellant that significant weight must be attached to the fact that the second appellant had lived in the United Kingdom for a period of at least 7 years.
28. I am therefore satisfied that the judge did err in law, by failing to consider s.117B(6). It is for this reason that there was no mention in her reasoning that significant weight must be attached to the fact that the second appellant had lived in the United Kingdom for a period of at least 7 years.
29. The next question is whether this was a material error of law. i.e. whether the judge's decision should be set aside.
30. On this question, I agree with Mr Gajjar that I simply cannot be sure that, if the judge had considered s.117B(6) and applied MA (Pakistan), her decision would inevitably have been the same.
31. The next question is the extent to which the judge's decision should be set aside.
32. As I have said at para 6 above, the appellants have not challenged the judge's adverse findings of fact except that it is implicit, from the fact that the grounds contend that the judge had materially erred in law by failing to consider the fact that the second appellant is a "qualifying child" under section 117B and failing to apply MA (Pakistan), that the grounds challenge the judge's finding that it would not be unreasonable for the second appellant to leave the United Kingdom. As I have also said, this is the only reason why this finding is challenged.
33. Given that the remainder of the judge's assessment of the evidence before her was not challenged, there is no reason to set aside the remainder of the judge's reasoning and findings of fact.
34. I appreciate that it is said that the appellants were poorly represented. I also appreciate that the judge herself made reference to the fact that the appeal was a poorly prepared appeal. However, that is not a reason to set aside the judge's adverse reasons and findings. Many appellants are not represented at all. Furthermore, this was not a ground of appeal. Even if it had been a ground of appeal, it is very unlikely to have succeeded.
35. I have therefore concluded that the judge's reasoning and findings in relation to the first appellant shall all stand, i.e. her reasoning and findings at paras 19-29, 31 and 33-36 shall all stand.
36. I turn to consider the extent to which the findings of the judge in relation to the second appellant should be set aside. I have considered paras 30, 32 and 37 very carefully. I have considered the nature of the findings made by the judge in relation to the second appellant and the fact that it is desirable for the Tribunal to be updated on his circumstances, if there is further evidence available. Having done so, I have concluded as follows:

- (i) As to para 30, there is no need to set aside the judge's finding that the second appellant has formed a private life during the period of his residence in the United Kingdom and that such private life is not independent life, unless there is new evidence showing that he has formed an independent private life (which is unlikely). The period of the second appellant's length of residence will, of course, be the period as at the date of the next hearing.
 - (ii) As to para 32, any further evidence which touches upon the matters considered by the judge at paragraph 32 of her judgment will, of course, be considered.
 - (iv) As to para 37, I set aside the following findings of the judge: (a) that the second appellant has minimal private life, on the basis that this is inconsistent with the judgment in MA (Pakistan); and (b) that it would not be unreasonable for the second appellant to leave the United Kingdom and return to Nigeria.
37. Both Mr Gajjar and Mr Nath were of the view that the appeal should be remitted to the First-tier Tribunal.
38. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:
- “(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”
39. The appellants' case has been put to the First-tier Tribunal and considered by it, albeit that the judge materially erred in law in its assessment. It cannot therefore be said that para 7.2(a) of the Practice Statements applies.
40. As I have made clear, all of the findings of the judge in relation to the first appellant are preserved. The issue that falls for consideration in the resumed hearing (if the Upper Tribunal re-makes the decision on the appeal) is a narrow one, i.e. limited to s.117B(6), which is not complicated. It cannot therefore be said that para 7.2(b) of the Practice Statements applies.
41. Accordingly, I do not agree with Mr Gajjar and Mr Nath that this case should be remitted to the First-tier Tribunal. I am not satisfied that para 7.2 (a) or (b) of the Practice Statements apply. The Upper Tribunal will therefore re-make the decision on the appellant’s appeal. The case is reserved to myself.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision to dismiss the appeal under Article 8 is set aside.

The Upper Tribunal will re-make the decision on the appellants’ appeals. The case is reserved to myself. The extent to which the judge’s reasoning and findings are set aside is explained at paras 32-36 of the instant decision.

Directions to the parties

- (1) The appellants shall notify the Tribunal within five days of the date on which these Directions are despatched the following:
 - (a) if an interpreter is required at the hearing, the language in which an interpreter is required;
 - (b) the number of witnesses who will give evidence.
- (2) Any evidence the appellants seeks to rely upon must be served within 21 days of the date on which this "Decision and Directions" is sent to the parties. The appellant's bundle must include:
 - a. Witness statements of the evidence to be called at the hearing.
 - b. A paginated and indexed bundle of all documents to be relied on at the hearing. Essential passages must be identified in a schedule, or highlighted.
 - c. A skeleton argument, identifying all relevant issues and citing relevant authorities.
 - d. A chronology of events (if relevant and to be relied upon).



Signed
Upper Tribunal Judge Gill

Date: 22 April 2018