



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/15165/2018**

Appeal Numbers:

HU/15171/2018

HU/15174/2018

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated
On 19th March 2019**

On 5th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

M O A D

M B B O

F O O (A MINOR)

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Cohen (Counsel)

For the Respondent: Mr S Kandola (Home Office Presenting Officer)

ERROR OF LAW DECISION AND REASONS

1. This is an error of law hearing. The appellants appeal against the decision of the First-tier Tribunal (Judge Place) (F-tT) promulgated on 20th December 2018 in which the appellants human rights claims were dismissed.

Background

2. The appellants are citizens of Nigeria. The third appellant is a child born in 2010 and was a qualifying child under section 117B(6) Nationality, Immigration & Asylum Act 2002 as amended ("2002 Act as amended"). At the date of hearing he was nearly 9 years old. The FtT considered Article 8 outside of the Rules.

FtT findings

3. The FtT found that both parents had entered and remained in the UK illegally [13]. They had worked without permission, used the services of the NHS and obtained education at public expense. The parents failed to meet the requirements of the Immigration Rules under paragraph 276ADE as there were no insurmountable obstacles to their reintegration in Nigeria [15]. Their private lives had been built up while living illegally in the UK for a period of 12 years [16].
4. The FtT considered the third appellant's position as regards the Immigration rules at paragraph 276ADE (iv) and section 117B(6) 2002 Act as amended [17]. The FtT found that it was in his best interests to remain with both of his parents and that whilst he was a qualifying child he was nevertheless dependent on his parents. It was accepted that he was established at school and had friends. No weight was placed on the evidence that the child considered himself to be British [19]. The FtT considered that the economic circumstances of the parents would not make it unreasonable for the child to move to Nigeria given that there are family members in Nigeria. The FtT accepted the evidence that the second appellant's siblings were struggling economically but that they were able to survive and the threshold for Article 3 was not met. No weight was given to the fact that the child did not speak the local dialect given that the official language in Nigeria is English [20].

Grounds of appeal

5. In grounds of appeal the appellants argued that the FtT erred by failing to properly consider the significance of the length of residence and integration of the child in the UK, the best interests assessment and reasonableness consideration was flawed. The FtT failed to apply the respondent's guidance dated 22.2.2018 and the case law of **MT & ET**(child's best interests ; ex tempore pilot) Nigeria [2018] UKUT 88 (IAC) and or to properly apply section 117B(6) 2002 Act as amended.

Permission to appeal

6. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ N. Haria on 28.1.2019. In granting permission the FTJ found that it was arguable that the approach to section 117B(6) was flawed.

Submissions

7. I heard submissions from both representatives, the details of which are set out in the record of proceedings. Ms Cohen produced a bundle of authorities and made reference in particular to **KO**(Nigeria), the background to the drafting of paragraph 276ADE and current Home office guidance as to the assessment of “reasonableness.” She argued that the Courts sought to approach the question of children in a more consistent and fair manner and thus the length of residence and age of the child were key. The only qualification to section 117B(6) was that the parties were not liable to deportation. The FtT failed to make any reference to the underlying guidance as to the position of qualifying children. The FtT erred by conflating the issues including the parents immigration history and had not made a proper factual assessment of the best interests of the child and the question of reasonableness. The FtT erred by way of a misdirection in law. The FtT had not taken into account the strength of the child’s private life and no reference was made to the material from his school, which showed that he was established and thriving. The FtT had not found or identified powerful reasons to displace the interests of the child in remaining in the UK. The FtT erred by taking into account in a direct and material way the poor immigration history of the parents.
8. Mr Kandola acknowledged the bundle of authorities and Ms Cohen’s summary of the law. He argued that there was no misdirection and that the parents immigration history could be taken into account indirectly. The strong reasons for the child to live in Nigeria with his parents was because they had no right to remain. The FtT’s approach was consistent with **KO**. Mr Kandola relied on **NS** which looked on the immigration history of the parents as a significant factor. The FtT had not overlooked any issues or evidence and had considered the position of the family in Nigeria.
9. Ms Cohen responded that whilst the parents’ immigration history was indirectly relevant, the FtT erred by focussing on it as directly relevant. The facts of this case were distinct from **NS**. The facts were more similar to **MT & ET** (para 33).

Decision

10. I was satisfied that the appellants grounds were made out and that there was a material error in law by the FtT. There was a misdirection in law by failing to follow the guidance in **KO**(Nigeria) as to the approach to be taken when dealing with qualifying children. The FtT disregarded the evidence from the school, which in general showed that the child was established and thriving. The FtT placed insufficient weight on the length of residence in the UK and the child’s age and wishes, and conflated the issues by concluding that the parents immigration history was directly relevant in the assessment of reasonableness. There was evidence that the family in Nigeria were simply “surviving” on very low finances and whilst that does

not meet the Article 3 threshold, it was a factor relevant to the assessment of reasonableness. The family would have no property and be unable to support the child in Nigeria. The FtT accepted that the first and second appellants were hardworking and no issue was specifically taken as to reliance on public funds.

11. There is a material error of law in the decision which shall be set aside. I heard further submissions as to the re making of the decision.

Re making

12. I have decided to allow the appeal on human rights grounds under the rules and outside of the rules. On the evidence before me, none of which was challenged by the respondent before the F-tT, I am satisfied that the best interests of the child are to remain with his parents in the UK. The child was born in the UK and regards himself as British which is understandable given that he knows of no other country. He is of an age where his views can be taken into account. He is settled at school and the evidence shows that he has consistently done well and his attendance is 100%. The evidence from the school demonstrated that the child was well integrated and had established friends. It was not evidence of any exceptionality but clearly established that he was doing well and that it was in his best interests that that continue. Whilst I accept that he is at present dependent on his parents, he has reached an age where he will be developing towards adulthood and his school plays an important role in terms of his secondary socialisation. A disruption would not be in his interests. I find that he has established a private life in the UK and there would be an interference if removed to Nigeria to live with his parents. There is family life in the UK.
13. I have considered the poor immigration history of the appellant's parents which has indirect bearing on my consideration. The appellants have lived and worked in the UK without leave for a considerable number of years and made use of resources and public funds in the UK. However, I find no evidence to show that their conduct was to the level of seriousness in **NS**, where the behaviour which involved fraud was found to amount to a powerful reason to displace the interests of the child. The immigration history of the parents reveals nothing that would amount to powerful reasons capable of displacing the child's interests. This is compatible with the relevant Home office guidance dated 22.2.2018 and case law (**MA**(Pakistan) & ors [2016] EWCA Civ 705, **MT & ET** (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88 (IAC), **PD & ors** (Article 8: conjoined family claims) Sri Lanka [2016] UKUT 108 (para 39) and **KO (Nigeira)** at paragraph 17.
14. In terms of the circumstances in Nigeria I find that the child has never visited Nigeria and does not speak the local dialect although he would of course be able to fully communicate in English. The educational system and schooling would be different and he has no friends or experience of

Nigerian life. He would face hardship in terms of day to day existence to the extent that the standard of living was found to be at survival level for the family in Nigeria and there would be no assistance from them. The criteria for a qualifying child is residence of 7 years in the UK or British citizenship. I find that the best interests of the child lie in his remaining in the UK with his parents and that it would not be reasonable for him to relocate to Nigeria. I find no evidence that would amount to strong or "powerful" reasons why the interests of the child should be displaced (**MA para 46**). Significant weight is attached to the length of residence and the age of the child, now 8 years and 7 months old. In conclusion the third appellant meets paragraph 276ADE (1)(iv) and the first and second appellants meet section 117B(6).

Decision

15. I remake the decision by allowing the human rights appeals.

Signed

Date 13.3.2019

GA Black

Deputy Judge of the Upper Tribunal

Direction Regarding Anonymity - rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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

NO FEE AWARD

Signed

Date 13.3.2019

GA Black

Deputy Judge of the Upper Tribunal