



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/10602/2018**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 February 2019**

**Decision and Reasons  
Promulgated  
On 25 February 2019**

**Before**

**Deputy Upper Tribunal Judge MANUELL**

**Between**

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

**ADEBAYO [A]  
(ANONYMITY DIRECTION NOT MADE)**  
Respondent

**Representation:**

For the Appellant: Ms S Cunha, Home Office Presenting Officer  
For the Respondent: Mr A Jafar, Counsel (Direct access)

**DETERMINATION AND REASONS**

*Introduction*

1. The Appellant (The Secretary of State for the Home Department) appealed with permission granted by Deputy Upper Tribunal Judge Saffer on 22 January 2019 against the decision and reasons of First-tier Tribunal Judge

Abebrese who had dismissed the Respondent's protection appeal but had allowed the Respondent's Article 8 ECHR family life appeal. The decision and reasons was promulgated on 26 November 2018.

2. The Respondent is a national of Nigeria, born on 6 June 1980. His full immigration history is set out at [4] to [6] of Judge Abebrese's determination. He was an overstayer from 2013 who resorted to the use of false documents and who claimed asylum on spurious grounds on 31 January 2018 just as he was about to be removed from the United Kingdom. There was no challenge to Judge Abebrese's decision to dismiss that spurious protection appeal.
3. The Respondent had also relied on Article 8 ECHR grounds. Judge Abebrese dismissed the private life element of the appeal, but allowed the family life element on the basis of the Respondent's relationship with his 11 year old son. The son has ILR and lives with his mother. The Respondent saw his son once a week. The judge found that the son was a "qualifying child" within section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended) and that it would not be reasonable for the son to leave the United Kingdom. It should be pointed out immediately that it was obvious that the son was not removable and there was no need for him to leave the United Kingdom identified in the determination.
4. Permission to appeal was granted to the Secretary of State for the Home Department because in summary it was considered arguable that the judge had erred by treating the son as a qualifying child without referring to any supporting evidence.

### *Submissions*

5. Ms Cunha for the Appellant submitted that the decision and reasons could not stand. Ms Cunha relied on the grounds and the grant. No evidence had been identified to support the finding that the son was a qualifying child. The Appellant had been absent from his son's life for some seven years. The public interest in the Appellant's removal had not been sufficiently considered. In any event the son did not have to leave the United Kingdom as he lived with his mother. The basis for the finding of exceptionality had not been reasoned, all of which were material misdirections. KO (Nigeria) [2018] UKSC 53 had not been followed. The child's situation was that he was not going

anywhere. The onwards appeal should be allowed. It was appropriate for the appeal to be reheard in the First-tier Tribunal.

6. Mr Jafar for the Respondent took great exception to the submissions made on behalf of the Secretary of State for the Home Department. He contended that they far exceeded the grounds submitted and the terms of the grant. He declined to make any further submissions, although when pressed by tribunal contended that the Secretary of State for the Home Department should seek leave to amend the grounds. He declined the opportunity for an adjournment if he felt disadvantaged. He then submitted that it was not reasonable for the child to go to Nigeria and the child's length of residence made the child a qualifying child within the Nationality, Immigration and Asylum Act 2002 (as amended), section 117B(6). He then returned to his initial position that the tribunal in effect had no jurisdiction because the submissions made fell outside the terms of the grant. He then left the hearing.
7. In reply, Ms Cunha submitted that the grounds were apt to cover her submissions, as material misdirection in law had been the substance of the application and had been granted. The grounds had contended that the First-tier Tribunal Judge's findings were not supported by any relevant evidence identified.

#### *Material error of law finding*

8. The tribunal accepts the submissions of Ms Cunha. Mr Jafar had not served any rule 24 notice indicating the basis on which the appeal was resisted, nor was there any skeleton argument. While the Secretary of State for the Home Department's grounds of appeal may be categorised as less than ideal, Ms Cunha's development of them did not involve any novel points of law or any other point which was not obvious from examination of the determination. It was a fact that the judge did not state how he had arrived at the child's qualifying length of residence. Some leeway was appropriate, especially as Ms Cunha had not settled the grounds and stepped in at the last moment. In the tribunal's view, Mr Jafar was not being asked to meet a new case and his approach was of no assistance. Some judges might consider Mr Jafar's attitude petulant as well as disappointing in an experienced practitioner. The tribunal is satisfied that it has jurisdiction and that it was fair and just to the Respondent to proceed.

9. This was an appeal at first instance which the Respondent had unwisely sought to complicate by persisting with a wholly spurious asylum claim, which the First-tier Tribunal Judge had to examine in detail. The judge had no hesitation in finding that the asylum claim was fabricated, which is a serious matter. As already indicated, there has been no attempt to challenge the dismissal of the asylum claim.
10. That claim, apart from wasting the tribunal's time, was perhaps an unfortunate distraction from what the judge perceived to be a potentially strong Article 8 ECHR claim, notwithstanding the Respondent's past deceit and dishonesty: see, e.g., [4] and [5] of the First-tier Tribunal's determination and the fabrication finding.
11. When the judge came to explain his Article 8 ECHR decision, however, there are several difficulties, of which the first is the failure to identify the evidence to support the judge's finding that the Respondent's son was a "qualifying" child. There is nothing which shows the child's length of residence in the United Kingdom, such as to lead to qualification. Section 117B(6) makes no express reference to children holding ILR. Such children must plainly hold some nationality other than British, so have potential freedom to move without difficulty to their country of nationality, as with other non-British Citizen children. Their length of residence is surely an essential finding to be made. These were issues for the judge to notice in some form but he did not in any clear manner.
12. As noted above, the Respondent's son lives with his mother. The son holds ILR and so cannot be compelled to leave the United Kingdom. His ILR would have to be revoked and there was no suggestion that the Secretary of State for the Home Department has any such plans. Nor has the son's mother indicated any wish for her son to leave the United Kingdom, with or without her. The Respondent has limited access rights. There was no evidence identified in the determination that the Respondent is supporting his son financially, which is not surprising as the Respondent has never had the right to work in the United Kingdom. The judge erred by considering the reasonableness of the son's departure from the United Kingdom without seeing that the son is not leaving. This on its face was a fundamental oversight.
13. The question was whether the Respondent's removal would have such serious consequences for his son as to make such removal disproportionate. The judge stated

that there were exceptional circumstances (see [22] of the determination) but exactly what those exceptional circumstances were are not identified. There is no link to any finding beyond the fact stated that the Respondent sees his son every weekend when he takes him to football. How that is different from the activities of other similar parents who no longer live with their child was not explained, let alone what makes the activity exceptional.

14. Mr Jafar, while insisting that he would not participate in the hearing, made mention of “accepted facts” concerning the child (briefly, special needs), however Mr Jafar failed to assist the tribunal by pointing out any finding of fact to such effect in the determination. The tribunal could see none.
15. In the tribunal’s view, the judge’s proportionality analysis as recited in the determination proceeded without adequate explanation. It was not shown why the child was “qualifying” on the basis of residence. As the child was not facing removal, since the child’s presence was not determined by or dependent upon the father’s presence, the issue of “reasonableness” (see KO (Nigeria) [2018] UKSC 53) did not obviously arise. The public interest in the Respondent’s removal attracts substantial weight, particularly where there has been an abusive immigration history with a recent finding of a fabricated claim. The decision and reasons must accordingly be set aside for material error of law.
16. Ms Cunha’s submission that the appeal should in those circumstances be reheard is plainly right, as there are further findings of fact needed before the Article 8 ECHR proportionality balancing exercise can be conducted.

## **DECISION**

The Secretary of State’s appeal to the Upper Tribunal is allowed

The making of the previous decision involved the making of a material error on a point of law. The First-tier Tribunal’s decision is set aside, and the original appeal must be heard again before another First-tier Tribunal Judge apart from First-tier Tribunal Ababrese.

**Signed**

**Dated** 21 February 2019

**Deputy Upper Tribunal Judge Manuell**