



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/05058/2015

**THE IMMIGRATION ACTS**

Heard at Manchester  
On 1<sup>st</sup> June 2017

Decision & Reasons Promulgated  
On 16<sup>th</sup> June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

DN  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr M Moksud of International Immigration Advisory Services  
For the Respondent: Mr G Harrison, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

1. The Appellant appeals against a decision of Designated Judge McClure of the First-tier Tribunal (the FtT) promulgated following a hearing on 17<sup>th</sup> October 2016.
2. The Appellant is a female Nigerian citizen born in August 1986. She has a son born in the United Kingdom on 6<sup>th</sup> August 2008 who is a dependant in her appeal.
3. On 17<sup>th</sup> June 2015 the Appellant applied for further leave to remain in the United Kingdom, based upon her family and private life.

4. The application was refused on 19<sup>th</sup> August 2015. The Appellant appealed to the FtT.
5. The FtT found that the Appellant could not satisfy the Immigration Rules contained within Appendix FM in relation to family life, nor paragraph 276ADE in relation to private life. The FtT did not find that there were any circumstances that would justify allowing the appeal with reference to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules and therefore the appeal was dismissed.
6. The Appellant applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FtT had erred in considering Article 8, by failing to consider section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). It was contended that the Appellant's child is a qualifying child and he had been in the United Kingdom in excess of seven years, and therefore the FtT should have considered whether it was reasonable to expect him to leave the United Kingdom. It was contended that this had not been considered by the FtT, and the FtT had failed to follow guidance given in MA (Pakistan) [2016] EWCA Civ 705.
7. Permission to appeal was initially refused, it being noted that a child must accrue a period of seven years' residence at the date of application, and in this case the application for leave to remain had been made before the child had accrued seven years' residence.
8. The application for permission to appeal to the Upper Tribunal was renewed and permission to appeal was granted by Upper Tribunal Judge Lindsley, and I set out in part the grant of permission;
  3. The grounds contend inter alia that the First-tier Tribunal erred in law by failing to properly consider the appeal outside of the Immigration Rules on Article 8 ECHR grounds and to apply section 117B(6) of the Nationality, Immigration and Asylum Act 2002 in the light of MA (Pakistan) [2016] EWCA Civ 705 and Teebhawon [2017] UKUT 13 given the applicant's son was born in the UK on 6<sup>th</sup> October 2008 and had lived in the UK for eight years at the time of the decision of the Tribunal. There was no need for the seven year period to have been accrued at the time of application under section 117B(6) of the Nationality, Immigration and Asylum Act 2002 as was said by Judge of the First-tier Tribunal Manuell to be needed in the refusal of permission to appeal by the First-tier Tribunal, see the decision of Lord Justice Elias in the Court of Appeal in MA (Pakistan) at paragraph 13.
  4. The grounds are arguable.
9. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008. In summary it was contended that the FtT directed itself appropriately. While the FtT may not have directly referred to section 117B(6), it was clear when the decision was read as a whole that the FtT had considered whether or not it would be reasonable for the Appellant's son to leave the United Kingdom. The FtT considered the best interests of the child and found that these would be to remain with his mother. The FtT found the Appellant to be highly educated and able to obtain employment in Nigeria, and

would have support from family members. The FtT gave reasons for concluding that the Appellant and her child could adjust to life in Nigeria, and the findings made by the FtT mirrored the consideration required under section 117B(6).

10. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

### **Submissions**

11. At the commencement of the hearing Mr Harrison was provided with the Appellant's written response to the rule 24 response, which had been settled by Counsel. This response pointed out that the FtT at paragraph 50 had found that the child had not completed seven years' residence at the date of application. The FtT had made irrelevant findings in relation to the public interest and the Appellant's precarious immigration status. More importantly "it appears that conspicuously the judge did not mention the word 'reasonable' a single time in his findings [paras 47 to 63]."
12. Mr Moksud relied upon the grounds seeking permission to appeal, together with the reply to the rule 24 response. Mr Moksud submitted that the FtT did not consider the best interests of the Appellant's son, and did not take into account the medical reports at pages 23-28 of the Appellant's bundle.
13. Mr Moksud submitted that reasonableness had not been considered by the FtT and the FtT had not considered that the Appellant's son is a qualifying child.
14. Mr Moksud submitted that the FtT was in error in making reference to section 117B(4) and (5) on the basis that these provisions did not apply to family life between the Appellant and her son, and the FtT had failed to consider section 117B(6). Mr Moksud submitted that the FtT decision should be set aside, and remade by the Upper Tribunal, and the Appellant's appeal should be allowed on the basis that it would not be reasonable for her son to leave the United Kingdom.
15. Mr Harrison relied upon the rule 24 response and submitted that the FtT had produced a detailed decision, and provided adequate reasons for the findings made. The decision should therefore stand.
16. At the conclusion of oral submissions I reserved my decision.

### **My Conclusions and Reasons**

17. The challenge to the FtT decision made by the Appellant relates to section 117B(6) of the 2002 Act which for ease of reference I set out below;
  - (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.

18. Section 117D confirms that a qualifying child is a child under the age of 18 who is either a British citizen or has lived in the United Kingdom for a continuous period of seven years or more.
19. It is said that the FtT did not consider whether the child was a qualifying child, and did not consider whether it would be reasonable to expect him to leave the United Kingdom.
20. I reject the contention in the reply to the rule 24 response that the FtT made no mention of the word 'reasonable' in paragraphs 47-63, which contain the FtT findings and conclusions. The following finding is contained at paragraph 58;

In the circumstances I find that it is reasonable for the child to return to Nigeria with his mother.

21. I also reject the submission made by Mr Moksud that the FtT did not consider the best interests of the Appellant's son. The following finding is contained at paragraph 58;

I have considered the best interests of this child and taken account of the evidence presented. Whilst clearly he would benefit from the education provided in the United Kingdom I see no reason why he could not undertake education in Nigeria. I also take account of the medical evidence. Even taking that into account however I am satisfied that the best interests of this child are to remain with his mother, the person that has supported and cared for him throughout his life.

22. It is correct that the FtT did not specifically cite section 117B(6) when setting out conclusions. It is also correct that there is no reference to Treebhawon or MA (Pakistan). However this is not an error of law if the principles contained within section 117B(6) and the case law are followed. I am satisfied that those principles have been followed in this appeal for the following reasons. Treebhawon at paragraphs 20-22 makes it clear that if an individual is not liable to deportation, has a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect that child to leave the United Kingdom, the public interest does not require the removal of the parent from the United Kingdom. In that case the provisions of section 117B(1)-(5) are of no application. I mention this, because of the contention made by the Appellant, that the FtT should not have made reference to section 117B(4) and (5). That would only be the case if the FtT had already decided that it would not be reasonable for the child to leave the United Kingdom. In this case, when the FtT decision is read as a whole, as it should be, I find the FtT has taken into account all the relevant circumstances, and decided that it would be reasonable to expect the Appellant's son to leave the United Kingdom.
23. I do not find that the FtT has ignored the principles in MA (Pakistan). At paragraph 49 of that decision it was stated that the fact that a child has been in the United Kingdom for seven years needs to be given significant weight in the proportionality exercise for two related reasons, firstly because of its relevance to determine the nature and strength of the child's best interests, and secondly because it establishes

as a starting point that leave should be granted unless there are powerful reasons to the contrary.

24. At paragraph 101 of MA (Pakistan) it is stated that a court, when considering the issue of reasonableness, can have regard to the wider public interests, including the immigration history of the child and parents. All these considerations must be taken into account when considering whether it would be reasonable to expect the child to leave the United Kingdom.
25. The FtT was aware of the length of residence of the Appellant's son. Paragraph 1 refers to him being born in the United Kingdom on 6<sup>th</sup> August 2008.
26. At paragraph 13 the FtT recognises the arguments put forward by the Appellant, which includes the fact that her son has been in the United Kingdom for eight years and "therefore it would not be reasonable to remove the child."
27. At paragraph 44 the FtT notes the Appellant's claim that her son has been a witness to domestic violence, and makes specific reference to the reports within the Appellant's bundle, evidencing speech and language therapy requirements, and the child continence appointments. The FtT notes, that there are no medical reports indicating any ongoing medical condition.
28. At paragraph 45 the FtT acknowledges that within the Appellant's bundle there are reports in relation to the child's school and education.
29. There is further reference by the FtT at paragraph 46, the Appellant's claim that she and her child would have an uncertain future in Nigeria without family support, and that the child is settled in the United Kingdom and that it would be unreasonable to expect him to live in Nigeria.
30. The consideration and conclusions of the FtT begin at paragraph 47. At paragraph 50 the FtT correctly finds that reliance cannot be placed upon paragraph 276ADE(iv) in relation to the child, because there is a requirement that the child must have accrued seven years' continuous residence at the date of application. That date was 17<sup>th</sup> June 2015, and the child had not accrued seven years' continuous residence at that date. The FtT notes that the same applies to EX1(a) of Appendix FM. Therefore those provisions of the Immigration Rules do not assist the Appellant.
31. It is the case that section 117B(6) must be considered, and the date to be considered when assessing residence in that case, is the date of hearing. It is common ground that by the date of hearing, the child had resided in this country for approximately eight years, two months.
32. I do not find that it can be reasonably said that the FtT was unaware of the child's length of residence. At paragraph 57 the FtT confirms that the medical evidence in relation to the child has been considered, together with the evidence that he is settled in school. The FtT finds that there is no reason why the child could not enter school in Nigeria, and that there are medical facilities available in Nigeria, and the FtT finds

that the Appellant would in fact have the assistance and support of her family. Those findings have not in fact been the subject of any challenge from the Appellant.

33. Paragraph 58 sets out the conclusions of the FtT, which have already been summarised, and in which the FtT finds that the best interests of the child would be to remain with his mother, and in all the circumstances it is reasonable for the child to return to Nigeria with his mother.
34. The FtT has therefore taken into account all the evidence presented to it. That evidence includes the length of residence of the child, the fact that he was born in the United Kingdom, that he and his mother are Nigerian citizens, that he does not need medical treatment currently, but in any event both medical treatment and education are available in Nigeria. The FtT also takes into account that contrary to the Appellant's claim, she would not be at risk if returned to Nigeria, that she would have family support, that she is highly educated and there is no apparent reason why she could not find employment, and that she has remained in the United Kingdom without leave since 30<sup>th</sup> January 2012. Although it may have been helpful to have specifically cited section 117B(6) the FtT took into account all material evidence, followed the correct legal principles, and gave adequate reasons for findings. The FtT was entitled to take these factors into account when finding that leave should not be granted based upon the child's residence because as mentioned in paragraph 49 of MA (Pakistan) 'there are powerful reasons to the contrary.'

### **Notice of Decision**

The making of the decision of the FtT did not involve the making of an error of law such that the decision must be set aside. I do not set aside the decision. The appeal is dismissed.

### **Anonymity**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the Appellant or any member of her 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. This direction is made pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed  
Deputy Upper Tribunal Judge M A Hall

Date 5<sup>th</sup> June 2017

### **TO THE RESPONDENT FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed  
Deputy Upper Tribunal Judge M A Hall

Date 5<sup>th</sup> June 2017