



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

Appeal Numbers: HU/08795/2016  
HU/08799/2016

**THE IMMIGRATION ACTS**

**Heard at North Shields  
On 12 December 2017**

**Decision & Reasons Promulgated  
On 13 December 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES**

**Between**

**H T A  
A C A  
(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**SECRETARY OF STATE**

Respondent

**Representation:**

For the Appellants: Mr Tampuri, Tamsons Legal Services

For the Respondent: Mr Diwnycz, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants are citizens of Nigeria who entered the UK lawfully as visitors in September 2008 and who became overstayers in March 2009. On 23 November 2015, as overstayers, and having borne two further children whilst living in the UK, but not having made any other attempt to regularise her immigration status, the First Appellant applied for herself and the Second Appellant, (but not on behalf of her two younger children) for a grant of DLR outside the Immigration Rules. There is no obvious

reason why an application was not made on behalf of her two younger children. Those applications were refused by the Respondent on 18 March 2016.

2. The Appellants duly appealed that decision, and their appeals came before First-tier Tribunal Judge Abebrese sitting at Taylor House on 16 August 2017. The Judge allowed the Article 8 appeals by way of decision promulgated on 6 September. The Respondent duly applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal, and that was granted by a decision of First-tier Tribunal Alis on 20 October 2017. Thus the matter comes before me.
3. It is plain that the First Appellant could not demonstrate that she met the requirements of the Immigration Rules, either at the date of her application, or at the date of the hearing. The success of her application and appeal was therefore dependent upon the position of her eldest daughter. The decision of the Judge does not acknowledge that reality in terms, and indeed within the decision the Judge analyses the position of the eldest daughter as if her mother and younger siblings had leave to remain, and it was she who faced removal from the UK on her own [19]. The reality was, of course, that the family did not face being separated; they would all leave the UK together, or they would remain in the UK together.
4. It is also plain that in the course of a very brief decision, the Judge failed to make reference to the relevant current jurisprudence. Although this hearing took place in August 2017, the Judge made no reference to the guidance of the Court of Appeal in AM (Pakistan) [2017] EWCA Civ 180 (promulgated in March 2017) upon the true nature of the “*reasonableness*” test. There is also no reference to be found in the decision to the guidance upon the proper approach to such cases given in EV (Phillipines) [2014] EWCA Civ 874. Even reading the decision as a whole and making all due allowances, I am not satisfied that the decision demonstrates that the Judge had the proper test in mind when approaching the evidence before him. The decision does not demonstrate that the Judge approached the question of the reasonableness of the Second Appellant’s removal from the starting point that no member of the family had leave to remain, and the decision clearly demonstrates that he elevated his assessment of the best interests of this child to a trump card [19]. Although the Judge did go on to state that he had in the alternative given consideration to whether the appeals should be allowed on Article 8 grounds, it was therefore not at all clear on what other basis he had first purported to allow them. The clear inference is that he, wrongly, saw the best interests of the child, and the s55 consideration that he was obliged to undertake, as a ground of appeal in and of itself.
5. Arguably the clear and obvious errors in the Judge’s approach are sufficient to suggest that any alternative decision he undertook in relation to the Article 8 appeal was fundamentally tainted and unsafe. However, since the Judge did purport to allow the appeal in the alternative on Article

8 grounds I too shall consider his Article 8 decision in the alternative. There are clear errors of law disclosed here too.

6. Although the Judge found [20-21] that the decision under appeal was not proportionate, before he had found that Article 8 was engaged, this could (perhaps) be excused as merely poor draftsmanship if it were indeed clear as to why he had found that Article 8 was engaged. Regrettably this is not the case. This was not, as the Judge appears to have presumed, a “family life” case, since there was no prospect of the family not being removed from the UK together. There was no suggestion that either Appellant had formed a “family life” in the UK with anyone other than each other and the two younger siblings; the First Appellant did not rely upon any relationship in the UK with either the father of the Second Appellant, or with the father of her younger two children. Thus the appeals were in reality only ever based upon their “private lives”.
7. The First Appellant appears to have provided no evidence to suggest that her own “private life” had the necessary quality and strength to engage Article 8; certainly the Judge does not identify any. Mere presence in the UK for 9 years was not enough to do so. Whilst the Second Appellant, her eldest child, had indeed lived in the UK for more than seven years she had not, as the Judge appears to have assumed, reached an important stage in her education. She was only 11.
8. If Article 8 was indeed engaged, then the assessment of the proportionality of the removal begged a number of questions, once the public interest in that removal had been identified and placed correctly into the balance. The Judge would be obliged to consider, for example, the question of whether any member of the family had any health issue that could not be adequately catered for in Nigeria. The Judge did not address that matter, although it was argued before him that the First Appellant had a diagnosis of hepatitis B. The Judge ought also to have assessed the circumstances to which the family would be returning and whether there was any basis to fear for their personal safety or integrity. He did not do so. Unless there was some good reason to find to the contrary, the natural inference would normally be that the Appellants would return to the extended family who they had left behind when they travelled to the UK as visitors, so that all three children would have the opportunity to grow up within that extended family.
9. In the circumstances the decision discloses a material error of law that requires it to be set aside and remade. I have in these circumstances considered whether or not to remit the appeal to the First Tier Tribunal for it to be reheard, or whether to proceed to remake it in the Upper Tribunal. In circumstances where it would appear that the relevant evidence has not properly been considered by the First Tier Tribunal, the effect of that error of law has been to deprive the Appellant of the opportunity for her case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 25 September 2012. Moreover the extent of the judicial fact finding exercise is such that having regard to the over-riding

objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 25 September 2012. Having reached that conclusion, with the agreement of the parties I make the following directions;

- i) The decision is set aside, and the appeal is remitted to the First Tier Tribunal for rehearing *de novo* at the North Shields hearing centre, the Appellants having recently moved from London to Newcastle. The appeal is not to be listed before Judge Abebrese. No findings of fact are preserved.
- ii) No interpreter is required for the hearing of the appeal.
- iii) There is presently anticipated to be First and Second Appellants as witnesses, and the time estimate is as a result, 2 hours. It is anticipated that further evidence will be filed and served, which must be filed and served by 5pm 9 January 2018.
- iv) The appeal will be listed for hearing at North Shields on the first available date after 12 January 2018.

#### Notice of decision

10. The decision promulgated on 6 September 2017 did involve the making of an error of law sufficient to require the decision to be set aside and reheard. Accordingly the appeal is remitted to the First Tier Tribunal for rehearing *de novo* with the directions set out above.

#### Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Since the Second Appellant is a child, 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 Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge J M Holmes