



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/04116/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 November 2017**

**Decision & Reasons  
Promulgated  
On 15 December 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**TA (NIGERIA)  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms M Vidal, Counsel instructed by Haris Ali Solicitors  
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Ian Howard sitting at Harmondsworth on 6 February 2017) dismissing her appeal against the decision of the respondent to refuse to grant her leave to remain in the UK on family or private life grounds. The First-tier Tribunal made an anonymity direction in favour of the appellant, and as the central issue in the appeal is whether the best interests of her dependent children should prevail over public interest considerations, it is appropriate to maintain those anonymity directions for these proceedings in the Upper Tribunal in order to protect the children from harmful publicity.

## **Relevant Background**

2. The appellant is a national of Nigeria, whose date of birth is 11 June 1975. She claims to have arrived in the UK in 1991, but the Home Office has no record of her entry or of her presence in the UK in the 1990s, and so her asserted length of residence has always been a matter of dispute. Her partner and the husband of her children, "L", claims to have arrived in the UK from Germany in the year 2000. L is also a national of Nigeria. The couple say that they began their relationship in 2005, and that they started cohabiting in 2006. It is not disputed that they have three children, all of whom have been born in the UK. "P" was born on 17 May 2008, "M" was born on 14 December 2009 and "A" was born on 23 June 2012.
3. The appellant and L sought to regularise their status in the UK in 2009, and for this purpose they instructed Chidys Solicitors to act on her behalf. Their solicitors submitted bank statements from the Nationwide Building Society and the Cooperative Bank, purportedly relating to accounts held by the appellant and L with these banks as far back as 2004. However, the documents were forgeries. The applications were refused on 21 April 2010 on this ground, and the appellant was given no right of appeal.
4. In a letter dated 15 August 2010, Moorehouse Solicitors claimed that the appellant knew nothing about the bank statements: they had been submitted by Chidys Solicitors without her knowledge. On 23 September 2010, Moorehouse Solicitors requested reconsideration of the appellant's application.
5. On 12 June 2014, the respondent gave her reasons for refusing the appellant's application for leave to remain upon reconsideration. The appellant fell for refusal under R-LTRP as she did not meet all the requirements of section S-LTR. Specifically, she fell within S-LTR.2.2A as she had previously submitted false documentation to the Home Office. The appellant's bank statements had been confirmed to be false. It was noted that Moorehouse Solicitors claimed that the appellant knew nothing about these bank statements, but this was not accepted because no information or evidence had been provided to support the claim. She also did not meet the eligibility requirement. Her partner was a Nigerian national who was present in the UK illegally, with no leave to remain. In addition, the appellant had not evidenced her legal entry into the UK.
6. The appellant's then solicitors made a request for reconsideration, and the application was re-refused upon reconsideration on 15 January 2015. The respondent continued to assert that the appellant did not meet the suitability requirements of section S-LTR of Appendix FM of the Rules.
7. The appellant's appeal against this decision came before Judge L. Gibbs, sitting at the First-tier Tribunal at Hendon Magistrates' Court on 25 July 2015. The Judge took into account a document verification report in respect of a bank statement relating to an account purportedly held by L with Nationwide Building Society, and a separate document verification

report in respect of bank statements purportedly relating to an account held by the appellant with the Cooperative Bank. The Judge noted the explanation of the appellant and her partner that they were unaware of these documents being submitted. The Judge held that, notwithstanding any finding of complicity, she was satisfied that the suitability requirement was relevant, whether or not the applicant was aware of the submission of false information. Judge Gibbs went on to dismiss the appeal.

8. Her decision was set aside by Upper Tribunal Judge Southern in a decision promulgated on 25 February 2016. He found that Judge Gibbs had misunderstood the suitability requirement in play, and so she had failed to make a crucial finding of fact concerning the submission of false documents. As a consequence, it was not known whether the First-tier Tribunal Judge accepted the appellant's evidence that she was wholly unaware that any false documents had been submitted.
9. Judge Southern set the decision of the First-tier Tribunal aside, and remitted the appeal to the First-tier Tribunal for a fresh consideration before a different Judge.

### **The Decision of Judge Howard**

10. Both parties were legally represented before Judge Howard. Ms Vidal appeared on behalf of the appellant, and Mr Bassi appeared on behalf of the respondent. The appellant and her partner gave oral evidence, and each of them was cross-examined by Mr Bassi.
11. In his subsequent decision, Judge Howard found against the appellant on the issue of her length of residence, and on whether she and her partner were complicit in the submission of false bank statements in 2009.
12. On the topic of the appellant's claim to have arrived in the UK in 1991 and to have been kept in servitude in the North of England from 1991 to 2001, the Judge held that the appellant's evidence on this matter was "*the least convincing*" of all the matters she spoke of. She was hesitant in her answers. What answers she did give were devoid of any real content. She was unable to impart any sense of having been in the North of England at all between 1991 and 2001. Thus, he did not accept that she had been in the UK since 1991.
13. In the same paragraph, the Judge gave his reasons for concluding that it was not the solicitor who had submitted "*the false bank statement*". His reasoning was that the appellant had much more to gain from submitting false documents than did the solicitor. If the false document was accepted, the appellant would have had a better chance of getting the leave she sought. If her application was rejected, the appellant was put to the cost and inconvenience of making other application. In contrast, the solicitor exposed himself to the loss of his livelihood. Additionally, he did not find convincing the appellant's contention that they were simply fobbed off by the solicitor, and that they did not take the matter further.
14. In the context of a discussion of the best interests of the children, the

Judge rejected the evidence of the appellant and her partner that they had nothing to return to in Nigeria, including no surviving family, and he also rejected their claim that L would not be able to find work in Nigeria as he did not have an education: *“These matters I do not accept. That both parents should be devoid of any living relatives in Nigeria is not credible. [L] has shown himself to be resourceful enough while living unrecognised in the UK to find and keep work. Work sufficient for him to provide for his family. In Nigeria, he would not have the disadvantage of only being able to work beneath the radar of officialdom.”*

15. In paragraph 20(5), the Judge found that the children would not be deprived of an education in Nigeria. He was satisfied that there were family members in Nigeria who would assist, and that their father’s personal resources were such that he would find work in Nigeria.

### **The Application for Permission to Appeal to the Upper Tribunal**

16. Ms Vidal settled an application for permission to appeal to the Upper Tribunal, advancing four grounds. Ground 1 was that the Judge had erred at paragraph [13] in stating that it was common ground that the appellant did not meet the requirements of any of the Immigration Rules. This contradicted her skeleton argument, in which she sought to argue that the appellant met Rule 276ADE(1)(iii) and that the two eldest children met Rule 276ADE(1)(iv).
17. Ground 2 was that the Judge had failed to give strong reasons for finding that it was reasonable to expect the two eldest children, who met the seven year residence rule, to leave the UK, following **MA (Pakistan)**.
18. Ground 3 was that, in finding that the appellant’s two eldest children would not be deprived of an education if returned to Nigeria, the Judge had failed to take into account background country material which showed that in Nigeria one-third of school-aged children were out of school.
19. Ground 4 was that, in assessing proportionality, the Judge had failed to take into account that the finding of the competent authority there were reasonable grounds to believe that the appellant had been a victim of human trafficking/modern slavery.

### **The Reasons for the Grant of Permission to Appeal**

20. In a decision dated 5 September 2017, First-tier Tribunal Judge Ransley granted the appellant permission to appeal on all four grounds, as all of them involved arguable errors of law.

### **The Hearing in the Upper Tribunal**

21. After hearing submissions from Ms Vidal and Mrs Fijiwala, I found that an error of law was made out in respect of ground 2, but not in respect of the remaining grounds. My reasons for so finding are set out below.

### **Reasons for Finding an Error of Law on Ground 2 Only**

### Ground 1

22. The Judge was wrong to hold at paragraph [13] that it was common ground that the appellant did not meet the requirements of any of the Immigration Rules. However, his error was not material, as neither the appellant nor her two older children could bring themselves within Rule 276ADE(1).
23. All the relevant requirements of this Rule have to be met by the applicant at the date of application. The oldest child had not accrued seven years' residence at the date of application, and so Rule 276ADE(1)(iv) was not potentially in play.
24. I accept that the position is less clear-cut with regard to the appellant herself. This depended on whether the refusal decision was treated as a refusal upon reconsideration of the application made in 2009, or whether the appellant was treated as having at some point made a fresh application after 2011. I consider that it was open to the Judge to treat the appellant as having applied in 2009 - and hence after 18 years of unlawful residence on her case - not least because that was the case she put forward in her supplementary witness statement, in which she observed: *"already more than seven years have lapsed since my application was submitted."*
25. In addition, the effect of the Judge's findings of fact was that the requirements of Rule 276ADE(1)(i) and Rule 276ADE(1)(iii) were not met. In finding against the appellant on the issue of suitability, the appellant could not satisfy the requirement of showing that her application on private life grounds under Rule 276ADE(1) did not fall for refusal under any of the grounds in section S-LTR.1.2 to S-LTR.2.3 and S-LTR.3.1 in Appendix FM.
26. In finding that the appellant had not proved that she entered the UK in 1991, and had not credibly demonstrated her presence in the North of England between 1991 and 2001, the appellant could not show that she had resided in the UK for at least 20 years.

### Ground 3

27. The Judge was not obliged to refer to every piece of evidence relied upon by the appellant. It was open to the Judge to find that the children would not be deprived of an education in Nigeria, for the reasons which he gave. These were that there were family members in Nigeria who would be able to assist the family, and that L would be able to support himself and his family adequately, including paying for the costs of his children's education. On that basis, there was no reason to suppose that the children would be part of the minority of children of school age who are not in school, according to a Human Rights Watch World Report of 2017 on Nigeria; or that the family would be amongst the 54% of Nigerians who live in dismal poverty, according to the same Report.

### Ground 4

28. The appellant's remitted appeal was originally due to be heard in the First-tier Tribunal in August 2016, but it was adjourned because the appellant had raised a claim that she had been a victim of trafficking/modern slavery in the period 1991 to 2001. The appellant was asked to complete a Questionnaire. On the basis of her answers to the Questionnaire, the Competent Authority at the Home Office informed the appellant by letter dated 15 November 2016 that there were reasonable grounds to believe that she had been a victim of modern slavery (human trafficking).
29. She was informed that she had a period of 45 days to recover and consider her options. At the end of the recovery and reflection period, she was informed that the Competent Authority would make a conclusive grounds decision as to whether she was the victim of modern slavery (human trafficking or slavery, servitude, or false/compulsory labour). In order to be able to make a conclusive ground decision in as timely manner as possible, she was asked to provide all the documents listed "*below*" by 29 November 2016. The list of documents included witness statements; third party reports/supporting statements; and anything else deemed relevant to her claim.
30. However, the appellant did not provide the information requested. She also did not make a claim for asylum. On 16 January 2017, a member of the Metropolitan Police wrote to the appellant to say that she had been trying to call her on the contact number provided to the Home Office and she had left several messages for her to call back. She wished to substantiate the allegations that the appellant had made, so that the police could carry out a full investigation, and the appellant was asked to contact the writer so that they could arrange a mutually convenient time to carry out an official police interview. If she did not hear from the appellant within the next 7 days, she would presume that the appellant did not wish to support a police investigation and she would close down the crime report and she would inform the Home Office of the outcome. The appellant did not contact the Police Officer.
31. In the light of this evidence (all of which was before Judge Howard), there was no error on his part in not taking into account the provisional conclusion of the Competent Authority as part of the proportionality assessment. Ms Vidal referred me to the supplementary witness statement of the appellant in which she explained why she had not pursued the allegation that she had been the victim of modern slavery. Her explanation was that she did not have the energy to pursue the matter, when she could not recollect the details. It was a chapter in her life which she wanted to forget.
32. The appellant claims to have been kept in servitude in the North of England between 1991 and 2001. She was questioned about her knowledge of the North of England in cross-examination, and the Judge did not find her to be credible in her account of having resided there. Given that she had not pursued the complaint of being a victim of modern slavery, it was open to the Judge to treat the provisional finding of the Competent Authority as being completely irrelevant to the question of

proportionality, and hence not worthy of mention.

### *Ground 2*

33. However, as I ruled at the hearing, the Judge materially erred as pleaded in ground 2. He failed to acknowledge that the two eldest children were now qualifying children for the purposes of section 117B of the 2002 Act, and failed to acknowledge the significance of section 117B(6) which is that, where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted.

### **The Remaking of the Decision**

34. Having ruled that an error of law was made out on ground 2 only, I invited submissions from the representatives as to how the decision should be remade, applying the relevant jurisprudence, including **MA (Pakistan and others, R on the application of) -v- Upper Tribunal (IAC) and another [2016] EWCA Civ 703.**

### **Discussion and Findings on Remaking**

#### *Best Interest Guidance*

35. A useful summary of the learning on the best interests of children in the context of immigration is to be found in **Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC):**

30. It is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:
- (i) As a starting point in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
  - (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
  - (iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
  - (iv) Apart from the terms of published policies and Rules, the Tribunal

notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than peers and are adaptable.

- (v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic wellbeing of society amply justifies removal in such cases.

### *The Home Office Policy Guidance*

36. The IDIs on Family Migration: Appendix FM state at paragraph 11.2.4 that the longer a non-British citizen child has resided in the UK, the more the balance swings in favour of it being unreasonable to expect the child to leave the UK,, and strong reasons are required to refuse a case where the child has accrued over seven years continuous residence.

### *The relationship between the Rule and Section 117B(6)*

37. In **AM (S117B) Malawi [2015] UKUT 260 (IAC)** the Tribunal held that the duty of the First-tier Tribunal was quite clear. The First-tier Tribunal was required to have regard to considerations listed in Section 117B. It had no discretion to leave any of those considerations out of account, if it was a consideration that was raised on the evidence before it. The Tribunal continued in paragraph [13]:

There is also in our judgment no requirement that the FtT should pose and answer the same question more than once, simply as a matter of form. Thus since both paragraph 276ADE(1)(iv) of the Immigration Rules, and s117B(6), both raise the same question in relation to a particular child, of whether or not it would be reasonable to expect that child to leave the UK: it is a question that need only be answered once

### *The question of reasonableness*

38. In **MA (Pakistan) and Others, R (on the application of) v Upper Tribunal (IAC) & Anor [2016] EWCA Civ 705** at paragraph [45] Elias LJ said:

In my judgment, the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the ‘unduly harsh’ concept under Section 117C(5), so should it when considering the question of reasonableness under Section 117B(6). ... The critical point is that Section 117C(5) is in substance a free-standing provision in the same way as Section 117B(6), and even so the court in **MM (Uganda)** held that wider public interest considerations must be taken into account when applying the ‘unduly harsh’ criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in Section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with



the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of Section 117B(6) is that where the seven year Rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted.

39. At paragraph [46] Elias LJ said that the published Home Office Policy guidance merely confirmed what is implicit in adopting a policy [the seven year rule] 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 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 to be 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.

40. At paragraph [48] Elias LJ cited with approval the explanation given by Clarke LJ in **EV (Phillipines)** at [34]-[37] as to how the Tribunal should apply the proportionality test where wider public interest considerations are in play, in circumstances where the best interests of the child dictate that he should remain with his parents. At [36] Clarke LJ said that if it is overwhelmingly in the child's best interests to remain, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite. Clarke LJ continued in [37]:

In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

#### *Primary Findings of Fact of the First-tier Tribunal preserved*

41. As will be apparent from my error of law ruling, the primary findings of fact made by the First-tier Tribunal Judge do not require to be revisited, and therefore they are preserved. The appellant has not shown that she entered the UK in the 1990s, and so she has not shown that she has accrued twenty years continuous unlawful residence in the UK.

#### *Article 8 Claim outside the Rules*

42. I accept that questions 1 and 2 of the **Razgar** test should be answered in favour of the appellant. Questions 3 and 4 of the **Razgar** test must be answered in favour of the respondent. On the question of proportionality, I take into account the relevant public interest considerations arising under section 117B of the 2002 Act. The appellant speaks English, but neither

she nor her partner is financially independent. As their private and family life has been built up in the UK unlawfully, little weight can be attached to these matters from the perspective of the appellant and her partner. However, the best interests of their children are a primary consideration in the proportionality assessment and are capable of dictating the outcome of the proportionality assessment, having regard in particular to section 117B(6).

### *Best Interests Assessment*

43. The eldest child has the strongest private life claim, as her length of residence is the longest. The best interest factors militating in favour of her remaining in the UK are that she has resided in the UK since birth, for over nine years, and relocation to Nigeria would disrupt the excellent primary school education which she is currently receiving. However, she is likely to receive an adequate education in Nigeria. She has also not yet accrued seven years' residence from the age of four, and she has not reached significant milestones in her education. She will have the support of her parents and extended family members in Nigeria in adjusting to life there, and in common with her younger siblings, she will be able to enjoy all the benefits attendant upon her Nigerian citizenship, including being immersed in the social and cultural milieu from which both her parents spring.
44. So, overall, I consider that the best interests of the eldest child lie in her going with her parents and siblings to Nigeria. The same applies to the middle child. But even if I am wrong about that, it is not overwhelmingly in either child's best interests to remain. At best, it is only on balance, with some factors pointing the other way.
45. The youngest child has not accrued seven years' residence from his date of birth, and he has always been in good health (as have his older siblings). So, the best interest considerations militating in favour of him remaining here are much weaker than those which apply to his older siblings, whereas the best interest considerations militating in favour of him going to Nigeria with his parents and siblings are as strong as those which apply to his older siblings. So, I give an emphatic answer as to where his best interests lie. They plainly lie in him going to Nigeria with his parents and siblings.

### *Whether it is reasonable to expect the children to leave the UK*

46. In answer to the question of whether it is reasonable to expect the children to leave the UK, it is necessary to have regard to wider proportionality considerations. Both parents have adverse immigration histories. Not only are they illegal entrants, but they have sought to use deception in order to obtain leave to remain. They have established private and family life in the UK in the full knowledge that they were present in the country unlawfully, and neither of them has had a legitimate expectation of being able to carry on family and private life here on a permanent basis. Their children are being educated at public

expense. Although L worked illegally in the past to support the family, since March 2016 (or earlier) the family has been supported under section 17 as otherwise they would be destitute without local authority financial support. Thus, the parents' continued unlawful presence in the UK imposes a significant financial burden on the London Borough of Bromley, where they reside. Hence there are strong reasons for requiring the children to leave the UK.

47. While the appellant has a genuine and subsisting relationship with her three children, it is reasonable to expect all the children (including the two qualifying children) to leave the country with the appellant and L.

*Conclusion on proportionality*

48. The decision appealed against strikes a fair balance between, on the one hand, the appellant's rights and interests, and those of her children and partner, and, on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought to be achieved, namely the protection of the country's economic well-being and the maintenance of firm and effective immigration controls.

**Notice of Decision**

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

The appellant's appeal on human rights (Article 8 ECHR) grounds is dismissed.

Signed

Date 4 December 2017

Judge Monson

Deputy Upper Tribunal Judge

**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 Appellant is 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.