



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/23008/2015
IA/23009/2015
IA/23010/2015

THE IMMIGRATION ACTS

Heard at Field House
On 15 February 2017

Decision & Reasons Promulgated
On 16 May 2017

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR AYODELE PETER JOSEPH (FIRST RESPONDENT)
MISS ENIOLA FAITH JOSEPH (SECOND RESPONDENT)
MISS OLUWAFUNMILOLA JOY JOSEPH (THIRD RESPONDENT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Mardner, Counsel
For the Respondents: Mr T Wilding, Presenting Officer

DECISION AND REASONS

1. The Secretary of State appealed with permission against the decision of First-tier Tribunal Judge Hanley promulgated on 18 July 2016 in which he allowed the appellants' appeals. For the reasons set out in my decision of 5 December 2016 which is annexed to this decision, I found that the decision of the First-tier Tribunal

involved the making of an error of law, and directed that it was to be remade in the Upper Tribunal

2. The appellants are all citizens of Nigeria. The first appellant is the father of the second and third appellants, both of whom are minors. The older of the two was born in 2008.
3. For the reasons given in my decision, I consider that the First-tier Tribunal's finding that, on the particular (and unusual) facts of this case, the best interests of the second appellant are that she should remain in the United Kingdom.
4. The issue is then whether, as the respondent contends, it is reasonable to expect her to leave the United Kingdom; and/or, whether, having had regard to section 117B of the 2002 Act, removal of the appellants would be proportionate or not.
5. The Immigration Rules provide at paragraph 276ADE:

Requirements to be met by an applicant for leave to remain on the grounds of private life

276ADE (1).

The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

- (i) does 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. to S-LTR.4.5. in Appendix FM; and
- (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
- (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
- (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
- (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK discounting any period of imprisonment); or
- (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

276ADE (2) Sub-paragraph (1)(vi) does not apply, and may not be relied upon, in circumstances in which it is proposed to return a person to a third country pursuant to Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

6. In addition, close attention must be paid to Section 117A and B of the 2002 Act which provides as follows:-

117A Application of this Part

- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
 - (a) breaches a person’s right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
 - (a) in all cases, to the considerations listed in section 117B, and
 - (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
- (3) In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.

- (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.
7. It follows from Kaur (children's best interests/public interest interface) [2017] UKUT 14 that the assessment of the child's best interests must focus on the child, evaluating the reality of a child's life situation and circumstances. Factors such as parental information must not intrude at this stage (see EV (Philippines)). Factors such as parental misconduct are to be taken into the equation at a later stage of the overall proportionality balancing exercise as they are based by the public interest in the maintenance of immigration control. See EV (Philippines) at 35 to 37
8. The issues arising in EV (Philippines) were considered in MA (Pakistan) and Others at [46] to [49]:
 46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy 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 so 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 be to 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.
 47. Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interests assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so. The concept of "best interests" is after all a well established one. Even where the child's best interests are to stay, it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed he should return. What could not be considered, however, would be the conduct and immigration history of the parents.
 48. In EV (Philippines) Lord Justice Christopher Clarke explained how a 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 in the UK (paras. 34-37):

- "34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.
35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (d) what stage their education has reached; (e) to what extent they have become distanced from the country to which it is proposed that they return; (f) how renewable their connection with it may be; (g) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, 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.
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."

49. Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.

9. With regards to the children's situation I note what was held in MA (Pakistan) at [103], per Elias LJ:

In my judgment, the observation of the judge to the effect that people who come on a temporary basis can be expected to leave cannot be true of the child. The purpose underlying the seven year rule is that this kind of reasoning ought not to be adopted in their case. They are not to be blamed for the fact that their parents overstayed illegally, and the starting point is that their status should be legitimized unless there is good

reason not to do so. I accept that the position might have been otherwise without the seven years' residence, but that is a factor which must weigh heavily in this case. The fact that the parents are overstayers and have no right to remain in their own right can thereafter be weighed in the proportionality balance against allowing the child to remain, but that is after a recognition that the child's seven years of residence is a significant factor pointing the other way.

10. As Mr Wilding submitted, this is a case in which the third appellant cannot meet the requirements of the Immigration Rules. The extent to which the first appellant can do is, even on the appellants' case, dependant on the position of the second appellant. Further, as Mr Wilding submitted, in this case there would be no separation of the current family unit. He submitted also that in this case there were significant countervailing factors, given that none of the appellants had ever had leave to remain, and the first appellant had overstayed as an adult.
11. I bear in mind also the submission that section 117B (5) applies to the children as well as the first appellant, following Miah (section 117B NIAA 2002 - children) [2016] UKUT 131 (IAC).
12. In assessing the public interest, I consider that significant weight attaches thereto in this case, given the strong public interest in maintaining immigration control. That is particularly so in the case of the first appellant who has deliberately remained in the United Kingdom without leave. While I accept that he and the children speak English that neither diminishes the public interest in their removal, nor acts as a factor in their favour. There is no proper indication that they are financially independent, and again that increases the weight to be attached to the public interest in removal.
13. With regard to the appellant's respective private lives, the issue is more complex. I readily accept that little weight can be attached to the first appellant's private life, given that has been developed while he had had no basis to remain here.
14. The position of the second and third appellants is different. While they have not had leave to remain, they have been under the control of their parents, latterly only their father. They could not at their age be held to be responsible for their overstaying. As is noted in Kaur,

The "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

15. In addition, at 28 and 29, the Upper Tribunal held

28. The Court then turned its attentions to the " *little weight*" provisions in section 117B. Sales LJ categorised these " *normative statements*" which are " *less definitive*" than those found in other provisions and continued at [53]:

" Although a Court or Tribunal should have regard to the consideration that little weight should be given to private life established in such circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question, where it is not appropriate in Article 8 terms to attach only little weight to private life. That is to say for a case falling within section 117B(5) little weight should be given to private life established in the circumstances specified, but that approach may be overridden where the private life in question has a special and compelling character. Such an interpretation is also necessary to prevent section 117B(5) being applied in a manner which would produce results in some cases which would be incompatible with Article 8, ie is necessary to give proper effect to Parliament's intention in Part 5A; and a similar interpretation of section 117B(4) is required, for the same reasons."

It is necessary also to consider the following passage, in [54]:

" In my view, reading section 117A(2) and section 117B(5) together in this way, as is appropriate, means that considerable weight should be given to Parliament's statement in section 117B(5) regarding the approach which should normally be adopted."

The critical word, I venture to suggest, is " normally". The passage continues:

" In order to identify an exceptional case in which a departure from that approach would be justified, compelling reasons would have to be shown why it was not appropriate."

Finally, Sales LJ, pointedly, distinguished the test of " compelling circumstances" from that of " very compelling circumstances", applicable in relation to foreign criminals.

29. The effect of the analysis which I have developed in [25] above, considered in tandem with the decision in Rhuppiah, is that, through the medium of permissible judicial statutory construction, there is some flexibility in the " little weight" legislative instructions contained in section 117B (4) and (5) of the 2002 Act. Tribunals must be alert to this in their conduct of proportionality balancing exercises, in particular in considering whether the factors on the public interest side of the scales outweigh those on the other side, especially where the tribunal's assessment of a child's best interests points to a course other than the removal or deportation of the person or persons concerned.

16. In addition, regard must be had to Akinyemi v SSHD [2017] EWCA Civ 236 at [50]

50. There was some discussion before us about whether, even if section 117B (4) did not apply, section 117B (5) did – in other words, whether the Appellant's immigration status was at all material times "precarious". My answer to that question follows from what I have already said about sub-section (4). A person's immigration status is precarious when they understand, or should in any event be taken to have understood, "that their time in the host country would be comparatively short or would be liable to termination": see Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803, [2016] 1 WLR 4203, per Sales LJ at para. 34 (p. 4213 C-D). That was plainly not the Appellant's position, at least up to 2006, though not necessarily even after then.

17. The issue of "precariousness" was addressed also in Agyarko & Ikuga v SSHD [2017] UKSC 11 at [49] - [53]. Of particular note is what was held at [53]:

53. Finally, in relation to this matter, the reference in the instruction to "full knowledge that their stay here is unlawful or precarious" is also consistent with the case law of the European court, which refers to the persons concerned being aware that the persistence of family life in the host state would be precarious from the outset (as in *Jeunesse*, para 108). One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate.

18. There is, I consider, no reason why these principles should not apply to private life. What is notable is that there has to be some knowledge or understanding of the individual's position for the status to be precarious. It is difficult to see that could apply in the case of children who, as here, are under 10 years of age.
19. Applying these principles to the second and third appellants, given their ages and the fact that they are under 10 years old, I am not satisfied that their private life has been established while their status was precarious. That, however, cannot be said in the case of the first appellant
20. On the facts of this case, I find that section 117B (6) applies in the case of the second appellant. It does not yet apply in the case of the third appellant, although that will be so in a matter of days. I am satisfied therefore that there is a strong indicator that the second appellant should, given the assessment of her interests, be permitted to stay. There is, therefore, I find that significant weight is to be attached to the interests of the second appellant.
21. I bear in mind that the second and third appellants are separated from their mother. There would be significant disruption in their lives. I accept also that there is a significant public interest both in the maintenance of Immigration Control, and in removing overstayers. I find, however, that although that public interest weighs heavily in favour of the respondent, I am satisfied that on the particular facts of this case, and bearing in mind the best interests of the second appellant in particular, that the interests of the appellants outweigh the public interest and that thus their removal would be disproportionate. I am satisfied also that, in all the circumstances, the second appellant's removal would be unreasonable.
22. I therefore allow the appeals on human rights grounds in respect of the all three appellants, and under the Immigration Rules in respect of the second appellant alone.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the second appellant's appeal by allowing it under the Immigration Rules

3. I remake the decision by allowing the appeals on human rights grounds in respect of all three appellants.

Signed

Date: 11 May 2017

A handwritten signature in black ink, appearing to read 'Jeremy Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul

ANNEX - ERROR OF LAW DECISION



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

**Appeal Numbers: IA/23008/2015
IA/23009/2015
IA/23010/2015**

THE IMMIGRATION ACTS

**Heard at Field House
On 5 December 2016
Extempore**

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR AYODELE PETER JOSEPH (FIRST RESPONDENT)
MISS ENIOLA FAITH JOSEPH (SECOND RESPONDENT)
MISS OLUWAFUNMILOLA JOY JOSEPH (THIRD RESPONDENT)
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr I Jarvis, Presenting Officer
For the Respondents: Ms S Mardner, Counsel

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Hanley promulgated on 18 July 2016 in which he allowed the appeals

of Mr Ayodele Peter Joseph, Eniola Faith Joseph his daughter and the other child Oluwafunmilola Joy Joseph.

2. The appellants before the First-tier Tribunal to whom I refer as the claimants are all citizens of Nigeria. Materially the two younger ones are minors, the older child being born on 25 January 2008.
3. The immigration decision in this case was made on 9 June 2015, the application being to refuse them leave to remain in the United Kingdom, it being considered that none of the claimants met the requirements of the Immigration Rules. Given firstly it was not accepted that the first applicant met the requirements of paragraph 276ADE of the Immigration Rules as it was not accepted that there were very significant obstacles to his integration into Nigeria. Second it was considered that although the second claimant had been in the United Kingdom for more than seven years it was not considered unreasonable to expect her to leave the United Kingdom with her father and presumably her younger sister as part of the family unit and thus she did not meet the requirements of paragraph 276ADE (4). The third claimant did not meet the requirements of the Rules given her age at the time and therefore did not fall for consideration under the Rules.
4. The respondent was unrepresented at the hearing before the First-tier Tribunal. The judge heard oral evidence and had before him a number of documents relating to the children in particular and their progress at school. There was it appears some significant inconsistencies in the evidence as to the exact relationship between the first claimant and the mother of the two children, it being unclear whether there was in fact any contact with them.
5. The judge found materially that it would not be reasonable to expect the second claimant to leave the United Kingdom and that she therefore met the requirements of the Immigration Rules, paragraph 276ADE. The judge also found that it would not be reasonable to separately remove the children without their father even though it was not clear as to what the mother's status was, although it was clear that she was an unlawful but that she appeared still to be in the United Kingdom and that the third claimant could not succeed under the Rules because she was under 7 at the date of the application, that the first claimant did meet the requirement of paragraph 276ADE as he found that there would be very significant obstacles to integration into Nigerian society because it would be reasonable for the second claimant to be returned there and because any separate return of the father involving a family separation would in itself constitute a significant obstacle into integration into Nigerian society.
6. Having found that the claimants met the requirements of the Immigration Rules the judge then went on to consider Article 8 outside the Rules, considering having directed himself in line with Razgar and the decision of the Upper Tribunal in Treebhawon that on the facts of this case that it would be disproportionate to remove the claimants from the United Kingdom notwithstanding the father's poor immigration history.

7. The grounds of appeal put forward by the Secretary of State are condensed in fact to what Mr Jarvis submits is a narrow point, which is that the judge failed in the light of the decision in MA Pakistan [2016] EWCA Civ 705 to assess the issue of reasonableness both within the Immigration Rules and outside the Immigration Rules to take into account factors over and above the best interests of the children.
8. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 8 November 2016.
9. Before me Mr Jarvis focused primarily on the decision in MA submitting that this was directly relevant albeit that it is in this case the situation a child has been here for seven years although that was not the case in MA, it does however appear to have been the case in a subsequent decision of the Court of Appeal in Rhuppiah. In essence the submission is that the judge did not make any reference to other factors, nor was there any indication as to what weight was attached to factors other than the situation of the children.
10. For the claimants Ms Mardner submitted that although the judge may not have expressly referred to any other factors, this was not material given that when viewing the determination as a whole there were sufficient findings with regard to the strength of the factors in favour of the claimants that any error was not capable of being material.
11. I consider that in this case the judge did properly address the family situation as a whole following the decision in PD. It does not however appear that he took into account what was said in MA although he can hardly be blamed for that, given that MA appears not to have been reported before his decision was signed.
12. There are a number of passages in the decision in MA which bear close analysis, specifically paragraphs 45 and in this case 47 and also 49. 49 is of particular relevance because of what is said about the weight to be given to the interests of children where the seven-year qualification is met.
13. The Court of Appeal held that the fact that the child has been in the United Kingdom for seven years would need to be given significant weight in the proportionality exercise for two related reasons. First because of its relevance to determining the nature and strength of the child's best interests and second because it establishes as the starting point that leave should be granted unless there are powerful interests to the contrary.
14. I consider that it is evident from this and also the decision in the Court of Appeal that whilst the child's best interests are in the case where a child has established seven years' residence a significant starting point and significant weight must be attached to that; it does not however mean that there are no other factors to be taken into account.
15. I consider that in this case there is insufficient indication in the decision of the judge that he turned his mind specifically to any countervailing factors to be weighed

against the best interests of the children or rather specifically the second claimant who is a qualifying child. There are however some indications of countervailing factors on the facts of this case. The judge did comment adversely on the immigration history of the father. He also appears not to have considered some of the evidence of the father reliable, specifically at [38].

16. Whilst there is some more detail given on other factors in the consideration of Article 8 outside the Rules, there does not appear to have been any detailed consideration of the public interest and whilst all the circumstances are said to be weighed in the round at [60] and that account is taken of the poor immigration history of the father, nothing is said of the other factors which would need to be taken into account with respect to paragraph 117B, specifically sub-paragraphs 1, 2 and 3. There is no indication that in reaching the conclusion at paragraph [60] that the judge addressed those factors nor is there an indication of what weight he attached thereto.
17. Taking these factors into account I am satisfied that in this case the decision of the First-tier Tribunal did involve the making of an error of law, as in assessing the question of reasonableness within the terms of the Immigration Rules and also looking at Article 8 outside the Immigration Rules, the judge does not appear to have given any consideration to weight to be attached to countervailing factors or properly to have had to identify the countervailing factors which it was incumbent upon him to reflect and to take into account in analysing the decisions and for those reasons I set the decision of the First-tier Tribunal aside for it to be remade in the Upper Tribunal
18. Given that more than six months have passed since the First-tier gave its decision it is appropriate to hear further evidence regarding the children in particular. I therefore make the following directions: -

DIRECTIONS

1. Any new material on which the appellant or respondent wishes to rely must be served at least 14 days before the next hearing.
2. The appellant must provide a skeleton argument to be served at least 5 working days before the next hearing.

Signed

Date: 23 December 2016



Upper Tribunal Judge Rintoul