



Upper Tribunal  
(Immigration And Asylum Chamber)  
Appeal Number: IA/30459/2015

THE IMMIGRATION ACTS

Heard at: Field House  
On: 16 October 2017

Decision and Reasons Promulgated  
On: 17 November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MS ROSELINE IDOGUN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr D Eteko, Iras & Co  
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria, born on 3 December 1971. She appeals with permission against the decision of the First-tier Tribunal Judge dismissing her appeal against the respondent's decision dated 23 June 2015 refusing her application for leave to remain in the UK.
2. The appellant appeared in person before the First-tier Tribunal. The respondent was not represented.
3. The Judge noted the appellant's application to remain in the UK for her and her dependent son, D, who was born in the UK on 17 March 2007. He had lived for his whole life in the UK.

4. The appellant claimed that she had married a man in Nigeria in 1993. She was unable to conceive a child. She complained of harassment and threats by her former husband's family. She left her first husband in 2000.
5. She had not paid back the dowry that her family had received. Her husband also reclaimed the costs of medical treatment, said to be £10,000. She then moved from Delta State to Lagos to get away from him.
6. In 2001 she met Mr Monday Idogun and began to live with him. She became pregnant with his child. This occurred outside marriage. She claimed that there were threats to her family from members of her ex-husband's family.
7. She came to the UK on 9 August 2006 as a visitor. Mr Idogun came with her to the UK and stayed for about two weeks. The appellant wanted to pay off the debt that she owed to her first husband so she could return to Nigeria with Mr Idogun. However, she was left in the UK by him and as at the date of her statement he had another wife and children.
8. Her son, D, was born in the UK on 17 March 2007. The appellant claimed that she would be unable to find work if she went back to Nigeria as she had no qualifications and nobody to look after her son while she worked. She thought that D would be unable to cope with life in Nigeria because of the darkness at night and an allergy to dust, mosquitoes and heat. He had only known life in the UK and would have great difficulty adjusting to life in Nigeria where schools barely function for poor people like her. She was accompanied at the hearing by D who was then nine years old.
9. In her further statement she confirmed she had not left the UK since his birth. She said that she had been married to Mr Idogun in Nigeria in December 2003 but was abandoned by him in the UK. He divorced her in June 2011. She produced documents to that effect.
10. She said her father was still living in Nigeria, aged about 89. He lived with her elder sister. She is one of seven children. Some have died. Her father has retired. Her mother is now deceased.
11. She claimed that she could not go back to Nigeria as she had been threatened by the family of her first husband and was divorced by her second who some time ago had threatened he would try to take D away from her. Her second husband's family lived quite close to her own family. She would want to live in Lagos, however although she would find it difficult to support herself and her son, ensuring particularly that D had a good education [6-10].
12. D is usually in good health. He has progressed well with his education at the primary school. He has one more full year at his current school before moving on to secondary school. D stated that he goes swimming and used to go to Cubs, which the appellant can no longer afford [10].
13. She and her son were financially supported by her elder brother and her church. She did not believe that either her brother or the church would give her financial support if returned to Nigeria as they would not be fully aware of her situation. She said she suffers from asthma. She had been advised to change medication [11].
14. She claimed that it would not be reasonable for her son to go with her to live in Nigeria as she had too many problems from her first husband including her claim that she should repay the original dowry and hospital costs. She was scared of her first husband. Nor

would she be able to afford a good school for her son. The public school system in Nigeria is of a very poor standard without equipment such as computers. She would be alone in Nigeria and liable to action by the family of her first husband [12].

15. The Judge found that the appellant has a dependent son born to her in the UK who was now nine years old. She had a genuine parental relationship with him. He had lived in the UK for more than seven years. Paragraph EX.1 of Appendix FM applies [15].
16. The respondent accepted that D had never been to Nigeria, was at school in the UK and had started to put down his own roots. That concession was found by the Judge to be even more true at the date of hearing.
17. He found that the central part of the appeal by the appellant concerned the continuing education of her son, including some health concerns of her own arising from a diagnosis of asthma. She and D access healthcare and education in the UK even though they are not technically entitled to them. The available background information showed that there is a system of healthcare in Nigeria, albeit not of the same quality as provided in the UK by British taxpayers. The ability of the appellant to obtain funds for education or healthcare is not the determinative factor - [17].
18. She had no evidence to suggest that her son's allergy would be a serious problem. Nor was there evidence to confirm her claims regarding the asserted risk from the family of her ex-husband. Nor was there evidence that her ex-husband's family would still be pursuing such a claim seventeen years after she left Nigeria.
19. Nigeria, moreover, is a large and populous country. There is no sophisticated system of citizen registration. She could live quietly without attracting that family's attention. She accepted that she has family in Delta State although her father is very elderly. There were wider family members so she is not a person entirely without family support [18].
20. The question of whether it is reasonable to expect D to live in Nigeria has to be judged in the light of all the evidence, taking into consideration his best interests. The appellant herself has no exceptional circumstances [19].
21. He found that it is clearly in the best interests of D to continue to live with his mother and whilst the standard of education in Nigeria may not be as good as that available in the UK there is an educational system available for him. Balancing those factors together, it would not be unreasonable for the child to go to live in Nigeria with his mother even though he had spent nearly ten years in the UK [19]. The requirements of the exception in EX.1 had thus not been met. It would not be unreasonable to expect her and the child to live in Nigeria where they are both nationals. There were no exceptional or compelling circumstances warranting an assessment outside the rules. Even if that had been the case the Judge was satisfied that any interference with the Article 8 rights was justified and proportionate [20].
22. On 22 August 2017 Upper Tribunal Judge Plimmer found that it was arguable that the Judge failed to attach significant weight to the child's residence of over seven years pursuant to the guidance of MA (Pakistan) v SSHD [2016] EWCA Civ 705. She accepted that that point had not been identified in the grounds of appeal. It was however 'an obvious point'.

### Submissions

23. Mr Eteko referred to Home Office guidance as to whether it would be unreasonable to expect a British citizen child to leave the UK. He referred to SF and Others (Guidance, Post-2014 Act) Albania [2017] UKUT 00120, and in particular to paragraph 11.2.3 of the Home Office policy set out in paragraph 7 of SF. When the respondent made her decision on 23 June 2015, refusing the appellant's application the IDI - Family Migration - Appendix FM, s.1.0(B) "Family Life as a Partner or Parent and Private Life, 10 Year Routes" August 2015 Edition, was not in force at the date of the decision under appeal but was in force at the date of the First-tier Tribunal hearing and the decision and is MA (Pakistan) still in force.
24. Mr Eteko to paragraph [46] of MA, supra. The Court of Appeal held that 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. There was reference to the guidance published in 2015 in the form of Immigration Directorate Instructions in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be strong reasons for refusing leave.
25. He accordingly submitted that the decision of the First-tier Tribunal Judge was flawed as he failed to engage with the evidence and gave no consideration at all to the material facts, and in particular to the approach mandated by the Court of Appeal in MA or the respondent's guidance.
26. On behalf of the respondent, Mr Clarke referred to the Rule 20 response. The Judge directed himself appropriately. He gave full consideration to the appellant's claim. There was nothing to suggest that the argument relating to the policy guidance had ever been raised at the hearing.
27. The child's best interests were properly considered. He referred to EV (Philippines) v SSHD [2014] EWCA Civ 874 at [35] where the Court of Appeal set out the factors to be considered in deciding what the best interests of children are. The Judge did have regard to the child's age, the length of time he had been here, how long he had been in education and what stage his education had reached. He noted that the child had not been to Nigeria and had lived here all his life.
28. Mr Clarke submitted that apart from his lack of connection to Nigeria, and his schooling here, it is difficult to see what problems he would have about integrating into Nigeria. The Judge took into account his linguistic and medical difficulties. He also took into account the difficulties in adapting to life in Nigeria. The appellant was not at that stage a British citizen. He is still not a British citizen.
29. Accordingly he submitted that the decision is essentially consistent with the case law. The findings were open to the Judge.
30. In reply Mr Eteko submitted that EV (Philippines) is distinguishable. That case dealt with children who had not been in the UK for seven years. In the appellant's case the Judge had to assess the best interests of the child on the basis that he had been here for over seven years at the date of appeal.
31. In the circumstances there had to be "strong reasons" before dismissing the appeal.

### Assessment

32. As is evident from the grant of permission to appeal, the appellant did not identify within the grounds of appeal lodged by the solicitors any reference to the decision of the Court of Appeal in MA (Pakistan), supra. The grounds of appeal contended that the Judge made flawed and perverse findings relating to the child's best interests being served by his return to Nigeria with his mother. He had not identified all the material facts and considerations.
33. It was also contended that the Judge did not give adequate reasons for his findings that the child's best interests would be served by returning him to Nigeria with his mother and why it was reasonable to expect him to do so in the circumstances.
34. The appellant attended in person before the First-tier Tribunal. There was no representative on behalf of the respondent.
35. The Judge had regard to the fact that D had lived in the UK for more than seven years. He stated that the question of whether it is reasonable to expect the child to live in Nigeria must be judged in the light of all the evidence and taking into consideration his best interests. He found that it was clearly in his best interests to continue to live with his mother. Although the standard of education may not be as good in Nigeria, there is education awaiting him. On balance it was not unreasonable to expect the child to go to live there even though he had now spent nearly ten years in the UK [19].
36. In MA, Elias LJ referred to the decision of Lord Justice Christopher Clarke in EV (Philippines), which 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 he should remain in the UK, as set out in paragraphs 34-37. He noted that EV was not a seven year case but on the wider construction of s.117B(6) of the 2002 Act, the same principles would apply in such a case. The fact that the child had been in the UK for seven years would need to be given "significant weight" in the proportionality exercise because of its relevance to determining 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 [49].
37. It is accepted that the First-tier Judge did not have regard to the decision in MA (Pakistan) which as noted by Judge Plimmer is an "obvious point".
38. In the circumstances, the fact that the child had been in the UK for more than seven years required the Judge to give significant weight in the proportionality exercise in determining the nature and strength of his best interests. Further, it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.
39. That exercise was not carried out. I cannot safely conclude that notwithstanding that omission the appeal was nonetheless bound to be dismissed.
40. In the circumstances, I find that the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision which will have to be re-made.
41. I am satisfied that the extent of judicial fact finding which is necessary in order for the decision to be re-made, is extensive. I have also had regard to the overriding objective

and conclude that it would be just and fair to remit the case.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law. It is set aside. The appeal is remitted to Taylor House for a fresh decision to be remade by another Judge.

Anonymity direction not made.

Signed

Date 9 November 2017

Deputy Upper Tribunal Judge