



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

Appeal Numbers: HU/01838/2016  
HU/01843/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3 November 2017**

**Decision & Reasons Promulgated  
On 31 January 2018**

**Before**

**DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL**

**Between**

**AE  
SO  
(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Ms C Jaquiss, Counsel instructed by Cale Solicitors

For the Respondent: Mr E Tufan, Home Office Presenting Officer

**DECISION AND DIRECTIONS**

1. In a decision sent on 22 February 2017 Judge Henderson of the First-tier Tribunal (FtT) dismissed the appellants' appeal against the decision made by the respondent on 7 January 2016 refusing leave to remain. The grounds of appeal on the basis of which permission was granted were that the judge erred in (1) failing to give adequate reasons for rejecting the first appellant's account of the breakdown in her relationship with her EEA partner (and so wrongly failing to recognise that she made her application

for ILR within 28 days of her relationship ending at the latest); (2) wrongly applying the reasonableness test as regards the second appellant (the first appellant's daughter, S); and (3) wrongly assessing the overall state of the public interest factors in play on the facts of the appellants' case.

2. I am grateful to Ms Jaquiss and Mr Tufan for their particularly clear and fair submissions.
3. Insofar as the challenge raised in ground 1 is to the judge's findings of fact that the first appellant's relationship with her EEA national partner had ended by 30 April (and not in June as claimed by the first appellant), I have no hesitation in rejecting it. The judge considered all the relevant evidence and submissions relating to this issue and was entitled to make the findings she did at para 34. It was open to the judge in this regard to identify and count against the first appellant a material inconsistency and implausibility in her evidence as to why she moved to London on 30 April 2015. That said, I do regard the fact that the respondent did not see fit to revoke the first appellant's residence card (which remains technically valid until 8 August 2018) as of relevance to the issue of the reasonableness and proportionality of the decision appealed against.

4. This brings me to ground 2. At paras 46-47 the judge wrote:

"46. Turning then to the question of whether, having established that it would be in [SO]'s best interests to remain in the UK, whether it would be reasonable to expect her to leave to UK? In **MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705** LJ Elias noted that, '*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.... 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 reasonable 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*'.

47. In this case, I have not accepted the appellant's evidence that she would be unable to build a life for herself and [SO] upon return to Nigeria. I accept that she would find it difficult as a single mother and as someone who has not lived in Nigeria for over 12 years to return and build a new life. However, that is not the test I have to apply. I have found that there would be no very significant obstacles to her doing this under the test in paragraph 276ADE(1) (vi) and I find that she has not shown that there would be any matters which would make it unreasonable for [SO] to return to Nigeria with her. [SO] would be able to continue her education in Nigeria: this may not be of the same standard as that in the UK,

but state-funded education is available. [SO] has not yet entered secondary school and so a break in her education at this stage would be less detrimental than in another 2-3 years. Furthermore, I have not seen any evidence to establish on a balance of probabilities that there are serious health or medical reasons why [SO] could not return to Nigeria. The appellant referred to investigations relating to leukaemia but no evidence was presented to support this: [SO]'s only prescribed medication is a nasal spray. All the appellant's explanations as to why she could not return to Nigeria were effectively about her preference for her and [SO] to live in the UK."

5. Given that the judge specifically referred to **MA (Pakistan) [2016] EWCA Civ 705** and that I am only entitled to interfere in a judge's assessment if it is vitiated by legal error, I am conscious of the need not to be overforensic when examining the judge's reasoning. Even so, I cannot ignore the evident fact that the judge has not applied one of the cardinal features of the guidance given in **MA (Pakistan)**, namely the need to require the respondent to show "strong reasons" for refusing leave to a child who has been resident for seven years. In [46] of **MA (Pakistan)** Elias LJ stated: -

"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."

At [116] His Lordship emphasised that it was important for decision makers to "recognise that particular weight had to be given to the fact that the child had been resident for seven years".

6. In a nutshell, the judge selected a passage of from **MA (Pakistan)** that suited her purposes in deciding the appeal without making sure to apply it in light of the above presumption required by this judgment. Given that in paragraph 45 the judge had found that "on balance ... it would be in S's best interests to remain in the UK, bearing in mind that she has spent virtually all her life in the UK and has been educated here", the judge's

need to require strong countervailing reasons to justify the child's removal was particularly acute.

7. The above observations feed in to what I have to say about ground 3, which is interlined to ground 2. As **MA (Pakistan)** confirmed, the assessment of reasonableness incorporates an assessment of public interest factors. Immediately following paragraphs 46 and 47 (which themselves contain no express assessment of any public interest factors) the judge stated:

“48. I am also mindful of the relevant provisions of sections 117A-D of the NIA 2002 relating to the public interest question to be considered as part of the proportionality assessment required in questions 4 and 5 of **Razgar**.

49. The appellant speaks very good English (section 117B(2)). The appellant has not been reliant on state benefits (section 117B(3)). The appellant's private life in the UK has primarily been established in the period 2004 - April 2015 when she met S's father and then subsequently the EEA sponsor. Her stay in the UK was lawful through the majority of that time. (section 117B(4)). Therefore, none of the section 117B factors count against the appellant.”

8. If it was the case that “none of the section 117B factors count against the appellant[s]”, then it is very difficult to see how the judge could have concluded (had she properly applied **MA (Pakistan)**'s guidance that the respondent could show very strong reasons for deciding to remove the second appellant. In point of legal fact, the judge cannot be entirely right to conclude there were no s. 117B considerations weighing against the appellants, since on her own analysis of the breakdown of the relationship with an EEA national, she had never had ILR and she become an overstayer in April/May 2015 and hence her immigration status was precarious. However, as I shall explain below, that is not a factor that could or should have weighed heavily against the appellants given the precise circumstances of her history of residence.
9. In my judgement grounds 2 and 3 identify a material error of law necessitating that I set aside the judge's decision.
10. Having reflected on the matter I consider I am in a position to re-make the decision without further ado. There are no challenges to the judge's primary findings of fact nor to her finding as regards the best interests of the second appellant. Mr Tufan was also prepared to accept that the judge's statement that there were no s. 117B considerations that apply against the appellants was broadly correct. He was also prepared to accept that there was a further public interest factor which in fact weighed in the appellants' favour, arising from the terms of the respondent's own long residence policy Version 15.0 3 April 2017 which states at page 9 that:

“Once an applicant has built up a paragraph of 10 years continuous lawful residence there is no limit on the length of time afterwards

when they can apply. This means they could leave the UK, re-enter on any lawful basis, and apply for settlement from within the UK based on a 10 year period of continuous lawful residence they built up in the past. There is also nothing to prevent a person relying on a 10 year period that they may have relied on in a previous application or grant”.

11. I do not agree with Ms Jaquiss that this passage endorses an application under the 10 residence rules by someone without a lawful basis of stay. That it does not is confirmed by the sub-section immediately following on p. 10 which concerns “Breaks in continuous residence” and a later sub-section at p.18 on “Out of time applications”. Nevertheless the last-mentioned sub-section requires consideration, since it enjoins caseworkers, when refusing an application on the grounds it was made by an applicant who has overstayed by more than 28 days, to “consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying”.
12. Whilst it is moot whether the first appellant’s case demonstrated exceptional circumstances preventing her from applying within the first 28 days of overstaying, it is clear that (i) as of 8 August 2014 the appellant had achieved a period of over ten years’ continuous lawful residence; (ii) at the time she applied she had a valid residence card not due to expire until August 2018; and (iii) the respondent did not see fit to retrospectively revoke this card when deciding her relationship with the EEA national had ended in April 2015. Even though not in themselves constituting exceptional circumstances preventing the appellant from applying for long residence prior to June 2015, they do satisfy me, when carrying out the assessment of the reasonableness of the second appellant’s status under the Rules and the first appellant’s eligibility under s. 117B(6) of the 2002 Act, that there are no strong public interest factors to justify requiring the second appellant to leave the UK or for requiring the first appellant to leave either. In relation to the first appellant her removal would have unjustifiably harsh consequences.

### **Notice of Decision**

13. For the above reasons:

The decision of the FtT judge is set aside for material error of law although her primary findings of fact have been preserved.

The decision I re-make on the basis of these facts is to allow the appellants’ appeal on human rights grounds.

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

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly

identify them 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.

Signed

Date: 4 December 2017

A handwritten signature in black ink that reads "H H Storey". The letters are cursive and connected.

Dr H H Storey  
Judge of the Upper Tribunal