



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05865/2016  
HU/05847/2016  
HU/05870/2016  
HU/05873/2016

THE IMMIGRATION ACTS

Heard at HMCTS Employment Tribunal Liverpool      Decision and Reasons Promulgated  
On 5 March 2018      On 29 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

SOA  
SAI  
RMASA  
OEAA  
(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:      Mr Holmes, Counsel, instructed by GMIAU.  
For the Respondent:      Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1      The appellants, nationals of Nigeria, are a family comprising father, mother, and two minor children. They appeal against the decision of Judge of the First-tier Tribunal Birrell dated 5 June 2017, dismissing the appellants' appeals against the respondent's decision of 12 February 2016 refused their human rights claim. That

claim had been made in representations dated 23 December 2015 which had argued that the family should be granted leave to remain on the grounds of their private and family life enjoyed in the UK.

- 2 The first and second appellants have made a number of previous applications for leave to remain, as set out in the judge's decision at [4] to [8]. Their assertion that they entered the United Kingdom as long ago as 1995 was rejected in a previous appeal decided by Judge of the First-tier Tribunal Lambert on 23 June 2014. The judge held that there was no adequate evidence to demonstrate that the first and second appellants had been in the UK prior to 2008. In the present judge's decision, the judge proceeded on the basis that the family have enjoyed a private life in the UK since 2008 [30].
- 3 The third appellant was born in the UK in September 2008, and was seven years old at the date of application, and 8 ½ years old at the date of the appeal hearing before judge. The fourth appellant was born in the UK in February 2013, and was two years old at the date of application, and four years old at the date of appeal.
- 4 In the respondent's decision, the application for leave to remain was refused on the grounds that neither the first nor second appellant satisfied the requirements for leave to remain in the appendix FM, or on private life grounds under 276ADE (1)(vi), on the grounds that there were no very significant obstacles to their integration into life in Nigeria. In relation to the third appellant, the respondent accepted that he had resided in the United Kingdom for seven or more years at the date of application, but held, in relation to paragraph 276 ADE (1)(iv), that it would not be unreasonable for him to leave the United Kingdom. In relation to the fourth appellant it was held that he did not meet the requirements of the immigration rules.
- 5 The appellants appeal came before the judge on 9 May 2017. In her decision, the judge held as follows:
  - (i) the appellants had a family life in the United Kingdom, but as they will be removed together, there would be no interference with that family life [34];
  - (ii) the appellants have enjoyed a private life in the UK, since 2008 [36], [38];
  - (iii) little weight should be given to the report of Kathleen Whitehead, described as a social work student, purporting to provide an analysis of the best interests of the children, for reasons set out at [44 (a) - (d)] (which are not challenged);
  - (iv) the children are apparently happy, well adjusted and settled into school where they have friends, and the they attend church with their parents [45];

- (v) there is an education system in Nigeria [45];
- (vi) it would be in the children's best interests to remain in the UK, based largely on the fact that the third appellant has lived in the UK for more than seven years and that education and healthcare in the UK are better than in Nigeria [46];
- (v) however, the judge expressed the view that the best interests decision was not overwhelmingly in favour of remaining, as she was satisfied that they could pursue an education (in Nigeria) and are not presently at a particularly crucial stage in their education; there is nothing to suggest that they could not meet new friends and attend church as they have in the UK [46];
- (vi) the assessment of reasonableness of return, under S.117B(6) NIAA 2002 must not focus on the position of the children, as had been made clear in the cases of MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705 and AM (Pakistan) & Ors v Secretary of State for the Home Department [2017] EWCA Civ 180 [49];
- (vii) the appellants were not British and not entitled as of right to benefit from the education system and other public services in the UK [50];
- (viii) the appellants had never had lawful leave to remain in the UK had made a previous human rights applications and an asylum application, representing an adverse immigration history; even the respondent's IDI guidance said that the decision maker was entitled to take into account an adverse immigration history which can outweigh the best interests of children, and in the judge's view, this was particularly so whether factors advanced in favour of remaining were not overwhelming [51];
- (ix) it was reasonable for the children to leave the United Kingdom; whilst this would inevitably cause some distress and hardship, the judge was not persuaded that this would be sufficiently grave to outweigh the wider interests of maintaining immigration control; they would be returning as a family unit to a place where the parents have spent the majority of their adult lives; the first and second appellants had proved resourceful whilst in the UK and can focus that resourceful spirit in reintegrating into their home country; they are all members of a church that has links in Nigeria and could potentially provide a social and emotional support if that were needed outside of the family unit every [52].

6 The appeal was dismissed.

- 7 In grounds of appeal dated 15 June 2017, the appellant argues that the judge erred in law in:
- (a) failing to identify the 'strong reasons' or 'countervailing reasons of considerable force' that outweigh the best interests of children in this case;
  - (b) importing a precondition/criteria on that the appellant's children's best interest must be 'overwhelming' in order to qualify for a grant of leave;
  - (c) failing to deal with material factors other than the third and fourth appellant's access to education, such as their having been born in the United Kingdom, spent the whole of their lives in the United Kingdom; social and cultural factors warranted consideration;
  - (d) (in this case, were the Respondent was not represented), going beyond the scope of the refusal letter, in breach of the guidelines in the case of *Surendran v SSHD (19197)*;
  - (e) conducting her own Internet research on the availability of educational facilities in Nigeria.
- 8 Permission to appeal was granted by Judge of the first-tier Tribunal Hodgkinson on 19 December 2017 expressing the view that all of the grounds were arguable.
- 9 Before me, Mr Holmes, for the appellants, made an application to rely upon an unreported decision of the Upper Tribunal. I granted permission, but in any event subsequent to the hearing before me, the case in question has been reported: *MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88(IAC)* (1 February 2018).
- 10 There was no rule 24 apply from the respondent in this matter
- 11 Mr Holmes adopted his grounds. In particular, in relation to ground (a), Mr Holmes referred to the guidance in *MA Pakistan* which indicated at para 46, dealing with a child who has been present in United Kingdom seven or more years:

'46 ... 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.'" (Emphasis added)

- 12 Mr McVeety suggested that the appellant's first ground had more merit than the others, and in relation to that ground, whilst not making any formal concession, he accepted that he was unable to put forward any proper argument to counter the appellant's ground of appeal.

### **Discussion**

- 13 Although the judge has directed herself in law at the [15] to [19] as to the relevant law, including the guidance set out in MA Pakistan, quoting from paragraphs 45 to 47 of that judgment, I find with respect to the judge that she has ultimately misdirected herself in law as to the significance to be attached to a child having spent seven or more years in the United Kingdom when assessing the child's best interests.
- 14 I do not find, contrary to the appellant's ground (b), that it was impermissible for the judge to ask herself at [46] whether or not the best interests of the third child were 'overwhelmingly' in favour of remaining, because that question is itself posed in paragraph 36 of EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874. It is appropriate to quote a slightly longer extract from that judgement:

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; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) 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."

15 In MA Pakistan, the Court of Appeal noted that EV Philippines was not itself a case involving a child who had been present for seven or more years (the child had been present for 3 years and 9 months): As per MA Pakistan para 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."

16 The judge's error was, I find, not in considering whether the third appellant's best interests were overwhelmingly in favour of remaining, as opposed to such conclusion only being arrived at on balance; but rather, in failing to have regard to the guidance given by the Court of Appeal as to the *starting position*, when considering the best interests of a child who has been present for 7 or more years. Even within paragraph 46 of MA Pakistan, which the judge quoted within her decision, the judgment provides that 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.

17 There may be considerations pointing to it being in a child's best interests to remain in the UK, or to leave the UK, to live in their country of nationality. The judge did not identify any considerations positively indicating that it would be in the best interests of the children to leave the United Kingdom and to live in Nigeria. For example, no family members were identified as existing in Nigeria.

18 Further, in assessing what was in the third appellant's best interests, the judge does not address a number of considerations regarding the third appellant circumstances that were identified as being relevant in EV Philippines at paragraph 35: (a) his age; (b) the length of time he has been in the United Kingdom; (d) the extent he has become distanced from Nigeria; (e) how renewable his connections with Nigeria may be.

19 The judge does not, for instance, note that the third appellant had been present in the United Kingdom for 8 ½ years, rather than simply seven; he has been in the

United Kingdom the whole of his life; he has never been to Nigeria, and has no personal connections to it, other than some uncertain connections that his parents may have had there, before they left, which would have been some point prior to 2008.

- 20 I am also of the view that whereas it may be possible for any individual to leave one set of friends and to forge new friends in another country, the judge fails to consider whether it is in fact in the third appellant's best interests to be required to do so. I find, agreeing with the appellant's grounds of appeal, that the judge has considered principally matters of education, rather than other ties which the third appellant has, and would inevitably have, to the UK (Ground (c)).
- 21 Bearing in mind the guidance at paragraph 46 of MA Pakistan that in a seven year case, there must be a *very strong expectation that the child's best interests will to be remain in the UK*, I cannot for my part see how, in the discrete exercise of determining what was in the third appellant's best interests, that it could be said that these were anything other than overwhelmingly to remain in the UK.
- 22 Further, in the judge's subsequent proportionality balancing exercise there is nothing in paragraphs [45] to [53] to suggest that she gave the best interests of the third appellant *significant weight*, as is required by MA Pakistan paragraphs 46 and 49. Further, para 49 of that judgement also provides that a child having been in the UK for seven or more years "establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary". The judge does not direct herself that such powerful reasons are required.
- 23 I would also observe, although do not find this to be a discreet error, that whereas the judge directed herself at [49] that the assessment of the reasonableness of return must not focus on the position of the children, such a self direction would risk leaving relevant considerations out of account. When the question is whether it is reasonable for a child to leave the UK, it seems obvious that the children's interest must be considered; the authorities mentioned by the judge establish that the such assessment must not focus on the position of the children *exclusively*; other considerations, such as the immigration history of parents, can be taken into account.
- 24 It is not necessary for me to consider the appellant's grounds (d) and (e).

### **Decision**

- 25 I find that the decision involved the making of errors of law which were material to the outcome of the appeal.
- 26 I set aside the judge's decision.

27 Upon my asking the parties for their views about the forum in which the decision should be remade, Mr Holmes indicated that he would be content for the matter to be retained in the Upper Tribunal, and to make some further closing submissions as to the remaking of the decision. Mr McVeety agreed with that approach.

28 I heard the oral submissions from Mr Holmes, and Mr McVeety. For his part, Mr McVeety confined himself to relying on the decision letter of 12 February 2016.

### **Remaking**

29 Directing myself as to the considerations set out at paragraph 35 of EV Philippines, and Paras 46 and 49 of MA Pakistan, I find that the third appellant was born in United Kingdom and has lived here the whole of his life. He has never visited in Nigeria, as has no direct experience of living in that country. Although the judge had rightly found that the alleged expert opinion, expressed in the statement of Kathleen Whitehead, was to be given little weight, Mr Holmes invited me to treat the content of paragraph 6 of that statement as accurately representing the third appellant's wishes. Mr McVeety was content for me to do so.

30 That paragraph sets out that when Ms Whitehead asked the third appellant about living in Nigeria, he had said he would not want to, saying that he likes his life in the UK and does not want to leave. He stated that he had never been to Nigeria but said he had seen violence on the news in Nigeria and this had scared him. I take the third appellant's views and wishes into account as a relevant consideration in determining his best interests.

31 In the appellant's bundle at {47} the third appellant names within his school report, specific friends that he likes to play with. The appellant's bundle also establishes that the third appellant has been attending school, with very high percentage attendance {33}-{36}, was making good progress {42}, was polite and had good manners, and is a popular member of his class with lots of friends {45}, and plays at a local football club, where is a well liked member of the team {19}.

32 I also take into account, when hearing this appeal in March 2018, that the third appellant is now 9 ½ years old and his ties to the UK will have increased with further effluxion of time since the matter came before the First tier. I also observe that in another six months time he will be entitled to be registered as a British citizen, although I do not in fact take that matter into account in my present decision.

33 I find, with respect to the judge, that it is overwhelmingly in the best interests of the third appellant to remain living in United Kingdom with his parents. I find that the third appellant's removal would amount to an interference with his private life in the UK, developed entirely in the UK.



- 34 In determining whether it is reasonable for the third appellant to leave the UK, wider public interest considerations come into play via the concept of reasonableness under s.116B(6) NIAA 2002 (AM Pakistan, end of para 20). Conducting the proportionality balancing exercise, the principal public interest considerations militating against the appellants are the importance of the maintenance of immigration control, and the adverse immigration history of the parents. I accept, following MA Pakistan, that at this proportionality stage, adverse factors such as the parent's immigration history may be taken into account.
- 35 I turn at this point to the now reported case of MT and ET. That case also child from Nigeria. The mother, MT, had been the claimant in an earlier case of Tologuwa v SSHD [2012] EWHC 2386 (Admin). That judgement had suggested that consideration needed to be given as to what circumstances may prevail upon the return of a family to Nigeria. However, when appellant MT's case later came before the Upper Tribunal in MT and ET, the Upper Tribunal observed that the child ET had by then been present in the UK for 10 years, and had no direct experience of Nigeria (para 31). The Tribunal did not in fact find it necessary to make any comparative analysis of the education systems in the UK versus Nigeria (para 31, first and second lines), but held that on the state of the law as set out in MA (Pakistan), there needed to be 'powerful reasons' why a child who has been in the United Kingdom for over 10 years should be removed, notwithstanding that her best interests lie in remaining. The Tribunal held at para 34 that there were no such powerful reasons, despite that appellant's 10 years' overstaying *and* a criminal conviction resulting in a community order for the use of forged document to obtain employment.
- 36 Although in the present case, the third appellant has been present for 9 ½ years, rather than 10, no real distinction between those two periods could properly be made in my view. Further, the first and second appellants in the present case have no criminality, in contrast with the appellant MT in MT and ET.
- 37 I find in all circumstances that it would not be reasonable to require the third appellant to leave United Kingdom, there not being sufficiently powerful countervailing public interests considerations to make the third appellant's removal proportionate to the interference that would to his private life if removed.
- 38 In relation to the position of the first and second appellants, I find, applying s.117B(6) NIAA 2002 that the public interest does not require their removal from the United Kingdom, given that they have a genuine and subsisting parental relationship with the third appellant, being a qualifying child, and where it would not be reasonable to require the third appellant to leave United Kingdom.
- 39 Where there is no public interest in removing the first and second appellants, and where it would not be reasonable to remove the third, I find that any suggestion that the fourth appellant, a four-year-old child, might be removed from the United

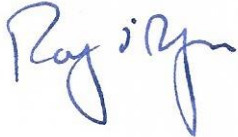
Kingdom, whilst his other family members remain in the UK, would be disproportionate.

### **Decision**

40 I allow the appellants' appeals on human rights grounds.

Signed:

Date: 28.6.18



Deputy Upper Tribunal Judge O'Ryan

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

The appeal concerns the welfare of minors. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their families. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.