



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04792/2016
HU/04795/2016
& HU/04797/2016

THE IMMIGRATION ACTS

Heard at Field House
On 12 February 2019

Decision & Reasons Promulgated
On 27 June 2019

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

- (1) MO
- (2) MD
- (3) MA

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss A Smith, instructed by JCWI
For the Respondent: Mr T Wilding, Senior Presenting Officer

ANONYMITY DIRECTION

Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders, I consider it appropriate to make an order in the following terms:

Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify any of the appellants. This direction applies to, amongst others, both the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings

DECISION AND REASONS

Introduction

1. The first appellant (MO) is a national of Nigeria, born in January 1984. The second (MD) and third (MA) appellants are the first appellant's children, born in June 2005 and June 2011 respectively.
2. The appellants appealed to the First-tier Tribunal against a decision made by the Secretary of State ("SSHD") on 8 February 2016, refusing their application to remain in the United Kingdom on human rights grounds. That decision was the subject of an appeal to the First-tier Tribunal ("FtT"), which was heard by First-tier Tribunal Judge Bart-Stewart on 17 October 2017 and dismissed in a decision promulgated on 15 November 2017. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Saffer on 13 April 2018.
3. By way of a decision of the 31 August 2018, I set aside the FtT's decision and directed that the re-making of the appeal be determined by the Upper Tribunal. The matter was then stayed to await the outcome of the Supreme Court's decision in KO (Nigeria) and Others [2018] UKSC 53, which was handed down on 24 October 2018.
4. The appeal came back before the Upper Tribunal on 12 February 2019, at which time I heard evidence and submissions. However, I agreed to defer the making of my decision until the Upper Tribunal (Presidential panel) had issued its decision in JG (s117B(6)): "reasonable to leave" UK) Turkey [2019] UKUT 00072. After JG had been handed down, I invited further submissions from the parties. Written submissions were received from the appellants on 8 April 2019. The SSHD did not respond to the invitation.
5. On 12 April 2019, the Court of Appeal handed down its decision in AB (Jamaica) v SSHD [2019] EWCA Civ 661. Despite the obvious relevance of this decision to the instant appeal I concluded that it was not necessary to invite the parties to make yet further submissions, given that the Court of Appeal had agreed with the approach to section 117B(6) of the Nationality Immigration and Asylum Act 2002 ("2002 Act") taken by the Tribunal in JG, albeit not for the same reasons as were identified in JG.

Appellant's Immigration History

6. The FtT recorded the appellants' immigration history in the following terms, which I adopt:

- "2. The appellant had a number of visit visas issued for the UK, the most recent being issued in 2010 valid until 27 September 2012. She said that she had been visiting the UK for over 11 years. On 12 November 2013 she applied for leave to remain on the basis of family and private life in the UK. This was refused without right of appeal on 31 January 2014. She made a further application on similar grounds on 18 February 2015. This was rejected on 7 October 2015.
3. The 2nd appellant is said to have been born in the UK and never left since birth however he was issued with entry clearance in Nigeria as an accompanied child valid from 27 September 2010 until 27 March 2011. He was included on the family and private life applications submitted in 2013 and 2015 as well as the current application.
4. The 3rd appellant was born in the United Kingdom and included on the previous application as well as the current application."

7. The FtT thereafter summarised the terms of the appellants' application to the SSHD as follows:

- "5. A letter from a charity, Minority Development and Advocacy, accompanied the application. This said the 1st appellant was referred to them by the Refugee and Migrant Project (RAMP). The letter states that the 1st appellant is a single parent of two British sons. She arrived in the UK in December 2004 as a visitor and has not left or returned to Nigeria since her arrival. She has overstayed. She cannot recall the exact date she arrived or provide her Nigerian passport as it was destroyed in a house fire. She separated from her partner since 2010 with whom she underwent a form of marriage ceremony and does not know his whereabouts. He is the biological father of her 2 sons. She is destitute and constantly moving from place to place. She does not receive public funds save child benefit and gets day-to-day support from charities and food banks. In Nigeria she had been disowned and excommunicated from the local community and her family had cut her off financially and emotionally.
6. The appellant suffered domestic abuse for her partner who abandoned her and her two children. She suffers from depression and mental illness since her traumatic experiences. She has forgotten everything of her country of birth and fears the possibility of Female Genital Mutilation (FGM) were she to return. The family never approved of her marriage and this would cause her further problems.
7. In the UK the children are settled and doing well academically. The relationship between the appellant's children and their local community would be ended if the 1st appellant were required to return to her country of origin. They have close friendships with classmates. The appellant would be at serious risk of FGM from the community or prospective partner/husband.

Appeal Proceedings thus far

8. As alluded to above, I set aside the FtT's decision for reasons given in my decision of 31 August 2018. In summary, I found that the FtT had failed to have regard to s117B of the 2002 Act - a failure which was of a particular significance in the instant appeal given that as of the date of the FtT's decision (which was the relevant date for the purposes of s117B(6) of the 2002 Act) MD had spent the previous six years and 11 months continuously living in the United Kingdom and over seven years in total living in the United Kingdom. MA had also spent over 6 years continuously living in the UK.
9. The FtT should have approach the issue of the weight to be attached to the time spent by the children living in the United Kingdom in its proper context i.e. in light of the terms of section 117B(6) of the 2002 Act, the judgment in MA (Pakistan) [2016] EWCA Civ 705, and the fact that at the relevant date one child had been continuously living in the United Kingdom for just one month short of the time period identified in s117B(6) and had been living in the UK for a period in excess of seven years in total. An analysis of the FtT's decision showed that it did not do so, and in my conclusion, such a failure constituted an error in its approach and reasoning.
10. In addition, I observed that before the FtT the appellants had relied upon evidence from Ms Jasmine Smith - an independent social worker. There is no doubt that Ms Smith is suitably qualified to provide evidence as an independent social worker. In her evidence Ms Smith identified the documents before her when reaching her conclusions and referred to having interviewed all three of the appellants. However, at paragraph 51 of its decision the FtT stated, *inter alia*, that Ms Smith's report was "[51] based entirely on what the appellant said in her statements, much of which is untrue and consequently I cannot place much weight in the report".
11. Even a brief consideration of Ms Smith's report leads inexorably to the conclusion that it was not based entirely on the statements of the first appellant, but on information provided by all three appellants, numerous well-known country background reports as well as Ms Smith's personal expertise.
12. Taking the aforementioned errors in the FtT's decision cumulatively, I found that its decision on the issue of whether it would be proportionate for the appellants to leave the United Kingdom and live in Nigeria was unsustainable and that it must be revisited on a lawful basis. It is for that reason that I set aside the FtT's decision.
13. I found all of other grounds pursued by the appellants to be unarguable.
14. The parties agreed at the hearing that if I set aside the decision of the FtT it would be appropriate for the appeal to remain in the Upper Tribunal for further consideration. This is the course I adopted. I limited the scope of the rehearing to the issue of whether the appellants' removal would breach Article 8 ECHR. I also directed that the findings of primary fact made by the FtT within paragraphs 41 to 47 of its decision would form the starting point for the remaking.

Remaking of Decision

Legal Background

15. Article 8 of the ECHR provides:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

16. In R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27, at [17], Lord Bingham of Cornhill set out the questions that arise for determination when removal is resisted in reliance on Article 8 grounds:

"(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

17. In that context, courts and tribunals must have regard in particular to the matters set out in Part 5A of the Nationality, Immigration and Asylum Act 2002, as amended by the Immigration Act 2014.

Section 117A provides:

"(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)."

Section 117B provides:

- "(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."

18. The definition of "qualifying child" is found in section 117D:

- "*qualifying child*" means a person who is under the age of 18 and who-
- (a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more"

19. In AB (Jamaica) [2019] EWCA Civ 661, the Court of Appeal adopted the interpretation of s117B(6) of the 2002 Act found in its earlier decision of MA (Pakistan), where at [36] Elias LJ said:

"Looking at section 117B(6) free from authority, I would favour the argument of the appellants. The focus on paragraph (b) is solely on the child and I see no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest. I do not deny that this may result in some cases in undeserving applicants being allowed to remain, but that is not in my view a reason for distorting the language of the section. Moreover, in an appropriate case the Secretary of State could render someone liable to deportation, and thereby render him ineligible to rely on this provision, by certifying that his or her presence would not be conducive to the public good."

Factual Background – starting point

20. As I identified above, the findings of primary fact made by the FtT in paragraphs 41 to 48 of its decision form the starting point for my consideration of the relevant factual matrix. These can be summarised thus:
- i) MO obtained, and entered the UK on 12 December 2010 using, a visit visa knowing that she intended to stay in the UK permanently.
 - ii) MD and MA were conceived outside of the UK and born in the UK.
 - iii) MO's claim to have lived in the UK continuously since 2004 is false.
 - iv) MD departed the UK to Nigeria (with MO) on 16 May 2009 and returned to the UK (with MO) on 12 December 2010;
 - v) MO has been dishonest throughout, she is educated and had a place at University in Nigeria. She is in contact with her family in Nigeria and they are close. She has close ties to Nigeria, has resources to draw upon and is resourceful;
 - vi) MO has submitted false documents, used false identities, has lied in applications and lied in oral evidence regarding registration with the Doctor and the name on the children's birth certificate. MO used a false name when she accessed medical treatment in the UK and when registering the birth of her child;
 - vii) There is no evidence MO has been subjected to domestic violence.

Further evidence before the Upper Tribunal

21. Further evidence was given by MO to the Upper Tribunal at the hearing of 12 February. In doing she adopted the contents of her witness statement dated 7 February 2019 and was tendered for cross-examination.

22. In her statement MO asserted that she had lived in the UK with MD between 2005 and 2009, and that she was not been in the UK for most of 2009 or 2010. MD speaks only English, has had his entire education in the UK, considers himself to be a Londoner and fears life in Nigeria. He also fears losing his friends and other connections in the UK should he move to Nigeria. MD has additional educational needs, and the school has helped improve MD's behaviour.
23. MA was born in the UK in June 2011 and has lived his entire life in the UK. He is a Londoner and an emotional child. He is doing well at school. He knows nothing about how things work in Nigeria. He gets upset at the thought of moving to Nigeria. They have cousins and uncles in the UK with whom they are close.
24. In paragraphs 14 to 24 of her statement MO seeks to paint a dire picture of the situation that would face her and the children in Nigeria, asserting that she would have no funds, no accommodation, no opportunity to work, that her father is ill, that her parents share cramped accommodation with the extended family, and that her siblings have their own families and could not support her and that when she returned to Nigeria in 2009 she was destitute and forced to live with a friend.
25. Under cross examination MO gave further information relating to the circumstances of her siblings in Nigeria. She accepted that she could help her brother's wife sell goods there "*to begin with*" but maintained that she could not live with her parents in Lagos because they have only two rooms, one in which they live and one in which her brother lives. She accepted that her children could be schooled in Nigeria but asserted that this would not be to the same standard as the schooling in the UK. She thought this because of the standard of her own education.
26. Finally, MO asserted that she has no relationship with the children's father, although the children do remain in telephone contact with him. He has let her down in the past. On 2 or 3 February, the children's father called MO on WhatsApp to say he had left Nigeria.
27. In addition to her won evidence MO also produced a further report from Jasmine Smith, an independent social worker. Ms Smith stated that she had interviewed all three appellants for a second time on 3 February 2019. In summary, the report sets out the connections the appellants have to the UK, in particular the children; identifies that MD has now started his GCSE preparation at school, states that both children know no other life other than that in the UK and concludes that it would not be in the children's best interests to leave the UK. Emphasis is also placed on the children's need for stability.

Submissions

28. Both parties' oral submissions focused on the correct interpretation and application of section 117B(6) of the 2002 Act, an issue which has now been resolved by the Court of Appeal – as to which see above.

29. Mr Wilding further submitted that it would be reasonable for the children to follow MO to Nigeria. MO could obtain work there, as she had accepted in evidence, and there was no evidence that the children could not receive adequate education in Nigeria. As to the expert report, he invited the Tribunal to attach little weight to the expert's assessment that it would not be reasonable for the children to move to Nigeria, the issue of reasonableness being a matter of mixed fact and law.
30. Ms Smith, in her submissions made on behalf of the appellants at the hearing, reminded the Tribunal that both children had lived in the UK for over seven years; one for almost his entire life and the other for his entire life. It is in the best interests of the children to remain in the UK, as the expert confirms. The children would struggle to cope with life in Nigeria. The family in Nigeria are poor, education in Nigeria is not as good as in the UK and MO's work prospects are limited to selling items with her sister in law. In her written submissions, filed after the hearing, Ms Smith made comparison between the instant appellants' circumstances and the circumstances that prevailed in JG's case. It was asserted that in the circumstances of the instant case it would not be reasonable to expect the two child appellants to leave the UK.

Decision and Discussion

31. It is plain that all three appellants have built up a significant private life in the UK. MO and MD have lived here continuously since December 2010 and, save for the periods spent 'visiting' Nigeria, both also resided in the UK between 2005 and 16 May 2009. MO continues to work with a voluntary organisation (RAMP) in the UK and has done so for some time - a fact not disputed by Mr Wilder. MD was born in the UK in June 2005 and has undertaken his entire education here. He is about to finish year 9, having started his GCSE preparations this year. MA was born in the UK in 2011 and has never lived elsewhere. He has also undertaken the entirety of his education in the UK. Each appellant has established a network of friends. None of these matters are in dispute.
32. In all the circumstances, I accept that removing each of the appellants would cause an interference with their respective private lives of such gravity so as to engage Article 8 ECHR.
33. Such an interference would be in accordance with the law.
34. This case therefore turns on the answer to Razgar questions 4 and 5.
35. It is at this stage that one must turn to section 117B of the 2002 Act. Reliance is placed with some vigour by the appellants on section 117B(6). In this regard it is not disputed that MO has a genuine and subsisting parental relationship with her children - MD and MA, or that both children are "qualifying" children - both child appellants having now lived in the UK for a continuous period in excess of seven years. In MD's case he has lived in the UK continuously for a period of 8 ½ years and

for a substantial part of his life in total. As already alluded to, MA was born in the UK in June 2011 and has never lived elsewhere, nor has he ever left the UK.

36. The question for determination is whether *"it would not be reasonable to expect [either] child to leave the United Kingdom."* Such a consideration must be undertaken in the 'real world' which, in the context of this case, leads to an analysis being undertaken on the basis that MA and MD would follow their mother to Nigeria if she were to be removed. There is no prospect of them remaining in the UK without their mother.
37. I have no hesitation in concurring with the FtT's view of MO. She is a dishonest individual who has at every turn sought to deceive and manipulate the UK immigration authorities, even to the extent that she came to the UK whilst pregnant on two occasions so the child would be born here and, on the second occasion, she came to the UK as a visitor with the intention of seeking to remain here indefinitely. However, as identified above, consideration of the 'real world' circumstances do not allow for the assessment of reasonableness of requiring the child(ren) to leave the UK to be infected by the findings made regarding the dishonesty and manipulation of immigration system by MO.
38. I reject MO's evidence that the children's father has left Nigeria. She has provided no evidence in support of such contention, despite the relative ease with which this evidence could have been obtained i.e. by production of the WhatsApp message or other evidence from the children's father. The same can be said of the MO's family circumstances in Nigeria. There has been ample opportunity for MO to produce evidence supporting her contentions that there would be no accommodation available to her and children upon return, but such evidence has not been produced. Given MO's dishonest attempts to manipulate the Tribunal and the immigration authorities in the past I am not prepared to accept assertions of this sort when corroborating evidence could have been made available. As to the availability of work upon return to Nigeria, MO accepted that she could assist her sister in law in selling goods, and she has also acquired skills in the UK which will no doubt benefit her in the employment market in Nigeria.
39. Moving on, I do not set out again the child appellants immigration histories save to emphasise that MA has lived all of his life in the UK and has never travelled outside of the UK and that MD has spent almost the entirety of his life in the UK, save for approximately 2 years, and has started on the educational pathway to his GCSE's. I have no doubt both regard the UK as their home. I accept Ms Smith's evidence that each of the children has significant non-familial bonds to the UK and that removal would be against their best interests.
40. There is little independent evidence before me regarding educational opportunities in Nigeria. I do not accept MO's own assertions regarding the availability of education there, these being based on the circumstances as MO saw them when she was at school. In her report Jasmine Smith refers to evidence of the acceptability of corporal punishment in Nigerian schools, but this adds little if anything to this case,

and I take account of the fact that the most recent Home Office COIS report indicates that *“Although free and compulsory education is federally mandated by the Education Act, little enforcement of compulsory education laws occurs at state level. School fees are often charged, and the cost of materials can be prohibitive for families. Access to education is further hindered by a lack of teachers...”*.

41. The stage at which MD has reached in his studies and consequences of him now being withdrawn from those studies, is something I attach significant weight to. MD is not a child who has entered the UK educational pathway in its latter stages but is someone who has been exclusively educated in the UK and has reached the position in which the culmination of these studies is in sight – having started preparation for his GCSEs.
42. Jasmine Smith’s expert opinion, which has not been the subject of contrary opinion by an expert relied upon by the SSHD nor indeed was this aspect the subject of adverse comment by Mr Wilding during his closing submissions, is that removing MD from the educational pathway at this stage of his studies would *“not only likely to be extremely disruptive but could cause irreversible damage to his development”*. She further stated that whilst she had previously observed MD to be an enthusiastic young child, the passing of time between her two assessments had seen changes in him. During this time, he has suffered emotionally and now appeared deeply sad and emotionless.
43. MA is not in the same position and it is said that he remains *“oblivious”* and has *“no idea that his life could change forever”*.
44. Drawing all of this together, I do not accept that the appellants would be destitute upon moving to Nigeria. I do not accept MO’s version of the circumstances that prevailed upon her return to Nigeria in 2009, and I conclude that there would have been, and will be if the appellants return now, some familial support available there. In particular the appellants will, in my conclusion, be able to live with family members there. I also find that MO could obtain work in Nigeria, even if this is selling goods with her sister in law. Furthermore, whilst I do not accept the child appellants’ father has left Nigeria as claimed, I do accept that he has thus far played no more than a minimal role in their lives and no role in their upbringing. There is nothing in the evidence which leads me to conclude that this situation would change.
45. I conclude that there is a likelihood of the child appellants being able to enter into the educational system in Nigeria but accept that this is would not be to the same educational standards as are available in the UK.
46. Having taken all the circumstances of the case in the round, including the fact that MD was born in the UK, has spent almost his entire life here, has substantial private life connections to the UK, has been educated exclusively in the UK and that he has now embarked on his GCSE preparations, as well as Jasmine Smith’s conclusions as to the consequences for MD of withdrawing him from UK education at this stage, I find that it would not be reasonable to expect MD to leave the UK.

47. Looking at MA's circumstances in isolation, if I exclude from my mind the earlier finding in relation to MD I do not accept that it has been established that it would not be reasonable to expect MA to leave the UK, despite the fact that he has lived here his entire life. As Jasmine Smith indicates, he is oblivious to the situation. He is not as embedded on the educational pathway as his brother and the consequences for him of leaving the UK educational pathway at this stage are not as significant as in MD's case.
48. Nevertheless, the consequence of my findings in relation to MD is that statute mandates that the public interest does not fall in favour of MO's removal (section 117B(6)) despite her immigration history. If MO is not to be removed, then plainly the real-world scenario dictates that it would not be proportionate to remove either of the children.
49. For this reason, all three appeals must be allowed.
50. I observe, however, that had I been required to assess the proportionality of removing MO absent the conclusion mandated by section 117B(6,) I would have unhesitatingly concluded against her. Nevertheless, she has successfully managed to manipulate the immigration system to her advantage by using her children (in particular MA) as the bedrock of an Article 8 claim which, as a consequence of section 117B(6) of the 2002 Act, has been made out.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law capable of affecting the outcome of the appeal and is set aside.

Upon re-making the decision under appeal I allow the appellants' appeals – their removal being a breach of Article 8 ECHR.

Signed:



Upper Tribunal Judge O'Connor

Date: 26 June 2019