



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

Appeal Number: HU/15357/2018
HU/15359/2018
HU/15361/2018
HU/15363/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 06 August 2019**

**Decision Promulgated
On 04 September 2019**

Before

**UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE CANAVAN**

Between

**E A and OTHERS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity should have been granted at an earlier stage of the proceedings because the case involves child welfare issues. We find that it is appropriate to make an order. 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 appellants and to the respondent.

Representation:

For the appellant: In person

For the respondent: Mr T. Melvin, Senior Home Office Presenting
Officer

DECISION AND REASONS

1. The first appellant is a citizen of Nigeria who entered the UK on 15 September 2007 with leave to enter as a student. The second appellant, his wife, entered the UK on 24 August 2011 with their two children. The oldest child was three years old and the youngest was two years old on arrival in the UK.
2. On 22 February 2018 the appellants applied for leave to remain on human rights grounds. At the date of the application both children had lived in the UK for a continuous period of six years and six months. The respondent refused the application in a decision dated 06 July 2018 on the ground that the appellants did not satisfy the family and private life requirements contained in the immigration rules and there were no other exceptional circumstances to justify a grant of leave to remain on human rights grounds.
3. First-tier Tribunal Judge N.M.K. Lawrence (“the judge”) dismissed the appeal in a decision promulgated on 03 April 2019. At the date of the hearing on 15 March 2019 the oldest child was 11 years old and the youngest child was 10 years old. By that time the children had been resident in the UK for a continuous period of around seven years and seven months. The judge concluded that none of the appellants met the private or family life requirements of the immigration rules. In assessing whether the first and second appellants met the requirements of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (“the NIAA 2002”) the judge accepted that both children were ‘qualifying children’ because they had been continuously resident for a period of at least seven years. There was no dispute that the first and second appellants had a genuine and subsisting parental relationship with the children. However, the judge concluded that it would be reasonable to expect the children to leave the UK with their parents.
4. The appellants appealed the First-tier Tribunal decision on the following grounds:
 - (i) **Failure to make clear findings relating to best interests of the children**

Despite citing numerous cases on the issue, the judge failed to make any clear findings as to where the best interests of the two children lay. Having failed to make any clear findings relating to the best interests of the children the judge lacked a proper starting point for consideration of the separate question of whether it was reasonable to expect the children to leave the UK for the purpose of section 117B(6) NIAA 2002.

(ii) Confused and contradictory findings relating to the ‘reasonableness’ test

The judge made confused and contradictory findings before concluding that it would be reasonable to expect the children to leave the UK. At [24] the judge said: *“On the evidence before me, on balance, I do not find it is not unreasonable to expect the third and fourth appellant from leaving the UK with their parents and returning to Nigeria. (sic)”* The finding itself is confused and the double negatives had the opposite effect to the one apparently intended by the judge.

(iii) Failure to give appropriate weight to the children’s length of residence

The judge made further confused and contradictory findings in relation to the test set out in *MA (Pakistan) v SSHD* [2016] EWCA Civ 705. At [13] he correctly identified the finding of the Court of Appeal that ‘significant weight’ must be accorded to the fact that a child had been continuously resident for a period of seven years. When he came to make his findings, the judge confused the test in the following way at [24]: *“On the evidence I find that the third and fourth appellants have put down some roots. However, I do not find that there are ‘strong reasons’ (MA (Pakistan)), at this stage in their lives, it would be detrimental to their development to leave and to return to Nigeria. (sic)”* This finding appeared to require the appellants to show ‘strong reasons’ why it would be detrimental for them to return to Nigeria and failed to give correct weight to the children’s length of residence.

(iv) Error of law in requiring some form of detriment or welfare concern before it would be unreasonable to expect the children to leave the UK

The third and fourth points dovetail with one another. It is argued that the judge erred at [10], [16] and [22] in requiring detriment or welfare concerns to be shown in relation to the ‘reasonableness’ test. Although the welfare of the children might be relevant to the assessment of whether it is reasonable to expect a child to leave the UK, the assessment under Article 8 is an evaluative assessment and not solely a welfare assessment. Whether it is reasonable to expect the child to leave the UK is a holistic assessment taking into account all relevant issues including the ties that the children were likely to have developed in the UK. There is no strict requirement for the appellants to show safeguarding concerns.

Decision and reasons

Error of law

5. Having considered the grounds of appeal and the submissions made by the parties we are satisfied that the First-tier Tribunal decision involved the making of errors of law in relation to the assessment of the 'reasonableness' test for the reasons given in the grounds of appeal outlined above. The decision was long on recitation of authorities and short on clear findings. Some findings were confused or incoherent. Some findings also applied the wrong approach.
6. For these reasons we set aside the First-tier Tribunal findings relating to the assessment the 'reasonableness' test contained in section 117B(6) NIAA 2002. The appellants only sought to challenge the decision on this basis. The other findings made by the First-tier Tribunal relating to the assessment under the immigration rules shall stand.

Remaking

Best interests of the children

7. In assessing the best interests of the children, we have considered the broad principles outlined in *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of children are a primary consideration although they are not the only consideration.
8. The respondent must have regard to the need to safeguard the welfare of children who are "in the United Kingdom". We take into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55 of the Borders, Citizenship and Immigration Act 2009 ("BCIA 2009"). In the guidance, the respondent acknowledges the importance of international human rights instruments including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies." The UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.
9. It is in the interest of both children to remain in the care of their parents. The two children are Nigerian citizens who entered the UK legally with their mother in 2011. Given their young age on arrival it is unlikely that they have any significant memories of life in Nigeria. They have now lived in the UK for a continuous period of eight years. Their residence has been at an important developmental time during which the children began

school and have progressed in their education. The oldest child is now 11 years old and is on the cusp of secondary education. The youngest child is 10 years old. Both children have spent most of their young lives in the UK. It is reasonable to assume that they have developed friendships and other ties outside the family unit during their time at school. It is also reasonable to assume that they are culturally integrated in the UK given that it is the only home that they have ever really known. The fact that the children have been resident for a continuous period of eight years is a matter that must be given significant weight.

10. Bearing in mind that the appellants are unrepresented, we have had regard to publicly available information contained in the respondent's Country Background Note relating to Nigeria dated May 2019. The note says that there continues to be high rates of infant mortality in Nigeria [7.1]. Although free and compulsory education is federally mandated by the Education Act, little enforcement of compulsory education laws occurs at state level and the cost of school fees is prohibitive for many families. Access to education is further hindered by a lack of teachers and inadequate sanitation facilities, particularly for girls [7.2.2]. UNICEF report that abuse in all its forms are a daily reality for many Nigerian children and only a fraction ever receive help. Six out of every 10 children experience some form of violence and one in four girls and 10 percent of boys have been victims of sexual violence. The drivers of violence against children are rooted in social norms, including around the use of violent discipline, violence against women and community beliefs about witchcraft [7.4.1].
11. An earlier Country Information and Guidance Note entitled "Nigeria: Women fearing gender-based harm or violence" dated August 2016 says that the Constitution protects women, but discrimination is still widespread. While progress has been made towards parity in primary school education, there remains significant gaps in education. Discriminatory laws and practices, violence against women and gender stereotypes continue to hinder progress towards gender equality [2.3.1]. A UNICEF report from September 2015 set out the statistics for childhood violence (as above) and found that such violence has a long-term impact that lasts well into adulthood, including poorer mental and physical health outcomes. The survey showed that violence against children is not confined to marginalised groups. Violence against children transcends social and economic status [6.1.4].
12. The appellants think that it would be difficult for their children to adapt to life in Nigeria. They are now accustomed to British culture and have strong ties to the UK. They do not speak any Nigerian languages, but that does not mean that they could not learn with the assistance of their parents. We take into account the fact that English is widely spoken in Nigeria and that it would be possible for the children to continue their education there. There is no evidence to suggest that either child suffers from a serious health condition or that they have any other significant vulnerabilities.

Their parents are well educated and were able to find work in Nigeria before coming to the UK. Nothing in the evidence suggests that they would not be able to provide for their children if they returned to Nigeria as a family.

13. However, the background evidence shows that there is widespread societal discrimination against girls and women in Nigeria. The evidence also shows that the girls are likely to be exposed to violent forms of discipline in school. As young girls who approaching puberty, they may also be more vulnerable to sexual abuse and exploitation by people outside the family home. Although the girls are likely to have had some exposure to Nigerian culture through their parents, given their young age on arrival and their close connections to the UK, Nigeria is now likely to be a foreign country to them. It is in the interests of the children to maintain the stability they have in the UK and to continue to make progress in their education. Removal of the appellants to a country the children are likely to find alien would cause serious disruption to their lives. In cases involving residence of over seven years there is a strong expectation that it is in the best interests of the children to remain in the UK with their parents. For these reasons we conclude that the best interests of the children point quite strongly towards remaining in the UK in the care of their parents.

Article 8(1) - private and family life

14. The first appellant has lived in the UK for nearly 12 years and the rest of the family for eight years. It is likely that they have developed private lives in the UK during such extended periods of residence. It is likely that the children have developed ties outside the family home as a result of school and extra-curricular activities and are now culturally integrated. We find that the removal of the appellants from the United Kingdom in consequence of the decision would interfere with their right to private and family life in a sufficiently grave way as to engage the operation of Article 8(1) of the European Convention.

Article 8(2) - proportionality

15. Article 8 of the European Convention protects the right to private and family life. However, it is not an absolute right and can be interfered with by the state in certain circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are "in accordance with the law" for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.
16. The requirements of the immigration rules and the statutory provisions are said to reflect the respondent's position as to where a fair balance is struck for the purpose of Article 8 of the European Convention. The

appellants do not meet the private and family life requirements contained in paragraph 276ADE(1) and Appendix FM of the immigration rules and there is no evidence of exceptional circumstances that might justify a grant of leave to remain on human rights grounds with reference to GEN.3.2(2) of Appendix FM.

17. Part 5A of the NIAA 2002 applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to private or family life and as a result is unlawful under the Human Rights Act 1998. In considering the 'public interest question' a court or tribunal must have regard to the issues outlined in section 117B in non-deportation cases. The 'public interest question' means the question of whether interference with a person's right to respect for their private or family life is justified under Article 8(2) of the European Convention.
18. Although several public interest considerations are listed in section 117B, section 117B(6) is the operative provision for the purpose of this appeal. The provision states that the public interest will not require the person's removal if the person has a genuine and subsisting relationship with a qualifying child and "it would not be reasonable to expect the child to leave the United Kingdom." A 'qualifying child' is defined as a person who is under the age of 18 and who is (i) a British citizen; or (ii) has lived in the UK for a continuous period of at least seven years.
19. In *KO (Nigeria) v SSHD* [2018] UKSC 53 the Supreme Court found that the assessment of 'reasonableness' is directed to the position of the child without reference to the misconduct of his or her parents although what is reasonable must be considered in the 'real world' context in which the children find themselves.
20. In *JG (s 117B(6): "reasonable to leave" UK) Turkey* [2019] UKUT 72 the Upper Tribunal rejected the submission that section 117B(6) is only engaged if the children would, as a matter of fact, be expected to leave the UK. It found that the provision requires a court or tribunal to hypothesise that the child in question would leave the United Kingdom and must ask whether it would be reasonable to expect the child to do so.
21. The concept of the 'real world' context in which the children find themselves discussed by the Supreme Court in *KO (Nigeria)* was drawn from the discussion of Lewison LJ in *EV (Philippines)*. However, it should be borne in mind that those comments were made in the context of an overall balancing exercise assessing whether the interests of the children were outweighed by the need to maintain an effective system of immigration control i.e. a holistic assessment under Article 8. Although section 117B(6) is intended to reflect the respondent's position as to where a fair balance should be struck in relation to Article 8, the position as it stands since *KO (Nigeria)* and *JG (Turkey)*, is that the 'reasonableness' assessment is

focussed on the child and is not balanced against the conduct and immigration history of the parents.

22. The case law relating to section 117B(6) has come full circle to the position first outlined by Elias LJ in *MA (Pakistan) v SSHD* [2016] EWCA Civ 705. His favoured approach was to interpret the wording of section 117B(6) to focus solely on the child (albeit he went on to find that he was bound by a previous decision of the Court of Appeal at the time). The chosen threshold of seven years has significance. Elias LJ emphasised that the Secretary of State's policy recognised that after seven years a child is likely to have set down roots and developed social, cultural and educational links in the UK such that it would be highly disruptive if the child is required to leave. This may be less so when a child is very young, but the disruption becomes more serious as the child gets older. The fact that a child has been resident for a period of seven years should be given "significant weight" in the balancing exercise. He went on to say: "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, that must rank as a primary consideration in the proportionality assessment."
23. The 'real world' context in which this case is considered is the fact that the appellants do not meet the requirements for leave to remain under the immigration rules and would normally be expected to leave the UK.
24. We have found that it is in the best interests of the children to remain in the UK, the country where they have lived most of their lives and where they have established strong ties over a period of eight years. It is not in their best interests to be returned to Nigeria where the evidence shows that their life chances would be reduced, they would be exposed to an increased risk of discrimination and possibly an increased risk of violence. For these reasons we conclude that it would not be reasonable to expect children who have been resident in the UK for eight years during an important developmental period of their life to leave the UK. Their parents meet the requirements of section 117B(6) NIAA 2002 which states that the public interest does not require their removal in such circumstances.
25. Even if a holistic assessment is conducted under Article 8, where the best interests of the children are weighed against the cumulative effect of public interest considerations, the outcome would be the same. The best interests of the children are a primary consideration albeit not the only consideration. The respondent previously recognised that strong reasons would be needed to outweigh the interests of children who have been resident in the UK for more than seven years. In this case the parents entered the UK legally and had leave to remain until 2013. Further applications for leave to remain on human rights grounds were made promptly but were refused. The appellants did not leave the UK following those negative decisions, but neither is there any evidence to show that

the respondent took any action to remove them. Apart from the fact that they remained without leave there is no evidence of abuses of the immigration system at the more serious end of the scale e.g. deception, fraud or absconding. There is no evidence of criminal convictions or other matters that might give additional weight to the public interest in maintaining an effective system of immigration control.

26. To the contrary, the first appellant says that he was not allowed to work so he has spent his time volunteering for several charities. He says that he worked for Peace Parters Charity as a Project Manager, at the 999 club in Lewisham as an Employability Team Member and as a volunteer in the Family Support Team at an organisation called Pecan. Both parents speak English and have qualifications that would assist them to find work. If permitted to work, they are unlikely to be a burden on taxpayers and are better able to integrate into society. Even if we were to conduct a full assessment under Article 8 the public policy considerations are not sufficiently strong to outweigh the interests of children who have been resident in the UK for a period of eight years. For these reasons we also conclude that any removal in consequence of the decision would be disproportionate under Article 8 of the European Convention.
27. We conclude that removal in consequence of the decision is unlawful under section 6 of the Human Rights Act 1998.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is remade and the appeal is ALLOWED on human rights grounds

Signed  Date 27 August 2019
Upper Tribunal Judge Canavan