



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/21877/2018  
HU/21882/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 14 October 2019

Decision & Reasons Promulgated  
On 18 October 2019

Before

UPPER TRIBUNAL JUDGE REEDS

Between

T O & I O  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms Lanlehin of Counsel

For the Respondent: Ms Everett, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellants are citizens of Nigeria and are mother and minor child.

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

**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. This direction applies both to the Appellant and to the Respondent.**

2. The Appellants, with permission, appeal against the decision of the First-tier Tribunal, who, in a determination promulgated on the 18 June 2019, dismissed their appeals against the decision of the Respondent made on the 10 October 2018 to refuse their applications for leave to remain on human rights grounds.
3. Permission to appeal was granted by First-tier Tribunal Judge Hollingworth on the 7<sup>th</sup> August 2019.

*Background:*

4. The background to the appeal is set out in the decision letter and the determination at paragraphs 1-4 and include an earlier decision of the FtT in 2017 relating to the first appellant. It can be summarised as follows. The Appellant entered the United Kingdom on the 9 September 2006 having been granted entry clearance and was granted further periods of leave as a student until 23 January 2011. The second appellant was born in the UK in January 2011. On the 10 August 2014, the first appellant made a human rights application which was refused, and a second application was also refused with a right of appeal on the 17 November 2015. The appeal was refused by the FtT and she became appeal rights exhausted by 2017.
5. On the 29 June 2018 the appellant made an application for leave to remain on human rights grounds which was refused on the 10<sup>th</sup> October 2018.

*The respondent's decision:*

6. The decision letter was summarised at paragraph 11 of the determination. The Appellant could not meet the immigration requirements of the Immigration Rules under Appendix FM as a parent.
7. Under EX1, whilst it had accepted her child had resided in the UK for over 7 years, it was stated that it was reasonable for the child to leave the UK with the appellant and continue family life in Nigeria. It was considered that the first appellant had lived in Nigeria for most of her life, including her formative years and some of her adult life and that she would have retained her knowledge of life, language and culture and would not face significant obstacles to re-integrating into life in Nigeria. As to private life under Paragraph 276ADE, she could not meet the requirements given her length of residence since 2006.
8. Paragraphs 33-53 of the decision letter set out the consideration of the second appellant's claim. It was accepted that he had had resided in the UK for over 7 years but that it would be reasonable to expect him to return to Nigeria with the first appellant and continue family life there. As his mother had lived in Nigeria and would have retained her knowledge of life, language and culture and would not face significant obstacles to re-integration into life there. She would be able to support the second appellant to adapt on return. As a national of Nigeria he would be able to access education and whilst the level of educational provision may differ to that of the UK, the respondent was satisfied that the second appellant would receive the same standard of education as other nationals of Nigeria. As to the best interests, it

was stated that his best interests would be served by him remaining with his mother (at [51]).

*The decision of the FtTJ:*

9. The Appellant appealed and the appeal came before the First-tier Tribunal on the 20<sup>th</sup> May 2019. The FtTJ heard oral evidence from the appellant and three witnesses. In a determination promulgated on the 18 June 2019 the Judge dismissed the appeal under the Immigration Rules and on human rights grounds (Article 8).
10. The judge set out his conclusions at paragraphs 39-64 and at 78-89 of his decision. The FtTJ found that the second appellant was a healthy child with no medical concerns and would be leaving with his mother and thus there was no risk of separation. The judge found that there were no significant family ties in the United Kingdom and that in terms of the child's education, English was spoken widely in Nigeria. The second appellant and spent all his life in the United Kingdom but would be able to obtain education in Nigeria. The judge found at [44] that seven years from the age of four was more significant than the first seven years of life and the appellant was eight years having spent those years since birth and had not forged a life for himself. He was not at a critical stage in his education (at [45]). The appellant and her child would return to Nigeria and where the father of the second appellant was resident. Consequently, the judge found that it was reasonable to expect the second appellant to leave the United Kingdom (see [48]).
11. In respect of the first appellant, she could not meet the immigration rules under paragraph 276 ADE taking into account her length of residence since 2006 and that there were no significant obstacles to her reintegration. The judge found that she had family remaining in Nigeria and was in good health and had been educated to master's level. The judge also made adverse credibility findings at paragraph 64.
12. When looking at Article 8 outside of the rules, the FtTJ at paragraph 78 made reference to the second appellant having lived in the UK for the first eight years of his life; he had started primary school and had never lived in Nigeria but that English was spoken there and he was not suffering from any health conditions that would make it unreasonable for him to return to Nigeria. The judge then turned to the first appellant and her immigration history and found that the second appellant was born during the time and when she had no leave.
13. At [79] the FtTJ found that it was in the best interests of children to be with both their parents and that if both parents are being removed the starting point suggested that the dependent children who form part of the household should do so unless there were strong reasons to the contrary. Having found that it was reasonable for the second appellant leave the United Kingdom, he would be leaving with his mother. The judge therefore concluded at paragraph 95 but it would be reasonable to expect second appellant to leave the United Kingdom with the first appellant.

*The appeal before the Upper Tribunal:*

14. Permission to appeal was granted by First-tier Tribunal Judge Hollingworth on the 7 August 2019.
15. Before the Upper Tribunal, Ms Lanlehin relied upon the written grounds and the grant of permission which I have taken into account. The written grounds principally challenge the legal test applied as to the issue of the assessment of reasonableness and whether the judge applied the correct test.
16. The submissions can be readily distilled into a challenge to the assessment of best interests and the overall assessment of the issue of reasonableness of return. In her oral submissions, Ms Lanlehin submitted that the judge took into account the public interest and the first appellant's immigration history when assessing reasonableness citing the decision in SSHD v AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661 and that the judge failed to adequately factor into the assessment the weight properly attached to the child's length of residence and as represented in the respondent's guidance.
17. At the oral hearing, after hearing submissions on behalf of the Appellant, Ms Everett appropriately conceded that there was a material error of law as set out in the grounds when read with the grant of permission. I find the Respondent's concession to be appropriately made, and in the circumstances, I give only summary reasons for finding that the decision of the First-tier Tribunal involved the making of a material error of law such that it is necessary to set aside the decision.

*Discussion:*

18. The statutory provisions contained in Paragraph 276ADE (1) (iv) and section 117B (6) were at the forefront of the issues in this appeal, which state that the public interest will not require the person's removal where that 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.
19. There is no dispute that the second appellant is a "qualifying child" for the purposes of section 117B (6) as he had resided in the UK for over 7 years.
20. The issue identified is whether it would be 'reasonable' to expect the children to leave the UK within the meaning of Paragraph 276ADE(1)(iv) and section 117B (6). In MA (Pakistan) v SSHD [2016] EWCA Civ 705 the Court of Appeal expressed some doubt as to whether the 'reasonableness' test should include consideration of public interest factors but declined to depart from the earlier decision in MM (Uganda) v SSHD [2016] EWCA Civ 450, which concluded that it did. The Supreme Court's decision in KO (Nigeria) v SSHD [2018] UKSC 53 made reference to that approach at paragraphs 63 and 64 of the decision. The Court held that the approach taken by the Court of Appeal in MM(Uganda) was wrong and endorsed the approach Elias LJ would have taken at paragraph 36 (see the judgment of Lord Carnwath at paragraph 17 and at paragraphs 12 -19).

21. As to the issue of whether the child will leave the UK, the correct test being identified and summarised in Secretary of State v AB (Jamaica and AO (Nigeria)) [2019] EWCA Civ 661, at paragraphs 72- 75; the question that the statute requires to be addressed is a single question; is it reasonable to expect the child to leave the UK?

22. The Court stated:

"72. I respectfully agree with the interpretation given by the UT to section 117B(6)(b) in *JG*.

73. Speaking for myself, I would not necessarily endorse everything that was said by the UT in its reasoning, in particular at para. 25, as to the meaning of the concept "to expect". However, in my view that does not make any material difference to the ultimate interpretation, which I consider was correctly set out by the UT in *JG*. In my view, the concept of "to expect" something can be ambiguous. It can be, as the UT thought at para. 25, simply a prediction of a future event. However, it can have a more normative aspect. That is the sense in which Admiral Nelson reputedly used the word at Trafalgar, when he said that "England expects every man to do his duty." That is not a prediction but is something less than an order. To take another example, if a judge says late in the day at a hearing that she expects counsel to have filed and served supplementary skeleton arguments by 9 a.m. the following morning, so that there is no delay to the start of a hearing an hour later: although she may not be ordering the production of that skeleton argument, that is what she considers *should* happen. That is not a prediction of a future occurrence. It carries some normative force.

74. Finally, in that regard, I agree with and would endorse the following passage in the judgment of UTJ Plimmer in *SR (Subsisting Parental Relationship – s117B (6)) Pakistan* [2018] UKUT 00334 (IAC), a case which was decided before decision of the Supreme Court in *KO (Nigeria)*, at para. 51:

"... It is difficult to see how section 117B(6)(b) can be said to be of no application or to pose a merely hypothetical question. Section 117B (6) dictates whether or not the public interest requires removal where a person not liable to deportation has a genuine and subsisting parental relation with a qualifying child. The question that must be answered is whether it would not be reasonable to expect the child to leave the UK. That question as contained in statute, cannot be ignored or glossed over. Self-evidently, section 117B (6) is engaged whether the child will or will not in fact or practice leave the UK. It addresses the normative and straightforward question – should the child be 'expected to leave' the UK?"

75. I respectfully agree. It is clear, in my view, that the question which the statute requires to be addressed is a single question: is it reasonable to expect the child to leave the UK? It does not consist of two questions, as suggested by the Secretary of State. If the answer to the single question is obvious, because it is common ground that the child will not be expected to leave the UK, that does not mean that the question does not have to be asked; it merely means that the answer to the question is: No."

23. The advocates are in agreement that the grounds and the grant of permission identify material errors of law in the decision of the FtTJ and expressly in relation to the issue under S117B6 and Paragraph 276ADE(1) (iv). I am satisfied that the concession made by Ms Everett is correctly made and accept that there are errors of law in the decision reached which I am also satisfied are material to the outcome. Firstly, the judge appeared to take into account the position of the first appellant and her history when assessing the issue of reasonableness at paragraph 78 and then at paragraph 80.
24. In the decision of the Supreme Court in KO (Nigeria) & Others -v- SSHD handed down on 24<sup>th</sup> October 2018, Lord Carnwath, with whom Lord Kerr, Lord Wilson, Lord Reed and Lord Briggs agreed, referred to paragraphs 276ADE(1)(iv) of the Immigration Rules, and s117B(6) of the 2002 Act. Having referred to the requirement that appears at paragraph 276ADE(1)(iv) of the rules, he stated, at [7]:

"It will be seen immediately that the substance of this provision, in particular the seven-year criterion and the "reasonableness" tests, appears identical to that of section 117B (6), taken with the definition of "qualifying child"

At paragraphs [17] to [19], Lord Carnwath stated:

"17. As has been seen, section 117B (6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is "reasonable" for the child. As Elias LJ said in *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber) [2016] EWCA Civ 705, [2016] 1 WLR 5093*, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B (6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B (6) as of paragraph 276ADE(1)(iv).

18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT 1245* :

"22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made ..."

25. He noted at (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) -v- Secretary of State for the Home Department [2014] EWCA Civ 874*, para 58:

"58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus, the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves.

26. Ms Everett was in agreement with the submission made on behalf of the appellant that the considerable weight to be given to the length of residence of the second appellant was not placed in the balance as reflected in the respondent's guidance. Whilst reference was made to the "7 years threshold as a recognised threshold" (at [44]), and at [86] that "... the 7 years from the age of 4 was found to be more significant to a child than the first 7 years of their life" that the great weight attached to the length of residence was not weighed in the balance. Furthermore, the analysis did not address the matters set out in the respondent's guidance.
27. On the question of reasonableness of return for a qualifying child there is no longer a reference to the need for "strong reasons" being required before leave is refused. The updated guidance now says this:

**"Would it be reasonable to expect the child to leave the UK?"**

If the effect of refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision maker must consider whether it would be reasonable to expect the child to leave the UK.

**Where there is a qualifying child**

A child is a qualifying child if they are a British child who has an automatic right of abode in the UK, to live here without any immigration restrictions as a result of their citizenship, or a non-British citizen child, who has lived in the UK for a continuous period of at least the seven years immediately preceding the date of application, which recognises that over time children start to put down roots and to integrate into life in the UK. The starting point is that we would not normally expect a qualifying child to leave the UK ..."

28. Given that this formed part of the guidance, some assessment of that issue was necessary and although the "strong reasons" injunction in the guidance no longer appears, it is notable that the guidance does state that "The starting point is that we would not normally expect a qualifying child to leave the UK".

29. In addition, significant weight must be given to a child's residence of over seven years. In MA (Pakistan) Elias LJ said this:

"46. 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...

49. 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."

30. Notwithstanding the jurisprudence that has followed the decision in MA(Pakistan), and the change in the wording of the guidance which no longer refers to "strong reasons" what is of remaining relevance is that the length of residence should be taken into account when determining the strength of the children's best interests. On the facts of this appeal, the relevant child had been born in the UK and had lived in the UK for 8 years and is a weighty and relevant consideration. That was not reflected in the assessment of reasonableness.
31. Consequently, I am satisfied that the decision of the First-tier Tribunal judge involved the making of an error of law and therefore the decision cannot stand and shall be set aside.
32. By way of re-making the appeal it is agreed by the advocates that the outstanding issue is that in Paragraph 276ADE(1)(iv) and the mirror section 117B(6), it being accepted that the second appellant is a "qualifying child" and as his residence of over 8 years is entitled to considerable weight. Ms Everett in those circumstances does not seek to argue that it would be reasonable for the second appellant to leave the United Kingdom and therefore it is accepted on behalf of the respondent that his removal would be disproportionate. Furthermore, in light of that conclusion, it follows that the public interest does not require the first appellant's removal, as she has a genuine and subsisting relationship with the second appellant and thus it follows that leave



should be granted to the first appellant so that the family unit can remain together in the UK. Therefore the first appellant's appeal also succeeds.

**Decision:**

The decision of the First-tier Tribunal did involve the making of an error on a point of law and is set aside; the appeal is re-made as follows; the appeals on behalf of the first and second appellants are allowed.

Signed

Date: 14 October 2019

Upper Tribunal Judge Reeds