IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003888
UI-2022-003887

First-tier Tribunal No:
HU/51163/2020
PA/52748/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

1st February 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MRS ROFIAT BELLO
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Katani, Katani & Co Solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

Heard at Melville Street, Edinburgh on 20 December 2023

DECISION AND REASONS

1. The appellant is a citizen of Nigeria. She appeals against a decision of the Secretary of State made on 3 December 2020 to refuse her human rights claim.

Background

2. The appellant entered the United Kingdom on 18 August 2004 to join her then partner, Mr Alada, who is now deceased. Using a false identity she was able to obtain British citizenship for herself and her three children.

3. On 23 May 2012 she applied for leave to remain outside the Rules, which was granted until 15 November 2014. On 30 July 2014 she was convicted of assault/ill-treatment/ neglect/abandonment of a child/young person and sentenced to a community order, an activity requirement and fined £10. She was granted further leave to remain on 12 November 2014 outside the Rules until 18 February 2018.

4. On 19 May 2016 she was convicted of three counts of making false representation to obtain benefit and one count of being concerned with fraudulent activity, with a view to obtaining tax credits, for which she was sentenced to one year and four months' imprisonment.

5. On 8 December 2017, she was served with a notice to refuse her human rights claim, which carried with it a grant of appeal. Her appeal to the First-tier Tribunal was dismissed on 30 April 2019. Subsequent to that, she made fresh representations on the basis that she has a family life in the United Kingdom with her partner, Mr GK and with whom she had a child born on 1 October 2019. She also said she continues to have a family life with her three children, who had been taken into care in Leeds.

6. The Secretary of State was not satisfied that she had a family life with her three elder children. She was satisfied, having had regard to the earlier Tribunal decision, that her deportation would not breach the United Kingdom's obligations under Article 8 of the Human Rights Convention, as the public interest in deporting her outweighed their right to a private and family life. She considered also that it would be unduly harsh for her younger child, AK, to remain in the United Kingdom, but that it would not be unduly harsh for him to live in Nigeria were she deported there. It is stated that she and her partner, GK could meet up in either her country or his country of nationality, Cameroon, and could apply for entry clearance to visit each other.

7. The Secretary of State did not accept that the appellant has a genuine and subsisting relationship with GK, given that confirmation had been received from Glasgow Social Services that they do not live together, dated 19 November 2020. It was not considered it would be unduly harsh for him to live in Nigeria if he chose to do so but it would be unduly harsh for him to remain in the United Kingdom even though he is deported [48]. The Secretary of State considered also that the appellant did not meet the private life exception to deportation nor were there very compelling circumstances such that she should be allowed to remain in the United Kingdom.

8. The appellant's partner, GK, is a citizen of Cameroon. He arrived in the United Kingdom in 2008 and his initial claim for asylum was dismissed. His further claim for asylum was refused by the Secretary of State on 26 November 2020 but his appeal against the decision was allowed by First-tier Tribunal Judge Kempton for the reasons set out in her decision promulgated on 15 June 2022. She concluded that he had a well-founded fear of persecution in Cameroon and allowed the appeal on that basis.

The judge also allowed this appellant's appeal on Article 8 grounds, finding [48] that there were no current concerns regarding her care of her youngest child or for that matter the three oldest children when she has contact visits with them. The youngest child and the older children have formed a bond and when they visit, in Leeds, that is unsupervised by the social worker. She accepted that the appellant and her oldest three children now have frequent telephone contact and that there is the prospect of them all being able to live together. She considered that it would be unduly harsh to all the family members, particularly for the appellant and her child, for her to be deported to Nigeria.

9. She found it would be very difficult for the three older children to maintain contact with the appellant were she and the younger child removed to Nigeria.

10. The Secretary of State sought permission to appeal both decisions. For the reasons set out in my decision of 21 September 2023, I upheld the decision of the First-tier Tribunal in respect of GK but found that the decision with respect to this appellant involved the making of an error of law. Materially, I observed as follows:-

> 27. There is a complexity in these appeals given the nature of the family life that exists. There is no challenge to the finding that there exists a family life between the first and second appellant and their child. Nor is there a challenge to the finding that there exists a family life between the second appellant and her three British citizen children. It would, however, be very difficult to argue that a family life exists between the first appellant and the three British citizen children or between the three British citizen children and their youngest half-sibling with whom they have very limited contact.
>
> 28. Bearing that in mind and bearing in mind that the position of the appellants' child is different from that of the three older children I proceed to analyse the grounds of challenge.
>
> 29. The starting point for the Article 8 analysis must be that the first appellant is entitled to refugee status. He could not therefore go to live in Cameroon nor could he approach the Cameroon authorities to obtain an identity document or a passport. There was no challenge to his evidence set out in his witness statement that without a passport he could not obtain a visa to enter Nigeria. In the light of that evidence and the appellant's position it cannot be submitted that the judge's findings in that respect are inadequately reasoned.
>
> 30. Given the sustainable finding that the first appellant is entitled to refugee status, and would therefore meet the requirements of the Immigration Rules to be granted leave to remain, the application of Section 117B of the 2002 Act is very far from straightforward as there would be no public interest in removing the first appellant.
>
> 31. Further, the grounds fail to specify any particular basis on which any of the factors set out in Section 117B would apply to the appellants' minor child and the fact that the appellants were here unlawfully would not be relevant to the assessment of the family life between the child and either of them for

the purposes of Section 117B. But, and this needs to be borne in mind, the finding is that removal of the first appellant would be in breach of his Article 3 rights, that is a breach of the Human Rights Convention, and thus any findings in respect of the first appellant's article 8 rights

The Hearing on 20 December 2023

11. I heard evidence from GK and the appellant. I also heard submissions from Mr Diwnycz and Mr Katani. In addition to the material put before the First-tier Tribunal I also had before me a further bundle, inventory of productions containing witness statements from the appellant, GK, correspondence from the social worker and statement from the first appellant's older daughter, who is now over 18.

The Law

12. Section 117C of the 2002 Act provides as follows:

> **117C Article 8: additional considerations in cases involving foreign criminals**
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

Paragraph 398 of the Immigration Rules replicates the framework.

13. In the case of individuals who have been sentenced to a period of imprisonment of four years or more or if neither Exception is to be met,

the test is one of “very compelling circumstances, over and above those described in Exceptions 1 and 2”.

14. I accept that “over and above the Exceptions” does not exclude or restrict the analysis to factors relevant to the issues dealt with in the Exceptions and we adopt the approach endorsed by Jackson LJ in NA (Pakistan) v SSHD [2016] EWCA Civ 662 at [37]:

> 37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6).

15. I observe also the comments made by the Upper Tribunal in MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) at [16] and [20]:

> 16. By contrast, the issue of whether "there are very compelling circumstances, over and above those described in Exceptions 1 and 2" is not in any sense a hard-edged question. On the contrary, it calls for a wide-ranging evaluative exercise. As NA (Pakistan) holds, that exercise is required, in the case of all foreign criminals, in order to ensure that Part 5A of the 2002 Act produces, in each such case, a result that is compatible with the United Kingdom's obligations under Article 8 of the ECHR.
>
> ...
>
> 20. For these reasons, despite Ms Patyna's elegant submissions, we find the effect of section 117C is that a court or tribunal, in determining whether there are very compelling circumstances, as required by subsection (6), must take into account the seriousness of the particular offence for which the foreign criminal was convicted, together with any other relevant public interest considerations. Nothing in KO (Nigeria) demands a contrary conclusion.

16. I accept also that in determining the public interest, regard is to be had to what is said in Section 117C(2); namely, that the more serious the offence, the greater is the public interest in deportation (MS at [47]). Further, by making the seriousness of the offence the touchstone for determining the strength of the public interest in deportation, parliament, in enacting Section 117C(2), must have intended courts and Tribunals to have regard to more than the mere question of whether the particular foreign criminal, if allowed to remain in the United Kingdom, would pose a risk to United Kingdom society(MS at [50]).

17. An element of the general public interest is the deterrent effect upon foreign citizens "of understanding that a serious offence will normally precipitate their deportation [might] be a more powerful aid to the prevention of crime than the removal from the UK of one foreign criminal judged as likely to reoffend" (MS at [69]).

18. With regards to the extent to which rehabilitation is to be taken into account I have applied the principles set out in HA (Iraq) at [132] to [141].

19. There was no challenge from the Secretary of State to the appellant and GK's evidence that they are no longer in a relationship although this has broken down owing to a number of difficulties. There is no indication either that the Secretary of State has chosen to appeal against my decision dismissing his appeal against the decision allowing GK's appeal. Although neither Mr Diwnycz nor Mr Katani were able to assist in any great way, it does appear that GK is awaiting issue of a biometric residence card. In any event, there is no record of any application for permission to appeal against my decision.

20. It is not in doubt that a family life exists between the appellant and her youngest child, nor for that matter between the appellant and her three oldest children. A family life also exists between GK and the youngest child and although she is over 18, the appellant's older child now appears to have formed a closer bond with her mother as, being over 18, she is now entitled to spend time with her. I am satisfied on that evidence, and the appellant's evidence that the family life between mother and daughter has continued, despite her turning 18, the appellant being the sole parent with whom she had had contact while being in care. I accept the findings of Judge Kempton that contact between the appellant and her three older children would be extremely difficult were she deported to Nigeria but equally I note that their contact is relatively limited at present to three meetings a year. That is much down to practicality as to anything else and I accept that, were circumstances different, there would be much more frequent contact.

21. The position of the youngest child is different. He does not have a status in the United Kingdom although I accept that he may, in future, be entitled to leave in line with his father.

22. The stark facts of this case are that if the appellant is deported the youngest child either has to go with her, in which case he will not be able to have contact with his father; or, if he stays with his father he will have little or no contact with his mother. He is young and I accept that he has now some contact with his half-siblings.

23. It would be, I consider wholly unreasonable to expect GK to have to go to Nigeria to maintain contact with his son. He falls to be recognised as a refugee. He is no longer in a relationship with the appellant and it is unclear what basis he would be entitled to go to Nigeria save as a visitor on an infrequent basis. In any event, there would no longer be the

continuity of day-to-day care which currently exists although the couple has separated, the child seeing his father almost daily.

24. Having directed myself as to "undue harshness" as summarised TD (Albania) [2021] EWCA Civ 619 at [20], I consider that the separation of the child from either parent would, as they are no longer a unit, and in the almost unique circumstances of this case, be unduly harsh.

25. I am not, however, bearing in mind what was said in **HA (Iraq)** in the Supreme Court, persuaded that any impact on the family life that exists between the appellant and her three oldest children would be unduly harsh given the limited nature of the contact that they have. It is difficult to see how that could be characterised as bleak but it would be significant.

26. Exception 2 cannot of course apply in respect of the youngest child given that he is not a British national and has no leave to remain here, nor has he been here more than seven years. Had that been the case then I may well have been satisfied that this Exception applies met given the child's age, and in effect he would effectively be separated from his father or mother at a young age.

27. For these reasons, I am not satisfied that Exception 2 applies in this case.

28. It is not suggested that the appellant meets Exception 1. She has not spent most of her life here, nor has there been much argument regarding whether she is socially and culturally integrated in the United Kingdom. Nor for that matter is it argued that there would be very significant obstacles to her integration into Nigeria.

29. I then move on to considering whether there are very compelling circumstances over and above the circumstances set out in Exceptions 1 and 2. In doing so I bear in mind also Section 117B.

30. In this case I find that Exception 2 is not made out in respect of the three older children, firstly because the oldest child is no longer under 18, and second in the case of the two younger children given the somewhat attenuated relationship between them and their mother which has persisted for some time. Nonetheless, I am satisfied that it would be a significant impact on them.

31. I am, however, persuaded that there would in the very unusual and particular facts of this case be very compelling reasons why deportation is disproportionate. That is because of the addition of the position of the youngest child whose best interests are a concern. In doing so I bear in mind the mother's convictions which although serious in respect of the offending which resulted in imprisonment, they are at the lower end of the scale resulting in a sentence of sixteen months. I note also the convictions in respect of neglect of her children but that is historic; the punishment meted out for that was relatively minor. There is no indication that she now presents a threat to the children and I accept that Glasgow Social Services had no concern over her relationship with the youngest child.

Similarly, I note that Leeds Council are concerned for her to have continued contact with the elder children, unsupervised, and in the light of the unchallenged evidence in respect of the oldest child, I consider that there is now no risk presented by that. I do, however, recall that the maintenance of effective immigration controls is very much in the public interest as indeed is the deportation of criminals particularly those who fall outside Exceptions 1 and 2. The appellant speaks English but she is in receipt of public funds and there is no indication that she would be financially independent and little weight is to be attached to her private life given that her position in the United Kingdom has almost always been precarious.

32. Taking all these factors into account and balancing them, and bearing in mind the very strong public interest in deportation not least where, as here, neither Exception 1 nor Exception 2 applies, I am satisfied that on the particular and unusual circumstances of this case that there are very compelling reasons as to why, given the cumulative effect of separating a 4 year old child from either his mother or his father for the foreseeable future thereby that, bearing in mind his best interests and the impact on the other children, which is significant, that deportation would be disproportionate. I therefore allow the appeal on Article 8 grounds.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the appeal by allowing it on human rights grounds.

Signed Date: 31 January 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal