Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/00545/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st November 2017	**On 22nd December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

JEMILAT ADEOLA OKIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sowerby, Counsel instructed by Kristal Law
For the Respondent: Ms Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Traynor promulgated on 7th July 2017 in which decision he dismissed the Appellant's appeal against the Respondent's decision dated 15th January 2016 to refuse her claim on human rights grounds.

2. Within the decision of Judge Traynor he noted that at the start of the appeal hearing Mr Reynolds on behalf of the Appellant acknowledged that she could not succeed in an application either under Appendix FM family life or paragraph 276ADE, and was asking for the case to be considered outside of the rules on Article 8 grounds.

3. Judge Traynor did not accept that the children had contact with their father to the extent claimed. He noted that the children were now aged 7 and 5 years old, but found that they were young enough to adapt to life in Nigeria, the country of their mother's birth where they also had a maternal grandmother living, and he found in paragraph 50 that there was no reason other than age being advanced as to why the mother could not assist in accommodating her and the children upon their return. He found there was no threat to the children from their father's family in Nigeria and that the Appellant was a resourceful woman and was capable of reintegration back into the country on her return, which he found in paragraph 51 were all factors that he took into account in finding that were no circumstances of an exceptional nature which warranted the Appellant being granted leave outside the Rules.

4. He went on in paragraph 52 to find that even if he was wrong in that consideration he had borne in mind the obligation to consider as a primary matter the impact of the Respondent's decision upon the welfare of the Appellant's children, who would be expected to leave with her. He noted it was said that the Appellant was the primary carer of the children and it was said that she was maintaining them to the best of her ability, but he gave no weight to the claim that she was suffering from depression and that she was likely to be stigmatised or the claim that the children would be at risk of being taken away on account of that.

5. The judge went on to say that he had regard to the terms of Section 117B of the 2002 Act in considering the public interest in the Appellant's removal, but found at paragraph 52 that he was satisfied there was no ongoing contact between the Appellant's children and their father which was likely to result in an adverse effect upon them, and found that the children were young enough to adapt to life in Nigeria with their mother and her family who speak the local languages. He found the Appellant reluctantly agreed at the end of the cross-examination that English is one of the main languages in which education is delivered in Nigeria, and therefore the mere fact he found that the children only speak English would not act towards their detriment. It was found that the Appellant had given no reason why the children could not be educated in Nigeria. He found that the situation where both children were in good health, the Appellant was not in receipt of any medication, that she and the children were capable of returning to Nigeria and the decision was not in breach of their Article 8 rights and therefore in consequence he dismissed their appeal.

6. At the appeal hearing before the Upper Tribunal the Appellant had been represented by Mr Sowerby of Counsel and the Respondent being represented by Ms Willocks-Briscoe, a Senior Home Office Presenting Officer.

7. The Grounds of Appeal themselves have been drafted by the Appellant and to a large extent amount to an attempt to re-argue the case and put forward further submissions in respect of the primary findings that were made by the First-tier Tribunal Judge. However, as was noted within the

grant of permission to appeal by Deputy Upper Tribunal Judge Pickup on 21st September 2017, although he noted that the lengthy grounds did largely take issue with the findings of the judge and were simply a disagreement with the judge's findings, he found that there was a point that the Appellant's eldest child was born in the UK on 1st May 2010 and at the date of the hearing had been resident in the UK for a period of seven years. He found it was arguable that there was no consideration of the effect of paragraph 276ADE in relation to the reasonableness of expecting that child to leave the UK, and similarly the judge's consideration outside the Rules under Article 8 arguably omitted to consider Section 117B(6) and the issue as to reasonableness when assessing proportionality of the decision of the Secretary of State. He found that it may ultimately be the decision may be the same, but it is arguable that the judge's assessment was incomplete. Therefore, he granted permission to appeal.

8. Within the Rule 24 reply dated 3rd October 2017 it is argued by the Secretary of State that the judge directed himself appropriately and did refer to Section 117B in paragraph 52 of the decision and addressed the position of the children from paragraph 50 to 54.

9. I have also been assisted this morning by the helpful submissions by Mr Sowerby of Counsel and by Ms Willocks-Briscoe on behalf of the Secretary of State.

10. Mr Sowerby in his submissions largely concentrated on the issue regarding Section 117B(6) and the question as to what is in the best interests of the children for the purposes of Section 55. He conceded at the start of the appeal that the Appellant did not meet the requirements or criteria under paragraph 276ADE on the basis that the Appellants' eldest child, H, who was born on 7th May 2010, had not been resident in the UK for seven years as at the date of the application. Indeed, in that regard I note that, as I stated earlier in my judgment, First-tier Tribunal Judge Traynor at paragraph 40 noted that Mr Reynolds on behalf of the Appellant at the First-tier Tribunal conceded that the Appellant could not succeed under paragraph 276ADE of the Rules. In that regard therefore the potential issue noted by Judge Pickup does not actually apply. Mr Sowerby however did argue that in effect the judge had not properly considered Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 and that the eldest child, H, had been in continuous residence for a period of seven years as at the date of the hearing before Judge Traynor and that therefore the child was a qualifying child for the purposes of Section 117D. He argued that pursuant to Section 117B(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 will not be reasonable to expect the child to leave the United Kingdom.

11. A qualifying child is defined in Section 117D as meaning a person who is under the age of 18 and who is either:-

    (a) a British citizen; or

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

12. Mr Sowerby argues that Judge Traynor has made no proper findings regarding Section 117B(6) and made no finding as to whether or not it was reasonable to expect the qualifying child to leave the United Kingdom. He also argues that regarding the question as to what is in the best interests of the children for the purposes of Section 55 of the 2009 Act, he argues that the judge has not made any clear findings regarding what is actually in the best interests of the children. As to whether that is to remain in the United Kingdom or to leave the United Kingdom or to remain with either or both of their parents.

13. In reply Ms Willocks-Briscoe relies upon the Rule 24 reply and argues that the judge has properly considered the position of the children between paragraphs 52 and 55 and within those paragraphs she argues has adequately dealt with Section 117B(6). She argues that the judge had noted and found that the Appellant was the primary carer in respect of her children and argues that at paragraph 52 the judge had made a finding that it was in the best interests of the children for them to leave with their mother. She refers me also, as both parties do, to the case of **MA (Pakistan) & Ors v Upper Tribunal [2016] EWCA Civ 705** and the lead judgment of Lord Justice Elias. She also refers me to the previous case of **EV (Philippines) & Ors v Secretary of State [2014] EWCA Civ 874**. She argues that there it was made clear by the Court of Appeal that the Tribunal had to look at these cases using the considerations of the real world.

14. Although Mr Sowerby also did raise an argument regarding whether or not the judge made adequate and sufficient findings regarding the contact that was had between the children and their father, Mr Okin, and referred me to the statement from Mr Okin before the First-tier Tribunal in which he said that he had maintained a relationship and contact with his children, the judge at paragraph 47 had noted that Mr Okin was not present in order to answer questions regarding his claimed relationship and found that there were only limited contributions to the welfare since the year of his child was born in 2012. The judge gave no weight to the Appellant's claim Mr Okin had any significant, real financial responsibility towards them, or was discharging such financial responsibility. The judge found the parenting was limited and Mr Okin did not actually have financial commitment to the children as had been claimed. The judge further found that he did not believe the Appellant's claim that Mr Okin was in regular contact with the children by seeing them two to three times per week as the Appellant said that she did not actually know where he lived. I note what Mr Sowerby says regarding the contents of Mr Okin's statement that he says he was enjoying a relationship with his children, but he does not

actually set out within that statement the actual level of contact as claimed. However, the judge was entitled, I find, to find that the Appellant's children were not in contact with their father in the way that the Appellant had described and that that was a finding actually open to the judge on the evidence before him.

15. However, in respect of the question regarding Section 117B(6), I find that it is clear that the eldest child, H, who was born on 7th May 2010, was actually then 7 years old as at the date of the hearing before the First-tier Tribunal. Although Judge Traynor has at paragraph 52 stated that he had regard to the terms of Section 117B of the 2002 Act in considering public interest in the Appellant's removal, in this respect he found that there was no ongoing contact between the Appellant's children and their father and it was likely to result in adverse effect upon them. He found the children were young enough to adapt to life in Nigeria with their mother and family speak the local languages and that education is taught in the English language, and therefore children who would only speak English would not have a detrimental effect upon them if they only spoke English.

16. However, Judge Traynor has not actually specifically considered, I find, Section 117B(6). As Ms Willocks-Briscoe properly concedes, Section 117B(6) was considered by the Court of Appeal in the case of **MA** to effectively be a freestanding consideration and, although as clearly the Tribunal has to consider all of the public interest considerations when considering 117B(6), and in particular as to whether it is reasonable to expect the child to leave the United Kingdom, including as found by the Court of Appeal in **MA** any adverse public interest considerations in terms of the immigration history of the Appellant and the wider public considerations not simply limited to a consideration of the children themselves.

17. Judge Traynor has not actually made any findings regarding the question as to whether it was reasonable to expect the oldest child who is a qualifying child to leave the United Kingdom. There has been no adequate consideration of the eldest child's private life within the UK or consideration of the extent of his relationships with friends or schooling or other aspects of the child's private life. Although in that regard Ms Willocks-Briscoe refers me to the case of **Azimi-Moayed** and the fact that the Upper Tribunal in that case did consider that there was a difference as to the weight to be attached to a seven year period as to whether it was the first seven years of life or the period between the ages of 4 and 11, the fact still remains that if a child is 7 years old then the child is a qualifying child and therefore Section 117B(6) does have to be considered. I do not find that the judge has adequately explained why it would not be reasonable to expect the child to leave the UK in paragraph 52 through to 55 or elsewhere within his decision, and in that regard there has not been an adequate consideration of the extent of the child's private life within the UK to factor into the positive signed of the scales in that regard.

18. Although it is argued by Ms Willocks-Briscoe on behalf of the Secretary of State at paragraphs 52 and 55 the judge has properly considered Section

55 of the Borders, Citizenship and Immigration Act 2009 regarding what is in the best interests of the children, in fact at paragraph 52, although the judge says that:-

> "Even if I am wrong in the above conclusion, I have nevertheless borne in mind in reaching my decision the obligation to consider as a primary matter, the impact of the Respondent's decision upon the welfare of the Appellant's children who will be expected to leave with her".

I do not accept as argued by Ms Willocks-Briscoe that that is actually a finding that it is reasonable to expect the children to leave. It is simply a statement that the children would be expected to leave with her given his findings that he did not accept that they were in contact with the father as claimed.

19. Although the judge clearly does not have to set out every single factor in his consideration, he clearly has to take into account the major statutory criteria and give adequate and sufficient reasons for his findings in that regard so that the losing party knows why they have lost on those issues. Sadly, in this case he has failed to do so. I therefore do find that there is a material error of law in the decision of First-tier Tribunal Judge Traynor and I therefore find that it is appropriate in the circumstances of this case to set aside the decision of First-tier Tribunal Judge Traynor and, as agreed by both legal representatives, it is appropriate for the case to be remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Traynor.

Notice of Decision

20. The decision of First-tier Tribunal Judge Traynor does contain a material error of law and is set aside. The case is remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Traynor.

21. No anonymity direction was made by the First-tier Tribunal Judge and no statutory direction has been sought before me today and therefore I do not make any anonymity direction in this case.

Signed Date 22 December 2017

RFMcGinty

Deputy Upper Tribunal Judge McGinty