**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: PA/01608/2016**

**THE IMMIGRATION ACTS**

| **Heard at Manchester (Piccadilly)** | **Decision & Reasons Promulgated** |
|---|---|
| **On 14th August 2017** | **On 4th October 2017** |

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**GU**
(ANONYMITY DIRECTION MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss Hashmi, Counsel instructed on behalf of the appellant
For the Respondent: Mr McVeety, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Nigeria.

2. Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I make an anonymity direction as this case concerns minor children. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him, his spouse or the children. This direction applies both to the Appellant and to

the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The procedural history and background:

3. The Appellant, with permission, appeals against the decision of the First-tier Tribunal (Judge Birrell) who, in a determination promulgated on the 30th December 2016 dismissed his appeal against the decision of the respondent to refuse his protection claim and on human rights grounds (Article 8).

4. The Appellant's immigration history and the basis of his claim is set out within the determination at paragraph 12 of the FTT determination and in the decision letter issued by the Secretary of State. It can be summarised briefly as follows.

5. The Appellant is a national of Nigeria. On 14 December 2008 he left Nigeria for the United Kingdom having applied for a multi-visit Visa valid until 3 June 2009. He arrived in United Kingdom on the same day.

6. On a date in May 2015, he was arrested and detained by the police. He had fraudulently used the documentation of a friend to gain employment. As a result he was charged with fraud and also served with documentation as an "over stayer". He appeared before the Crown Court and was convicted of fraud and sentenced eight months imprisonment.

7. On 12 August 2015 he submitted a human rights "leave to remain" Article 8 application on the basis of his relationship with his partner, and his daughter A and stepdaughter O. On 17 November 2015 the application was refused as it was not accepted that he had a genuine and subsisting relationship with his partner or children.

8. On 24 November 2015 he claimed asylum and completed a screening interview and also a substantive asylum interview. This resulted in a decision to refuse his protection claim on 1 February 2016.

9. The appeal came before the First- Tier Tribunal (Judge Birrell) at a hearing on the 14th December 2016. In a determination promulgated on the 30th December 2016 she dismissed the Appellant's appeal on both asylum and on human rights grounds. In relation to his asylum claim, the judge set out her findings at paragraph 35 to 44 and rejected his claim entirely that he or his family members in Nigeria were at the subject of any interest by the xxxxx supporters and expressly rejected his account that at any stage he was assaulted by them or that his brother was killed or that his mother's disappearance had anything to do with those individuals in question.

10. In respect of the human rights claim, are set at paragraph 45, it was not advanced on behalf of the appellant that he could meet the requirements of either Appendix FM or paragraph 276 ADE (dealing with private life). His claim was advanced on Article 8 grounds outside of the rules. The judge considered the relationship between the appellant and his partner. She found that their evidence that the relationship began in August 2013 when they started living together at the same address, was not supported either

in the documentary evidence or from the evidence of the appellant's partner in previous proceedings. The judge considered at paragraph 47 the documentary evidence which she found to be inconsistent with that claim and in particular made reference to a statement made by his partner in support of an application for leave to remain in the UK in a statement describing a "durable relationship" with another male who was described as having almost daily contact with her and their child with a view to them living together. The judge found that be inconsistent with the appellant's evidence that he only came to the house where they lived twice in 2013. Notwithstanding that finding, the judge accepted that the appellant and his partner together with their three children enjoyed family life in the UK.

11. As to the issue of proportionality, the judge took into account the best interests of the children, the appellant's two biological children and his stepdaughter aged 4, 2 and a baby) and found that it was in their best interests to continue to live with those who cared for them namely, their mother and the appellant. The judge took into account the children's circumstances (their ages and length of residence and their respective nationalities. She applied the public interest considerations under S117 including the aspects of the applicant's immigration history. She reached the conclusion after balancing the identified factors that "none of the facts underpinning the appellant's life and in the United Kingdom taken either singularly or cumulatively outweigh the legitimate purpose of the appellant's removal."

12. The Appellant sought permission to appeal that decision and permission was granted by the First-tier Tribunal (Judge Froom) on the 24th March 2017. He refused permission in respect of grounds three and four which related to the FTT J's assessment of the protection claim. Judge Froom reached the conclusion that the judge's assessment of the evidence was adequate and the decision was fully reasoned. He went on to state:

"However, I grant permission to argue the FTTJ may have erred in her assessment of the reasonableness question posed by S117B (6). She correctly directed herself in line with MA (Pakistan). However she did not have the benefit of the more recent decision in SF and others (guidance, post-2014 Act) Albania [2027] UKUT 00120, which highlighted the respondent's IDI on the issue of when it is reasonable to expect a British child to leave the UK. The FTTJ in this case noted the appellant had a genuine and subsisting parental relationship with his British stepdaughter. It is arguable that, had the FT TJ considered the IDI, she might have come to a different conclusion on the reasonableness question."

13. The appeal was therefore listed before the Upper Tribunal.

The submissions:

14. Ms Hashmi made the following submissions. The grant of permission made reference to the guidance and the judge did not have the benefit of the decision in SF (as cited) as the grant of permission sets out. This changes the position and the guidance has not been updated. This case the effect of the decision would be to force the child to leave the United Kingdom.

She submitted that when looking at the guidance, it did make reference to criminality and conduct but in this case in the appellant's bundle at page 34 onwards, there was evidence from the probation officer who had supervised him following his sentence of imprisonment. Those letters demonstrated and that he had attended all appointments and had complied with the requirements to supervision. It made reference also to him caring for his daughter whilst was his wife worked.

15. Miss Hashmi submitted that his criminality did not reach the threshold as his term of imprisonment with less than one year and also the aspect of his criminality was not a live issue at the time of the hearing in light of the evidence which related to his compliance with the supervision carried out by the probation service. She submitted that the appellant should be afforded the benefit of the IDI and that had the judge considered the guidance the outcome of the decision would have been different. Thus she invited the Tribunal to find an error of law and to remit the matter.

16. Mr McVeety on behalf of the Respondent relied upon the Rule 24 response in which it was stated that it was for the appellant to put the IDI before the Tribunal and in any event it was not binding on the Tribunal. He submitted that the judge correctly directed herself in accordance with the decision in MA (Pakistan) and considered all the relevant factors.

17. In his oral submissions, whilst there was no reference to the appellant's criminality it would not mean that his appeal would succeed in the light of the appellants offending history for which he received a sentence of eight months imprisonment. This was reflected in the findings at paragraph 43 of the judge. Thus he submitted if there was an error it would not be material.

18. In the alternative, he submitted that there was no challenge to the judge's finding that it would be proportionate to require the Appellant to seek entry clearance from abroad. As the judge found at paragraph 56 the Appellant's wife could remain in the United Kingdom looking after the children as she did whilst he was in prison. Thus he submitted the judge would not have reached a different conclusion.

19. At the conclusion of the hearing I reserved my decision which I now give.

Discussion:

20. Whilst the grounds made reference to the findings on the asylum aspect of this appeal, permission was not granted in respect of those grounds. No application was made to reconsider that decision in writing or otherwise before the Upper Tribunal and I have heard no submissions concerning this. The grounds upon which permission were granted relate to whether the First-tier Tribunal judge erred in her assessment of the question of reasonableness imposed by S117B (6) by reference to the guidance.

21. To consider this my submission, it is necessary to have regard to the decision of FTT Judge Birrell and the evidence that was before the Tribunal.

22. Appendix FM, "Family Members", begins with a general statement which explains that it sets out the requirements to be met by those seeking to enter or remain in the UK on the basis of their family life with a person who is a British citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (para GEN.1.1). It is said to reflect how, under Article 8, the balance will be struck between the right to respect for private and family life and the legitimate aims listed in article 8(2). The Appendix nevertheless contemplates that the Rules will not cover all the circumstances in which a person may have a valid claim to enter or remain in the UK as a result of his or her Article 8 rights. Paragraphs GEN.1.10 and GEN.1.11 both make provision for situations "where an applicant does not meet the requirements of this Appendix as a partner or parent but the decision-maker grants entry clearance or leave to enter or remain outside the Rules on Article 8 grounds".

23. In this case, the appellant, by virtue of his partner not being a British Citizen or being settled in the UK could not meet the requirements under the Rules and as the judge set out at paragraph 45 no argument was put to counter the respondent's submission that at the time of the application the appellant could not meet the requirements of Appendix FM or Paragraph 276ADE.

24. In her analysis the judge went on to consider whether the circumstances of this case would engage Article 8 outside the Immigration Rules. It is not disputed that the appellant has a partner and they have two children together aged 2 and a baby (none of whom are British nationals) and a child from her previous relationship who is a British Citizen (aged 4 at time of FTT hearing) and that he had a genuine and subsisting parental relationship with all the children. The judge properly concluded that removal of the appellant in consequence of the decision was likely to interfere with his family and private life in a sufficiently grave way to engage the operation of Article 8 (points (i) & (ii) of Lord Bingham's five stage approach in Razgar v SSHD [2004] INLR 349) (see paragraphs 46-49) and that the decision was in accordance with the law- his removal will be for the legitimate aim of effective immigration control.

25. Consequently the issue related to that of proportionality and it required a fair balance to be struck between the public interest and the rights and interests of the Appellant and others protected by Article 8 (1) (see Razgar at [20]) which includes the Appellant's partner and children (see R (MM and others) (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court at [43].

26. When assessing the proportionality of the removal decision the judge was obliged to consider the best interests of the children who are affected by the decision. The judge considered the best interests of the appellant's children and in assessing the best interests of the child took 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. In that guidance the UKBA acknowledges the importance of a number of international instruments relating to human

rights including the UN Convention on the Rights of the Child (UNCRC) and took into account the decision in ZH (Tanzania) v SSHD [2011] UKSC 4 ( see paragraphs 52-54). There was no dispute on the evidence before the judge that the Appellant has a genuine and subsisting parental relationship with the children and indeed on the evidence before her demonstrated that he shared the care of the children with his wife.

27. The judge found that it was in the best interests of the children to continue living with those who cared for them, both the appellant and their mother.

28. The fact that the appellant's step daughter is a British citizen was recognised and given weight by the judge. However, at this stage she was still a young child and the judge found that she had started nursery but was not yet in formal education and that the children's lives still revolved very much around their parents. The judge found that they were of an age where they would be able to adapt to a new living situation.

29. In the assessment under Article 8, the best interests of the child must be a primary consideration. That meant that they must be considered first. They could, of course, be outweighed by the cumulative effect of other considerations.

30. In carrying out the balancing exercise and reaching a finding on proportionality, the Tribunal must "have regard" to the considerations set out in section 117B of the Nationality, immigration and Asylum Act 2002 (section 117A). Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that 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).

31. S117B Article 8: public interest considerations applicable in all cases:

(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.

32. The judge properly identified that in this appeal and against the background in which it was accepted that the Appellant had a genuine and subsisting relationship with his partner and with the children, one of whom is a British citizen that S117B(6) provides that 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.

33. As to the issue of proportionality, the judge took into account the best interests of the children, the appellant's two biological children and his stepdaughter aged 4, 2 and a baby) and found that it was in their best interests to continue to live with those who cared for them namely, their mother and the appellant. When considering the children circumstances, she considered their ages and the stage that they had reached in their education, namely they were preschool or nursery and that if the family were to choose to return to Nigeria, there was no evidence to suggest that it would not be the children's best interests as they could access education and healthcare that would be available (paragraph 54). The judge took into account that the appellant's stepdaughter was a British national and that the child had no contact with her natural father.

34. The judge applied the public interest considerations under section 117 and in particular S117B (6) on the basis that the appellant had a genuine and subsisting relationship with his stepdaughter, who was a British citizen. In the light of her findings of fact, she reached the conclusion that it would be reasonable for the child to leave the United Kingdom with her mother, who only had limited leave to remain, and her stepfather and siblings. She stated at paragraph 56 that there was no evidence to suggest that the appellant's stepdaughter had any contact with her father or that her best interests lay in remaining anywhere other than with her mother.

35. At paragraph 56, the judge found that that was not the only option and that the appellant could leave the United Kingdom so that he could make an application for entry clearance and thus removal in those circumstances may be proportionate. In this context she noted that the children his partner had already had to cope with the temporary separation when he was sent to prison for his criminal offending. She was able to provide care arrangements the children and to continue working and thus could do so during any future separation. She applied the decision in R (on the application of Chen v SSHD (Appendix FM-Chikwamba-temporary separation-proportionality) IJR [2015] UKUT 00189 and that it would be for the individual to demonstrate that such temporary separation would interfere disproportionately with protected rights. In this case there was no evidence such as separation would be disproportionate.

36. Furthermore, the judge applied the decision in MA (Pakistan) and had regard to the wider public interest in reaching a decision on the question of reasonableness of return. She placed in the balance that the appellant did not meet the requirements of the Immigration Rules either for asylum or for leave on the basis of family and private life. She found that the private life and any family life that had been established occurred whilst his status was either "illegal or very briefly precarious". Earlier in the determination at paragraph 43 she had made reference to his criminal offending which had resulted in an immediate sentence of imprisonment of eight months. She found that the circumstances of the offending were "particularly troubling" that "the job that the appellant was able to secure using a false identity was that of a nursing assistant in the NHS". She found that it seriously undermined his credibility that he sought and obtained employment in the sphere when knowledge of his true identity would enable the hospital to check his suitability for a post which has an impact on the health and safety of the public.

37. Having taken all those facts into account, the judge reached the conclusion that "none of the facts underpinning the appellant's life and United Kingdom taken either singularly or cumulatively outweigh the legitimate purpose of the appellant's removal."

38. The written grounds at paragraph 3 mis-state the factual background of the parties and make reference to the child A as a British citizen and has been living in the UK for 5 years. The grounds also make reference to the significance of seven years residence. A is not a British citizen and has not lived in the UK for five years. I can only think that the grounds at paragraph 3 are referring to child O, the appellant's stepdaughter who was

a British citizen but who has not lived in the UK for seven years but is a qualifying child by reason of her nationality. At paragraph 5 of the written grounds, it again mistakenly refers to A and that it is questionable about what type of education she would have access to if relocated. It is right to observe that there was no material submitted on behalf of the appellant and importantly the children concerning this aspect of relocation. After paragraph 6 of the written grounds, they also misstate the reasonableness question as should be determined "without reference to the public interest factors". However as the grant permission sets out, the judge properly directed herself in accordance with the decision in MA (Pakistan) in this regard.

39. However the grant of permission (although not the written grounds) did identify a specific issue relating to the judge's assessment of section 117B (6) that she did not have the benefit of the decision in SF (as cited) which highlighted the respondents IDI and that had she considered this, she might have come to a different conclusion on the reasonableness question.

40. Consequently Miss Hashmi in her submissions has advanced the ground as set out in the grant of permission. She submitted that as the judge did not have the benefit of the decision in SF (as cited) and that it changed the position and the conclusion the judge reached when dealing with the second issue relevant to the reasonableness test. In this context she made reference to the guidance. Neither advocate has produced to the Tribunal a copy of the guidance. Miss Hashmi referred to a copy that she had on her computer and submitted that the guidance had not changed since that referred to in the decision of SF. I therefore set out the guidance relied upon by the advocates before me as follows:

The guidance:

41. The Home Office IDI of August 2015, headed "**Family Life as a Partner or Parent and Private Life, 10 year Routes**", gives guidance to caseworkers – in cases not involving serious criminality – on when it would be unreasonable to expect a British child to leave the UK, in terms of **EX.1(a)** of **HC 395.**

42. At [9.1] of the document under the heading "Exceptional Circumstances", the Respondent notes that the best interests of the child remain relevant in determining whether there are exceptional circumstances to justify a grant of leave outside the Rules and that this entails consideration of section 11 of the guidance.

43. The guidance makes a distinction between qualifying children who have been continuously resident in the UK for a period of seven years and British children. This reflects the different rights that might arise from British citizenship in terms of immigration status, and in particular, under European law. The relevant section of the policy guidance relating to British children at Section 11 which then deals with the best interests of children affected by the relevant decision and at [11.2.3] deals with the

position of British citizen children under the heading "Would it be unreasonable to expect a British citizen child to leave the UK?" Having made reference to the ECJ judgment in Zambrano, the guidance says this:-

"Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.
It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:
Criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision.

Where the applicant has made an application under the family and/or private life Immigration Rules, the application must:
a) be considered under those Immigration Rules First;
b) where the applicant falls for refusal, the decision maker must go on to consider whether there are any exceptional circumstances that would warrant a grant of leave to remain outside the Immigration Rules; and
c) where the applicant falls for refusal under the Immigration Rules and there are no exceptional circumstances, and where satisfactory evidence has been provided that all of the following criteria are met, the case must be referred to European Casework for review:
i) the child is under the age of 18; and
ii) the child is a British Citizen; and
iii) the primary carer?. of the child is a non-EEA national in the UK; and
iv) there is no other parent/guardian/carer upon whom the child is dependent or who could care for the child if the primary carer left the UK to go to a country outside the EU.”

44. The guidance does explain that the effect of the parent’s removal must not be to force the British child to leave the EU and has been interpreted

in that way by the Upper Tribunal (see ***SF and others (Guidance, post-2014 Act) [2017] UKUT 120 (IAC)*** a Vice-Presidential panel applied this guidance when deciding that it would be unreasonable to expect a British child to leave the UK with his mother and siblings). The facts are different to the present case. The policy applies in circumstances where the effect of the decision is to force the parent or primary carer of the British child to leave the EU. In this case the appellant's step child is a British citizen. She cannot be removed. Contrary to Miss Hashmi's submissions, there is no evidence to suggest that the appellant's partner would be forced to leave the UK if he is removed. She may choose to do so if she wishes to continue their family life together, but she is not forced to do so.

45. The guidance goes on to recognise that weighty public interest considerations would be needed to justify the separation. The circumstances outlined in the policy guidance are not exhaustive, but indicate that significant public interest considerations such as criminality or a very poor immigration history might be sufficient to justify such a decision.

46. MA (Pakistan) concludes that the reasonableness test in this context is wide ranging, effectively bringing back into play all potentially relevant public interest considerations, including the matters identified in section 117B. Accordingly, when considering the reasonableness of the children leaving the UK, a relevant factor is that the Appellant had entered into the UK unlawfully and had so remained for a significant period and he established a family life in the knowledge that he had no right to remain and this strengthens the public interest in his removal.

47. Furthermore, he engaged in criminal activity. Miss Hashmi submitted that the judge at paragraph 43 had found the appellant's credibility to be significantly undermined however, she submitted that there was material in the bundle which demonstrated that his criminality should be considered in a different light. The material in the bundle made reference to the appellant's conduct after his sentence had finished and at a time when he was subject to supervision in the community. That material, in summary, made reference to having complied well with the supervision element, having attended all appointments following his release and whilst subject to supervision (pages 35 – 36 of the bundle).

48. Miss Hashmi also submitted that the criminality threshold referred to in the guidance was not met by the appellant's conduct and that the judge did not consider this in the proportionality assessment.

49. The determination must be read as a whole. At paragraph 43 of the determination the judge made reference to the appellant's conduct in the following way:

    "I also note the appellant only claimed asylum after he was arrested for using false documents in order to work in the UK. I find his credibility significantly undermined by his conviction for an offence of dishonesty of this nature and which was clearly viewed so seriously by the criminal court that it had resulted in an immediate sentence of imprisonment. I find it

particularly troubling that the job that the appellant was able to secure using a false identity was that of a nursing assistant in the NHS: I find it seriously undermined his credibility that he sought and obtained employment in a sphere when knowledge of his true identity would have enabled the hospital to check his suitability for a post which has an impact on the health and safety of the public."

50. Contrary to the submission made by Miss Hashmi, the IDI does not set out any threshold of criminality to be met and makes reference to conduct falling below the threshold set out in paragraph 398 of the immigration rules. Nor is it exhaustive as the language makes plain. It does make reference to "criminality falling below the threshold set out in paragraph 398 of immigration rules and a very poor immigration history such as where the person has repeatedly and deliberately breached the immigration rules. In this case, the only threshold required is that which the appellant does potentially fall into as a result of his criminal offending.

51. I also observe that the circumstances in SF (as cited) are different from the present appeal. In SF it was accepted by the Secretary of State and the Tribunal at [8] that it was a case that did not involve criminality and whilst there may have been a grandmother in the United Kingdom, the Secretary of State had not taken the view that there was an alternative carer unlike this appeal.

52. It is also right to observe that the judge made clear findings on the issue of the appellant's conduct including his criminality at paragraph 43 as set out above. At paragraph 57 she applied the decision in MA (Pakistan) and thus applied the public interest considerations as required. Whilst it was submitted that it is wrong to blame the children for the parents conduct (as stated in MA (Pakistan), there is no suggestion in the analysis made by the judge that she did so.

53. In her assessment at [57] the judge placed weight on a number of matters- that he had made a claim for asylum in the circumstances described at paragraph 43 which the judge had rejected, he could not meet the rules and that any family or private life had been established at a time when his residence was unlawful or precarious and that there was no evidence that he was financially independent other than when he was working illegally. A reference to having worked illegally in the UK is what the judge had found to be significant and "troubling "in her assessment earlier at paragraph 43.

54. I am satisfied that it was open to the judge to have reached the conclusion that it would be reasonable to expect the children to leave the UK. Whilst the Respondent's own guidance recognises that it would not normally be reasonable to expect a child who is a British citizen to leave the UK, that guidance makes reference to the circumstances whereby it would be appropriate to refuse to grant leave. The judge's findings are to the effect that a British Citizen child cannot be required to leave the United Kingdom, but she found that the child and the child's mother would not be forced to leave the United Kingdom but may choose to do so if she wishes to continue family life together. She has limited leave to remain but

is not " settled " in the UK and is a national of Nigeria as is the Appellant and their 2 children. Consequently the fact that the judge made no express reference to the guidance makes no material difference to the outcome.

55. There is an additional point which arises from the guidance whereby it indicates that the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation. The circumstances envisaged cover criminality falling below the threshold set out in paragraph 398 of the Immigration Rules and a very poor immigration history, such as where the person has repeatedly and deliberately breached the immigration rules.

56. When applied to the facts of this case, the judge took into account that the appellant entered the UK in 2008 with entry clearance as a visitor and remained thereafter unlawfully until in 2015 when he made claim for asylum which the judge rejected. There were a number of aspects of the appellant's immigration history that gave weight to public interest issues. The judge's assessment is at paragraph 43 and 57 as set out above. These are negative findings that give significant weight to the public interest in removal.

57. When applied to the facts of this case, whilst the Appellant entered the UK for a limited period as a visitor and he remained for a significant period thereafter establishing family life in the knowledge that he had no right to remain. The evidence before the judge was that appellant and his partner both knew of his lack of status (see paragraph 13 (e)).

58. In my judgement, this conduct would fall within those two limbs- he has breached the Immigration Rules and there was evidence of him having committed criminality which the judge made reference to a paragraph 43.

59. Thus, in the alternative, I am satisfied that even if the judge had regard to the Guidance which is the basis of the grounds, she would have applied her findings at paragraphs 43 and reached the conclusion that he does fall within the envisaged exclusion categories . In the light of the factual circumstances and the judge's strong findings as to his criminality and how this affected the weight given to the public interest, even if the judge had taken the guidance into account, it has not been demonstrated that she would have reached any different decision than the one she reached.

60. Therefore taking the circumstances as a whole, as I have set out above, I am satisfied that it was open to the judge to reach the conclusion on the evidence that was before her that the Appellant's removal was proportionate having regard to all of those circumstances. The judge took into account the best interests of the children which are a primary consideration and the public interest in effective immigration control which is engaged in this case and the public interest as it is expressed in the S117 considerations. The judge did not find that the circumstances were such that they were outweighed by the public interest considerations that she had identified. Consequently it was open to the judge to reach the conclusion that there were no "compelling" circumstances that produced

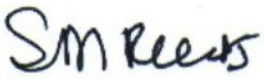
unjustifiably harsh consequences to outweigh the public interest in effective immigration control in the light of the Appellant's individual circumstances and that of his family members.

61. Consequently the appeal is dismissed; the decision of the FTT does not disclose the making of an error on a point of law.

**Direction Regarding Anonymity – Rule 14 of 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 him. The direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed



Upper Tribunal Judge Reeds Date: 26/9/2017