**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Numbers:**
**HU/06406/2016**

**H**

**U/06413/2016**

**H**

**U/06417/2016**

**H**

**U/06422/2016**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 30 April 2018** | **On 11 May 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

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

Appellant

**and**

**B A A (FIRST RESPONDENT)**
**M A A (SECOND RESPONDENT)**
**A A P A (THIRD RESPONDENT)**
**O A A A (FOURTH RESPONDENT)**
(ANONYMITY DIRECTION MADE)

Respondents

**Representation:**

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr J Gajjar, Counsel, instructed by Imperium Chambers

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the Appellants and to the

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

## DECISION AND REASONS

**1.** I shall refer to the parties as they appeared in the hearing before the First-tier Tribunal.

**2.** By a decision of mine promulgated on 30 November 2017, I concluded that the First-tier Tribunal's decision in these four linked appeals contained material errors of law and should therefore be set aside. My error of law decision is annexed to the re-making decision (see below). In summary, the First-tier Tribunal Judge had effectively conflated the best interests of the two children (the third and fourth Appellants) with that of the reasonableness assessment under section 117B(6) of the Nationality, Immigration and Asylum Act 2002, as amended. The approach adopted by the judge had been contrary to the guidance set out in MA (Pakistan) [2016] EWCA Civ 705.

**3.** Having found material errors of law and setting aside the judge's decision, I retained these appeals in the Upper Tribunal. The appeals were all adjourned in order for a case management hearing to take place. This was because the third Appellant had a pending application before the Respondent in respect of her registration as a British citizen under section 1(4) of the British Nationality Act 1981. As confirmed by the certificate of registration dated 3 December 2017 (now on file) the third Appellant is now a British citizen.

**4.** In light of this material development and given the fact that the first and second Appellants have and always have had a genuine and subsisting parental relationship with their two children, the primary issue in these appeals is now whether it would be reasonable to expect the third Appellant to leave the United Kingdom, with reference to section 117B(6)(a)(ii) of the 2002 Act.

**5.** On 27 April Mr Jarvis confirmed via e-mail that the Respondent had now reviewed the family's circumstances, in particular those of the third Appellant. The text of his e-mail is as follows:

> "... it is now apparent that A3 ... was granted (sic) as a British citizen on 5th December 2017 (having applied on the accrual of 10 years residence from birth in the UK). Having taken account of the immigration history of A3's parents (which is poor) the SSHD has taken the view that their conduct does not amount to the kind of conduct envisaged in the exception to the general policy in respect of British children in the SSHD's guidance: Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes (Version 1.0) (22nd February 2018) at pages 76-77.

On that basis the SSHD does not oppose the UT allowing the appeals of the Appellants on the basis of that concession or alternatively asks that the UT allow the SSHD to withdraw her case (that being the refusal decisions under appeal) [rule 17 of the UTPRs 2008] on the basis that the Appellants will be granted 30 months Leave to Remain on the 10 year route to settlement."

## The hearing before me

**6.** At the outset Mr Jarvis confirmed that the Respondent stood by what was set out in the e-mail quoted above (a hard copy of which is now on file). Unsurprisingly, Mr Gajjar asked that I simply allow all of the appeals on the basis set out in the e-mail. Mr Jarvis did not suggest that the alternative route of withdrawal of the decisions under appeal was the more appropriate course of action.

## The remake decision on all four appeals

**7.** The concession made by the Respondent, as set out in the e-mail dated 27 April 2018, is properly made. It is entirely in keeping with the guidance cited. In light of this and what is currently the correct legal position as set out in MA (Pakistan), I conclude that it would not be reasonable for the third Appellant to leave the United Kingdom: section 117B(6) is satisfied in full. This has the effect that the first and second Appellants succeed in their appeals.

**8.** It of course follows that the appeals of the third and fourth Appellants also succeed.

## Anonymity

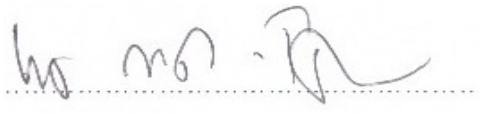
**9.** Although no direction was made by the First-tier Tribunal, I have decided to make one now. This is in line with paragraphs 18-19 of the Presidential Guidance Note No.1 of 2013.

## Notice of Decision

**The decision of the First-tier Tribunal contained material errors of law and has been set aside.**

**I re-make the decision in respect of all four appeals. The decisions of the Respondent to refuse the Appellants' human rights claims is unlawful under section 6 of the Human Rights Act 1998.**

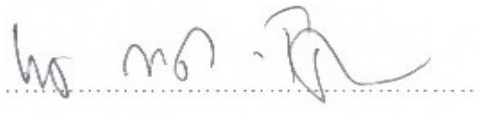
**Therefore the appeals of all four Appellants are allowed.**

Signed  Date: 4 May 2018

Deputy Upper Tribunal Judge Norton-Taylor

**FEE AWARD**

No fees were paid or were payable. I therefore make no fee awards.

Signed  Date: 4 May 2018

Deputy Upper Tribunal Judge Norton-Taylor

**ANNEX: ERROR OF LAW DECISION**

**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Numbers:**
**HU/06406/2016**

**HU/06413/2016**

**HU/06417/2016**

**HU/06422/2016**

**THE IMMIGRATION ACTS**

**Heard at Field House** **Decision & Reasons Promulgated**

**On 8 November 2017**

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**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR B A A (1)**
**MISS M A A (2)**
**MASTER A A P A (3)**
**MASTER A A A (4)**
(ANONYMITY DIRECTION MADE)

Respondents

**Representation:**

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondents: Mr J Gajjar, Counsel, instructed by Imperium Chambers

## DECISION AND REASONS

**10.** I shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is the Respondent and Mr A and his family members are once more the Appellants.

**11.** This is a challenge by the Respondent to the decision of First-tier Tribunal Judge Coutts (the judge), promulgated on 14 February 2017, in which he allowed the Appellants' appeals against the Respondent's decision of 4 February 2016, refusing their human rights claims. The appeals were based primarily on the fact that the third and fourth Appellants had been born in the United Kingdom and had resided here all of their lives.

### The judge's decision

**12.** The judge's core findings and reasons are contained in paragraphs 18 to 23 of his decision. The first three of those paragraphs relate to the first and second Appellants (the parents). The judge finds that in light of their immigration history and overall circumstances there was what he describes as "little merit" in their claims. There would not be significant obstacles to them reintegrating into Nigerian society.

**13.** In respect of the third Appellant, (the eldest child) the judge says the following at paragraphs 22 and 23:

> "22. The reality is that the third Appellant has been here since birth which is nearly nine and a half years ago. He attends school here, is doing well academically and also participates in activities outside of school. This is the only life that he knows. He has never been to Nigeria, he does not speak the language and is not aware of the culture there. He also has no wider family remaining in Nigeria.
>
> 23. I find therefore that it would not be reasonable therefore to expect him to have to return to Nigeria with his parents. His best interests are served by allowing him to continue with his life here in the United Kingdom. He has had no part in the poor choices that have been made by his parents, the first and second Appellants."

**14.** On the basis of the above passages the judge in effect allows the appeals of all the Appellants.

### The grounds of appeal and grant of permission

**15.** The Respondent puts forward two grounds. The first of these suggest that the judge has failed to identify any "unique" features of the case, and that he has failed to make specific findings. There is also an assertion that "too

much weight" had been placed upon the children's education in the United Kingdom.

**16.** Ground 2 asserts that the judge has failed to properly apply the guidance in MA (Pakistan) [2016] EWCA Civ 705 in respect of the reasonableness assessment. Permission to appeal was granted by Upper Tribunal Judge Martin on 1 September 2017.

## The hearing before me

**17.** Mr Clarke submitted that in paragraphs 22 and 23 the judge had conflated the best interests' assessment and that of reasonableness. Although the judge had noted the poor immigration history of the parents in previous paragraphs, it was clear that when considering the third Appellant in particular he had failed to properly differentiate between best interests and the wider public interest considerations involved in assessing reasonableness.

**18.** Mr Gajjar relied upon his Rule 24 response and submitted that the judge had in fact had regard to the wider considerations.

## Decision on error of law

**19.** As I announced to the parties at the hearing, I conclude that the judge materially erred in law, specifically in relation to what is said in paragraphs 22 and 23.

**20.** Whilst it is correct that the judge dealt with the parents' particular circumstances in paragraphs 18 to 20, when it came to the position of the third Appellant there is in my view a conflation of the best interests' assessment and that of reasonableness. It is well-settled that these are distinct issues and a finding that the best interests of a child lay in remaining in the United Kingdom does not necessarily mean that it would be unreasonable for that child to leave this country. Wider public interest considerations including those set out in section 117B of the 2002 Act come into play at the second stage of the overall assessment of what is, or is not reasonable. In my view and with all due respect to the judge, the wording of the two paragraphs quoted above indicate that the conclusion on reasonableness has followed, if not automatically then something close to it, from the preceding conclusion that the best interests of the third Appellant lay in remaining in the United Kingdom. The use of the word "therefore" twice in the first sentence of paragraph 23 goes to emphasise my concern as to the judge's approach. If the correct approach had been adopted it is by no means certain that the judge would necessarily have reached the same conclusion as to the third Appellant.

**21.** In light of the above I find that the error in approach is material and I set aside the judge's decision.

## Disposal

**22.** Having set aside the decision I invited the representative to make submissions on the basis that I could remake this decision myself based upon the evidence before me. Part of Mr Gajjar's case is now that there has been an application on the third Appellant's behalf for registration as a British citizen pursuant to section 4(1) of the British Nationality Act 1981. Evidence of this application is included in the new bundle (served in compliance with Rule 15(2A) of the Upper Tribunal Procedure Rules). That application was made in September this year and remains outstanding. Mr Gajjar submitted that it is extremely likely that the application will be successful and that the third Appellant will obtain British nationality. That, he submitted, would have a significant effect on his claim and those of his family members.

**23.** Mr Clarke submitted that the application had not yet been decided and I was being asked to reach conclusions based upon a hypothetical situation.

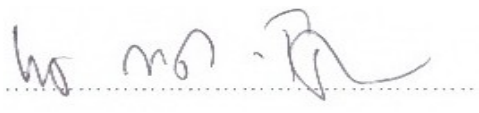
**24.** I reflected on the situation and indicated that this matter would be best dealt with by adjourning for a Case Management hearing before me in due course, at which stage I could be provided with an update as to the third Appellant's application. Once this application is decided the overall circumstances will be much clearer and both parties will be able to take a view as to where their respective cases stand. Neither representative opposed this course of action. Therefore I adjourn the appeals for them to be relisted before me for a Case Management hearing in due course.

## Notice of Decision

**The decision of the First-tier Tribunal contains a material error of law.**

**I set it aside the decision.**

**I adjourn these appeals for an oral Case Management hearing to be listed before me in due course**.

Signed  Date: 22 November 2017

Deputy Upper Tribunal Judge Norton-Taylor