Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08960/2016**

HU/08964/2016

HU/08967/2016

HU/08970/2016

HU/08974/2016

THE IMMIGRATION ACTS

Heard at Manchester **Decision and Reasons Promulgated**
On 2 May 2018 **On 09 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

O S ON
K P ON
S J ON
O ON
N V ON
(ANONYMITY DIRECTION MADE)
Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:

For the Appellant: Mr J Nicholson (Counsel) instructed by Greater Manchester Immigration Aid Unit
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

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DECISION AND REASONS

1. To preserve the anonymity direction deemed necessary by the First-tier Tribunal, I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellants.

2. These are appeals by the Appellants against the decision of First-tier Tribunal Judge Shergill promulgated on 21 June 2017, which dismissed the Appellants' appeals.

Background

3. The First Appellant is the mother of the remaining four appellants. The first appellant entered the UK in 2007 as a student. The second appellant is now 19 years old, and was 8 years old when she entered the UK. The remaining appellants were born in the UK. The second and third appellants had been in the UK for more than 7 years at the date their applications for leave to remain were submitted.

4. The appellants are all Nigerian nationals. On 23 April 2015 they submitted applications for leave to remain in the UK on article 8 ECHR grounds. Those applications were refused by the respondent on 14 March 2016.

The Judge's Decision

5. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Shergill ("the Judge") dismissed the appeals against the Respondent's decision. Grounds of appeal were lodged, and, on 28 November 2017, Designated Judge of the First-tier Tribunal Peart granted permission to appeal, stating

> 3. The grounds claim that the Judge failed to have regard to the principles underlying 276ADE and section 117B(6), applied an inconsistent approach including failing to resolve the argument as to whether or not the second appellant was to be treated as an adult or a child and failed to address properly or at all the question of the children's best interests.
>
> 4. The Judge was obliged to carry out an analysis of the various family members ability to meet the rules and then consider the wider context of the family unit's circumstances both here and on return to Nigeria. There was a necessity to weigh in the assessment of reasonableness the mandatory terms of s.117A-B, an individual assessment with regard to s.117B(6) and then a consideration of the appellants circumstances outside the rules in so far as a general approach to article 8 was required.

> 5. It appeared that two of the children satisfied paragraph 276 ADE(iv). Alternatively, one of them satisfied 276ADE(iv) and one satisfied (v) but the Judge failed to resolve that at [38] – [52].
>
> 6. Whilst the Judge referred to various caselaw at [11] –[12] there was no attempt to set the appellants' circumstances against that caselaw in his analysis.
>
> 7. For all these reasons, I find the judge carried out an arguably inadequate analysis of the appellants' circumstances and accordingly reached a decision there was arguably perverse.
>
> 8. All grounds are arguable.

The Hearing

6. (a) For the appellants, Mr Nicholson moved the grounds of appeal. He referred me to MT & ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88(IAC). He said that powerful reasons are required to overcome the length of residence of children in the UK. He told me that the second appellant has been in the UK for more than 10 years, the third appellant will have been in the UK for 10 years tomorrow. The third appellant was born in the UK and, tomorrow, can apply for British citizenship.

(b) Mr Nicholson told me that the Judge had failed to take account of the best interests of the children and failed to take account of the length of residence of the four child appellants when considering this case. He told me that the Judge did not make any proper findings in relation to the children's best interests and that there is no finding on strong powerful reasons which were in favour of removal. He took me to [54] to [58] of the decision, telling me that [54] to [57] were correct but that [58] is completely wrong.

(c) Mr Nicholson insisted that the second appellant's appeal had been incorrectly decided. He agreed that at the date of application the second appellant could not meet the requirements of paragraph 276 ADE(1)(vi) of the rules, but told me that because the appellant can meet those requirements at the date of decision the Judge should have made a finding that an application by the second appellant now is bound to succeed. By analogy the second appellant should succeed on article 8 ECHR grounds outside the rules (because the respondent's position is that the immigration rules embrace all article 8 considerations)

(d) Mr Nicholson turned to section 117B(6) of the 2002 Act and argued that there is no public interest in removing the four child appellants. He told me that, now, the second appellant is an adult and can succeed under paragraph 276 ADE(1)(vi) of the rules. Tomorrow the third appellant can

make an application for British citizenship. Today the fourth appellant has been in the UK for seven years.

(e) Mr Nicholson urged me to set the decision aside and to substitute my own decision in line with MT & ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88(IAC) & PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC).

7. (a) For the respondent, Mrs Aboni told me that the decision does not contain errors, material or otherwise. Mrs Aboni relied on the rule 24 response and told me that the Judge directed himself correctly. She told me that the first appellant chose not to give evidence and that the respondent was not represented before the First-tier Tribunal, so that there was little evidence placed before the Judge about the first appellant's circumstances & her ties to Nigeria, or the circumstances that this family would face if they go to Nigeria.

(b) Mrs Aboni took me to [21] of the decision, where the Judge bemoans the paucity of evidence, and told me that the findings the Judge made were based on a careful analysis of what was actually pled.

(c) Mrs Aboni told me that the second appellant was under 18 years of age at the date of application and over 18 years of age at the date of hearing. She told me that the Judge correctly dealt with the second appellant as a child and then considered the second appellant's appeal outside the immigration rules as an adult. She told me that the Judge's proportionality assessment for each appellant is careful and beyond criticism. Mrs Aboni referred to [73] to [80] and told me that, there, the Judge carries out a proportionality assessment weighing the public interest factors against the best interests of the child appellants.

(d) Mrs Aboni urged me to dismiss the appeal and allow the decision to stand.

Analysis

8. The Judge's consideration commences with the first appellant, not with the best interests of the remaining appellants. It is only at [38] of the decision of the decision that the Judge turns to the second appellant. There the Judge finds that the second appellant has been in the UK for more than 10 years and is now over 18 years of age. At [40] of the decision the Judge appears to try to incorporate the respondent's reasons for refusal letter *brevitatis causa*. At [43] the Judge's assessment of reasonableness for the second appellant is clearly dependent on the Judge's findings in relation to the first appellant.

9. Between [45] and [52] the Judge considers the second appellant's article 8 appeal outside the immigration rules. At [49] the Judge finds that

the public interest outweighs the argument advanced for the second appellant.

10. It is apparent that the Judge has gone to a lot of effort in preparing this decision, but it is also clear that the Judge has not made a finding about the best interests of the second appellant, who was a child at the date of the application. It is difficult to see how the Judge reaches his conclusions at [49] the decision. It is difficult to see whether or not the Judge has applied section 117B(6) of the 2002 Act. In his analysis of article 8 outside the immigration rules, the Judge does not take account of the fact that the second appellant can now succeed under paragraph 276 ADE(1)(v) of the rules.

11. The Judge moves on to consider the third, fourth and fifth appellants from [53] of the decision. The Judge acknowledges that the third appellant is a qualifying child, and assesses the test of reasonableness between [65] and [70] of the decision. Although the Judge takes correct guidance in law the Judge does not make any findings about the best interests of the third appellant nor does the Judge factor in the importance of the length of residence of the second and third appellant in his analysis.

12. Between [73] and [78] the Judge considers proportionality for all appellants cumulatively. Despite reminding himself a number of times throughout the decision that the first appellant’s immigration history is irrelevant when considering the remaining appellants, he starts [74] with the first appellant’s immigration history at the forefront of his mind.

13. At [76] the Judge fails to take guidance from Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC), so that his findings that little weight can be attached to the private life of the second, third, fourth and fifth appellants is undermined.

14. Although the Judge discusses the best interests of the children and discusses whether or not it would be reasonable for each appellant to leave the UK, in reality the decision contains inadequate findings about whether or not there are strong, powerful reasons to overcome the length of residence of the second, third, fourth and fifth appellants. The decision contains inadequate consideration of the best interests of the children. There is a material error of law.

15. I set the decision aside.

16. Although I set the decision aside there is enough material before me to let me substitute my own decision.

My Findings of Fact

17. At the date of application none of the appellants could meet the requirements of the immigration rules. The first appellant entered the UK

in 2007 as a student. Her leave to remain expired on 31 July 2010. The first appellant made a series of unsuccessful applications for leave to remain in the UK. On 23 April 2015 all five appellants made applications for leave to remain, which were refused by the respondent on 14 March 2016. It is against those decisions that each appellant appeals.

18. At the date of application the second, third, fourth and fifth appellants were all children. The second appellant is now 19 years old. The second appellant came to the UK as an 8 year old. She has her primary and secondary education in the UK and is now moving on to tertiary education.

19. The third, fourth and fifth appellants were born in the UK and have never lived anywhere else. The third appellant has now been present in the UK for 10 years. She is entitled to apply for British citizenship. The fourth appellant is now a qualifying child.

20. The second appellant was praised as a model pupil at secondary school. The third, fourth and fifth appellants are following in her footsteps. They are happy and well settled at school. They are studying well and are academically gifted.

21. If the second appellant submits an application today for leave to remain on private life grounds, she could succeed under paragraph 276ADE(v) of the immigration rules.

The Immigration Rules

22. The respondent accepted that the first appellant met the suitability requirements, but not the eligibility requirement. The focus was on E-LTRPT 2.2 of the rules because the respondent believed that the first appellant's children could return to Nigeria with the first appellant.

23. E-LTRPT.2.2. says

> The child of the applicant must be-
>
> > (a) under the age of 18 years at the date of application, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;
> >
> > (b) living in the UK; and
> >
> > (c) a British Citizen or settled in the UK; or
> >
> > (d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.

24. EX.1 says

EX.1. This paragraph applies if

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK;

25. Since the date of decision in this case the Upper Tribunal has issued the decision in MT & ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88(IAC).

26. The circumstances of the second appellant are on all fours with the circumstances of the child appellant in MT & ET. Relying on R(on the application MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705, there must be a powerful reason why a child who has been in the United Kingdom for over 10 years should be removed. There is a dearth of evidence of such a powerful reason. The second appellant can make a successful application under paragraph 276ADE of the rules today. Consideration under the immigration rules is restricted to the date of application. Becoming an adult is a change in circumstances since the date of application, but the fact remains that there is no evidence of powerful reasons which would outweigh the length of residence. That is what was found in MT & ET on similar facts and circumstances.

27. As there are no powerful reasons to remove the second appellant, it cannot be reasonable for the second and third appellants (Qualifying children at the date of application) to leave the UK. The first appellant meets the requirements of appendix FM.

28. For the same reasons, at the date of application the second and third appellants met the requirements of paragraph 276ADE(1)(iv) which says

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;

29. Three of the five appellants meet the requirements of the Immigration Rules.

Article 8 ECHR

30. The sole ground of appeal is on article 8 ECHR grounds. Section 117B of the 2002 Act tells me that immigration control is in the public interest. Family life within the meaning of article 8 is established for the appellants. The respondent's decision is an interference with that family life. The burden therefore shifts to the respondent to show that the interference was justified. The respondent relies solely on the public interest in effective immigration control.

31. The third and fourth appellants are (now) qualifying children. S.117B(6) of the 2002 Act, which says

> (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 focus in this case is on sub-section (6) of Section 117B. Section 117B(6) is in two parts which are conjunctive. Section 117B(6)(a) weighs in favour of the first appellant because she has a genuine and subsisting paternal relationship with qualifying children. It is Section 117B(6)(b) which is determinative of this case.

33. By virtue of section 117D a "qualifying child" means a person who is under the age of 18 and who— (a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more. If a child is a qualifying child for the purposes of section 117B of the 2002 Act as amended, the issue is whether it is not reasonable for that child to return.

34. The third and fourth appellant's are now qualifying children. The question for me is whether or not it is reasonable for the child appellants to leave the UK.

35. I remind myself of Section 55 of the Borders, Citizenship and Immigration Act 2009. In ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 Lady Hale

said that "*Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child".*

36. In R(on the application MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held that in light of the jurisprudence of the Supreme Court, courts and tribunals were not mandated to approach the proportionality exercise where the best interests of the child were in issue in any particular order such that it was an error of law for them to fail to do so:. Although it would usually be sensible to start with the child's best interests, ultimately it did not matter how the balancing exercise was conducted provided that the child's best interests were treated as a primary consideration (paras 49, 53–57 and 72). In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) in which it was held that the best interests assessment should normally be carried out at the beginning of the balancing exercise.

37. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

38. On the facts as I find them to be, today the second appellant meets the requirements of paragraph 276ADE(1)(v). At the date of decision, the second and third appellants met the requirements of paragraph 276 ADE(iv). Today, the third appellant is entitled to apply for British citizenship. Today, the third and fourth appellants are qualifying children. On the facts as I find them to be, the first, second and third appellants met the requirements of the immigration rules at the date of decision.

39. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) the Tribunal further held that the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

40. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was confirmed that if section 117B(6) applies then "*there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal.*" It was additionally held that the fact that a child had been in the UK for seven years should be given significant weight in the proportionality exercise because it is relevant to determining the nature

and strength of the child's best interests and as it established as a starting point that leave should be granted unless there were powerful reasons to the contrary.

41. The second appellant's circumstances are the same as the appellant in MT & ET. In that case the Upper Tribunal looked for powerful reasons why a child who has been in the UK for over 10 years should be removed and found that there were no such powerful reasons. Paragraphs 30 to 34 the decision in MT & ET could have been written with the second appellant in mind.

42. Applying exactly the same logic to the facts as I find them to be, the first appellant's immigration history is not so bad that it can constitute a powerful reason that would render reasonable the second appellant's removal to Nigeria.

43. The second, third and fourth appellants succeed on article 8 grounds. In line with PD their success leads to success for all five appellants.

Decision

44. The decision of the First-tier Tribunal promulgated on 21 June 2017 is tainted by material errors of law and is set aside.

45. I substitute my own decision

46. The appeals are allowed on article 8 ECHR grounds.

Signed Paul Doyle Date 8 May 2018
Deputy Upper Tribunal Judge Doyle