Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/19717/2016
HU/24047/2016
HU/19720/2016
HU/19719/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 September and 2 November 2018	**On 12 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) CE (NIGERIA)
(2) OO (NIGERIA)
(3) CO (NIGERIA)
(4) SO (NIGERIA)
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr G Lee, Counsel instructed by Rashid and Rashid Solicitors
For the Respondent: Mr T Wilding (07.09.18) and Mr S. Kandola (02.11.18), Senior Home Office Presenting Officers

DECISION AND REASONS

1. The appellants appeal against the decision of First-tier Tribunal Judge NMK Lawrence who, in a decision promulgated on 27 February 2018, dismissed their human rights appeals which were primarily brought on the basis that the second and third appellants were qualifying children under section 117B of the 2002 Act and it was unreasonable to expect them to leave the country. The First-tier Tribunal did not make an anonymity direction, but as the central issue in the appeals was whether the best interests of the minor children should or should not prevail over wider proportionality considerations, I considered that it was appropriate to make an anonymity direction for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 19 June 2018 First-tier Tribunal Judge Murray granted permission to appeal for the following reasons:

> "The grounds assert that the Judge erred in effectively reversing the ratio of MA (Pakistan) -v- SSHD [2016] EWCA Civ 705 in holding that there were no strong reasons to grant the minor Appellants' leave.
>
> It is arguable that at paragraphs 36, 41 and 48 in considering the case of the two minor Appellants had been in the UK for more than 7 years the Judge requires strong reasons to be shown for a grant of leave and therefore misunderstood the test in MA (Pakistan) and failed to direct himself properly."

Relevant Background Facts

3. The appellants are all nationals of Nigeria. The first appellant is the mother of the second to fourth appellants. The second appellant, O, was born in the UK on 9 December 2008; the third appellant was born in the UK on 18 June 2010; and the fourth appellant was born in the UK on 25 July 2012.

4. The first appellant entered the UK on 3 March 2008. It is not in dispute that whatever type of visa or its duration that she entered on, she overstayed after the visa expired.

5. On 14 February 2011 the first appellant applied for a residence card as the spouse of a German national exercising Treaty rights here. She also made parallel applications on behalf of her two oldest children (the youngest child not yet having been born). In May 2011 the first to third appellants were issued with residence cards as family members of Denis Schmidt.

6. On 6 July 13, in the course of executing a drugs search warrant (during which no drugs were found) Operation Trilogy officers encountered the first appellant and her children and the father of the children, "F", apparently living together. F had also obtained a residence card as the

partner of a German national, Amma Brempong. The first appellant and F were arrested and then bailed pending further enquiries.

7. On 9 March 2015 the respondent revoked the first appellant's residence card as there was sufficient evidence to believe that her marriage to Denis Schmidt was one of convenience contracted for the sole purpose of her remaining in the UK. The residence cards of the two children were revoked in line with the revocation of their mother's residence card.

8. Their appeals came before Judge Rozanski sitting at Taylor House on 2 February 2016. Both parties were legally represented. The Judge received oral evidence from the mother and the father of the children.

9. The Judge went on to find that it was most likely that the first appellant and F were living in a marriage-like relationship; and that the first appellant was not living in a marital relationship with Denis; and nor was F living in a marital relationship with Amma. This was further confirmed in his view by the fact that the first appellant and F had subsequently conceived a fourth child together. The overall picture that he formed of the relationship which the first appellant had had with Denis was that it was never a genuine marriage. He was satisfied that it was more probable than not that, from its inception, it was a marriage of convenience.

10. On 7 March 2016 the appellant's solicitors submitted an application on behalf of the second appellant for leave to remain on the grounds that she had accrued more than seven years' residence in the UK as a child.

11. On 25 July 2016 the respondent gave her reasons for refusing the application. She had lived with her parents who were Nigerian nationals, and she had lived in the UK which was a multicultural society with a resident Nigerian diaspora, so it was not accepted that she had lost all ties, including social, cultural and family ties, to her home country. It was noted on her passport that she had last visited Nigeria on 15 December 2011 until 13 January 2012. Although she was in school, Nigeria had a functioning education system that she would be able to access. It was generally accepted that the best interests of a child whose parents were facing removal from the UK were best served by the child remaining with their parents and being removed with them. This represented the centrality of a child's relationship with their parents in determining their wellbeing. Further to this, there were also a number of general factors which made a decision to refuse her application reasonable and section 55 compliant.

12. In a separate letter, also dated 25 July 2016, the respondent gave her reasons for refusing parallel applications for leave to remain made by the first appellant, and the third and fourth appellants. With reference to the first appellant, it was not accepted that she met the suitability requirements as her presence in the UK was not conducive to the public good because she had entered into a marriage of convenience with a

German national in order to obtain Treaty rights to remain in the UK - thereby using deception. With regard to the third and fourth appellants, it was observed that they had not lived in the UK continuously for at least seven years immediately preceding the date of application.

The Hearing Before, and the Decision of, the First-tier Tribunal

13. The appeals of all four appellants came before Judge Lawrence sitting at Hatton Cross on 16 February 2018. Mr Lee appeared on behalf of the appellants, and the respondent was represented by a Home Office Presenting Officer. The Judge received oral evidence from the mother and father of the children.

14. In his subsequent decision, he recorded at paragraph [3] that F's residence card had been revoked on the grounds that his marriage to Amma was a marriage of convenience, and that his appeal against the revocation had been dismissed. At paragraph [4], he noted that F had made a separate human rights application which had been refused on 30 January 2017, and that he had lodged an appeal against this decision, but a date for the appeal had not yet been set.

15. The Judge set out his findings at paragraph [11] onwards. At paragraph [21], he found that the parents' continued denial of the finding that each of them had entered into a marriage of convenience was relevant to their credibility on the circumstances they were likely to face in Nigeria. The Judge returned to this them at paragraph [47], where he held that the parents were not *"creditworthy"* witnesses. In any event, they were able-bodied adults, both in mind and body. They had lived most of their lives in Nigeria and were familiar with life there. Returning to Nigeria with their three children could not amount to very significant obstacles.

16. The Judge referred to **MA (Pakistan)** at paragraphs [34] and [35]. He directed himself that the Court of Appeal in **MA (Pakistan)** held that significant weight must be attached to the seven years that a child has been in the UK, and that there must be strong reasons for refusing leave. The Judge continued in paragraph [36]:

> "In the instant appeal the minor children are healthy, both in mind and body. They are doing well in school. There is healthcare and schools in Nigeria. Their parents are likely to find difficulties in finding employment and a home in Nigeria. The adults are not physically and mentally incapable of finding employment in Nigeria. They may prefer not to return to their home country but that is not the issue. The children may find they need to adapt to the Nigerian way of life. However, they grew up in a Nigerian home, provided by their parents. Further, they are young enough to do so and will be assisted by their parents. There is no evidence that their "welfare" or "life chances" are likely to be adversely affected by returning to Nigeria. In all the circumstances of this appeal there are no "strong reasons" to grant

> them leave. There is no evidence of any adverse consequences or that their life chances are likely to be affected. They have to make adjustments. But it is not unusual for children to move from one country to another with their parents. Children have moved from Nigeria to the UK. In the instant appeal, the mere fact that the children have to move from the UK to Nigeria does not of itself mean that it must, or likely, be to their detriment."

17. At paragraph [41], in the context of a discussion of **Azimi-Moayed**, the Judge repeated his finding that there were not powerful or strong reasons for a grant of leave.

18. At paragraph [48], the Judge held that the minors' circumstances were not sufficiently serious and compelling to grant "*the first two"* status in the UK. There were no strong reasons to grant leave. There were not strong reasons to find that by returning to Nigeria their best interests were likely to be adversely affected. Therefore, the decision in **PD** did not apply, and neither the first appellant, nor the fourth appellant, nor F was entitled to the grant of leave.

The Error of Law Hearing in the Upper Tribunal

19. At the hearing before me to determine whether an error of law was made out, Mr Wilding acknowledged that the approach by the Judge was very clumsy, but he submitted that his misapplication of the guidance given in **MA (Pakistan)** was not material. After hearing from Mr Lee and Mr Wilding in reply, I found that an error of law was made out such that the decision needed to be set aside and remade. I gave my reasons for so finding in short form, and my written reasons are set out below.

Reasons for Finding an Error of Law

20. While the Judge correctly identified the ratio of **MA (Pakistan)** at paragraphs [14], [20], [34] and [35] of his decision, the Judge failed to apply the ratio to the facts of the case before him. Instead of asking himself whether there were strong reasons for requiring the qualifying children to go to Nigeria, he answered a different question, which is whether there were strong reasons for granting them leave to remain. This is clearly erroneous in law, as this is not merely the same question put the other way round. The crucial distinction is that the way in which the Judge framed the question placed the burden on the children to show strong reasons as to why they should be granted leave to remain, rather than placing the burden on the judicial decision-maker to identify strong reasons for expecting the children to leave the country with their parents.

21. The knock-on effect of the Judge's error is that the assessment of best interests is flawed. The Judge failed to make clear findings as to whether,

overall, the best interests of the children lay in them going to Nigeria as against staying in the UK; and, if the latter, whether there were wider proportionality considerations that nonetheless outweighed their best interests.

22. The Judge wrongly addressed the question of reasonableness on the basis that it was a purely child-centric question. This would not have mattered if the only answer to the child-centric question was that it was in the children's best interests to go to Nigeria, and hence that it was reasonable to expect them to do so. But this is not the only possible answer. On the contrary, the necessary starting point is that, where children have accrued over seven years' residence, *prima facie* it is in their best interests to remain here.

23. Justice must not only be done, but must be seen to be done, and it is well-established that the assessment of the best interests of minors facing removal must be properly performed. Accordingly, the decision must be set aside on the grounds of inadequate reasoning.

Future Disposal

24. Mr Lee submitted that the appeals should be remitted to the First-tier Tribunal for a fresh hearing because the Judge's error was so gross that the appellants were deprived of a fair hearing in the First-tier Tribunal.

25. The Judge adequately engaged with the evidence that was before him, and he made sustainable primary findings of fact which are not the subject of an error of law challenge. As matters stand, the underlying facts relevant to the assessment of the children's best interests are settled and/or uncontroversial, and the resolution of the appeals turns on the proper application of the test in **MA (Pakistan)**, and not on any identifiable dispute of fact.

26. Accordingly, as I ruled at the hearing, I do not consider that the appellants were deprived of a fair hearing in the First-tier Tribunal and I am not persuaded to depart from the normal practice of the Upper Tribunal which is to retain cases such as this.

27. However, I have agreed to adjourn the remaking of the decision to a resumed hearing, at which the appellants will have the opportunity to present evidence of a material change of circumstances (if any) since the hearing in the First-tier Tribunal.

Conclusion

28. The decision of the First-tier Tribunal contained an error of law, such that the decision must be set aside and remade.

The Resumed Hearing for Remaking

29. On 24 October 2018 the Supreme Court gave its judgment in the case of **KO (Nigeria) & Others -v- Secretary of State for the Home Department [2018] UKSC 53**. Lord Carnwath, with whom the other Justices agreed, said at paragraph [16] that, unlike its predecessor DP5/96, Rule 276ADE(1)(iv) contains no requirement to consider the criminality or misconduct of a parent as a balancing factor and that it was impossible in his view to read it as importing such a requirement by implication. At paragraph [17], he said that section 117B(6) incorporated the substance of the Rule without material change, but this time in the context of the right of a parent to remain. He inferred that it was intended to have the same effect. The question again was what was reasonable for the child.

30. Opening the appellants' case on remaking, Mr Lee submitted that the declaration of law by the Supreme Court assisted the appellants, as it meant that the respondent could no longer rely on the misconduct of the parents as fortifying the case that it was reasonable to expect the qualifying children to leave the UK. The oldest qualifying child was due to celebrate her 10th birthday on 9 December 2018, and the second qualifying child had been resident in the UK for some eight and a half years.

31. My attention was drawn to paragraphs [46]-[52], in which Lord Carnwath gave his reasons for dismissing the appeals of **NS** and **AR**. Both of them had entered the UK as students, on 19 February 2004 and 4 February 2003 respectively. NS's wife and older child had entered as dependants of NS in December 2004. AR's wife and child had entered as AR's dependants in February 2004. In October 2008, NS and AR had made separate applications for leave to remain as Tier 1 (Post-study work) migrants. In early 2009 the SSHD refused these applications on the basis that both NS and AR were involved in a scam by which they and numerous others falsely claimed to have successfully completed post-graduate courses at an institution called The Cambridge College of Learning.

32. NS and AR both appealed against the SSHD's decision, and their appeals were ultimately joined, and came before Upper Tribunal Judge Perkins. In his decision issued on 5 November 2014, he dismissed the appeals. With regard to the children, he had no difficulty in concluding that the best interests of the children required that they remain in the UK with their parents. That, from their point of view, would be an ideal result. He reminded himself that one of the children, particularly, had been in the UK for more than 10 years, and this represented the greater part of her young life and she was someone who could be expected to be establishing a

private and family life outside the home. He also reminded himself that none of the children had any experience of life outside the UK and they were happy, settled and doing well. But the fact was that their parents had no right to remain unless removal would contravene their human rights. Given their behaviour, it would be outrageous for them to be permitted to remain in the UK: "*They must go and in all the circumstances I find that the other appellants must go with them.*"

33. Mr Knafler QC, on behalf of the children, submitted that the decision of UTJ Perkins was erroneous in law as parental misconduct should have been disregarded. However, Lord Carnwath said at paragraph [51]:

> "I accept that UTJ Perkins' final conclusion is arguably open to the interpretation that the "outrageousness" of the parents' conduct was somehow relevant to the conclusion under section 117B(6). However, read in its full context, I do not think he erred in that respect. He correctly directed himself as to the wording of the subsection. The parents' conduct was relevant in that it meant that they had to leave the country. As I have explained (para 18 above) it is in that context that it had to be considered whether it is reasonable for the children to leave with them. Their best interests would have been for the whole family to remain here. But in the context where the parents had to leave, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the Judge to suggest that that would be other than reasonable."

34. By parity of reasoning, Mr Kandola submitted, the natural expectation was that the qualifying children in this appeal should go with their parents who have no leave to remain, and there is nothing in the evidence to suggest that that would be other than reasonable. Indeed, in retrospect, First-tier Tribunal Judge Lawrence had not erred in law, as he had applied what was now recognised to be the correct approach, which was a real world approach, as distinct from the ideal world approach approved in **MA (Pakistan).**

35. In reply, Mr Lee submitted that it was difficult to reconcile the decision on the appeals of NS and AR with the earlier declaration that parental misconduct was not relevant to the question of reasonableness. He submitted that I should be cautious in applying the decision on the appeals of NS and AR by analogy, as the analysis of the UTJ Perkins had not been endorsed by the Supreme Court. It had only been held not to be clearly erroneous.

Discussion and Findings on Remaking

36. From the appellants' perspective, it seems to me that the decision of the Supreme Court in **KO & Others** gives with one hand, but takes away with another. The misconduct of the parents in entering into marriages of convenience so as to facilitate them remaining in the UK is removed from

the assessment of reasonableness, as the issue under Rule 276ADE(i)(iv) and section 117B(6) is what is reasonable for the child, not what is reasonable for the parent. However, Lord Carnwath endorsed as a highly relevant consideration the following guidance contained in an Immigration Directorate Instruction (IDI) of the Home Office cited at paragraph [10]:

> "It is generally the case that it is in a child's best interests to remain with their parents. Unless special factors apply, it is generally reasonable to expect a child to leave the UK with their parents, particularly if the parents have no right to remain in the UK (my emphasis)."

37. At paragraph [17], Lord Carnwath said:

> "The list of relevant factors set out in the IDI Guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as with paragraph 276ADE(1)(iv)."

38. At paragraph [18], he continued:

> "On the other hand, as the IDI Guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it would normally be reasonable for the child to be with them. To that extent, the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain."

39. Lord Carnwath went on to say that the point was well expressed by Lord Boyd in **SA (Bangladesh) -v- SSHD [2007] SLT 1245** at 22, and also by Lewison LJ in **EV (Philippines) -v- SSHD [2014] EWCA Civ 874** at paragraph [58]. Lewison LJ said, inter alia, as follows: "*If neither parent has the right to remain, then that is a background against which the assessment is conducted. Thus the ultimate question would be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"*

40. Lord Carnwath said, at [19], that, to the extent that Elias LJ may have suggested otherwise in **MA (Pakistan)** at paragraph [40], he would respectfully disagree. There was nothing in the section to suggest that "reasonableness" was considered otherwise than in the real world in which the children find themselves.

41. A useful summary of the learning on the best interests of children in the context of immigration is to be found in **Azimi–Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**:

> "30. It is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay,

family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:

(i) As a starting point in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

(ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

(iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

(iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than peers and are adaptable.

(v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic wellbeing of society amply justifies removal in such cases."

42. I consider that the effect of the Supreme Court ruling is that the first principle in **Azimi-Moayed** is potentially an overriding one, even in appeals involving qualifying children - if they are part of a household where both parents have no leave to remain.

43. The second appellant, O, has the strongest private life claim, as she is the oldest child. She is nearly at the 10-year threshold when she will be eligible to apply for naturalisation as a British citizen. The third principle of **Azimi-Moayed** clearly operates in her favour. The fourth principle also operates in her favour to a more limited extent: she has not accrued seven years' from the age of four, so she has not yet embarked on her secondary school education. But she is at an age where she can reasonably be expected to have established some significant social contacts involving friends at primary school. However, she has not yet reached a significant milestone in her education. She is still a long way off from taking GCSEs.

44. O is likely to receive an adequate education in Nigeria. With the support of her parents in adjusting to life there, and in common with her younger

siblings, she will be able to enjoy all the benefits attendant upon her Nigerian citizenship, including being immersed in the social and cultural milieu from which both her parents spring. Return to Nigeria will also promote the possibility of family reunion with extended family members on her mother's and father's side.

45. The Judge below found that the parents were not credible in their claim that they had lost contact with their respective families in Nigeria. He also rejected the suggestion of the parents that the family would face destitution in Nigeria. While he accepted that they are likely to face difficulties in finding a home and employment in Nigeria, he held that they were not physically or mentally incapable of achieving these objectives. Moreover, the Judge found that the parents had not discharged the burden of proving a risk of destitution, following **MA (Proved destitution) Jamaica [2005] UKIAT 0013**, which was referenced by the Judge at paragraph [23] of his decision. He found that the parents had not seriously addressed the issue of the practicalities of relocation. They had not investigated schools in Nigeria or any employment prospects. They had expressed concern about the health care system in Nigeria, but they did not bring forward any specific evidence of a relevant deficiency. In any event, all the children, including O, are healthy, both in mind and body, as the Judge found at paragraph [36].

46. Accordingly, there is no reason to suppose that O, and the younger children, would not thrive in Nigeria just as they have thrived under the care of their parents in the UK.

47. Nonetheless, in an ideal world and other things being equal, I accept that overall it is in O's best interests to remain in the UK with her parents and younger siblings; and that the same applies to the third appellant, C, albeit that her private life claim is less compelling.

48. However, other things are not equal, and, following **KO & Others**, I am enjoined to assess the best interests of the children on the basis of the facts as they are in the real world. Neither parent has leave to remain under the Rules. Neither parent has established a right to remain on human rights grounds. (The Judge below refused to grant an adjournment so as to enable the father's appeal against a separate refusal decision to be joined with these appeals.)

49. The question I must ask myself is whether it is reasonable to expect O and her younger siblings to follow their parents with no right to remain, to the country of origin. I answer this question in the affirmative. Given the ages of the children, including O, by far the most important best interest consideration is that contained in the first principle of **Azimi-Moayed**. It is essential for the children's welfare and wellbeing that that they should remain in the same household as their parents, wherever that household is. It would clearly be contrary to their best interests to separate them from their parents; and it follows that it is in the best interests of O and

her younger siblings to follow their parents with no right to remain to the country of origin.

50. By the same token, it is reasonable to expect the children to follow their parents to Nigeria, notwithstanding the fact that the two older children have accrued over seven years' residence in this country. There are sufficiently strong reasons to expect all the children to leave the UK, of which the most powerful is the reason identified in **KO & Others**, but the other best interest considerations in favour of relocation to Nigeria identified at [44] to [46] above are also relevant.

51. As only live issue in these appeals is how the reasonableness question should be answered, this disposes of the appeals. However, for the avoidance of doubt, the other relevant public interest considerations arising under section 117B of the 2002 Act do not militate against the proportionality of the removal of the entire family. The decision appealed against strikes a fair balance between, on the one hand, the rights and interests of the appellants, and, on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought to be achieved, namely the protection of the country's economic wellbeing, the prevention of disorder, and the maintenance of firm and effective immigration controls.

Notice of Decision

52. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: these appeals are dismissed.

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 or any member of his family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 6 November 2018

Deputy Upper Tribunal Judge Monson