



IAC-FH-CK-V2

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/00911/2016  
HU/04181/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3 July 2018  
Prepared 3 July 2018

Decision & Reasons Promulgated  
On 07 August 2018

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

**FRANK [O]  
ROSEMARY [O]  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants: Mr D Akinpelu, Solicitor, Spring Solicitors  
For the Respondent: Mr C Howells, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants, nationals of Nigeria, appealed against the Respondent's decisions dated 28 January 2016 to refuse applications for leave to remain based on human rights grounds.

2. Their appeals came before First-tier Tribunal Judge Telford (the Judge) on 10 July 2017, who dismissed them under the Immigration Rules and Article 8 ECHR. Permission to appeal was given by First-tier Tribunal Judge P J M Hollingworth on 8 March 2018.
3. The gravamen of the complaints made in the grounds of appeal is that the Judge failed to properly address and provide adequate reasons for concluding in effect with reference to the best interests of the children that it was appropriate for them as children of the Appellants, who are not British nationals, to leave the United Kingdom. At the material time the children, [JO<sup>1</sup>]and [JO<sup>2</sup>], date of birth 7 October 2008, were over 7 years and had been born in the United Kingdom but remained Nigerian nationals at the material time. The children had never left the United Kingdom and were in the UK educational structure as well as having grown up in the UK with friends and acquaintances.
4. The Judge set out on the journey with reference to Article 8 ECHR, somewhat erroneously in that he said it was for the Respondent, the Secretary of State, to show on a balance of probabilities that the decision was proportionate. Whatever may be the source of the Judge's understanding, that is wrong. There is no burden of proof and standard of proof in dealing with the judgment on proportionality. Be that as it may, the Judge then went on to consider the best interests of the children and somewhat curiously addressed it on the basis of their capacity to integrate into life in Nigeria. The Judge seems to have started with the premise that, [D17], "the real question is whether they are still malleable and able to adapt with a move to Nigeria at their age and in their circumstances." That was plainly wrong. The malleability of children may be pertinent, to the extent to which one is assessing the proportionality of removal, but it certainly does not resolve the issue of whether or not it is reasonable for them to leave the UK.
5. The Judge in the decision sadly makes no reference whatsoever to Section 117B(6) NIAA 2002 and simply fails in the light of the well-known case law of MA (Pakistan)

[2016] EWCA Civ 705 in considering the issues of the children, the impact of the removal of the children, whether it is reasonable to expect them to leave as understood, following in the Court of Appeal's decision, in AM (Pakistan) [2017] EWCA Civ 180.

6. In the circumstances it is accepted, perfectly sensibly, if I may say so, by Mr Howells that the Secretary of State accepts it would not be reasonable to expect the children to leave the UK. In those circumstances, if it is not reasonable it follows, as the case law identifies, it cannot be in the public interest or proportionate to require a person who has a subsisting parental relationship to leave. I have, for my own part, looked at the findings the Judge made and examined the papers as to whether or not the Appellants' immigration history is a material factor to be borne into consideration with the reasonableness of the children leaving. It seemed to me that the way the case was put and the basis on which the decision was made as promulgated around about 28 January 2016, the concerns were not being raised particularly as to the immigration history of either Appellant. For my part it did not seem to me that that took it beyond the considerations of Section 117B(6) into the wider issues which required proportionality to be addressed in the usual way.
  
7. For these reasons therefore, on the basis of the parties' acceptance that it is appropriate for me to redecide this case on basis of the findings of fact made and expressed in the decision of the Judge, I conclude that the appropriate outcome is as follows. First, the Original Tribunal's decision cannot stand. Secondly, the following decision is substituted.

### **NOTICE OF DECISION**

The appeal is allowed on Article 8 ECHR grounds.

### **ANONYMITY ORDER**

No anonymity order was made, none is being requested and, having regard to the Presidential Guidance, it seems to me that none is necessary in the circumstances of this

decision or indeed that written by the First-tier Tribunal Judge. Accordingly, no anonymity order is made.

**FEE AWARD**

The appeals have succeeded and in those circumstances a fee award in the sum of £140 for each Appellant.

Signed

Date 24 July 2018

Deputy Upper Tribunal Judge Davey