



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/05548/2017

**THE IMMIGRATION ACTS**

Heard at Centre City Tower Birmingham  
On 20<sup>th</sup> July 2018

Decision & Reasons Promulgated  
On 15<sup>th</sup> August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

A M  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms L Mair of Counsel

For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

1. The Appellant is a female Nigerian citizen born 27<sup>th</sup> June 1979. She appeals against a decision of Judge Birk (the judge) of the First-tier Tribunal (the FtT) promulgated on 19<sup>th</sup> July 2017.
2. The Appellant entered the UK on 4<sup>th</sup> February 2010 having been granted a six month visit visa on 17<sup>th</sup> September 2009. The Appellant overstayed and remained in the UK without leave. She made a human rights and protection claim on 2<sup>nd</sup> November 2016.

She has three children who are dependants in her claim, a daughter born 15<sup>th</sup> April 2007, and sons born 24<sup>th</sup> January 2014 and 17<sup>th</sup> August 2015 respectively.

3. The Respondent refused the application on 11<sup>th</sup> May 2017 and the Appellant appealed to the FtT.

### **The First-tier Tribunal Hearing**

4. The Appellant's claim was that she would be at risk if returned to Nigeria because she feared that she would be forced to join a cult. She did not wish to join the cult and feared that she would be killed. The judge heard evidence from the Appellant and found her to be an incredible witness, and concluded that she was neither reliable nor truthful. The judge found that the Appellant would not be at risk if returned to Nigeria and that she could return to her home area, but in the alternative she had a reasonable internal relocation option to an area other than her home area of Lagos.
5. With reference to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) the judge accepted that the Appellant had established a family and private life. The judge found that the Appellant could not satisfy the requirements contained in Appendix FM with reference to family life, or paragraph 276ADE(1) in relation to private life. The judge noted that the eldest child had not acquired seven years residence at the date of application and therefore could not satisfy paragraph 276ADE(1)(iv).
6. The judge found that the Appellant had remained in the UK without leave and worked illegally. The judge noted that the father/stepfather of the children did not attend the hearing and in any event he is a Nigerian citizen with no leave to remain in the UK. The judge accepted that the Appellant is the primary carer of the children. The judge found that it would be proportionate for the Appellant and her children to leave the UK together and return to Nigeria, and this would not breach Article 8 of the 1950 Convention.

### **Permission to Appeal**

7. The Appellant, who had been unrepresented before the FtT, remained without legal representation and made an application for permission to appeal. This was initially refused by Judge Grant-Hutchison of the FtT, but a renewed application was granted by Upper Tribunal Judge Canavan on one ground only. This was on the basis that the judge had erred in law in failing to consider section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). The eldest child had acquired seven years' residence by the time the FtT hearing took place. Therefore the eldest child was a "qualifying child" and the judge had failed to take that into account and attach appropriate weight to the fact that the eldest child had acquired more than seven years' continuous residence.
8. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 accepting that the judge had materially erred in law in failing to consider section 117B(6) in relation to the

Appellant's eldest child. The Respondent conceded that this aspect of the FtT decision must be set aside and re-made.

## **The Upper Tribunal Hearing**

### **Error of Law**

9. Ms Mair, who was present at the hearing centre to represent another Appellant, offered to represent the Appellant on a pro bono basis, as a friend of the court. The Appellant instructed Ms Mair on this basis.
10. Mrs Aboni confirmed that she relied upon the rule 24 response and therefore accepted that the FtT decision should be set aside and re-made in relation to section 117B(6) of the 2002 Act.
11. I therefore did not need to hear from Ms Mair on this point. I was satisfied that the judge had materially erred in law in failing to consider section 117B(6) in relation to the Appellant's daughter, who is her eldest child and I set aside the decision.

### **Re-Making the Decision**

12. No further evidence was called. I heard submissions from Ms Mair on behalf of the Appellant. It was submitted that the issue to be decided was whether it would be reasonable for the Appellant's eldest child to leave the UK. I was asked to take into account that she had come to the UK with her mother in February 2010. She is now 11 years of age. She has just finished year 6 which means she will be moving from primary to secondary school. She wants to be a nurse when she completes her education.
13. The child has no memory of living in Nigeria. I was referred to MA (Pakistan) [2016] EWCA Civ 705, and in particular paragraph 49, and was also referred to MT and ET (Nigeria) [2018] UKUT 00088 (IAC) at paragraphs 33 and 34.
14. Ms Mair also relied upon the Respondent's guidance published on 22<sup>nd</sup> February 2018, as to whether it will be reasonable to expect a child to leave the UK.
15. I was asked to find that it would not, in the circumstances, be reasonable to expect the eldest child to leave the UK, and therefore the public interest did not require the Appellant's removal.
16. Mrs Aboni submitted that it would not be unreasonable to expect the child to return to Nigeria with her family. Family life could continue in Nigeria. I was asked to take into account that the Appellant had made an asylum claim which was refused and subsequently dismissed. There may be family members in Nigeria who could offer support. The Appellant has a poor immigration history, and has tried to circumvent immigration control. She delayed making an asylum claim, as the application was only made on 2<sup>nd</sup> November 2016, the Appellant having been in the UK since 4<sup>th</sup> February 2010. I was asked to dismiss the appeal.
17. At the conclusion of oral submissions I reserved my decision.

## My Conclusions and Reasons

18. Although the decision of the FtT has been set aside, the findings made in relation to risk on return were not successfully challenged and are preserved. Therefore the FtT finding that the Appellant does not have a well-founded fear of persecution, and would not be at risk if returned to Nigeria stands. The Appellant is therefore not entitled to asylum or humanitarian protection, and her removal from the UK would not breach Articles 2 or 3 of the 1950 Convention.
19. The only issue to be decided by me relates to Article 8, and in particular section 117B(6).
20. The Appellant cannot succeed under the Immigration Rules in relation to family or private life. At paragraph 48 of Agyarko [2017] UKSC 11 guidance was given that if an Appellant cannot satisfy the relevant test under the Immigration Rules, but refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave may be granted outside the rules on the basis that there are exceptional circumstances.
21. I am deciding this appeal on the factual matrix set out below.
22. The Appellant entered the UK lawfully, with a visit visa together with her eldest daughter. The Appellant and her daughter have remained living in the UK continuously since arrival. The Appellant's two younger children were born in the UK. The Appellant has a partner, who appears to have played no meaningful part in the appeal proceedings and who does not have leave to remain in the UK.
23. The Appellant has therefore remained in the UK without leave since 2010 and appears to have made no attempt to regularise her immigration status, until the asylum claim which was made on 2<sup>nd</sup> November 2016.
24. The three children are Nigerian citizens. No evidence has been submitted to indicate that they have any special educational needs or medical issues. The youngest children are aged 4 and 2 respectively, and the eldest child is 11 years of age. I accept that she has finished her primary education, and therefore is due to start in a new school in September 2018.
25. Having set out the factual matrix, I must consider the best interests of the children as a primary consideration. In considering the best interests I take into account the factors set out in paragraph 35 of EV (Philippines) [2014] EWCA Civ 874. This involves considering the age of the children, the length of time they have been in the UK, how long they have been in education and what stage their education has reached. It also involves considering the extent that the children have become distanced from the country where it is proposed they return, how renewable their connection with that country may be, to what extent they would have linguistic, medical or other difficulties in adapting to life in that country, and the extent to which the course proposed would interfere with their family life or their rights (if they have any) as British citizens.

26. In this case the children are not British citizens. Only one has more than seven years' residence. It would be in the best interests of the children to remain with their mother as a family unit.
27. Taking into account the eldest child's length of residence, and the fact that the youngest children were born in the UK, I find on balance that their best interests would be served by remaining in the UK. This does not however mean that the appeal must be allowed, as I must consider any other relevant considerations.
28. I must have regard to the considerations in section 117B of the 2002 Act. Sub-section (1) confirms that the maintenance of effective immigration controls is in the public interest. I place significant weight upon the need to maintain effective immigration controls.
29. Sub-section (2) confirms that it is in the public interest that a person seeking leave to remain can speak English. The Appellant has not demonstrated her ability to speak and understand English.
30. Sub-section (3) confirms that it is in the public interest that a person seeking leave to remain is financially independent. The Appellant is not financially independent.
31. Sub-section (4) confirms that little weight should be given to a private life or relationship formed with a qualifying partner established when a person is in the UK unlawfully.
32. Sub-section (5) confirms that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
33. The Appellant does not have a relationship with a qualifying partner. The Appellant has formed a private life while in the UK initially with leave as a visitor, and thereafter unlawfully. I am satisfied that it is appropriate to attach little weight to the Appellant's private life.
34. I take into account that the children are Nigerian citizens, as is the Appellant. Nigeria has a functioning education system, and healthcare is available. Were it not for the eldest child, my conclusion would be that it would be proportionate and appropriate for the Appellant and her two youngest children to return to Nigeria, and this would not breach Article 8.
35. However, this appeal hinges upon the eldest child. I set out below section 117B(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.
36. I find that the Appellant has a genuine and subsisting parental relationship with her daughter, who is a qualifying child by virtue of having acquired more than seven

years' continuous residence since February 2010. The issue that I therefore have to consider is whether it would not be reasonable to expect the child to leave the UK.

37. In considering whether it would not be reasonable for the child to leave the UK I follow the guidance in MA (Pakistan) in that the Tribunal must not focus on the position of the child alone but must have regard to the wider public interest, including the immigration history of the parent.
38. At paragraph 49 of MA (Pakistan) it is stated that when considering section 117B(6) the fact that a child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons, first because of its relevance to determine the nature and strength of the child's best interests, and second, because it establishes the starting point that leave should be granted unless there are powerful reasons to the contrary. In this case I therefore have to consider whether there are powerful reasons to the contrary.
39. In considering powerful reasons I take into account the guidance in MT and ET. At paragraph 34 the Upper Tribunal found in that case that the parent of a child had received a community sentence for using a false document to obtain employment, and was described as abusing the immigration laws of the UK. The parent in that case had overstayed following entry clearance as a visitor, made a claim for asylum that was found to be false, and then pursued various legal means of remaining in the UK. The behaviour was described by the President of the Upper Tribunal as unlawful, but the immigration history was found to be not so bad as to constitute the kind of powerful reason that would render reasonable the removal of the child from the UK.
40. I also apply the guidance in SF and Others (Albania) [2017] UKUT 00120 (IAC) which confirms that the Tribunal ought to take the Respondent's guidance into account if it points clearly to a particular outcome in the instant case. The Respondent's guidance at paragraph 76 states;
 

"The longer the child has resided in the UK, the older the age at which they have done so, the more the balance will begin to shift towards it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more."
41. The Respondent's guidance therefore refers to "strong reasons" while the guidance in MA (Pakistan) refers to "powerful reasons".
42. The Appellant's daughter has resided in the UK continuously for in excess of eight years and has done so from the age of 2. The Appellant has remained in the UK without leave and worked illegally. There are no criminal convictions. Her immigration history is not dissimilar to that described in MT and ET, in that having overstayed when her visit visa expired, she then made an asylum claim which was found to be false. Having placed weight upon the guidance in MA (Pakistan) and MT and ET, I do not find that the immigration history of the Appellant is so bad as to constitute powerful reasons for concluding that it would be reasonable for the child to leave the UK. I therefore conclude that the requirements of section 117B(6) are

satisfied, and in those circumstances it would be unjustifiably harsh to require the Appellant and her children to leave the UK. The appeal is therefore allowed with reference to section 117B(6) and Article 8 of the 1950 Convention.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeal is dismissed on protection grounds and human rights grounds with reference to Articles 2 and 3 of the 1950 Convention.

The appeal is allowed with reference to Article 8 of the 1950 Convention.

### **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 her or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  
Deputy Upper Tribunal Judge M A Hall

Date: 29<sup>th</sup> July 2018

### **TO THE RESPONDENT FEE AWARD**

No fee has been paid or is payable. There is no fee award.

Signed  
Deputy Upper Tribunal Judge M A Hall

Date: 29<sup>th</sup> July 2018