Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08580/2017

THE IMMIGRATION ACTS

Heard at Field House | **Decision & Reasons Promulgated**
On 27th February 2018 | **On 15th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

[A O]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: The Appellant in person
For the Respondent: Mr J McGill, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of [AO] against the decision of First-tier Tribunal Judge Onoufriou, promulgated on 13th October 2017, in which he dismissed the appeal against the refusal of his application for leave to remain in the United Kingdom on private and family life grounds.

2. The Grounds of Appeal which led to the granting of permission to appeal were drafted by the Appellant himself. They may conveniently be summarised as follows.

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3. Firstly, it is said that the judge failed to attach sufficient if any weight to the economic benefit to the United Kingdom of him and his wife providing care for his ailing mother in lieu of state-aided support.

4. Secondly, it is said that the judge's approach to the eldest of the appellant's three children ([Az], born on [ ] 2002) was flawed.

5. I will deal with the grounds in turn.

6. There is in my judgment nothing in the first ground. The economic wellbeing of the country is a broad concept that involves much more than a simple accounting exercise. It may well be that if the economic well being of the country were to be measured solely by reference to the cost-benefit of the care provided by the appellant to his mother then the point would be well made. However, the general economic well being of the country includes other factors, such as the economic necessity of filling gaps in the UK skills and labour market the cost of providing education and health services for the appellant and members of his family. The extent to which the appellant and his family may fill those gaps and offset those costs by working and paying their taxes is not known and cannot be predicted. It is therefore to be assumed that the consistent application of immigration controls is necessary in a democratic society for the economic wellbeing of the country. The judge did not therefore err in law by making that assumption without further enquiry into the precise value to be placed upon the care that the appellant provides for his mother.

7. However, the second ground is one that has caused me some anxiety. By way of background, the appellant and his wife have three children. [Az] was born on [ ] 2002. He is a boy and has lived in the United Kingdom since the age of 6 years. At the time of Judge Onoufriou's decision, he had been in the United Kingdom for eight years. [At] was born on [ ] 2011. She is a girl. The third child is [Ah], who born on [ ] 2015. She is also a girl. Both of the girls were born in the United Kingdom and have resided in the United Kingdom ever since.

8. It was not in dispute before the First-tier Tribunal that [Az] is a "qualifying child" for the purposes of paragraph 276ADE(iv) of the Immigration Rules and also under Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The matter that concerns me is the judge's approach to the position of [Az]. This is set out at paragraph 53 of the decision:

> "Despite my findings thus far, the primary consideration is, of course, the children under section 55 of the Borders, Citizenship and Immigration Act ("the 2009 Act"). It is otiose to say that the children are clearly better off in the United Kingdom where they would have probably a higher standard of education and a higher standard of living and, of course, the two elder children will have their own friends and particularly the eldest child, will have activities in which they are involved. However, the welfare of the children is not a 'trump card'. In the case of the eldest child within the context of paragraph 276ADE(1)(iv), I note he has been in the United Kingdom for seven years and is under the age of 18. However, I do not consider it would be

> unreasonable for him to return to Nigeria. This is the country where he was born and spent the first six years of his life. He is not totally unfamiliar with the culture, having spent his very early years there. At the age of 6 he will have acquired a reasonable awareness of life in Nigeria. He is living within a Nigerian culture with his parents and their friends, although he is, of course, going to school and will have assimilated much of the British culture. However, like many children, he will be adaptable. There are no medical or mental issues and therefore as his best interest is to be with his family, I do not consider it unreasonable for him to return to Nigeria as part of the family unit."

9. I consider this approach to be flawed for the following reasons.

10. The leading case in relation to the correct approach to the question of reasonableness, both in relation to paragraph 276ADE(iv) of the Immigration Rules and Section 117B(6) of the 2002 Act, is the decision in **<u>MA (Pakistan) & Others v Secretary of State for the Home Department</u> [2016] EWCA Civ 705**.

11. At paragraph 46 of his judgment Elias LJ said as follows:

> "Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given <u>significant weight</u> when carrying out a proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled 'Family Life (as a partner or parent) and Private Life: 10 Year Routes' in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be <u>'strong reasons'</u> for refusing leave (para.11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. <u>That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older</u>. Moreover, in these cases there must be <u>a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family u</u>nit, and that must rank as a primary consideration in the proportionality assessment [emphasis added]."

It seems to me that paragraph 53 of the judge's decision fails to adopt this approach.

12. Firstly, in relation to the age of [Az] when he came to the UK and his age now, it appears to me that the judge followed the very reverse of the approach commended by Lord Justice Elias. This is because the judge appears to have considered the fact that [Az] had spent the first six years of his life in Nigeria as something that made it more rather than less likely that he would be able to adapt to life in Nigeria now. The correct approach, however, was to have assumed that when [Az] was living in Nigeria during his early years, his life would almost entirely have centred

on his family. He would therefore have been able more readily to adapt to life in the UK at that stage than he would now (aged 14 years) be able to adapt to life in Nigeria. Thus, contrary to the judge's reasoning, the grounds for allowing [Az] to remain in the United Kingdom with his parents were <u>stronger</u> than they would have been had [Az] been born and continuously resided in the United Kingdom to a point just beyond his seventh birthday.

13. Secondly, the reasons given by the judge for not fulfilling the very strong expectation that [Az] should be allowed to remain in the UK with his parents are, if I may say so, nothing more than 'the usual' reasons for holding that removal is proportionate in furtherance of the public interest. Essentially, those reasons revolve around him having the emotional support of his parents to assist him in adapting to a new life in Nigeria. However, such reasons are likely to apply in every case where parents and their children intend to continue to reside together as a family and, whilst they may be adequate to justify removal in the case of a non-qualifying child, they cannot in my judgement be characterised as the "strong reasons" that are required to outweigh the "very strong expectation" that a qualifying child will be permitted to remain with his or her parents in the United Kingdom.

14. Elsewhere in his judgement, Elias LJ gave a clear indication of the type of public interest considerations that might be capable of outweighing the very strong expectation that a qualifying child will be permitted to remain in the United Kingdom with his or her parents. These include criminality and such things as a very poor immigration history by the child's parents. To have regard to such matters is not to visit the sins of the parent on the child; it is simply to have regard to the weighty public interest that exists in seeking to discourage criminality and the abuse of immigration laws. However, no such weighty public interest considerations were engaged by the facts of this appeal.

15. I therefore conclude that the judge's approach to the eldest child was legally erroneous. In my judgement, there were no "strong reasons" in this case for not fulfilling the "very strong expectation" that he would be permitted, as a 'qualifying child', to remain with his parents and siblings in the United Kingdom. It follows that, applying the test in section 117B(6) of the 2002 Act, the only conclusion that the judge could reasonably have come to was that the public interest did not require the appellant's removal given that he had a genuine and subsisting parental relationship with a qualifying child in respect of whom it was not reasonable to expect him to leave the United Kingdom.

<u>Notice of Decision</u>

16. This appeal is allowed.

17. The decision of the First-tier Tribunal to dismiss the appeal is set aside and substituted by a decision to allow the appeal.

No anonymity direction is made.

Signed Date: 14th March 2018

Deputy Upper Tribunal Judge Kelly