Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/19771/2016
HU/19785/2016
HU/19788/2016

THE IMMIGRATION ACTS

Heard at UTIAC Birmingham	**Decision & Reasons Promulgated**
On: 12 December 2018	**On 7 January 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

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(ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Idowu of Gans & Co Solicitors
For the Respondent: Mrs H Abone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Following a grant of permission to appeal against the decision of the First-tier Tribunal dismissing the appellants' appeal against the respondent's decision to refuse their human rights claim, it was found, at an error of law hearing on 19 October 2018, that the First-tier Tribunal had made errors of law in its decision. The decision was accordingly set aside with directions for it to be re-made.

2. The appellants are citizens of Nigeria, born on 3 March 1973, 6 August 2010 and 16 September 2012 respectively. The first appellant is the mother of the second and third appellants, both of whom were born in the UK. The first appellant entered the UK on 29

September 2008 with leave to enter as a Tier 4 student valid until 31 January 2010. On 17 November 2010 she was refused leave to remain as a Tier 4 student and unsuccessfully appealed against that decision in February 2011. On 28 March 2014 the first appellant was refused an EEA residence card. On 14 December 2015 all three appellants were served with removal papers. On 16 March 2016 they applied on form FLR(O) for leave to remain outside the immigration rules under the parent and private life route.

3. The appellants' applications were refused on 28 July 2016. The respondent considered that the first appellant could not qualify under the parent route in Appendix FM as her children were not British or settled in the UK and had not lived in the UK for over seven years and that the children could not qualify under the child route under Appendix FM. The respondent considered that the appellants could not meet the requirements in paragraph 276ADE(1) on private life grounds and that there were no exceptional circumstances outside the immigration rules.

4. The appellants appealed against the respondent's decision and the appeals were heard in the First-tier Tribunal on 17 April 2018 by First-tier Tribunal Judge O'Hagan. It was conceded on behalf of the appellants that the only issue was whether the test set out in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 had been made out. The second appellant OO was, by the time of the hearing, a qualifying child and it was accepted that the first appellant had a genuine and subsisting relationship with her. The issue before the judge was whether it was reasonable to expect the second appellant to leave the UK. The judge considered evidence about OO's speech and language delay and the need for therapeutic input in that regard and considered, in regard to the first appellant's concerns, that it was unlikely that she was on the autistic spectrum. The judge noted that the children's father was in the UK but was not settled here and had applied for leave to remain but had not received a decision. There was no written evidence from him and he did not attend the hearing. The judge considered that it was in OO's best interests for her to be with her mother and to remain in the UK but did not accept that it would be unreasonable to expect her to leave the UK with her mother. The judge found also that the second child IO's interests were with remaining with her mother and sister. She was not a qualifying child. The judge considered that there were no very significant obstacles to integration in Nigeria and that the criteria in paragraph 276ADE(1) had not been met. The judge concluded that the public interest outweighed the private interests of the appellants and that the appeals had to be dismissed.

5. Permission to appeal against that decision was sought, and granted, on the grounds that the judge had failed to consider MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705 and had therefore failed to undertake a complete assessment of whether it was reasonable to expect the second appellant to leave the UK.

6. At an error of law hearing before Upper Tribunal Judge Hanson, the respondent conceded that, whilst the judge had referred to MA (Pakistan), he had not followed the guidance in that decision and in the later decision in MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88. On the basis of the respondent's concession, UTJ Hanson found an error of law in the First-tier Tribunal's decision and set it aside,

preserving the factual findings relating to the family's circumstances and those relating to immigration history. He made directions for the re-making of the decision which was limited to considering the test in section 117B(6) of the 2002 Act.

Appeal hearing and submissions

7. The appeal then came before me on 12 December 2018.

8. Mr Idowu relied upon the grounds of appeal submitted for the hearing, in which it was asserted that there had been a material change in circumstances since the refusal decision as the eldest child, OO, was now a qualifying child. Mr Idowu relied upon the case of ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 in submitting that the best interests of the children lay in remaining with their mother in the UK. Mr Idowu referred to the evidence of OO's health concerns and special needs and to the fact that she was born in the UK and had never been to Nigeria. He relied upon the case of MA (Pakistan) in submitting that it would be unreasonable to expect OO to leave the UK and that the appellants should be granted leave to remain.

9. Mrs Abone relied upon the refusal letter and the preserved findings of fact set out in Upper Tribunal Judge Hanson's error of law decision. She submitted that whilst OO was eight years of age and a qualifying child, it would not be unreasonable for her to leave the UK with her mother and younger sibling. The first appellant's status in the UK had always been precarious. OO was not at a critical stage in her education. She had required speech therapy but had been discharged. There was no evidence to support the appellant's concern that OO was on the autistic spectrum. There was no evidence from the children's father to support the first appellant's claim that he had a relationship with them. He had no immigration status in the UK. He had made an application for leave to remain on the basis of his parental relationship with the children but his application had been refused in July 2018 and he had an outstanding appeal listed for 13 March 2019. There was no reason why he could not return to Nigeria and maintain any relationship with the children in that country. The appellants had failed to show that there were any exceptional or compelling circumstances justifying a grant of leave outside the immigration rules.

Consideration and findings

10. The decision of the First-tier Tribunal was set aside upon the respondent's concession that it contained an error of law in that the guidance in MA (Pakistan) and MT and ET (Nigeria) had not been followed. The judge's findings of fact in relation to the family's circumstances were preserved and the issue before the Tribunal for the re-making of the appeal was consideration of section 117B(6) of the NIAA 2002.

11. The First-tier Tribunal's findings of fact are set out at [27], [29], [31] to [36] and [45] and can be summarised as follows. There are two children in the family, OO and IO, the eldest child OO being the only qualifying child. Whilst she has some speech and language difficulties, OO has now been discharged from speech therapy and has not been found to be on the autistic spectrum despite the first appellant's concerns. There are otherwise no concerns about her health. Whilst OO has established ties to the UK, as set out at [29] of the First-tier Tribunal's decision, her circumstances are essentially no different to any other

child of her age. As Judge O'Hagan found, OO's best interests lie in remaining with her mother, as do those of her sister IO. There was no challenge to the judge's finding that it would be in OO's best interests to remain in the UK. However, as the judge observed at [41], this is not a case in which the weight to be attached to the best interests is greater than that of any other child of her age. It was noted by the judge at [35] that the evidence of the children's relationship with their father was very limited and that remains the case, with no evidence to support the first appellant's claim that there is a subsisting relationship and contact between him and the children. Furthermore, as Mrs Abone clarified, the children's father has no immigration status in the UK, his application to remain on the basis of his parental relationship with the children had been refused and it is unlikely that he would succeed in his appeal in the current circumstances.

12. I therefore turn to the question of reasonableness. I have had regard to the principles set out in MA (Pakistan) and the finding of the Court of Appeal that the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. I have also had regard to the Upper Tribunal decision in MT and ET, and in particular the observations and findings at [31] to [34] in that regard. At [31] the Upper Tribunal observed that:

> "A much younger child, who has not started school or who has only recently done so will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part."

13. That is particularly relevant in two respects. Firstly that the child ET in that case was 14 years of age and was well advanced in her education, having already embarked on her course of studies leading to GCSEs, whereas OO is 8 years of age and is still in the early stages of primary education. Secondly, the reference to the child's position in the "wider world" leads into the most recent caselaw in KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent) [2018] UKSC 53, where the Supreme Court considered at [19] that there was no place within section 117B(6) and the concept of reasonableness for a balancing exercise which included the criminality or conduct of the parents and that "*There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves*." That followed the Court's quotation, at [18], from SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT 1245:

> "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …"

14. It seems to me that, following the same reasoning, there can only be one answer in the case of OO, namely that it is reasonable to expect her to leave the UK because her parents have no right to remain here. The first appellant has no basis of stay in the UK.

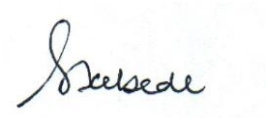
There is no evidence, other than the unsupported statement of the first appellant, of any contact between the children and their father. As Judge O-Hagan observed at [35] of his decision, the lack of evidence from him and his failure to attend the hearing is informative. In any event, as Mrs Abone submitted, there is no reason why he could not return to Nigeria himself to maintain contact with his children as he has no immigration status in the UK. Whilst OO is a qualifying child, there is nothing in her circumstances or in her ties to the UK which would suggest that it would be unreasonable for her to return to Nigeria with her sister and mother. There is no challenge to Judge O'Hagan's findings at [36],[45] and [46] in regard to the appellants' ability to integrate into Nigeria and, in the circumstances, it seems to me that section 117B(6) does not apply in the appellants' case. The remaining parts of section 117B were properly considered by Judge O'Hagan and remain unchallenged. Accordingly I am in agreement with the respondent that there are no compelling circumstances justifying a grant of leave to the appellants outside the immigration rules. Their removal from the UK would not be disproportionate and would not breach their Article 8 human rights and the appeals are therefore dismissed.

DECISION

15. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside. I re-make the decision by dismissing the appellants' appeals on Article 8 grounds.

Anonymity

The anonymity order made previously in the Upper Tribunal pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 is maintained.



Signed Dated: 13 December 2018
Upper Tribunal Judge Kebede