



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

Appeal Number: IA187192015

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham

**Decision & Reasons
Promulgated
On 27th June 2017**

On 16th June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**MJ
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Brooks of Counsel instructed by Wright Justice Solicitors

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Thomas of the First-tier Tribunal (the FtT) promulgated on 5th October 2016.
2. The Appellant is a male Nigerian citizen born in December 1975. His wife and four children are dependants in his appeal.

3. In August 2014 the Appellant applied for leave to remain in the United Kingdom based upon his family and private life.
4. The application was refused on 28th April 2015. The Appellant appealed to the FtT.
5. The FtT found that the Appellant could not satisfy the Immigration Rules contained within Appendix FM in relation to family life, and the requirements of paragraph 276ADE(1) in relation to private life were not satisfied. The FtT considered Article 8 outside the Immigration Rules. The FtT accepted that Article 8 was engaged but concluded that the public interest in maintaining effective immigration control, outweighed the weight to be attached to the family and private life of the Appellant and his family, and therefore found the Respondent's decision to be proportionate, and accordingly there was no breach of Article 8, and the appeal was dismissed.
6. The Appellant applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FtT had erred in concluding that the best interests of the Appellant's children lay in remaining with their parents and returning to Nigeria. It was noted that the eldest child, being 9 years of age, and having been born in the United Kingdom, would shortly be eligible to register as a British citizen based on ten years' residence.
7. It was submitted that the FtT had erred by failing to consider the private lives of the children in the United Kingdom, had inadequately considered proportionality, and failed to explain the conclusion at paragraph 27, that the children did not satisfy paragraph 276ADE because it was not unreasonable to expect them to return to Nigeria with their parents.
8. Permission to appeal was initially refused, but subsequently granted by Upper Tribunal Judge Rintoul in the following terms;

As is averred in the renewed grounds at 6(g), it is arguable that First-tier Tribunal Judge D A Thomas erred in failing to give adequate reasons why, given that at least one of the children has lived here for over seven years, it was reasonable to expect the family to return to Nigeria, given also the impact of section 117B(6) which is arguably not directly addressed.
9. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008. In summary it was contended that the FtT directed itself appropriately. The Respondent considered that the FtT had conducted a careful analysis of the evidence and had given reasons for the conclusions reached. The FtT looked at the circumstances in the round, and noted that the Appellant had been an overstayer and found that the Appellant and his wife had knowingly set out to establish themselves in the United Kingdom. The Respondent considered that although there was no specific reference to MA (Pakistan) [2016] EWCA Civ 705, the principles set out therein had been followed.

10. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

11. The Appellant attended and was represented by Mr Brooks who applied for an adjournment. Mr Brooks explained that the Appellant's eldest daughter had now made an application for British citizenship, and the Respondent had acknowledged the application by letter dated 17th May 2017. Mr Brooks requested an adjournment to await a decision upon the application for British citizenship.
12. Mr Mills opposed the application, submitting that the eldest daughter's application for British citizenship was not relevant to the issues before the Upper Tribunal.
13. I refused the adjournment application. I found that the result of the application for British citizenship would have no bearing upon the issue to be decided by the Upper Tribunal, which was whether the FtT had erred in law. The FtT decision had been promulgated as long ago as 5th October 2016, and the fact that an application for British citizenship had now been made, was irrelevant to the issues considered by the FtT.
14. I then heard oral submissions from Mr Brooks who relied upon his comprehensive skeleton argument dated 14th June 2017.
15. In brief summary Mr Brooks submitted that the FtT had erred in law as indicated by the grant of permission, and had failed to consider the interests of the Appellant's four children specifically and individually. I was asked to find that at paragraph 23 the FtT had adopted an incorrect starting point in finding that the children could return to Nigeria with their parents. The FtT should have considered the private lives of the children in the United Kingdom and the proposed interference with their private lives.
16. Mr Mills relied upon the rule 24 response. He submitted that the best interests of children must be considered separately from other considerations, but when considering the question of reasonableness, which was a separate test, then all circumstances must be taken into account, including the immigration history of the parents.
17. Mr Mills submitted that paragraph 12 of the Appellant's skeleton argument was incorrect on this point.
18. Mr Mills' submission was that the FtT had correctly considered the best interests of the children at paragraph 23. There was reference at paragraph 27 to the fact that it would not be unreasonable to expect the children to return to Nigeria with their parents. Paragraph 31 summed up the various issues in the appeal, and concluded that the Respondent's

decision was proportionate, and therefore it would be reasonable to expect the children to travel to Nigeria with their parents.

19. Mr Mills submitted that the challenge to the FtT decision related to form rather than substance, and even though there was no specific reference to section 117B(6) the FtT had considered the correct principles and reached a conclusion open to it, with sustainable reasons.
20. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

21. The primary challenge to the FtT decision relates to whether the FtT correctly assessed whether it would be reasonable for children who have acquired seven years' continuous residence to leave the United Kingdom, and whether adequate reasons were given.
22. The Appellant has four children, born 9th April 2007, 22nd September 2008, 25th July 2010, and 9th December 2013. All were born in the United Kingdom. The Appellant has had no leave to remain since June 2008.
23. When the application for leave to remain was made in August 2014 only the eldest child had acquired seven years' residence, and therefore only she could potentially benefit from paragraph 276ADE(1)(iv) which requires a child to be under the age of 18 years and have lived continuously in the United Kingdom for at least seven years at the date of application, and it would not be reasonable to expect the child to leave the United Kingdom.
24. However by the time of the hearing before the FtT, two of the Appellant's children had acquired seven years' residence, and when considering Article 8 outside the Immigration Rules, section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) needed to be considered in relation to both of them. For ease of reference I set out below section 117B(6);
 - (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.
25. Section 117D of the 2002 Act confirms that a qualifying child is a child under the age of 18 who is either a British citizen or has lived in the United Kingdom for a continuous period of seven years or more (at the date of hearing rather than the date of application).
26. The FtT found Article 8 to be engaged. That finding is not challenged. The FtT found that the Appellant could not satisfy the requirements of Appendix FM in relation to family life. That finding is not challenged.

27. The FtT set out the Appellant's immigration history at paragraph 3, and there has been no challenge to that history. It is clear that the FtT realised that the Appellant's wife and four children were dependants in his appeal. It is also clear that the FtT realised that all four children had been born in the United Kingdom, and at paragraph 4 the FtT found that the eldest two children had accrued more than seven years' continuous residence.
28. The Court of Appeal issued guidance in MA (Pakistan) on how to approach the question of reasonableness, when a child had accrued seven years' residence. It is correct that the FtT made no reference to this case, and there was no specific reference to section 117B(6). However, this without more, is not an error of law if the principles contained within the case law and section 117B(6) are followed.
29. The FtT appreciated that considering the best interests of the Appellant's four children, regardless of whether they had accrued seven years' residence, was a primary consideration, and the best interests of the children are considered in paragraph 23. This is a separate test from considering reasonableness, as when considering the best interests, as confirmed in Kaur (children's best interests/public interest interface) [2017] UKUT 00014 (IAC) the best interests of a child must be assessed in isolation from other factors, such as parental misconduct.
30. I do not find the FtT erred in law in considering the best interests of the children. I do not find that the FtT failed to consider any material factor when considering their best interests. It is clear that the ages of the children were taken into account, the fact that they were born in the United Kingdom, that they live with their parents in a close family unit and speak Igbo and English.
31. The FtT specifically referred at paragraph 23 to letters written by the eldest children expressing their wishes. The FtT accepted that they had made friends in this country, and that they undertook activities outside school. The health of the children was considered, and all found to be in good health save one of the boys who suffers from asthma and eczema.
32. The conclusion as to best interests, is that their best interests would be to remain with each other and their parents, and live in a country where they would have access to financial support, education and medical care. The FtT found, and gave adequate reasons for so doing, that these facilities would be available to the children in Nigeria as they are in the United Kingdom.
33. The question that must be decided, is whether the FtT having made a conclusion in relation to best interests, also considered, in the case of the two elder children, the issue of reasonableness. There is a brief reference to reasonableness in the context of paragraph 276ADE at paragraph 27 but this could only apply to the eldest child as only she had accrued seven years' residence at the date of application.

34. It may be said, that the FtT could have been clearer on the issue of reasonableness and had there been specific reference to section 117B(6), this would have made the position clear. However, in my view the FtT does go on to consider reasonableness, having made its conclusion on best interests at paragraph 23, by going on to consider proportionality at paragraphs 30 and 31. At paragraph 31 the FtT makes a specific reference to there being an educational system in Nigeria together with medical and mental healthcare and church communities. There is also reference to financial matters, the FtT concluding that the family would not be destitute. The FtT also considers the concerns expressed by the Appellant's wife in relation to FGM.
35. In my view, the FtT is considering reasonableness at paragraph 31, by making the point that the children were born in the United Kingdom, and cannot be held responsible for the actions of their parents. There was no reference to the actions of the parents when best interests were considered at paragraph 23 and that is the correct approach. However, MA (Pakistan) makes it clear (paragraph 101) that the court or tribunal can have regard to the wider public interest, including the immigration history of the parents.
36. The FtT at paragraph 31 considers the immigration history of the parents which is set out in paragraph 3, which confirms that the Appellant has had no leave since 2008, and it would appear that his wife has had no leave since 2007. In any event, the FtT was entitled, and bound to take this into account and was entitled to make the point that the parents had set out to establish themselves in the United Kingdom knowing that they had no status.
37. At paragraph 49 of MA (Pakistan) the point is made in relation to section 117B(6) that the fact that a child has been in the UK for seven years must be given significant weight and establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.
38. Although there is no specific reference to this by the FtT, this, I find, is what the FtT has considered. The FtT has taken into account the length of residence and the integration into the United Kingdom by the eldest two children, but also taken into account what their circumstances would be if they went to Nigeria, the country of which they are citizens. The reference by the Court of Appeal at paragraph 49 to "powerful reasons to the contrary" could encompass the immigration history of parents. In this case, that is the view taken by the FtT, having balanced the circumstances of the children in the UK and in Nigeria, and then added to that balance, the public interest, and specifically the consideration of the parents of the children deliberately remaining in the United Kingdom without leave for a substantial period of time.
39. Overall, I therefore conclude that the FtT has analysed all the material evidence, made findings and provided adequate reasons for those findings, and applied the appropriate legal principles.

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