



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11655/2016
HU/11670/2016
HU/11668/2016
HU/11656/2016

THE IMMIGRATION ACTS

Heard at Field House
On 13 July 2018

Decision and Reasons Promulgated
On 03 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

OCJ, DJ, OLUJ and OLAJ
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms U Miszkiel (for Jein Solicitors)
For the Respondent: Mr T Wilding (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. These are the appeals of OCJ, DJ, OLUJ and OLAJ, citizens of Nigeria born respectively on 22 November 1976, 16 April 2002, 30 May 2005, and 23 September 2008, against the decision of the First-tier Tribunal to dismiss their appeals on human rights grounds on 29 January 2018, those appeals originally having been brought against the decision of the Secretary of State of 21 April 2016 to refuse their claim to remain in the UK on human rights grounds.
2. I have made an anonymity order on the appeals. I acceded to an application for the appeal to be heard in private given the vulnerability of one of the children.

3. The application leading to this appeal involves the family and private life links that the family has established in this country, with particular importance being afforded to the situation of the children, who have all lived here for some years. The application was refused because it was not accepted that the return of the family to Nigeria would be contrary to the childrens' best interests given both their parents were free to return abroad with them, and as it was not established that the relationship between OCJ and OOJ was genuine and subsisting.
4. I take the history from the facts recorded and found by the First-tier tribunal. The father of the family, Mr OOJ, arrived in the UK on 14 October 2005 as a student; his leave was extended until 31 January 2008, and he was joined by OCJ, DJ and OLUJ, on 25 November 2007; they were granted leave in line with them. OLAJ was born in the UK in September 2008. Mr OOJ was refused a further student extension application, and his appeal was dismissed in early 2010. He was encountered working illegally and served with a notice of liability to removal; a further application for leave was refused on 11 June 2013, that refusal being maintained on reconsideration. Mr OOJ had a further adult son from a previous relationship, EOJ, who has been granted leave to remain on 5 April 2016 on the basis that he would face very significant obstacles to integration back in Nigeria, until October 2008.
5. The family has had at times a troubled existence in the UK. At times Mr OOJ has been separated from the mother. She presented herself and the children to the local authority in Bexley on 23 November 2013, stating she had no partner. Social services took an interest in the case because there was evidence that DJ was being sexually exploited. Nevertheless, by February 2017 it was clear that they were back together once again, as a social services report following a home visit had confirmed that the family was a close-knit unit.
6. The First-tier tribunal accepted that Mr OOJ had originally held leave in the UK and that the other family members began their residence in the UK lawfully, though they had ultimately overstayed for around eight years, a period longer than that over which they were legally resident; the motivation for their overstaying had never been made clear. The parents had worked at various times and also depended on charitable support including from Kids Company until its closure in 2015. They had presumably had some recourse to public funds via healthcare, and the children had been schooled at public expense. It was clear the family now lived together as a unit notwithstanding the reference to some family issues in the past. The parents spoke Yoruba to one another and remained fluent in the language; the children spoke English though could be assumed to have sufficient familiarity with Yoruba and to gain a command of the language if they relocated to Nigeria.
7. The parents had links abroad, though it was reasonable to assume they would not have retained a Nigerian home there given their length of residence in the UK. There were extended family members in Nigeria, although OCJ was vague as to her knowledge of

them: however, as she had lived there until the age of 31, it was not credible she did not know them.

8. DJ had apparently done well in school since the period over which social services expressed concerns. She aspired to study in the UK with a view to becoming a forensic psychologist. The childrens' school behaviour was described as exemplary, and they attended church and valued their friendships outside school and the family unit. They had a relationship with their British citizen grandmother.
9. In Nigeria there was a functioning education system which the children could attend; common sense dictated there would be a difficult period of transition and the standard would not match that presently available to them. The parents had clearly (and understandably) aimed to secure a better life for themselves and their children in a country more secure and prosperous than their own.
10. Having set out its primary findings of fact, the First-tier tribunal directed itself to the relevant authorities, including *MA (Pakistan)* the effect of which it summarised as "Even where the child's best interests are to stay, it may still not be unreasonable to expect them to leave" having regard to public interest factors including the parents' immigration history.
11. The Judge considered there was no reason to think the parents could not reintegrate in Nigeria, where they have studied and worked, and where they were familiar with the language, and were not from minority groups that might be at society's margins. They would not be outsiders. The family might well face some diminution in its standard of living (though in a context where they had recently subsisted at a meagre level). They would nevertheless not face destitution or particular hardship albeit they would lose the assistance they receive in the UK. It was to be assumed that there would be some family support available to them such that childcare responsibilities would not prevent them working.
12. The older step-brother, EOJ, who had been granted leave to remain, was at a time in his life when he would necessarily be moving towards independence; he might well be a member of the household but there was no firm evidence to say that the childrens' best interests would be affected by separation from him though their preference would be to remain with him. It would be in the best interests of the children to continue their high quality free education here, though "not overwhelmingly so" given there was a reasonable standard of education available in Nigeria. Doubtless they would be upset but there was no evidence they would suffer a particularly adverse reaction to a move to Nigeria.
13. The youngest child OLAJ would be able to make an application for British nationality by registration in September 2018 but that time had not yet been reached. DJ would have no clear memories of her life in Nigeria, and had extensive UK ties including extra-curricular activities outside school. At this moment, she was at a critical stage of her

education, but in 2-3 months time she would have sat her GCSEs, and that might be said to be a convenient point to leave the UK's educational system and to convert to another, given the natural break in studies she would face between GCSEs and A levels. Notwithstanding her significant difficulties in the past, given her academic prowess she could be expected to meet the challenges of a change of school.

14. Looking at the section 117B factors, the family had been a heavy drain on public finances, though they could speak good English. Their residence was precarious and it was necessary to give little weight to private life ties established during this time.
15. Grounds of appeal of 12 February 2018 argued that the First-tier tribunal decision was flawed because
 - (a) No finding had been made as to the family's entitlement to remain under the Immigration Rules;
 - (b) The language of the decision repeatedly indicated that a higher test had been applied than one of reasonableness: eg the search for a "particularly adverse reaction" to return to Nigeria and for "significant damage or harm" caused by relocation, indicating a test more akin to undue harshness than one of reasonableness had been applied;
 - (c) The Judge had directed himself that he should determine the appeal based on facts at the date of that hearing when assessing the possible future entitlement of one child to register as a British citizen in September 2018, but then inconsistently indicated that another child could be expected to return abroad after another future event, her imminent GCSEs;
 - (d) The connections of the most integrated child, DJ, were such the case for her appeal's success was almost irresistible: she had spent a decade here since the age of five, was at a critical stage of her education, knew no other country, and had expressed her own wish as to remain here with her friends and relatives.
16. Judge Buchanan granted permission to appeal on 25 May 2018 on the basis that there might have been a material error of law in identifying a prospective date at which DJ's education might be interrupted, though without limiting the grounds that might be argued.
17. Ms Miszkiel developed the grounds of appeal, arguing that it was possible (though unclear) that the children satisfied Rule 276ADE(iv) at the date of application, and that by failing to make a finding on this issue, the First-tier Tribunal had discounted the potential advantage they should have enjoyed by having an (arguably) tenable case under the Rules. She emphasised the evidence going to the vulnerability of DJ, which she submitted had been seriously underplayed in the Tribunal's reasoning. Finally she

argued that the appropriate heightened protection given to a qualifying child had not been recognised by the Judge below: the proper approach was exemplified by the Upper Tribunal's decision in *MT and ET Nigeria* [2018] UKUT 88 (IAC).

18. Ms Miszkiel emphasised the potential relevance of *NS (Sri Lanka) and others* (UKSC 2016/0187) and *Pereira* (UKSC 2016/0207), on which judgment from the Supreme Court is pending, and reserved her position as to whether the present state of the law was correct. She applied for permission to appeal to amend the Appellant's grounds of appeal in order to take the point that *MA (Pakistan)* was wrongly decided. Given I have ultimately allowed that appeal on the law as it stands, it is unnecessary to address that application further. Nevertheless her position merits recording, to demonstrate that she reserved her position, as she was entitled to do, on the correctness of present binding authority.

Findings and reasons

19. Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 explained that wider public interest considerations had to be taken into account when assessing the reasonableness of a child's relocation, beyond its best interests. The fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise as was shown by the Secretary of State's published guidance from August 2015 in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave, because 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. Nevertheless, it may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling. The statutory provision "establishes as a starting point that leave should be granted unless there are *powerful reasons* to the contrary" (emphasis added).
20. In *MT and ET Nigeria* [2018] UKUT 88 (IAC) the Upper Tribunal examined the "best interests" question in a seven-year resident child case, where a mother and daughter had lived in the UK for around a decade (for the latter, from the age of four to fourteen) by the time of the appeal hearing. The First-tier Tribunal had found that the daughter had no memory of Nigeria and was well integrated in school and socially; it was clearly in her best interests to remain in the UK. However, her mother had overstayed her original visit visa, pursued a false asylum claim and received a community order for using a false document to obtain employment. The Judge concluded that the child's uprooting from school and loss of her friends would be no different to the common experience of any child whose parents decided to make a significant move abroad or otherwise.
21. The Upper Tribunal found a material error of law in the approach below, and upon re-determining the appeal, disagreed with the First-tier Tribunal's assessment. It relied on *MA Pakistan* for the proposition that seven years' residence in the UK

“establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary”. As it put it, it was necessary to look for "powerful reasons" why a child who has been in the United Kingdom for over ten years should be removed, notwithstanding that her best interests lie in remaining. Accordingly the mother was merely a somewhat run of the mill immigration offender who came to the United Kingdom on a visit visa, overstayed, made a claim for asylum that was found to be false and who has pursued various legal means of remaining in the United Kingdom: these were not sufficiently powerful reasons to counteract the child's best interests when assessing reasonableness: the appeal was accordingly allowed.

22. Unfortunately it was not possible to identify the date of the applications made by the family to remain in the UK. This theoretically simple task was wholly obscured by the relatively complicated history of applications and reconsiderations. From the history provided in the papers, I am simply unable to determine, on balance of probabilities, when the applications were made. Given the burden of proof lies on the Appellants, this means that they cannot demonstrate whether or not they satisfy the Rules at the date of application, that being uncertain. However given that the enquiry inside and outside the Rules is virtually identical, I do not consider that this makes any material difference to the outcome of the appeals.
23. I do not consider that the First-tier Tribunal took an irrational approach to its assessment of the differing circumstances raised by the prospective future application for British citizenship that one child might successfully make, on the one hand, and on the other, concluding that there would soon be a foreseeable natural break in DJ's studies. The law attributes a particular consequence to the status of British citizen, which is a status that one either has, or one does not. On the other hand, a child's educational path is tolerably predictable: that is simply a matter of common sense.
24. However, I consider the other grounds have greater force. There is a real difference in the test to be applied to the circumstances of a *qualifying* child than to a *non-qualifying* one: the latter must have their case assessed by reference to their "best interests", but the former has the additional benefit of a statutory starting point which recognises that the possession of seven years' residence will normally lead to the putting down of significant roots such that "powerful reasons" need to be identified before it is proportionate for those roots to be severed. The First-tier Tribunal's self-direction as to the impact of *MA (Pakistan)* did not identify this critical feature of the judgment.
25. The failure to cite every aspect of a governing authority is not necessarily fatal to a decision; it is necessary to read the decision as a whole to see if the principles have nevertheless been applied. Here it seems to me that they have not: this is shown by the Judge stating that there would be no "*particularly adverse reaction*" to return to Nigeria and that the children would suffer no "*significant damage or harm*" there. The

threshold implied by this language is to my mind quite inconsistent with the true enquiry, which seeks to identify whether there are “powerful reasons” calling for a qualifying child’s return abroad.

26. The Tribunal gave the briefest of mention to one very distinctive feature of this case. DJ is documented as having suffered serious sexual exploitation in the past. A Child and Family assessment report by Bexley social services and dating from 2005 stated that DJ had been the subject of concern following meetings with the school nurse which had revealed concerns as to her potential for sexual exploitation. Whilst aged 13 she had shown willingness to have sex with strangers in return for money, behaviour apparently driven by her fears regarding the family’s precarious financial situation. She had seemed unaware of the risks and dangers that might ensue and appeared low in mood. An assessment rated her as scoring highly because of her severe depression, self-harm and suicidal thoughts.
27. The very specific circumstances of DJ demanded attention via this rubric. Given she was a child who was documented as having become susceptible to sexual exploitation when the family was previously under significant pressure from external events and struggling to adapt, it was essential that the possibility of a recurrence of similar pressures received express attention.
28. I accordingly find there is a material error of law in the decision appealed. That is a threshold error as to the prism via which the evidence as a whole was addressed, and accordingly it undermines the conclusions of the First-tier Tribunal, notwithstanding the care and attention it otherwise applied to its task.

Remaking the decision

29. Having reviewed the papers and the evidence potentially available, it seems to me that it is appropriate to finally determine the appeal. Both sides made all the arguments available to them at the hearing before me, and the fact-finding conducted by the First-tier Tribunal was exceptionally thorough. Indeed, it itself identified all the relevant arguments for and against the grant of leave to remain, though for the reasons addressed above, assessed them via the wrong prism.
30. I can be relatively succinct in my conclusions given the clarity of the evidence set out below. The starting point is that this is an appeal where there are three qualifying children, of which not one, but two, have the same length of residence as the child in *MT and ET*. DJ and OLUJ have lived here, respectively, from the ages of five and two, until the ages of sixteen and thirteen. OLAJ was born in this country and has never lived in Nigeria. The presence of not one but three qualifying children is a very significant, and relatively rare, feature of the appeal. That means that three individual children, each at a point in their lives which is recognised in the government’s own Rules as demanding particularly careful attention, stand to be affected by the immigration decision.

31. Drawing together the legal threads above, it is clear that, when assessing the reasonableness of a child's relocation, stability and continuity of social and educational provision, and an upbringing consonant with the cultural norms of the society to which their parents belong, are usually in their best interests. Generally speaking greater weight will attach to the private life of children who have been developing private life connections outside the family unit, and as a rule of thumb residence from the age of four upwards, when the child is developing external ties, is of particular importance. *Azimi-Moayed* encapsulates the starting point, showing the facts of the individual case must be evaluated with care.
32. Here one child has never been to Nigeria, and the others will have no significant memories of the country. Here in the UK DJ has plainly for some years been developing life outside the family unit, and has spent more than seven years in school. The evidence is that she has a significant number of good friends, and is well-settled there. DJ was put forward at the family's "best case", but similar considerations must be presumed to apply to OJUJ, given her own length of residence: applying *Azimi-Moayed* thinking to her, she too must be assumed to have very significant UK ties with her course of study, and friends from school and church, in her own right. I attach significant weight to the factor identified above vis-à-vis DJ: she is clearly a vulnerable youngster, and I am unable to conclude that the fact she has been on an even keel for a couple of years means there is no significant risk of a reversion to her more troubling behaviour were the family to face straitened circumstances in the future.
33. I join with the First-tier Tribunal in concluding that the childrens' best interests would be served by remaining in the UK where they are established in school and have extensive friendship networks outside the family unit. So the remaining question is to assess the reasonableness of their relocation to Nigeria, taking account of all relevant factors including the immigration history of their parents.
34. The Secretary of State has published a policy document, *Every Child Matters - Change for Children*, as statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children, which refers to the definition of this task found in section 11 of the Children Act 2004 and in the policy guidance Working Together to Safeguard Children, as "ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully." A dramatic change in schooling arrangements visited upon children who are well-established in their existing schools (including one who has responded very badly to external pressures in the past) would undoubtedly threaten their ability to enter adulthood successfully.
35. I recognise, as did the First-tier Tribunal, that the parents are likely to have some connections in Nigeria. However, they have not worked there for a very significant

period, and they are accepted as not having retained a home there. There would clearly be a difficult period of transition, and one cannot be confident that there would be adequate childcare arrangements available to them simply on the basis that there are unspecified extended family members who might step in to help out: there can be no assurance that any such family members would be in the same area as where the parents might find work.

36. Weighing the positive factors against the negative ones, it seems to me that the negative factors, whilst present in the equation, are not especially strong. Section 117B of the NIAA 2002 identifies aspects of the public interest that must be afforded particular attention. The family are fluent in the English language, so that does not count against them (thus, applying *Rhuppiah* [2016] EWCA Civ 803 §44, that is a matter that is neutral rather than in their favour). I am aware at the time of writing that the Secretary of State has conceded the relevance of third party support before the Supreme Court in *Rhuppiah* when the question of financial independence falls to be considered. On the evidence, the family has received significant support in the past from the community. Of course, the children have been a burden on public funds in their schooling, and family members may have had recourse to the NHS over time, though there is no suggestion of any significant illness that would have led to more than a relatively minimal interaction with the health authorities. There has been involvement by social services in the past, though that was at least partly with a view to securing the best interests of a vulnerable child, and the family is presently on a much more even keel, making further recourse unlikely. It seems to me to be foreseeable on balance of probabilities that the parents, who are clearly resourceful, will between them be able to find work than should significantly diminish any cost to the public purse going forwards.
37. That leaves the question of the precariousness of the family's residence. I have particular regard to *MT and ET Nigeria* as a useful benchmark in terms of identifying the kind of case where considerations of immigration history can be expected to outweigh a young child's strength of connections in this country. There a history of overstaying and a false asylum claim were considered not to outweigh a child's interests, in circumstances where the child in question had resided in the UK for an equivalent period to two of the children here. Nevertheless, here the mother has merely overstayed, albeit for a significant period. One should not downplay the severity of that: clearly overstaying is contrary to government policy, is potentially a criminal offence, but nevertheless context is everything. The children cannot be blamed for integrating themselves in the society where they have found themselves.
38. I conclude that the positive features of the case outweigh the negative ones and on balance I find that the Appellants' departure from the UK would be disproportionate to their private and family life.

Decision:

The decision of the First-tier Tribunal contains material errors of law.
Remaking the decision, I allow the appeal.

Anonymity Order

I make an anonymity order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure of any information or matter likely to lead members of the public to be able to identify the Appellant.

A handwritten signature in black ink, appearing to read 'M.A.S. Symes', with a long horizontal flourish extending to the left.

Signed:
Deputy Upper Tribunal Judge Symes

Date: 17 July 2018