Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10198/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre	**Decision & Reasons Promulgated**
On 27 February 2018	**On 24 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Z T
(ANONYMITY ORDER CONTINUED)

Respondent

Representation:
For the Appellant: Ms H Aboni, Senior Home Office Presenting Officer
For the Respondent: Mr M Moksut, instructed by International Immigration Advisory Services

DECISION AND REASONS

1. The appellant is the Secretary of State for the Home Department. She was the respondent in the First-tier Tribunal.

2. The appellant appeals with permission to the Upper Tribunal against the decision and reasons statement of First-tier Tribunal Judge M A Hall that was promulgated on 20 March 2017.

3. The appellant challenges only one part of Judge Hall's decision. The appellant disagrees that the fact the respondent's eldest child was preparing for GCSE exams in the summer of 2017 was a compelling factor that required a short period of leave to be granted. Judge Hall indicated that once the exams had been taken, it would be reasonable to expect the respondent and her children to return to Nigeria.

4. There is no challenge by the appellant to the other findings made by Judge Hall. Judge Hall decided the respondent was not a refugee or otherwise in need of international protection. By analogy, the respondent's claim under article 3 ECHR failed.

5. Judge Hall decided the respondent enjoyed family life with her three children in the UK. All were overstayers. At the date of promulgation, the children had been living in the UK for six years and four months. Judge Hall found the respondent could not benefit from any provision of the immigration rules. This meant there was public interest in her expulsion with her children because it was necessary to maintain effective immigration controls. Judge Hall also found none of the children was a qualifying child and therefore the respondent did not benefit from s.117B(6) of the Nationality, Immigration and Asylum Act 2002.

6. Having heard from Ms Aboni and Mr Moksut, I concluded that Judge Hall erred in finding that the pending GCSE exams was a compelling factor that outweighed the public interest. I reach this conclusion because there is no indication in the decision and reasons statement that Judge Hall had in mind the following factors, although he was required to take them into consideration.

   (i) The child was being educated at public expense, meaning it was in the public interest to expel her because her presence undermined the economic wellbeing of the UK.

   (ii) The child had no right to be educated in the UK, being an overstayer. Education is part of a person's private life as clearly expressed by Lord Carnworth in *Patel & Ors v Secretary of State for the Home Department* [2013] UKSC 72, [2014] Imm AR 456.

   (iii) Sections 117B(4) and (5) specify that little weight must be given to a person's private life established when the person was in the UK unlawfully or whilst the person's status was precarious. This applied not only to the respondent, but to her eldest child as well.

7. By not considering these factors, I find Judge Hall failed to properly balance the public interest factors with the best interests of the child in question and therefore with the respondent and her other children.

8. I am fortified in this conclusion by the fact Judge Hall does not explain why it was necessary for the child to take the exams before leaving the UK. Judge Hall clearly had in mind that the child's future would be in Nigeria. There was no evidence from the respondent that her oldest child would not be able to enrol as an external candidate for the same exams; or to

take similar exams in Nigeria, or postpone them. There was no evidence the child would suffer any detriment from such actions. It was for the respondent to provide such evidence and she did not. To this extent, the best interests' assessment carried out by Judge Hall was incomplete.

9. It follows from the above that I set aside the erroneous conclusion.

10. I indicated to the representatives that this was a case where it would not be appropriate to remit to the First-tier Tribunal. I reminded them that directions had been issued on 8 September 2017, paragraph 4 of which reminded the parties that it was presumed that the re-making of the decision would take place at the same hearing. The remaining directions addressed the submission of further evidence.

11. Mr Moksut advised that the respondent had not provided any further evidence in support of her own or her children's situations. Mr Moksut suggested the respondent had only recently been represented in the case, not having had legal representation at the hearing before Judge Hall. I realise Mr Moksut was instructed as an agent and may not have been aware that the respondent has had access to legal advice from International Immigration Advisory Services throughout all stages of her appeal. It was her choice not to have a legal representative present at the earlier appeal hearing, as confirmed in correspondence to the First-tier Tribunal. Given the directions issued and the legal advice available, there is no reasonable explanation for the failure to submit further evidence.

12. Mr Moksut pointed out that at the date of hearing in the Upper Tribunal the children had all resided in the UK for over seven years. I am aware that I must have regard to the fact they are qualifying children for the purposes of s.117B(6). Mr Moksut said he had up dated school reports for the children. I declined to admit them because they were not submitted in accordance with directions. I also pointed out that they would add nothing material to the case because none of the children has a right to be educated at public expense in the UK, remembering the issues I have already identified and discussed above.

13. Mr Moksut had no explanation why the appellant had not left the UK with her children after her eldest child completed her GCSE exams. The respondent was present at the hearing. I can only conclude that the respondent is not willing to cooperate with the legitimate aim of immigration control. I also infer from the submissions made that the respondent may think she automatically derives a benefit from s.117B(6) now her children have lived in the UK for over seven years. If that is her belief, or the advice she has been given, then she is mistaken. The law requires me to consider whether it is reasonable to expect the children to leave the UK. Only if I find it is not reasonable to expect them to leave will the respondnt draw a benefit.

14. To answer this question, I must follow the guidance given by the Court of Appeal in *R (MA (Pakistan) & Ors) v Secretary of State for the Home*

Department & Anor [2016] EWCA Civ 705, [2017] Imm AR 53. In summary, the question of reasonableness is not limited to the best interests of the children but requires me to consider the entirety of the circumstances.

15. It is evident from Judge Hall's decision (and the findings on these issues are unchallenged) that there is significant public interest in expelling the respondent and her children. Nothing has changed other than the passage of time. The only factor that has in fact changed is that the eldest child has taken her exams. Judge Hall, at paragraph 86, found that it would be appropriate for the respondent and her children to return to Nigeria.

16. I have no evidence to suggest that assessment is no longer valid. I conclude that on all the available evidence it is reasonable to expect the qualifying children to leave the UK. Therefore, the respondent draws no benefit from s.117B(6).

17. It follows that I substitute a decision to dismiss the appeal against the decision to refuse a protection and human rights claim. The decision is not unlawful under s.6 of the Human Rights Act 1998.

Notice of Decision

NB The respondent is ZT, who was the appellant in the First-tier Tribunal.

There is no legal error in First-tier Tribunal Judge Hall's decision in relation to the protection claim. His decision to dismiss that part of the respondent's case is upheld.

There is legal error in First-tier Tribunal Judge Hall's decision in relation to the article 8 ECHR rights of the respondent and her children. That decision is set aside.

I remake the decision in relation to the article 8 rights of the respondent and her children and substitute "dismissed" for the outcome of that part of the respondent's appeal in the First-tier Tribunal.

Signed Date 28 February 2018

Judge McCarthy
Deputy Judge of the Upper Tribunal

Order regarding anonymity

I make the following order. I prohibit the parties or any other person from disclosing or publishing any matter likely to lead members of the public to

identify the respondent or her children. The respondent can be referred to as "ZT".

Signed Date 28 February 2018

Judge McCarthy
Deputy Judge of the Upper Tribunal