Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/06020/2018
HU/06029/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th May 2019	**On 24 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ASM (FIRST APPELLANT)
GAAM (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms E Lanlehin of Counsel (directly instructed)
For the Respondent: Miss J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appealed against a decision of Judge Manyarara (the judge) of the First-tier Tribunal (the FtT) promulgated on 29th October 2018.

2. The Appellants are Nigerian citizens born 8th March 1971 and 20th October 2011 respectively. The first Appellant is the mother of the second Appellant.

3. The Appellants made a human rights claim on 20th February 2017 seeking leave to remain in the UK. The first Appellant contended that she had resided in the UK since 1995, and the second Appellant was born in the UK. The application was refused on 16th February 2018.

4. The appeals were heard together on 8th October 2018. The judge produced a comprehensive decision dismissing the appeals on all grounds. The judge rejected the first Appellant's claim to have been residing in the UK since 1995. It was found that the first Appellant had resided in this country since 2003. She had therefore not resided in the UK for twenty years.

5. The judge found the first Appellant could not satisfy the requirements of paragraph 276ADE(1)(vi) as there would be no very significant obstacles to her integration into Nigeria. The judge did not find any compelling or exceptional circumstances existing in relation to the first Appellant.

6. With reference to the second Appellant, the judge found that she was not a qualifying child at the date of hearing. The best interests of the second Appellant would be to remain with her mother, and the judge concluded that the removal of the Appellants from the UK would be proportionate and there would be no breach of Article 8 of the 1950 European Convention.

7. The Appellants applied for permission to the Upper Tribunal in relation to the findings made by the judge in relation to the second Appellant. It was submitted that the judge had erred by providing inadequate reasoning and had not reached a firm conclusion as to whether the second Appellant's best interests would be served by remaining in the UK. It was submitted the judge could not carry out an adequate proportionality assessment, not having made a finding in relation to the second Appellant's best interests.

8. It was submitted that the judge had erred by finding that the second Appellant was not a qualified child at the date of the FtT decision which was 24th October 2018. It was contended that the second Appellant at that date was a qualified child for the purpose of paragraph 276ADE(1)(iv).

9. It was further contended that the judge had fallen into error by failing to treat the second Appellant as a qualifying child, and failing to take into account case law such as MA (Pakistan) [2016] EWCA Civ 705, and MT and ET (Nigeria) [2018] UKUT 00088 (IAC). It was contended that the judge had erred by adopting a wrong approach and failing to recognise that the attainment of seven years' residence in the UK as a child should lead to a grant of leave to remain unless there are powerful reasons to the contrary.

10. Permission to appeal was granted by Judge Grimmett of the FtT.

Error of Law

11. On 27th February 2019 I heard submissions from both parties in relation to error of law. The Respondent contended that there was no material error.

On behalf of the Appellants reliance was placed upon the grounds upon which permission to appeal had been granted. Full details of the application for permission to appeal, the grant of permission, the submissions made by both parties and my conclusions are contained in my decision dated 28th February 2019 promulgated on 11th March 2019. I found that the judge had erred in law in considering the position of the second Appellant, and set aside the FtT decision. I set out below paragraphs 13–23 of my decision, which contain my conclusions and reasons for setting aside the FtT decision;

> "13. I do not accept that it can fairly be said that the judge did not consider the best interests of the second Appellant. At paragraph 94 the judge concludes;
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> > "94. Next, I give primacy to the best interests of the child. I hold that the best interests of these children will primarily be served by the maintenance of the family unit. In the absence of any compelling circumstances, I have given effect to the public interest in the maintenance of effective immigration controls."
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> 14. The conclusion of the judge is that as the first Appellant would be returning to Nigeria, the best interests of the second Appellant would be served by remaining with her and travelling to Nigeria.
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> 15. I do not accept the contention contained in the grounds, or in Counsel's speaking note, that the second Appellant is a qualifying child with reference to paragraph 276ADE(1)(iv). In order to be a qualified child under this provision, a child must have been living in the UK continuously for seven years at the date of application. It is common ground that the date of application was 17th February 2017. The second Appellant, who was born in the UK, had not lived in this country continuously for seven years at that date.
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> 16. However for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) there is no requirement that a child must live in the UK continuously for seven years at the date of application. The definition of a qualifying child is contained in section 117D(1) and means a person under the age of 18 who is a British citizen or who has lived in the UK for a continuous period of seven years or more.
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> 17. I am persuaded that the judge erred in not treating the second Appellant as a qualifying child. The second Appellant was born on 20th October 2011 and therefore had accrued seven years' continuous residence in this country on 20th October 2018. The hearing took place on 8th October 2018 and therefore the judge was correct as at that date the second Appellant had not accrued seven years' continuous residence. However the judge did not make her decision at the hearing date. The decision was made on 24th October 2018 and promulgated on 29th October 2018. Therefore at the date of the FTT decision and date of promulgation the second Appellant was a qualifying child in accordance with the definition in section 117D of the 2002 Act.

18. Therefore in my view the judge should have considered section 117B(6) which provides in the case of a person who is not liable to deportation, the public interest does not require the person's removal, where the person has a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect the child to leave the UK.

19. The judge should have considered whether it would be reasonable for the second Appellant to leave the UK by reliance upon case law such as MA (Pakistan) in which it was held at paragraph 49 that the fact that a child had been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons, first because of its relevance to determine the nature and strength of the child's best interests, and second because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.

20. The Respondent's own guidance in force at the date of the FTT decision, which was published on 22nd February 2018 contains at page 75 the guidance that "strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more."

21. Therefore, notwithstanding the comprehensive nature of the judge's decision, I am persuaded that she erred in law by not treating the second Appellant as a qualifying child as at the date of her decision, and therefore adopted an incorrect approach when assessing whether it would be reasonable to expect the second Appellant to leave the UK. The decision of the FTT is therefore unsafe on this point and the decision is set aside.

22. There was no challenge to the findings made by the judge in relation to the first Appellant and those findings stand. This is not an appropriate case to remit to the FTT. The decision does need to be remade but it can be appropriately remade by the Upper Tribunal.

23. There will be a further hearing before the Upper Tribunal the purpose of which is to consider the best interests of the second Appellant and whether in the circumstances it would be reasonable to expect her to leave the UK. Findings made in relation to the first Appellant are preserved."

Remaking the Decision – Upper Tribunal Hearing

12. The first Appellant attended the hearing but Ms Lanlehin indicated that no further oral evidence would be called. I received from Ms Lanlehin a skeleton argument.

13. I ascertained that I had all documentation to be relied upon by the parties. This was the documentation that had been before the FtT which amounted to the Respondent's bundle with Annexes A-F, and a bundle prepared on behalf of the Appellants with Annexes A–B.

14. The representatives made oral submissions. On behalf of the Appellants reliance was placed upon the skeleton argument. In brief summary it was submitted that the best interests of the second Appellant would be to remain with her mother and to remain in the UK. Section 117B(6) must be considered and it was argued that it would not be reasonable for the second Appellant to leave the UK. It was submitted that the Respondent had not demonstrated that there were any compelling or powerful reasons to indicate that it would be reasonable for the second Appellant to leave the UK. Therefore the public interest did not require either Appellant to leave the UK.

15. Miss Isherwood disagreed and submitted that the only evidence produced on behalf of the second Appellant indicated that she attended school and had more than seven years' continuous residence in the UK. She is only 8 years of age, and Miss Isherwood pointed out that Azimi-Moayed [2013] UKUT 197 confirmed that seven years' residence from age 4 is likely to be more significant to a child than the first seven years of life. The second Appellant had not accrued seven years' residence from age 4. It was submitted that it would be reasonable for the second Appellant to leave the UK and return to Nigeria with her mother.

16. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

17. It is accepted on behalf of the Appellants that they cannot satisfy the requirements of the Immigration Rules. I am asked to consider Article 8 of the 1950 Convention outside the Rules. I find that Article 8 is engaged. The Appellants have established family life together, and private lives. There would be no interference with their family life if they were removed to Nigeria together. If the first Appellant did not have a child, her appeal would fail.

18. The burden of proof lies on the Appellants to establish their personal circumstances in the UK, and to establish that family and private life exists which engages Article 8, and why the decision to refuse their human rights claim interferes disproportionately in their family and private life rights in this country. It is for the Respondent to establish the public interest factors weighing against the Appellants. The standard of proof is a balance of probabilities throughout. In deciding this appeal I take into account the balance sheet approach recommended at paragraph 83 of Hesham Ali [2016] UKSC 60.

19. The factual matrix is that the Appellants live together in the UK. The first Appellant has lived here since 2003. The second Appellant was born in the UK and has not visited Nigeria. She is in the early stages of her education.

20. The best interests of a child must be considered as a primary consideration but not a paramount consideration, and not the only consideration. Factors relevant to considering the best interests of a child

are set out in paragraph 35 of EV (Philippines) [2014] EWCA Civ 874. The factors involve considering the age of the child, the length of time the child has been in the UK, how long the child has been in education and what stage the education has reached. There must also be consideration of the extent to which the child has been distanced from the country where it is proposed they return, how renewable the connection with that country may be, and to what extent the child would have linguistic, medical or other difficulties in adapting to life in that country, and the extent to which the course proposed would interfere with the private life of the child or the child's rights if there are any, as a British citizen.

21. Because of the age of the child it is clear that her best interests would be served by remaining with her mother. She was born in the UK and therefore has now been living continuously in this country for eight years and seven months. She is in the early stages of her education and not at a critical stage. It is relevant that the second Appellant has never visited Nigeria, but I do not find that there would be significant linguistic, medical or other significant difficulties in adapting to life in Nigeria.

22. If the second Appellant was removed to Nigeria this would interfere with the private life that she has established. She is not a British citizen, but I am satisfied that she regards this country as her home, as she has never known any other country, she speaks English, and as one would expect, has made friends with other children, both inside and outside school. Taking all those circumstances into account, I conclude, on balance, that the best interests of the second Appellant would be to maintain the status quo and for her to remain in the UK. This does not however mean that her appeal must be allowed. I must consider any other relevant considerations.

23. I must have regard to the considerations in section 117B of the 2002 Act, which confirms that the maintenance of effective immigration controls is in the public interest.

24. In particular I must consider section 117B(6) which for ease of reference I set out below;

> '(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
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> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
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> (b) it would not be reasonable to expect the child to leave the United Kingdom.'

25. The first Appellant is not liable to deportation. It is accepted that she has a genuine and subsisting parental relationship with the second Appellant. The second Appellant is a qualifying child because she has resided continuously in the UK for a period in excess of seven years.

26. I therefore must decide whether it would not be reasonable to expect the second Appellant to leave the UK. I find it is relevant to follow the guidance, on this point, contained in MA (Pakistan). At paragraph 49 it is confirmed that seven years' continuous residence in the case of a child must be given significant weight, not only in relation to the child's best interests, but because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary. The Respondent's own guidance makes a similar point. This is referred to at paragraph 20 of my error of law decision, which confirms that "strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more".

27. It has now been established that when considering the issue of reasonableness, I must consider the position of the child, without taking into account the immigration history of the parents. This was confirmed in KO (Nigeria) [2018] UKSC 53 and I set out below paragraphs 16 and 17 of that decision;

> "16. It is natural to begin with the first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DP5/96 it contains no requirement to consider the criminality or misconduct of a parent as a balancing factor. It is impossible in my view to read it as importing such a requirement by implication.
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> 17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is 'reasonable' for the child. As Elias LJ said in MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber) [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Section 117B(6) is on its face freestanding, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv)."

28. I also follow the guidance in AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661 and set out below paragraph 59 of that decision;

> "59. Accordingly, the position has now been reached in which this Court is not only free to depart from the approach taken by Laws LJ in MM (Uganda) but indeed is required to do so in order to follow the binding decision of the Supreme Court in KO (Nigeria).

That can be done by following the preferred approach of Elias LJ in MA (Pakistan), at para 36, where he said:

> "Looking at section 117B(6) free from authority, I would favour the argument of the appellants. The focus on paragraph (b) is solely on the child and I see no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest. I do not deny that this may result in some cases in undeserving applicants being allowed to remain, but that is not in my view a reason for distorting the language of the section. Moreover, in an appropriate case the Secretary of State could render someone liable to deportation, and thereby render him ineligible to rely on this provision, by certifying that his or her presence would not be conducive to the public good.""

29. Because of the second Appellant's length of continuous residence, I find I must follow the guidance in MA (Pakistan), that as a starting point leave must be granted unless there are powerful reasons to the contrary. I do not find that the immigration history of the first Appellant is relevant when considering reasonableness. I do not find that the Respondent has pointed to any powerful reasons why leave should not be granted to the second Appellant. In my view, given the length of residence, it will not be reasonable to expect the second Appellant to leave the UK where she has resided since birth.

30. Having made that decision, it follows that the public interest does not require the removal of the first Appellant who has a genuine and subsisting parental relationship with her daughter.

31. As section 117B(6) is satisfied, I find that it would be disproportionate to remove the Appellants given my conclusion that it would not be reasonable to expect the second Appellant to leave the UK, and the public interest does not require the first Appellant's removal, and therefore the appeals are allowed with reference to section 117B(6) and Article 8 of the 1950 Convention.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeals are allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

Anonymity

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. Failure to comply with this direction could lead to contempt of

court proceedings. This direction is made because the second Appellant is a minor, and is made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date 17th May 2019

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

I make no fee award. The appeals have been allowed because the second Appellant has resided in the UK for in excess of seven years. That was not the case when the applications for leave to remain were initially refused by the Respondent.

Signed Date 17th May 2019

Deputy Upper Tribunal Judge M A Hall