Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/14077/2018
HU/14084/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 September 2019	**On 18 September 2019**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MMO
ED
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Malik, Counsel instructed by Calices Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

REMAKING DECISION

1. The appellants are citizens of Nigeria born 4 November 1980 and 19 August 2010. They are mother and son. Together they appeal against a decision of the Secretary of State taken on 19 June 2018 to refuse their human rights claims. The respondent's decision, and the reasons for it, are set out in a reasons for refusal letter of the same date.

2. Their appeals were initially heard and dismissed by First-tier Tribunal Judge French, in a decision promulgated on 18 March 2018. In a decision promulgated on 22 July 2019, Deputy Upper Tribunal Judge Phillips found Judge French to have made an error of law such that the decision had to be set aside. Judge Phillips directed that the decision be remade in the Upper Tribunal. In those circumstances, the matter came before me.

3. The central issue in the case is what the best interests of the second appellant are, for the purposes of establishing whether it is reasonable to expect him to leave the United Kingdom. Consideration of his best interests was a factor that Judge French did not expressly address.

The Appellant's Case and the Reasons for Refusal Letter

4. The first appellant entered the United Kingdom in January 2008 as a student, with leave valid until 1 January 2011. Her leave was renewed such that it expired on 20 July 2012. That was the final date on which she held valid leave to remain. She applied for a residence card as the family member of an EEA national in respect of her marriage to an EU citizen. It is not necessary to detail those applications. Each was refused. The appellant then made a number of applications based on her private and family life in the United Kingdom, culminating in an application on 22 March 2018. That application was refused, and it is that refusal decision which the appellants now appeal against in these proceedings.

5. The second appellant was born in the United Kingdom and has resided continuously here ever since. He is now 9 years old. It is the contention of both appellants that the best interests of the second appellant are overwhelmingly to remain in this country. He considers himself to be British, his extended family members are British, he is integrated at school, in his church, he has friends and family here, and he is an aspiring footballer taking part in a football academy run by a local football club. He is also receiving tuition for the 11-plus exam which he is due to take shortly. Mr Malik submits that the requirements of Article 8, as articulated by section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), are such that the removal of either appellant would be disproportionate because it would not be reasonable to expect the second appellant to leave the United Kingdom. Mr Malik submits that the expectation established by the statutory framework is that leave should be granted to a child in the position of the second appellant. Where a child has been resident in the United Kingdom for seven years or more, there must be strong or powerful reasons to the contrary, if leave is not to be granted. Mr Malik submits that that is a high threshold, and that there are no such strong or powerful reasons in the present matter. It is not possible to import into consideration of that issue a consideration of the immigration or other misconduct of the child's parents.

6. The refusal letter addressed the position of both appellants initially under the Rules. The main finding of the refusal letter is that it would be reasonable for the second appellant to return to Nigeria. He is from a Nigerian background and has been brought up surrounded by Nigerian culture, albeit in this country. To the extent he

is embedded in community life here, contends the respondent, he would be able to replicate that in Nigeria. In relation to the position of the first appellant in her own personal capacity, the refusal letter contends that there would be no very significant obstacles to her removal to Nigeria. Before me Mr Malik helpfully indicated that he does not contest that particular finding of the refusal letter concerning the second appellant.

Legal Framework

7. This is an appeal brought under Article 8 of the European Convention on Human Rights. The essential issue for my consideration is whether it would be proportionate under the terms of Article 8(2) of the Convention for the appellants to be removed, in light of the private and family life they claim to have established here. This issue is to be addressed primarily through the lens of the respondent's Immigration Rules and by reference to the requirements of Article 8 directly, see Razgar [2004] UKHL 27 at [17]. The relevant Rules are contained in paragraph 276ADE and Appendix FM of the Immigration Rules.

8. It is settled law that the best interests of the child are a primary consideration when considering whether the removal of an appellant under Article 8 would be proportionate, see ZH (Tanzania) [2011] UKSC 4 and Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 at [10] per Lord Hodge. In addition, a number of statutory public interest factors are set out in Part 5A of the Nationality and Immigration Act 2002 which I must apply.

9. Of significance for present purposes is section 117B(6) of the 2002 Act. It provides:

> "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 relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

10. It is common ground that in the present matter the second appellant is a "qualifying child" as defined by section 117D(1): he has resided here continuously since birth, which exceeds seven years.

11. It is for the appellants to establish their case to the balance of probabilities standard.

Evidence and Documents

12. I considered the bundle that had been prepared for the initial appeal before Judge French, in addition to a supplementary bundle that had been provided on the morning of the hearing by Mr Malik. I considered the skeleton argument that Mr Malik had relied upon before Judge French, in addition to a refreshed skeleton argument provided for the purposes of the hearing before me.

13. The first appellant gave evidence and adopted her statement. She was cross-examined. There is a full record of her evidence based on the Upper Tribunal's audio

recording system and in my note of her evidence which will be on the Tribunal's file. I will refer to the salient aspects of her evidence to the extent that it is necessary to give reasons for my findings.

Findings

14. I will address first the findings of fact that I need to reach before addressing the best interests of the second appellant and the question of reasonableness. It is common ground that the appellants enjoy a genuine and subsisting parental relationship. It is also uncontroversial that the second appellant's father has no part in his upbringing; this is clear from part 9.6 of the appellants' application to the respondent, page F89 of the main appellant's bundle. See also [5] of the first appellant's witness statement.

15. In the supplementary bundle, there is a letter dated 17 August 2019 from OBD, the brother of the father of the second appellant (his uncle). OBD writes that he provides extensive support for the first appellant and describes himself as the "guardian" to the second appellant. He states he has assumed that role since the second appellant was born. He also writes that he has taken responsibility for the first and second appellants financially, and in terms of the second appellant's growth and development.

16. It is clear from the letter that the second appellant spends a degree of time with OBD. The difficulty with the letter from the uncle of the second appellant is that it does not provide any detail as to the nature of the role which he claims to perform as a guardian. Other than an assertion that he has performed that role since the second appellant's birth, it contains no detail as to what such support looks like in practice. It does not contain any particular detail that will be necessary to make a finding, not necessarily that he performs a genuine and subsisting parental role, but even to establish that there is a relationship of depth and gravitas such that it amounts to a significant feature of the fabric of the second appellant's Article 8 rights.

17. I accept the first appellant's evidence that she and her son are significantly involved church life; I have read the letters from the pastors of their congregation which describes the first appellant as performing the role of a lay pastor. I accept that she is heavily involved in her wider community.

18. The second appellant has an excellent record in school. He displays promise as an aspiring footballer as demonstrated by his participation in a local football club's youth academy. The first appellant had accepted in oral evidence before Judge French that she was still in contact with her father the second appellant's grandfather in Nigeria. Before me she said that he is now blind and lives on his own in a single room. I accept that.

19. Towards the end of her evidence I asked the first appellant whether the financial support she enjoys at the moment from her sister and from the second appellant's uncle would be able to continue upon her return to Nigeria. She stated that she did not think that it would.

20. I gave the opportunity to Mr Malik to ask supplementary questions in response to these queries. Mr Malik sought to question the appellant on this point with greater specificity. The appellant said that the reason she thought that it would not be possible for the financial support to continue is because she would essentially be out of sight and therefore out of mind. She was concerned that if she were to return to Nigeria, because she would not be the presence that she is at the moment in the lives of the second appellant's uncle and in her sister, that the financial support she currently enjoys would cease. In my view this is speculation, albeit understandable speculation, on the part of the appellant. The letter from the second appellant's uncle states that he has "taken responsibility" for her and for the second appellant financially. The letter from her sister speaks in similarly warm terms that letter is dated 22 August 2019 and it states that there is a very strong emotional bond between the first appellant and her sister. I have not received sufficient information or evidence from the appellant to establish that the financial support she currently enjoys from her wider family in this country would dry up upon her return. I find that the support she receives at the moment would continue upon her return to Nigeria, at least initially.

21. In light of those findings of fact I now turn to address the best interests of the second appellant. In KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, Lord Carnwath endorsed the Court of Appeal in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874 at [58]. There, the Court of Appeal had said the best interests of the child should be addressed in these terms,

> "In my judgment, therefore, the assessment of the best interests of the children must be made on the basis of the facts as they are in the real world. If one parent has no right to remain but the other parent does that is the background against which the assessment is conducted. If neither parent has the right to remain then that is the background against which the assessment is conducted. Thus, the ultimate question will be is it reasonable to expect the child to follow the parent with no right to remain to the country of origin."

22. Turning to the real world context of the first appellant, it is clear that she does not have the right to reside here. She has not enjoyed leave to remain since July 2012, although I accept that she sought to regularise her status by means of an application as the spouse of an EEA national. I accept that there are many advantages to the second appellant to his residence here; he is excelling at school and has the potential of the 11- plus before him, he is embedded within church and community life and is showing signs of promise in football. It will be difficult to replicate those features of his life in Nigeria. However, adopting the approach of EV (Philippines), the best interests of the second appellant are to be with his mother wherever his mother should be, unless there are significant fact-specific features to the contrary. I have considered the claimed evidence of the strong relationship with the second appellant's uncle as set out in the letter I referred to earlier. However, over the bold assertions featured in that letter I do not have sufficient evidence to enable me to reach a more in-depth finding as to the breadth and depth of the claimed relationship between the second appellant's uncle and the second appellant.

23. The second appellant is 9 years old and therefore still at an age when he can adapt. There are church communities in Nigeria, his grandfather is there albeit, given his blindness, there may be a degree of an impediment to the relationship between the two forming to the extent that would be possible otherwise.

24. His mother is a citizen of Nigeria, she will enjoy a full panoply of rights as a citizen of Nigeria and will enjoy the ability to do things that she is currently unable to do in this country, for example work legally.

25. In light of the above factors, I find that the best interests of the second appellant are to be with his mother wherever she lives, whether here or in Nigeria. This is a finely balanced assessment, taking into account the strong desires that the family will have to remain here in order to take advantage of the many opportunities that life in the United Kingdom provides. However, adopting the approach set out in EV (Philippines), as endorsed by the Supreme Court in KO (Nigeria), the ultimate question for me to address is whether it would be reasonable to expect the child to follow the parent with no right to remain in this country.

26. It is on that note that I turn to the second question I must address in light of the best interests finding namely, whether it would be reasonable to expect the second appellant to leave the United Kingdom. This is the issue that is central to all provisions of the Immigration Rules of potential relevance to this appeal in particular paragraph EX.1 of Appendix FM and in relation to the second appellant's personal position paragraph 276ADE(1)(iv) and it is also the same test which is encapsulated by section 117B(6) of the 2002 Act. As such my assessment as to reasonableness will deal compendiously with each of those three separate issues, as they are united by the same underlying analysis.

27. The operation of section 117B(6) has recently been considered by the Supreme Court in KO (Nigeria). It is no longer necessary to incorporate into the assessment of "reasonableness" the impact of any immigration or other misconduct of the parent of the qualifying child. The immigration status of the parent or parents of the qualifying child is only of indirect relevance to the overall assessment, in the sense that it goes to the real world question of where the parents should be, as set out in EV (Philippines). But for that consideration, section 117B(6) is a free-standing provision and "there is nothing in that sub-Section to import a reference to the conduct of the parent" (KO at [17] per Lord Carnwath).

28. Lord Carnwath also held at [17] that the relevant factors going to reasonableness contained in the respondent's Immigration Directorate Instructions then in force, *Family Life (as a partner or parent) in Private Life: Ten Year Routes*, August 2015, were "wholly appropriate and sound in law". The extract of that guidance referred to by His Lordship was as follows:

> "b. Whether the child would be leaving with their parents.
>
> It is generally the case that it is in a child's best interests to remain with their parent(s). Unless special factors apply, it will generally be reasonable to expect a

> child to leave the UK with their parent(s), particularly if the parent(s) have no right to remain in the UK."

29. In the context of the present matter, the second appellant would return to Nigeria with his mother who has no right to remain in this country. That is the real world context. Adopting this approach is not to say that the immigration history of the first appellant is to be held against the second appellant, far from it. However, as Lord Carnwath observed at [18] of KO (Nigeria) the immigration record of a person such as the first appellant in the present matter "may become indirectly material". The starting point for my consideration therefore is that it will "generally be reasonable to expect the child to leave the UK" with his mother. I do not consider the factors highlighted in in my assessment of his best interests to amount to "special factors" of the sort envisaged by the guidance. There are no medical reasons or compelling family or private life reasons which mitigate against this finding.

30. I reject Mr Malik's submissions that the MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705 "starting point" set out at [49], namely that leave should be granted in a seven year child case unless there are powerful reasons to the contrary, has been preserved. Mr Malik additionally relied on MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC) to demonstrate this point in practice. He also relied on JG (s.117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) Rev 1 as authority for the proposition that the president of this Tribunal in remaking the decision in that case maintained the "powerful reasons" approach.

31. The approach adopted by Lord Justice Elias in MA (Pakistan) was based on the now discredited premise that the wider immigration context of the qualifying child's parents may be taken into consideration. It was in that – now overturned – context that the question of powerful reasons displacing the starting point arose. By contrast, Lord Carnwath made no mention of there being a "starting point" along those lines. Instead, he endorsed the Immigration Directorate Instructions quoted above that it will "generally be reasonable" to expect the child to return in a situation such as the present. Were it the case that the MA "starting point" were preserved by definition, there could be no suggestion that it would "generally be reasonable" to expect the children to return with their parents.

32. Turning to the other authorities relied upon by Mr Malik, MT and ET is authority primarily for the relatively uncontroversial proposition that the longer a child has resided in this country the stronger the child's best interests will be in favour of remaining here: see the Headnote.

> "A very young 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."

33. MT's case concerned an older child who was at a crucial stage in her GCSE education; in contrast to the second appellant who is still at primary school and has not yet started his GCSE education. It is always necessary to exercise caution when looking to fact specific examples of general principles being applied. It will rarely, if ever, be the case that the facts under consideration in the case with which the Tribunal is seized will be the same as the case specific decision relied upon. To the extent that MT and ET survives KO, it is simply authority for the above proposition; paragraph 34 of MT and ET does not establish a universal principle that a qualifying child will almost always result in an appeal being allowed. Although [34] is often cited, it is simply a case-specific application of the wider principle reflected in the headnote. In any event the focus of the discussion in [34] was the now discredited MA (Pakistan) approach of balancing the conduct of the parents against the circumstances of the child. I find therefore that to the extent that MT and ET previously was authority for an approach that qualifying children should generally be permitted to remain in this country, barring strong reasons to the contrary, that principle has given weight to the approach of Lord Carnwath in KO (Nigeria).

34. Similarly, it is necessary to exercise a degree of caution before relying on JG, that again was a case specific assessment. As the President noted at [96] of the decision, there were certain factors which were relevant when the Panel reached its overall conclusion that it would not be reasonable to expect the two children in that case to return to Turkey. They included the children being raised in a Roman Catholic academic and social environment. Turkey is a majority Muslim country with very few Christians or Roman Catholics. The president observed at [93] that, "It is likely to be difficult to achieve anything similar for the children in Turkey".

35. In addition, the children could not speak Turkish, and they had no material understanding of what it was like to live there. Although I accept that the second appellant in this case has only ever known life in the United Kingdom, he is fluent in English which is one of the official languages of Nigeria. There are many churches in Nigeria, and football is widely played; it will therefore be possible to begin to replicate something of the life that he has in this country in a way that the children in JG were unable to do so. In addition, the appellant in JG had, as noted at [85], a strong case to apply for entry clearance were she to leave the United Kingdom. Although the Tribunal concluded it was not for them to usurp the role of the Entry Clearance Officer in assessing such an application, there was nevertheless a recognition that it was at least possible that such an application may succeed, and the discussion therefore turned to whether the temporary disruption and all that would flow from that, given the likely strength of a future application for entry clearance, was something that would be reasonable to inflict upon the children. In the present case there is no suggestion that the first appellant would be able to meet the requirements of the Immigration Rules in similar circumstances.

36. Accordingly, the real world context is that the first appellant does not have leave to remain in this country and will have to go back to Nigeria. Under the circumstances, I find that it is entirely reasonable and consistent with the best interests of the second appellant for him to return with her. I do not consider there to be "special factors",

adopting the approach of the August 2015 Immigration Directorate Instructions, which apply here. The private life which Mr Malik emphasised the second appellant enjoys in this country does not have features of a particular quality such that they may be described as "special factors" rather, and not wishing in any way to diminish the quality of the life the second appellant enjoys in this country, they are all factors which would be expected of a child who has been brought up well and has integrated well in this country. Such difficult considerations will always be inherent to the approach of the Court of Appeal in EV (Philippines) to determining the best interests of the child, and the real world assessment required by KO (Nigeria) in relation to the question of reasonableness.

37. In light of the findings that it would be reasonable for the second appellant to return to Nigeria, it follows that the provisions of section 117B(6) of the 2002 Act are not met. It is not, therefore, possible for the first appellant to satisfy the provisions of EX.1 of Appendix FM and nor can it be said that the second appellant can benefit from paragraph 276ADE(1)(iv) in his own capacity.

38. That is not the end of the matter. It is still necessary for me to address whether the appellant's removal is proportionate, pursuant to the Razgar criteria.

39. It is clear that the removal of the appellants would interfere with their rights under Article 8 of the European Convention on Human Rights. Their removal would have consequences of such gravity so as to potentially engage the operation of Article 8. Their removal would be "in accordance with the law", in the sense that it would be governed by an established legal framework, coupled with a right of appeal to this Tribunal. It would, in principle, be capable of being regarded as necessary in a democratic society on the basis of one of the derogations contained in Article 8(2) of the European Convention. The remaining question is whether the removal would be proportionate.

40. In order to address the proportionality of removal I will adopt a balance-sheet approach.

41. The factors in favour of the removal of the appellants are as follows.

    (a) The public interest in maintaining effective immigration controls as set out in section 117B(1) of the 2002 Act;

    (b) Little weight is to be attached to private or family life established when a person is in the United Kingdom unlawfully or precariously;

    (c) Neither appellant meets the requirements of the Immigration Rules;

    (d) The first appellant has been in the United Kingdom unlawfully since the middle of July 2012 (this is a factor in relation to the first appellant in isolation);

    (e) There is no material from a social worker or other care professional stating that the second appellant is unable to be removed to Nigeria;

(f) The second appellant will return to Nigeria with a fluent command of English which will place him in good stead later on in his educational and professional life;

(g) The first appellant will be able to work and provide for the second appellant in Nigeria in a way that she has not been able to do in this country;

(h) The appellants currently enjoy the financial support of their friends and family in this country, and for the reasons previously stated, there is no reason why such support could not be resurrected or at least continue initially upon their return to Nigeria, taking advantage of the lower cost of living there.

(i) The second appellant is relatively young he is 9 years old. Although for some children who are older removal would have a disproportionate impact, "that may be less so when the children are very young because the focus of their lives will be on their families" (that is MA (Pakistan) at [46]).

42. Factors in favour of the appellants remaining in this country include:

(a) The extensive private life they have each established, they are integrated in their church and community lives and have extensive friends and family in this country (although I have not heard any evidence suggesting that Article 8 is engaged on a family life basis as regards the appellants and other non-immediate family members);

(b) The second appellant is excelling at school and is already making preparations to study for the 11-plus;

(c) They each have an active role at their church and have received letters of commendation from the pastors;

(d) If the appellants were permitted to remain in this country, the relationship which the second appellant has with his uncle would be able to develop in a way that it would not if he is returned to Nigeria. Similar considerations apply in relation to the second appellant's relationship with his aunt, the first appellant's sister and, of course, there would be disruption to the private life of the first appellant as regards the interruption to her life with her sister and her sister's own private life;

(e) The appellants speak English and are financially independent (in the sense that they are not reliant on state benefits);

(f) Fifthly, the second appellant is a promising young footballer and is involved in a football academy;

(g) The second appellant claims he will become eligible for British citizenship on a ten year basis next year.

43. Drawing these factors together and addressing where the balance lies, I consider that the factors in favour of removal outweigh those in favour of the appellants remaining. The public interest in the maintenance of effective immigration controls is a weighty factor. The matters which have been outlined to me do not reveal considerations of such exceptionality which demonstrate that removal of the

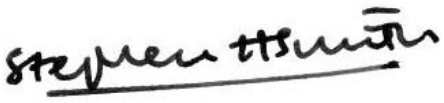
appellants would be unjustifiably harsh for the purposes of the European Convention on Human Rights. The second appellant is still of primary school age, and his removal is consistent with his best interests. The fact that he may be eligible for British citizenship in due course is of minimal relevance, as the date of assessment is the date of the hearing, and at present the second appellant holds only Nigerian nationality.

44. The removal of both appellants may take place without placing the United Kingdom in breach of its international obligations under Article 8 of the European Convention on Human rights.

45. This appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  Date 13 September 2019

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal there can be no fee award.

Signed Date 13 September 2019

Upper Tribunal Judge Stephen Smith