
**Upper Tribunal**

**(Immigration and Asylum Chamber)** **Appeal Number: HU/15692/2018**

**HU/15700/2018**

**HU/15695/2018**

**THE IMMIGRATION ACTS**

**Heard at Manchester Civil Justice Centre**
**On 9th July 2019**

**Decision & Reasons Promulgated**
**On 17th July 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

**Between**

**FNO**

**TSO**

**HOO**

**(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Adewusi of Crown Solicitors

For the Respondent: Ms Groves Senior Home Office Presenting Officer

## DECISION AND REASONS

Introduction

***1.*** An anonymity direction was previously made and shall continue.

***2.*** The Appellants are a mother (A1) and her two daughters (A2 and A3) whose dates of birth are respectively 30.3.1973, 21.2.2000 and 29.3.2004 and they are all nationals of Nigeria.

***3.*** This is a resumed hearing after at an error of law hearing on 4.1.2019 when I set aside the decision of First tier Tribunal Judge Turner who had allowed the Appellants appeal against a refusal of their human rights claim.

***4.*** The Appellants are appealing against the decision of the Respondent made on 10 July 2018 to refuse leave to remain in the United Kingdom on the basis of family and private life. The refusal was on the basis that the requirements of Appendix FM and Paragraph 276 ADE of HC 395 were not met.In the circumstance that the requirements of the Immigration Rules are not met by such the Appellant the Secretary of State will consider granting leave to remain outside the Rules where exceptional circumstances apply which are defined by her as circumstances in which refusal would result in unjustifiably harsh consequences for the individual concerned. Such circumstances were not found to apply in this case.

***5.*** The refusal letter reasons can be summarised as follows:-

(a) A1 the adult could not meet Appendix FM as a partner and in relation to EX.1a the Appellants children had not lived in the UK for 7 continuous years at the time of the application and the Appellant did not meet the eligibility requirements because she was an overstayer.

(b) In relation to paragraph 276ADE (vi) there were no very significant obstacles to her reintegration in Nigeria a country where she had lived the majority of her life and spoke both English and Yoruba.

(c) A2 and A3 could not at the date of application meet the requirements of paragraph 276 (iii) (20 years residence) ; (iv) (lived in the UK for 7 years); (v) (aged 18-25) or (vi) (aged over 18)

(d) There were no exceptional circumstances.

**The Law**

***6.*** The burden of proof in this case is upon the Appellant and the standard of proof is upon the balance of probability.

***7.*** The Appellant's appeal is pursuant to Section 82(1) (b) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') which provides that a person may appeal to the Tribunal where the Secretary of State has decided to refuse a human rights claim. S84 of the Act provides that an appeal under s82(1)(b) must be brought on the ground that a decision is unlawful under section 6 of the Human Rights Act 1998.

***8.*** Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the 'public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

***9.*** The S117B considerations are as follows:

> *"(1) The maintenance of effective immigration controls is in the public interest.*
>
> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—*
>
> *(a) are less of a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—*

*(a) are not a burden on taxpayers, and*

*(b) are better able to integrate into society.*

*(4) Little weight should be given to—*

*(a) a private life, or*

*(b) a relationship formed with a qualifying partner,that is established by a person at a time when the person is in the United Kingdom unlawfully.*

*(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*

*(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."*

Section 117B6

***10.*** The definition of "qualifying child" is found in section 117D:

> *"qualifying child" means a person who is under the age of 18 and who-*
>
> *(a) is a British citizen, or*
>
> *(b) has lived in the United Kingdom for a continuous period of seven years or more;"*

***11.*** In relation to the test of reasonableness for the purpose of both paragraph s 117B6 of the 2002 I have taken into account the guidance in KO (Nigeria) [2018] UKSC 53 at paragraph 51

*"The parents' conduct was relevant in that it meant that they had to leave the country. As I have explained (para 18 above), it was in that context that it had to be considered whether it was reasonable for the children to leave with them. Their best interests would have been for the whole family to remain here. But in a context where the parents had to leave, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable."*

**Evidence**

***12.*** I had the bundles that were before the First tier Tribunal. No additional evidence was served.

***13.*** I heard evidence from all of the Appellants and there is a full note of their evidence in the record of proceedings and I will refer to it where relevant.

**Final Submissions**

***14.*** I heard submissions from Ms Groves on behalf of the Respondent:

***15.*** She relied on what was said in KO that while it may be in the best interests of the child Appellant to remain in the UK if the parent has no right to remain in the UK the natural expectation is that they will follow the parents.

***16.*** It was not unreasonable for A3 to leave with the mother.

***17.*** She suggested that the Tribunal were not being told the whole truth about the family available in Nigeria as there were significant inconsistencies in the evidence of the witnesses.

***18.*** The fact that contact has been lost with family members does not mean it cannot be re-established.

***19.*** A1 had made an effort to maintain links with people from Nigeria and her culture in her place of worship.

***20.*** English is widely spoken in Nigeria and clearly A2 and A2 had some facility in Yoruba.

***21.*** I heard submissions by Mr Adewusi on behalf of the Appellants.

***22.*** He accepted that the issue in the case was one of reasonableness for the purpose of s 117B 6 as A3 is a qualifying child.

***23.*** He suggested that the child Appellant was at a crucial stage in her education studying for her GCSEs and it was in her best interests to remain in the UK.

**Findings**

***24.*** I am required to look at all the evidence in the round before reaching any findings. I have done so. Although, for convenience, I have compartmentalised my findings in some respects below, I must emphasise the findings have only been made having taken account of the evidence as a whole.

***25.*** The Appellant appeals the refusal of their human rights claims. I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27.

***Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?***

***26.*** I accept that the Appellants enjoy family life together in the UK but their enjoyment of family life could continue if they were returned to Nigeria as a family. Indeed it seems likely from the evidence I heard (which I will address further below) that it is likely that A2 and A3s father is in Nigeria and therefore if they are ever to have a prospect of developing a relationship with their father that is more likely to occur if they are in Nigeria.

***27.*** I accept that given the Appellants have been in the UK and A2 and A3 had attended school here they have developed a private life.

***If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?***

***28.*** I am satisfied that removal would have consequences of such gravity as potentially to engage the operation of Article 8.

***If so, is such interference in accordance with the law?***

***29.*** I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellants to regulate their conduct by reference to it.

***If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for***

***the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?***

***30.*** The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of immigration control. The state has the right to control the entry of non nationals into its territory and Article 8 does not mean that an individual can choose where she wishes to enjoy their private and family life.

***If so, is such interference proportionate to the legitimate public end sought to be achieved?***

***31.*** In making the assessment of the best interests of A3 who is 15 years old I have taken into account ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 where Lady Hale noted Article 3(1) of the UNCRC which states that *"in all actions concerning children, whether undertaken by … courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

***32.*** Article 3 is now reflected in section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions *"are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".* Lady Hale stated that *"any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2)".* Although she noted that national authorities were expected to treat the best interests of a child as "*a primary consideration",* she added *"Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration".*

***33.*** The starting point is that it is in the best interests of children to be with both of their parents and if their parents are being removed from the UK and starting

point suggests dependent children should go with them. A1 had leave in the UK until April 2013 and thereafter has had no right to remain in the UK.

***34.*** I take into account that at the time of the hearing A3 has been in the UK for eight years having entered on the 2nd of May 2011. She confirmed to me that she enjoys good health. She also confirmed in oral evidence that she attended school in Nigeria prior to coming to the UK. She attends school in the UK and there is nothing to suggest that she is not performing well. Given that that she turned 15 this year she is on course to do her GCSEs next year so I do not accept that she is currently at a particularly crucial stage in her education.

***35.*** I considered the extent to which it could be said that she has become distanced from her country of origin as she has not returned to Nigeria since her arrival in the UK. A3s mother confirmed in oral evidence that she could speak Yoruba although the Appellant herself suggested she was not a strong speaker but could certainly understand it. She is clearly a bright young lady and if she can speak it to a degree and understand it I am satisfied that if required her fluency would improve with the help of her mother although clearly English is widely spoken in Nigeria. She also said in oral evidence that a mother made efforts to keep their culture alive for them. She confirmed that she attended the Muslim Society with her mother and sister and that many of the other attendees were Nigerians and that you room that was routinely spent there. Therefore I find that efforts have been made both socially and linguistically to retain links to their country of origin.

***36.*** I have considered the extent to which the family's connections could be re-established in Nigeria in so far as that was relevant to the issue of A3s best interests. I have found it difficult two draw a clear picture of what family is available in Nigeria because I found the mothers evidence on this issue to be extremely poor and inconsistent with the evidence given by A2 and 3. It seems to need more likely that they were telling the truth as they understood it to be and the mother was lying in order to minimize what might be described as family available to them in Nigeria as it did not assist her case. Thus for example while A1 suggested that her mother died a long time ago as did her father, and dated 2002 being suggested after some hesitation, A2 confirmed

that her mother's parents were alive when they came to the UK in 2011 and A3 stated in oral evidence she believed they were still alive. This undermines the general credibility of A1s evidence about her family in Nigeria as she has clearly lied to minimize her links to the country.

***37.*** I have already indicated that the available information about the father of A3 was that he was in Nigeria as that was the last place A2 and A3 were aware he lived and clearly if A3 was in the same country there is some potential for re-establishing contact.

***38.*** I note that the family are Muslims and attend the Muslim Society in the UK but there is nothing to suggest that A3 could not continue to practice her religion in Nigeria and indeed may find some support from religious charities initially as they have been supported by a religious organisation in the UK.

***39.*** At this stage I have also considered whether the family could support themselves on their return to Nigeria as this might impact on the best interests of A3. I found that in this respect A1 was again a very poor witness in her own cause. The Appellant had to be repeatedly reminded to answer questions directly as it seemed to me she was being deliberately vague and evasive and mumbling so that neither I nor the advocates could hear her response to difficult questions that did not assist her case so the questions had to be repeated on a number of occasions. It became clear from her oral evidence that after initially claiming she had not worked in Nigeria that in fact she had a shop selling goods and lived independently of her family. She gave evidence that she acquired the shop when she was 25 years old and was able to support herself of the next 13 years and was unable to give any coherent reason why on her return she could not support herself and her family with such an enterprise again. Therefore I do not accept that there would be anything about their financial and social circumstances that would be contrary to the Appellants best interests.

***40.*** I recognise that A3 herself would prefer to stay in the UK as she has developed friendships and feels familiar with the culture, education and society here. There are no health or linguistic issues and Nigeria has an education system that A1 herself admits she benefited from until the age of 25.

***41.*** There is therefore no evidence that returning to her home country where she lived for 7 years would be contrary to A3s best interests. If I were wrong and it was in her best interests to stay it would not be overwhelmingly so as I am satisfied that in the absence of social, health, linguistic or educational issues the Appellant would re-establish herself in Nigeria with the support of her mother and older sister.

***42.*** I now turn to the wider proportionality assessment. Consideration of the issue of proportionality is 'consideration of "the public interest question" as defined by section 117A(3) of the 2002 Act. I am therefore required by section 117A(2)(a) to have regard to the considerations listed in section 117B.

***43.*** I take into account that the maintenance of effective immigration controls is in the public interest. I note in this context that while this is not an appeal against the refusal under the Immigration Rules that none of the Appellants meet the requirements of the Immigration Rules which underpin immigration control in the UK that there would It is apparent from the documents which accompanied the Statement of Changes that the changes to the Rules were intended to promote consistency, predictability and transparency in decision-making where issues under Article 8 arose, and to clarify the policy framework. The changes were said to reflect the Government's and Parliament's view of how, as a matter of public policy, the balance should be struck between the right to respect for private and family life. While Mr Adewusi referred to A3 meeting 276 ADE (iv) she did not do so at the time of the application which is a requirement of the Rules and A2 for the reasons set out in the refusal letter did not meet the private life requirements of the Rule. I am required therefore to give weight to the fact that the Appellants did not meet the requirements of the Rules.

***44.*** Therefore I am satisfied that the only issue in this case is whether the Appellants succeed by reference to paragraph 117B6 and whether it would be reasonable to expect A3 to leave the United Kingdom because if the answer to that question is no then A1 and A3 s appeal would I accept A1s appeal would succeed and given that they are a family unit and A3 has not established an independent life her appeal would also succeed.

***45.*** The assessment of the reasonableness of return must not however focus on the position of the children alone and this has been made clear in MA and more recently in AM (Pakistan) [2017] EWCA Civ 180. I am therefore entitled to take into account that A1 and A2 had no right to live in the UK as A1s leave expired in 2013 and A2s leave expired in 2011 and there was no attempt to regularise their status until 2017. A1 was unable to give a coherent explanation as to why she waited so long to regularise her status. None of the parties are UK citizens which distinguishes their case from J G (117B6 "reasonable to leave UK") Turkey [2019] UKUT 00072 relied on by Mr Adewusi .

***46.*** I accept that they speak English.

***47.*** I note that they have not been self reliant as they have relied on the charitable support of a religious organisation.

***48.*** I am required by the provisions of s 117B to give little weight to private life established while status is unlawful and as indicated above the Appellants have had no status in the UK since their leave expired.

***49.*** When considering where the balance lies between the best interests of the children on the one hand where I have set out above that the best interests A3, and the importance of maintaining immigration control on the other, I am mindful of the fact that a child should not be punished for the actions of their parents. But I am entitled to take into account the fact that they are not British Citizen children and are not entitled as of right to benefit from the education system and other public services of this country.

***50.*** Having considered all of the evidence carefully and in the round I have come to the conclusion that it is reasonable for the purposes of section 117B6 to require A3 to leave the United Kingdom as her best interests are not determinative of the issue and can be outweighed by the public interest. Whilst I accept that it will inevitably cause all of the family some distress and hardship, I am not persuaded that this will be sufficiently grave to outweigh the wider interests of maintaining immigration control. They will be returning as a family unit to a place

- where they have all lived previously, A1 for the majority of her life.

- A1 has previously worked and supported herself in Nigeria and there was no reason why she could that there not do so again.
- I am not satisfied that the Tribunal has been given a truthful picture about what family members are available in Nigeria. There was a clear discrepancy between the evidence of the appellants as to whether A1s parents were still alive and therefore I have come to the conclusion that I cannot rely on her assertion that she has any other family members in Italy and she has contact. I am satisfied that A 2 and 3 have relied on her evidence as to what family they have there.

***51.*** I am satisfied that in this case the applications failed to comply with the Immigration Rules and no compelling circumstances were identified why those Rules should not be applied in this case in the usual way, there was nothing disproportionate in applying the Rules in accordance with their terms, with the effect that Appellants application failed.

**Conclusion**

***52.*** On the facts as established in these appeals, there are no substantial grounds for believing that the Appellant's removal would result in treatment in breach of ECHR.

**Decision**

***53.*** The appeals are dismissed.

***54.*** **Direction Regarding Anonymity – rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014**

***55.*** 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 12.7.2019

Deputy Upper Tribunal Judge Birrell