Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/18848/2018
HU/18850/2018
HU/18852/2018

THE IMMIGRATION ACTS

Heard at Field House
On 6 November 2019

Decision & Reasons Promulgated
On 19 November 2019

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'ASA'
'OEA'
'AIA'

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

By virtue of the third appellant being a child, 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 or any member of their family. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellants: Mr Z Jafferji Counsel, instructed by Oasis Solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

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1. These are the approved record of the decision and written reasons which were given orally at the end of the hearing on 6 November 2019.

2. This is the remaking of the decision in the appellants' appeals against the respondent's refusal of their human rights claims.

3. The appellants, citizens of Nigeria, sought leave to remain in the United Kingdom (the 'UK') on the basis of their human rights, specifically their right to a private and family life. The respondent refused their claims in a decision dated 24 August 2018 (the 'Refusal Letter').

4. On 29 May 2019, First-tier Tribunal Judge P-J S White (the 'FtT') dismissed the appellants' appeals against the refusal of the appellant's human rights claims. The central issue was whether it would be reasonable to expect the third appellant, as a 'qualifying child' within the meaning of the Nationality, Immigration and Asylum Act 2012, to leave the UK. While the FtT concluded that it would be in the best interests of the third appellant to remain in the UK with his parents, that was not an end of the matter. The FtT concluded that it would be reasonable to expect the third appellant to return with his parents, rather than to separate him from them. The appellants appealed and asserted that by reference to MA (Pakistan) & others v SSHD [2016] EWCA Civ 705 and MT and ET (child's best interests; ex tempore pilot) [2018] UKUT 00088 (IAC), powerful reasons were needed to justify removal of a 'qualifying' child and in particular, family and private was likely to deepen when the period of time spent by the child in the UK was at a later age, as in the third appellant's case; and that any analysis should not blame the third appellant for his parents' adverse immigration history.

5. This Tribunal, then comprising Upper Tribunal Judges Hanson and Keith, set aside the FtT's decision, allowing the appeal, as set out in the error of law decision dated 2 October 2019 in the Annex to these reasons. We preserved the FtT's conclusions that it would be in the best interests of the third appellant that he remains with his parents in the UK. The remaking hearing would therefore focus on the extent to which it would not be reasonable to expect the third appellant to leave the UK. Given the narrowness of the factual issues and the legal questions to be answered, we regarded it as appropriate that the Upper Tribunal should remake the FtT's decision, based on the present conclusions, which we do so now.

The issue in this appeal

6. The sole issue in remaking the FtT's decision is whether it would not be reasonable to expect the third appellant to leave the UK, for the purposes of section 117B(6) of the 2002 Act. It is accepted that the first and second appellants have genuine and subsisting parental relationships with the third appellant and that he is a 'qualifying child' for the purposes of the 2002 Act as he has lived in the UK for a continuous period of nine years, having entered the UK in July 2010, and his date of birth is 6 August 2005, so that he was 4 years old when he entered the UK and is now 14 years

old, and is due to start his GCSE's next year. In answering the question about whether it would not be reasonable to expect the third appellant to leave the UK, this is a hypothetical question, rather than an assessment of whether he would leave the UK. In answering the question, I should not have regard to his parents' adverse immigration history, but at the same time, the assessment needs to be carried out on a 'real-world' analysis, noting that all of the appellants are Nigerian nationals who have never had settled leave to remain in the UK.

7. If it would not be reasonable to expect the third appellant to leave the UK, then there is no public interest in his parents' removal, as they are not subject to deportation orders, so that all of the appellant's human rights appeals would necessarily succeed.

The first appellant's evidence

8. In terms of the documents, I was provided with the original hearing bundle, to which I do not refer in any detail except to the first appellant's witness statement, which he readopted before me in this hearing; and a supplemental bundle, which included the first appellant's second witness statement of 21 October 2019 and a number of other documents, which I have considered, even where I do not refer to them expressly.

9. In terms of the appellants' evidence, the first appellant's witness statements broadly outlined his prior immigration history and he accepted that he had entered the UK on a student visa in August 2016 aged around 30; had come to train as a chartered accountant through the ACCA qualification; and was joined by his wife, the second appellant in November 2008; and then by the third appellant in July 2010; and their subsequent children have since been born in the UK. The family live together at a privately rented address in Belvedere.

10. The first appellant works as a courier part-time dropping leaflets to houses and his wife sometimes provides catering for their church. He is registered as self-employed although, as he candidly accepted in oral evidence, his earnings are relatively low and he relies substantially on church members for both the family's accommodation expenses and also their other living costs. The first appellant had previously been prevented from continuing with his studies in 2014 because the London School of Business and Finance would not agree to his continuing his studies without his leave to remain being extended and he was not able to successfully extend his leave.

11. In assessing the first appellant's oral evidence, I found him to be a frank and credible witness who was willing to accept points that were not necessarily in his favour. As a consequence, I place significant weight on his evidence. By way of example, he confirmed that his mother continues to live in a suburb of Lagos, in a four-bedroom home and that there would be accommodation to which the appellants could return, if so required. He also accepted that he would be able to obtain work as a book-keeper in Nigeria, a role that he had carried out prior to coming to the UK, albeit based on his experience of having worked as a book-keeper, he did not believe that he would earn a sufficient income to support his wife and children, which was precisely the reason why his family in Nigeria had originally funded his studies in the UK, so that he could gain qualifications as a fully-qualified accountant.

12. He confirmed that his father sadly has passed away in January of 2018; his mother is retired, on a limited pension; his brother is near to retirement and has a family of his own to support and his only other sibling, a sister, is a housewife and is unable to financially support the appellants on their return to Nigeria.

13. The first appellant confirmed that while he himself had attended state education in Nigeria during his youth, his experience was that the Nigerian state school system had deteriorated substantially since, so that not only would the third appellant be required to repeat a year because of the transitional arrangements around the differently structured education system in Nigeria; but that the quality of that education would, whilst providing education at a basic level, be sufficiently poor that the family would need to actively consider whether to delay entry to the state school system and try and somehow to find the money to fund private education for the third appellant.

14. Similarly, with regard to the suburb in which the family would be returning, whilst the first appellant did not seek to overstate the matter and whilst the suburb in Lagos had been a good one when he left Nigeria, his evidence, having remained in contact with his family, is that, sadly, the suburb has deteriorated so it in general terms is not as safe as it once was.

The respondent's submissions

15. The respondent's submissions were, without any criticism of them, brief. Mr Tarlow submitted that the first appellant was fairly self-sufficient and had found work in the UK, but had also worked as a book-keeper in Nigeria and could return to work in Nigeria. Whilst the education of the third appellant would necessarily be disrupted, it would not be broken and it was in the public interest, in controlling immigration, that the family, all Nigerian nationals and none with leave to remain in the UK, return as a family unit. That return was viable and I was therefore asked to dismiss the appeal.

The appellants' submissions

16. Mr Jafferji asked me to accept the candid and careful evidence of the first appellant. He asked me to contrast the test in paragraph 276ADE(1)(iv) of the Immigration Rules with that in sub-paragraph (vi); in other words, on one hand whether it would not be reasonable to expect a qualifying child to leave the UK; in contrast to very significant obstacles to the family's integration. In that regard, I was referred to the authority of PD and Others [2016] UKUT 108 (IAC), in particular at paragraph [39], which confirmed that the former test was a lower one. I was asked to focus, in the holistic assessment, less on the country to which the family might return, (Nigeria), but primarily on the family life which the qualifying child, i.e., the third appellant, would be leaving behind in the UK.

17. In other words, where, as here, the situation of the appellants may not be desperate, were they required to return to Nigeria, as there would be accommodation to return to and the third appellant would have access to a basic level of state education, albeit

at a significantly lower quality level than in the UK, it would nevertheless be unreasonable to expect him to leave the UK, noting particularly the important period of time and the ties developed by the third appellant, by reference to the authority of Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC), and considering the powerful reasons needed to justify the third appellant's refusal, as per the starting point of MA (Pakistan).

Discussion and conclusions

18. I accept Mr Jafferji's submission that whilst it is ultimately a holistic assessment and I have to consider both the circumstances as they currently are in the UK and also the circumstances as they might pertain on a return to Nigeria, nevertheless the underlying emphasis has to be on the family life as has been established in the UK. That is why section 117B(6) of the Nationality, Immigration and Asylum Act 2002 reflects an assessment under article 8 of the ECHR. In particular, in this case, the uncontested evidence is that the third appellant has lived in the UK from the ages of 4 to 14 and whilst the first appellant admitted that he had had some telephone contact with his paternal grandmother, so that there is still some link with Nigeria, nevertheless the entirety of his schooling; his friendship groups; and his social focus will be on his immediate family, friends and peers in Belvedere and Greenwich, where he currently attends school, noting the previous schools he had attended were within the local area. In other words, the third appellant is a child who has remained in South London for the entirety of his formative years and it is clear, as if proof were needed, that he has put down roots in the local community and is described by the coach of the Greenwich Tigers Football Club, as one of his outstanding players and very important to the team and hard working. The coach describes him as willing to help other players on and off the field, which is testament to the third appellant's engagement with fellow players.

19. This is a paradigm case of a strong and deep integration within the UK, not only in school but in local sports. Crucially, the third appellant is due to start his GCSEs next year and so will have started considering his GCSE choices this year.

20. Balanced against the situation of such integration in the UK and the highly disruptive effect on that family life, would be a return to a country where the third appellant would most likely have no memory, albeit with ongoing telephone contact with a grandmother over the years; a home to live in, where he would not be destitute; and access to a basic level of education; and the support, such as they can provide, of his parents and grandmother.

21. In answering the question of whether it would not be reasonable to expect the third appellant to leave the UK, for the purposes of section 117B(6) of the 2002 Act, I concluded, without reservation, that it would not be so reasonable, given the third appellant's age; the period of his time spent in the UK, during his formative years; the fact that he is at a key stage of his education and in the absence of any powerful reasons justifying his removal. On that basis, not only does his appeal succeed but it also follows that as the first and second appellants are his parents and their parental

relationship with him is genuine and subsisting, there is no public interest in their removal, so that their appeals succeed too, on human rights grounds. It may be that when the third appellant is no longer a minor that the respondent chooses to review any grant of leave for the parents, but at this stage, the appeals succeed.

22. I remake the FtT's decision, finding that the refusal of leave to remain does engage and breach all of the appellants' rights under articles 8 and therefore the appellants' appeals succeed.

Decision

23. The appellants' appeals are allowed on human rights grounds.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **15 November 2019**

TO THE RESPONDENT
FEE AWARD

The appeal has succeeded. I make a fee award of the £140.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **15 November 2019**

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/18848/2018
HU/18850/2018
HU/18852/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th September 2019	**On**

Before

UPPER TRIBUNAL JUDGE HANSON
UPPER TRIBUNAL JUDGE KEITH

'ASA'
'OEA'
'AIA'
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

By virtue of the third appellant being a child, 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 or any member of their family. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the appellants	Mr Zainul Jafferji, Counsel, instructed by Oasis Solicitors
For the respondent:	Mr T Lindsay, Senior Home Office Presenting Officer

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DECISION AND REASONS

Introduction

1. This is an appeal by the appellants against the decision of First-tier Tribunal Judge P-J S White (the FtT), promulgated on 29 May 2019, by which he dismissed their appeals against the respondent's refusal of their applications for leave to remain, based on their human rights, specifically their right to a private and family life. The respondent had refused their applications in a decision dated 24 August 2018.

2. By way of background, the first and second appellants are a married couple and the third appellant is one of their sons, born on 6 August 2005 in Nigeria. All of the appellants are Nigerian nationals. The first appellant entered the UK in August 2006, on a student visa which he successfully extended. His wife joined him in November 2008; and the third appellant joined him, aged five, from Nigeria in July 2010. The first appellant's application to renew his leave to remain was rejected as invalid in April 2013. He applied for judicial review of that decision. Permission was refused and assessed by the Upper Tribunal as being totally without merit, in April 2015. In September 2015, the appellants applied for leave to remain on human rights grounds, and their appeal was dismissed by a First-tier Tribunal (Judge Beg) on 18 October 2016. They sought permission to appeal the Upper Tribunal, which was refused, and their appeal rights were exhausted on 2 June 2017. They reapplied for leave to remain based on human rights grounds, which was rejected in February 2018 and they renewed their application once again on 5 April 2018, which was refused, and their appeal against that refusal was the subject of the current FtT decision.

3. The core points taken against the appellant by the respondent were that the appellants had never had settled leave to remain in the UK; they could return as a family unit to Nigeria without very significant obstacles to their integration; and Judge Beg had previously considered the third appellant's best interests in 2016, including his ability to continue in education in Nigeria. The third appellant's grandparents and wider family continued to live in Nigeria, who could assist in the appellants' integration there.

The FtT's decision

4. The FtT's analysis of the evidence runs from [8] to [22] of his decision. He considered the evidence as a whole, including the previous findings of Judge Beg in 2016. He reminded himself of the passage of time since Judge Beg's decision in 2016, which meant that he needed to reconsider the appellants' continued presence in the UK, even if it was without leave. He concluded that Judge Beg's previous findings that there was likely to be family support available in Nigeria was likely to still be the case, as the lead appellant continued to have a brother who was employed in Nigeria; and the family owned property in Nigeria. Whilst the FtT noted the integration of the third appellant in the UK, including in school and at church, the issue was whether it would be reasonable to expect the third appellant, as a 'qualifying child' within the meaning of the Immigration Rules and section 117B(6) of the Nationality, Immigration and

Asylum Act 2002, to leave the UK. The FtT referred himself to the cases of KO (Nigeria) and others v SSHD [2018] SC 53; and JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC).

5. The FtT concluded that it would be the best interests of the third appellant to remain in the UK, having lived in the UK for nearly 9 years. However, an assessment of the third appellant's best interests was not an end of the matter. The FtT concluded that on the assumption that his parents would return to Nigeria, it would be reasonable for the third appellant to return to Nigeria with his parents, rather than to separate him from them, by allowing him to remain in the UK without them. Maintenance of immigration control was in the public interest.

The grounds of appeal and grant of permission

6. The appellants lodged grounds of appeal which are that the FtT erred in concluding that it was reasonable for the third appellant to return with his parents to Nigeria, despite it not being in that child's best interests to do so. The authorities of MA (Pakistan) & others v SSHD [2016] EWCA Civ 705 and MT and ET (child's best interests; ex tempore pilot) [2018] UKUT 00088 (IAC) confirmed that powerful reasons were needed to justify removal of a 'qualifying' child and in particular, family and private was likely to deepen when the period of time spent by the child in the UK was at a later age, as in the third appellant's case.

7. First-tier Tribunal Judge Ford granted permission on 14 August 2019. She regarded it as arguable that the FtT had erred in law in concluding, where the best interests lay in the third appellant remaining with his parents in the UK, that it was reasonable for him to leave the UK; and that the FtT had implicitly consider the reasonableness of the third appellant's return by reference to the adverse immigration history of his parents, when the FtT ought to have considered reasonableness of return in isolation from their immigration history.

The hearing before us

The appellant's submissions

8. Mr Jafferji relied on the grounds of appeal. He submitted that the FtT had asked himself the wrong question at [19], by asking whether, on the assumption that the third appellant's parents were in Nigeria, it would be reasonable to expect the third appellant to be with them, and whether separation from them by remaining in the UK would be far more severe than any disruption arising from living with them to Nigeria. The question, as confirmed in JG, was simpler, namely whether it would be reasonable to expect the third appellant to leave the UK. The FtT had failed to focus on the reasonableness of the third appellant in the UK and had focussed inappropriately on his parents' immigration history. MT and ET confirmed that as a child became older, school played a more important part of his or her life, so that integration in the UK would strengthen. The Upper Tribunal in MT and ET had considered the minor appellant's personal circumstances in detail, in the analysis of whether it would be reasonable to expect the child to return to Nigeria. No such analysis had been carried

out by the FtT in this case. Whilst the appellants did not complain about the FtT's conclusion that the third appellant's best interests were to stay with his parents in the UK, even the reasoning for that conclusion was limited. The assessment at [19], which went beyond best interests to consider whether it was reasonable for the third appellant to leave the UK, was not adequate. The authority of MA (Pakistan) indicated, at [49], that for a child who had been in the UK for seven years, their presence established a starting point that leave to remain should be granted unless there were powerful reasons to the contrary. No such analysis had been carried out and no powerful reasons had been identified, although the appellants' appeal did not depend on the 'powerful reasons' principle. The minor appellant had succeeded in MT and ET where her mother's immigration history was far worse than the lead appellant in this case, who had entered the UK lawfully, and his appeal rights had only been exhausted in the later part of his presence in the UK.

The respondent's submissions

9. Mr Lindsay submitted that when making an assessment of the reasonableness of requiring the third appellant to leave the UK, JG allowed the question to be posed from the starting point that adult appellants would be leaving the UK as well. That was not always the case where, for example, one parent was a British citizen, so the question needed to be put hypothetically.

10. Both MA (Pakistan) and MT & ET predated KO (Nigeria), and the test of 'powerful reasons' needing to justify the requirement for a qualifying child to leave the UK was no longer good law. By way of example, although not strictly binding on this Tribunal, we were referred to the Inner House, Court of Session decision given by the Lord President, the most senior Scottish judge, in the case of SA and others v SSHD [2018] CSIH 71. In that case, the minor appellants' personal circumstances were far more difficult than the third appellant in this case and yet the Court of Session had concluded that it was reasonable to expect the minor appellants to return with their parents. The Court of Session had not applied a 'powerful reasons' test and by implication that test had been overruled.

11. In this case, the FtT had clearly considered the ages of the third appellant and his siblings and the FtT's conclusions on the reasonableness of the third appellant's return were open to the FtT to make.

Discussion and conclusions on error of law

12. We conclude that there are material errors of law in the FtT's decision. We were referred to different sets of facts in MT and ET and SA and others, with each representative inviting us to conclude that the set of circumstances they relied on was more extreme than the circumstances of the appellant in this case, so that depending on which set of facts we applied, the FtT's decision was either not open to him to make, or his findings had not only been open to him, but were not so extreme as asserted.

13. These submissions illustrate the danger of relying on facts in other, factually unconnected cases, as somehow amounting to precedent or binding facts, which

should guide other cases. What the authorities are clear on is a need to examine facts on a case-by-case basis, so that any assessment of article 8 rights, either within or outside the Immigration Rules, is intensely fact sensitive.

14. We do not accept Mr Lindsay's submission that the reference to 'powerful reasons', outlined in MA (Pakistan), does not survive KO (Nigeria). Nothing in KO (Nigeria) suggested that powerful reasons are no longer a valid factor to consider and the absence of a reference by the Court of Session to them cannot, by inference, be seen as suggesting that that part of MA (Pakistan) was wrongly decided. In any event, we consider that the FtT's error of law did not depend on a narrower consideration of 'powerful reasons', but the absence of a wider analysis by the FtT of what made it reasonable to expect the third appellant to leave the UK.

15. The FtT had concluded that it would be in the best interests of the third appellant and his siblings to remain with their parents in the UK; and had correctly identified at [19] that that did not answer the question of whether it would be reasonable to expect the third appellant to leave the UK. However, in the remainder of the reasoning at [19], which comprises the substance of the FtT's analysis, the FtT did not explain adequately how he moved from the conclusion about the third appellants' best interests to the reasonableness of his departure from the UK. We accepted Mr Jafferji's submission that the FtT's analysis amounted to a conclusion that if one were to assume that the parents were to leave the UK, then on a comparative exercise, it would be less disruptive for the third appellant to join them, as opposed to being separated from them and remaining in the UK. The FtT had made no assessment, on the 'balance sheet' or holistic approach (or indeed by any other analysis) to weigh up the strength of roots and ties in the UK; and what the third appellant would face on his return to Nigeria, in answering the question of whether a requirement for him to leave the UK would be reasonable or not. The absence of such reasoning fundamentally undermined the FtT's decision, so that it contains an error of law and must be set aside.

Disposal

16. With reference to paragraph 7.2 of the Practice Direction, given the narrowness of the factual issues and the legal questions to be answered, the Upper Tribunal will remake the decision on the appellants' appeals, rather than remit them to the First-tier Tribunal. A hearing to remake the appeal decisions will be listed before the Upper Tribunal accordingly.

17. We preserve the FtT's conclusion that it would be in the best interests of the third appellant that he remains with his parents in the UK. The remaking hearing will therefore focus on the extent to which it would not be reasonable to expect the third appellant to leave the UK.

18. The following directions shall apply to the future conduct of this appeal:

    (a) The Resumed Hearing will be listed before Upper Tribunal Judge Keith sitting at Field House on the first open date after 4 November 2019, time estimate 3 hours,

to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

(b) The appellant shall no later than 4 PM on 21 October 2019 file with the Upper Tribunal and served upon the respondent's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

(c) The respondent shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the appellant's evidence; provided the same is filed no later than 4 PM on 28 October 2019.

Notice of Decision

The decision of the First-tier Tribunal contains errors of law and we set it aside.

A hearing in order to remake the decision will be listed in the Upper Tribunal before Upper Tribunal Judge Keith only.

The anonymity directions continue to apply.

Signed J Keith Date: 2 October 2019

Upper Tribunal Judge Keith