Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/21165/2016
HU/21162/2016
HU/21164/2016
HU/21161/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 December 2018	**On 15 January 2019**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

C N-A
O N-A
OA N-A
R N-A
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr J. Plowright, Counsel
For the Respondent: Mr N. Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Nigeria born on 18 October 1964, 3 August 1971, 23 March 1998 and 4 September 2003, respectively. The first and second appellants are husband and wife and the parents of the third and fourth appellants.

2. On 15 March 2016 they applied for leave to remain on article 8 grounds in terms of family and private life. The applications were refused in a decision dated 23 August 2017. Their appeal against that decision was dismissed by First-tier Tribunal Judge Walters ("the FtJ") after a hearing on 7 December 2017.

3. Permission to appeal was granted by a judge of the Upper Tribunal who referred in the grant to the decision of the Court of Appeal in *MA (Pakistan) & Others v Secretary of State for the Home Department* [2016] EWCA Civ 705. Deputy Upper Tribunal Judge Lewis adjourned these appellants' appeals pending the judgment of the Supreme Court now reported as *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53. The appeals now come before me for determination in the light of that judgment.

The FtJ's decision

4. The following is a summary of the FtJ's decision.

5. The FtJ noted that the appellants all entered the UK as visitors in 2008 and then overstayed and that at the time they entered the third appellant was aged 10 and the fourth appellant aged four. At the date of the applications for further leave to remain the appellants had resided in the UK for seven years and for nine years at the date of the hearing before him.

6. In his findings he concluded that the best interests of the children were to remain in a family unit with their parents but also to continue their education in the UK. He did however note that the education that they had been receiving had been provided free at taxpayers' expense and as the minor appellants had no leave to remain they had no right to that education.

7. He concluded that the evidence of the first appellant was not credible. In terms of language he found that it was probable that "a considerable proportion" of the language spoken in their home is Yoruba and that the third and fourth appellants have a considerable understanding of it.

8. He found that the first appellant was an electrician in Nigeria and that he had produced no evidence to suggest that he would not be able to find employment in that respect on return to Nigeria. His evidence that that he had overstayed because he wanted to stay in the UK and work was contrary to his evidence that he had never had paid employment in the UK.

9. He did not believe the evidence of the first appellant that his friends and family would not assist him financially if he had to return to Nigeria. He noted that there was no witness statement from his brother-in-law who it was said gives him cash on a regular basis and he concluded that there was no reason why the same sums could not be given to him until he established himself on return to Nigeria.

10. The FtJ found that the appellants had family life with each other but noted that it was the respondent's intention to return them as a family unit to Nigeria. Referring to section 117B(4) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") (little weight attached to private life established when a person is in the UK unlawfully) he again referred to the fact that the appellants were overstayers but also said that the third and fourth appellants were blameless in that regard.

11. He found that the first appellant would be able to find a job as an electrician in Nigeria and would be able to continue educating his children there although the quality of their education in Nigeria would not be as high as that which they presently receive in the UK.

12. He concluded that the wider public interest in the maintenance of immigration control outweighed the children's best interests, referring to the expense of their education in the UK being met by the taxpayer.

13. The FtJ thus concluded that it would be reasonable for the third and fourth appellants to return to Nigeria and that none of the appellants would encounter very significant obstacles on return. He found that the children would have the support of their parents, and the family as a whole would have the support of the first appellant who is qualified in a skilled trade.

The grounds and submissions

14. The grounds, to summarise, contend that the FtJ failed to consider whether or not the minor appellants qualified for leave to remain under paragraph 276ADE(1)(iv) at the date of the application, in that both were under 18 at the date of the application and had lived in the UK for more than seven years at that date. The FtJ needed to consider whether it was reasonable for them to leave the UK. It is asserted that there was likewise a failure to consider s.117B(6) of the 2002 Act. It is further asserted in the grounds that the FtJ only considered proportionality in terms of the private lives of the appellants and not their family lives.

15. He had failed to identify any strong reasons for refusing leave to remain and had made no reference to relevant authority (such as *MA (Pakistan)*). Likewise, the grounds contend that the FtJ erred in failing to refer to or apply Home Office guidance (now updated) in relation to Appendix FM in particular having regard to the fact that no 'suitability' issues are relied on by the respondent.

16. In submissions Mr Plowright relied on the grounds and referred me to the decision in *KO (Nigeria)*. The Home Office guidance that was applicable at the time of the hearing before the FtJ was that set out in *MA (Pakistan)*. I was also referred to the current, updated, guidance.

17. Mr Bramble argued that the FtJ had considered the best interests of the third and fourth appellants and had made a proper article 8 assessment. He took into account the length of time that the third and fourth appellants had been in the UK.

18. In terms of *KO (Nigeria)*, the FtJ had in fact decided the appeal in line with that decision in the sense that he took into account that the parents had no leave to remain in the UK and neither did their children.

19. As to whether the outcome would potentially have been any different had the FtJ referred to authority and guidance "potentially it would not". Although another judge might have come to a different decision on the appeals, the FtJ's decision was sustainable.

20. After I indicated to the parties that I was satisfied that the FtJ had erred in law in his decision such as to require the decision to be set aside (for the reasons explained below), the parties made further submissions as to the re-making of the decision.

21. Mr Plowright submitted that OA would now meet the requirements of the Rules in terms of para 276ADE(1)(v) in that he was between the ages of 18 and 25 and had spent at least half his life in the UK. He was aged 10 years and 2 months when he came to the UK. However, the fact that OA would now meet the requirements of the Rules in that respect was a 'new matter' (s.85(5)-(6) of the 2002 Act) which required the consent of the Secretary of State for it to be considered.

22. The second appellant's parents live in the UK and they all live together. That is a matter that has not previously been considered in terms of evidence.

23. As to the Home Office guidance, there were no countervailing circumstances such that leave on article 8 grounds outside the Rules should not be granted. Although the appellants were overstayers, that was usually a factor in cases of this kind.

24. Mr Bramble submitted that although in terms of the Rules and para 276ADE(1)(v) that was a new matter that required the consent of the Secretary of State, it was nevertheless a factor that could be considered in article 8 terms outside the Rules. Thus, no issue arises in terms of it being a new matter. What is required is a balancing exercise.

Assessment and Conclusions

25. The reason for my concluding that the FtJ erred in law in his decision is in terms of his failure to have had regard to relevant authority and Home Office guidance in terms of the 'reasonableness' question regarding return to Nigeria of the third and fourth appellants. This aspect of my decision can be briefly expressed.

26. At [49] of *MA (Pakistan)* the Court said as follows:

> "…However, the fact that the child has 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 determining 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."

27. That reflected the Home Office guidance applicable at the time of the appeal before the FtJ, and as summarised by the Court in *MA (Pakistan)*, were it said that:

> "Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4)."

28. It is not that the FtJ failed to refer to and consider the fact that the third and fourth appellants had been in the UK for a period in excess of seven years at the time of the hearing before him (and indeed before), it was that he failed to assess that issue in terms of whether there were "strong reasons" such that leave should not be granted. He very properly referred to the fact that all of the appellants were overstayers and that the minor appellants had received education that they were not entitled to, at taxpayers' expense. However, those factors were not analysed in terms of the applicable Home Office guidance or with reference to the Court of Appeal's analysis of the significance of seven years' residence. Put another way, in my judgment he did not assess the seven years' residence of the third and fourth appellants with proper regard to the significant weight to be attributed to such residence.

29. What was said by the Supreme Court in *KO (Nigeria)* (including with reference to what was said about *MA (Pakistan)*) does mean that the error of law on the part of the FtJ was not material, given the Supreme Court's own analysis of the 'reasonableness' requirement in the Rules and under s.117 of the 2002 Act and the need to consider the matter with reference to the latest Home Office guidance. Accordingly, the decision of the FtJ must be set aside.

30. Para 276ADE provides as follows:

"**Requirements to be met by an applicant for leave to remain on the grounds of private life**

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

31. S.117 of the 2002 Act, so far as relevant, states as follows:

"PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "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).

117B Article 8: public interest considerations applicable in all cases

(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."

32. The guidance that was relied on on behalf of the appellants at the hearing before me was the 'Immigration Directorate Instruction on Family Migration: Appendix FM Section 1.0b, Family Life (as a Partner or Parent) and Private Life: 10-year Routes, dated 22 February 2018'. That superseded the guidance that was applicable at the time of the hearing before the FtJ.

33. However, since the hearing before me yet newer guidance has been published which seeks to reflect the decision of the Supreme Court in *KO (Nigeria)*. That guidance was published on 19 December 2018. On the question of reasonableness of return for a qualifying child there is no longer a reference to the need for "strong reasons" being required before leave is refused. The updated guidance now says this:

Would it be reasonable to expect the child to leave the UK?

If the effect of refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision maker must consider whether it would be reasonable to expect the child to leave the UK.

Where there is a qualifying child

A child is a qualifying child if they are a British child who has an automatic right of abode in the UK, to live here without any immigration restrictions as a result of their citizenship, or a non-British citizen child, who has lived in the UK for a continuous period of at least the seven years immediately preceding the date of application, which recognises that over time children start to put down roots and to integrate into life in the UK. The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK.

In the caselaw of KO and Others 2018 UKSC53, with particular reference to the case of NS (Sri Lanka), the Supreme Court found that "reasonableness" is to be considered in the real-world context in which the child finds themselves. The parents' immigration status is a relevant fact to establish that context. The determination sets out that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that that it would not be reasonable.

There may be some specific circumstances where it would be reasonable to either expect the qualifying child to leave the UK with the parent(s) or primary carer or for the parent(s) or primary carer to leave the UK and for the child to stay. In deciding such cases, the decision maker must consider the best interests of the child and the facts relating to the family as a whole. The decision maker should also consider any specific issues raised by the family or by, or on behalf of the child (or other children in the family).

It may be reasonable for a qualifying child to leave the UK with the parent or primary carer where for example:

- there is nothing in any country specific information, including as contained in relevant country information which suggests that relocation would be unreasonable
- the parent or parents, or child, are a citizen of the country and so able to enjoy the full rights of being a citizen in that country
- the parent or parents or child have existing family, social, or cultural ties with the country and if there are wider family or relationships with friends or community overseas that can provide support:
    - the decision maker must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of his or her life and how a transition to similar support overseas would affect them
    - a person who has extended family or a network of friends in the country should be able to rely on them for support to help (re)integrate there

- parent or parents or a child who have lived in or visited the country before for periods of more than a few weeks. should be better able to adapt, or the parent or parents would be able to support the child in adapting, to life in the country
- the decision maker must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the country
- for example, a period of time spent living amongst a diaspora from the country may give a child an awareness of the culture of the country
- the parents or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period
- fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice

• removal would not give rise to a significant risk to the child's health

• there are no other specific factors raised by or on behalf of the child".

34. Although the "strong reasons" injunction in the guidance no longer appears, it is notable that the guidance does state that "The starting point is that we would not normally expect a qualifying child to leave the UK".

35. For completeness, it is as well to point out that it has not been suggested on behalf of the appellants that any of them meet the requirements of the Rules in terms of Appendix FM, for example for leave to remain as a parent.

36. In my summary of the FtJ's decision I refer to his findings. Those findings that are not infected by the error of law plainly ought to stand. The immigration history of the appellants and their ages at various points are matters that are not in dispute. The FtJ found that the third and fourth appellants have a considerable understanding of Yoruba, that the first appellant would be able to find a job as an electrician in Nigeria and that he would be able to continue educating his children there. He found that friends and family would assist the first appellant financially (and thus the family as a whole) if they had to return to Nigeria.

37. On the question of 'reasonableness' *KO (Nigeria)* says the following:

> "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.

> 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. Subsection 117B(6) is on its face free-standing, 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)."

And at [18]:

> "On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245, [2017] ScotCS CSOH_117:
>
> > "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …""

38. For completeness I quote the guidance at [10], referred to at [17]. At [10] it states the following:

> "The President also cited (para 16) relevant guidance contained in an Immigration Directorate Instruction ("IDI") of the Home Office entitled "Family Life (as a partner or parent) and Private Life: Ten Year Routes", published in August 2015, extracts of which were appended to the judgment (Appendix 2). They included a section headed "Would it be unreasonable to expect a non-British citizen child to leave the UK?", under which were set out a number of "relevant considerations", such as risk to the child's health, family ties in the UK and the likelihood of integration into life in another country and:
>
> > "b. Whether the child would be leaving the UK with their parent(s)

> 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."
>
> There was no reference in the list to the criminality or immigration record of the parents as a relevant factor."

39. The Supreme Court held that the conduct of the parents has no direct part to play in the assessment of what is reasonable in relation to return of a child. Its relevance is said to be only in terms of whether or not the parents themselves have any right to remain.

40. In the case of these appellants, none of them have any form of leave, having overstayed their visas. As to the conduct of the first and second appellants, not only is it not suggested that there is any adverse conduct on their part to be taken into account, notwithstanding that they have overstayed, any such conduct is irrelevant in the light of the Supreme Court's judgment.

41. As regards the third and fourth appellants with reference to para 276ADE(1)(iv), they were under the age of 18 years at the date of application (which is the relevant date) and had lived continuously in the UK for at least 7 years. The issue of reasonableness then arises for consideration under this aspect of the Rules. However, I cannot say that applying the Home Office guidance or, respectfully, the decision in *KO (Nigeria)* is without difficulty. For example, the Home Office guidance says that the starting point is that "we would not normally expect a qualifying child to leave the UK" yet in its interpretation of *KO (Nigeria)* states that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that that it would not be reasonable. In addition, as was suggested in submissions before me on behalf of the appellants, the fact of adult appellants being without leave is a commonplace in cases such as these.

42. However, the resolution of these appeals does not in fact depend on any further analysis of the Supreme Court's judgment in that context, or indeed of the Home Office's guidance.

43. Putting aside for the moment the question of reasonableness in para 276ADE(1)(iv) in relation to the third and fourth appellants, as was acknowledged by both parties before me OA would now meet the requirements of the Rules in terms of para 276ADE(1)(v) in that he is between the ages of 18 and 25 (he is 20 years and nine months) and has spent at least half his life in the UK (he arrived when he was aged 10 years and 2 months). What that means is that if he were to make an application now he would succeed under para 276ADE(1)(v). That provision of the Rules is without qualification in terms of reasonableness.

44. He could not succeed *under the Rules* in that specific respect in this appeal because he would need to have met the age and living in the UK qualification as at the date of the application, which he did not. However, if on a consideration of article 8 outside the Rules in his case (and noting s.117B(5) of the 2002 Act-precarious private life) one reached the point of an assessment of proportionality as one surely would in this case, it seems to me inevitable that the appeal of OA must succeed. It could not be said to be proportionate to remove him in circumstances where he would, on simple application now, meet the requirements of the article 8 Rules which represent the Secretary of State's view of the circumstances in which a person in that appellant's situation would be entitled to a grant of leave.

45. There is no issue in terms of family life; they are a family unit. There is no dispute but that the appellants have each established a private life in the UK. Removing OA would amount to a disproportionate interference with his private life. The result would, equally, be a disproportionate interference with his family life if his sister and parents (with whom he came to the UK) were to have to leave the UK with him remaining behind, even though he is now an adult. It is not suggested that he is independent of his parents or that he does not still enjoy family life with them. To grant OA leave only for him to be separated from his parents and younger sibling would be to give with one hand but to take away with the other.

46. One can approach the matter in another way with reference to para 276ADE(1)(iv) of the Rules in relation to R who is now aged 15. In terms of reasonableness of her return a relevant factor would be that she would be separated from her brother, assuming he would remain. That seems to me to be a powerful factor militating against return even taking into account the preserved findings of the FtJ in terms of language and material parental and other family support on return. In addition, she has lived in the UK since the age of four, a period of 11 years, thus significantly in excess of seven years.

47. Once one reaches the conclusion that OA's appeal must succeed with reference to article 8 outside the Rules, and R's appeal is to be allowed with reference to para 276ADE(1)(iv), it is inevitable that the appeals of their parents must be allowed in terms of article 8 outside the Rules. S.117B(6) applies in relation to R such as to mean that the public interest does not require her parents' removal in those circumstances. There are various permutations but the end result is the same.

48. If necessary to express a concluded view as to whether the appeals succeed under the article 8 Rules or outside the Rules I hold that the appeals of the third and fourth appellants are allowed under article 8 (with reference to para 276ADE(1)(iv) of the Rules), alternatively outside the article 8 Rules in relation to the third appellant OA, and the appeals of the first and second appellants are allowed on article 8 grounds (outside the Rules).

Decision

49. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and I re-make the decision by allowing the appeal of each appellant on article 8 grounds.

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 his 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.

Upper Tribunal Judge Kopieczek 3/01/19