IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2021-000396
UI-2021-000397, UI-2021-000398
First-tier Tribunal Nos: HU/06181/2020
HU/06337/2020, HU/06341/2020

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 22 February 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

(1) MRS ONORH FLORA EGHAREVBA
(2) MS OGHOGHO CHRISTABEL EGHAREVBA
(3) MR JASON OSAHON ENEHIZENA EGHAREVBA
(NO ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C. Amgbah, solicitor, UK Law Associates
For the Respondent: Ms S. Lecointe, Senior Presenting Officer

Heard at Field House on 16 January 2023

DECISION AND REASONS

1. This is a re-making of an appeal against a decision by the respondent dated 16 April 2019 to refuse their human rights claim.

2. The appeal concerns a family unit. The appellants are respectively mother, daughter and son, each of whom are Nigerian nationals.

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3. The procedural background to the appeal is as follows:

   a. The appellants made a human rights claim on 18 November 2018.

   b. As noted, this was refused by the respondent on 16 April 2019.

   c. The First-tier Tribunal ("the FTT") dismissed the appellants' appeal by a decision dated 12 July 2021.

   d. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Macleman on 21 December 2021 on the basis that it was arguable that the FTT had overlooked section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

   e. In the respondent's rule 24 response dated 28 February 2022 it was conceded that the FTT had in fact committed the error identified by Judge Macleman in his permission decision. The respondent accordingly invited the Upper Tribunal to determine the appeal afresh, limited to Article 8 ECHR.

   f. On 4 November 2022, Upper Tribunal Judge Allen directed that, in light of the respondent's concession, in the absence of any submissions to the contrary, to be provided within 14 days, the appeal would be reheard in light of and to the extent of the agreed error of law in the decision.

   g. The parties did not make representations to the contrary and the hearing before us accordingly proceeded as a re-hearing of the underlying appeal.

4. Notwithstanding the above chronology, the decision of the FTT has not yet formally been set aside. We therefore now do so.

5. Although the hearing before us was a re-hearing, neither party suggested that the primary findings of fact by the FTT should be disturbed, save that, given the passage of time, any updating evidence would need to be considered so that our assessment is based on the position as it now stands. We therefore preserve the following findings of the FTT:

   a. The first appellant was born on 21 September 1971 in Nigeria. Prior to coming to the UK, the first appellant and her husband, Mr Solomon Egharevba, lived, studied and worked in Nigeria. They each have postgraduate qualifications. Mr Egharevba is a qualified maths teacher.

   b. Their daughter, the second appellant, was born on 24 June 2001. The first and second appellants came to the UK on a visit visa in March 2004, with 6 months leave to enter but they did not return to Nigeria on its expiry. Mr Egharevba, who had been living here, returned to Nigeria, leaving the first and second appellant here. At the time, the first appellant was pregnant with their son (the third appellant).

   c. In December 2004, the first and second appellants moved to Ireland, where they made an unsuccessful claim for asylum.

   d. The third appellant was born in Ireland on 14 January 2005.

   e. Mr Egharevba returned to the UK in 2006 and has since naturalised as a British citizen.

f. After an unsuccessful attempt in 2008, the appellants came to the UK from Ireland illegally in 2012 and have lived, together with Mr Egharevba, as a family unit ever since.

g. The second and third appellants attended school in the UK from 2012.

h. The second appellant was, at the time of the hearing before the FTT, aged 20 and had completed her first year at university as a nursing student, but was still living at home with her parents. She remains financially and emotionally dependent on her parents and in the particular circumstances of the case should still be regarded as having Article 8 family life with her parents. She also had without doubt a strong private life in the UK, having lived here continuously from the age of about 11. She has not lived in Nigeria since the age of 3. She is fully integrated into life in the UK, despite her lack of legal status here. If she were removed, she could not afford to apply for entry clearance to return to continue her course as an overseas student.

i. The third appellant, then still a minor, had established family life in the UK with his mother and father. He also has strong private life in the UK, having lived here since age 7. His predominant social ties are with the UK, he never having been to Nigeria. He had been in primary and second education here and was looking forward to starting his A levels in the autumn. He too was fully integrated into the UK. His best interests would lie in remaining in the UK with both his parents and continuing his education here.

j. In light of the fact that Mr Egharevba did not relocate to Ireland when the first and second appellant did so, it was doubtful whether he would choose to go to Nigeria if his wife were required to go there.

6. At the hearing before us, the appellants produced evidence of the following, each of which was accepted by Ms Lecointe for the respondent, and which we find on the balance of probabilities as facts:

a. Mr Egharevba is working full-time as a maths teacher, through an agency, earning about £420-450 net per week;

b. the second appellant is now in her third and final year of her nursing course and has a job offer at the Homerton Hospital for when she graduates;

c. the third appellant did not attend the Tribunal because he had an exam on the day of the hearing;

d. the appellants came to the UK from Ireland in July 2012.

7. Ms Lecointe, as well as accepting the above facts, conceded that the permanent removal of the appellants would be disproportionate and breach their article 8 rights. She however submitted that it might be possible (she put it no higher) for the appellants to be removed to Nigeria on a temporary basis for the purpose of making an entry clearance application.

8. We consider that Ms Lecointe's concession in respect of the appellants' permanent removal to have been rightly made. This is a case in which we are in no doubt that, had the FTT not committed the error it did and considered section 117B(6) of the 2002 Act, it would have been compelled to conclude that the third appellant was a 'qualifying child' (he had, by the time

of the hearing been continuously resident in the UK for about 9 years) and that it would be unreasonable to expect him to leave the UK (his best interests were to remain with both parents in the UK, but, as his father would have remained in the UK, the third appellant's removal would have severed the family; he has never been to Nigeria and is and was fully integrated into life in the UK). That being so, had it been applied s.117B(6) the FTT would have conclusively determined that the public interest did not require the first appellant's removal. Given the necessary findings on the way to that conclusion, it follows that the third appellant's removal would also have been found to have been disproportionate. That would just have left the position of the second appellant to be considered. Given that the FTT found that she continued to enjoy family life with her parents and brother, the length of her residence in the UK and given her level of integration (then a nursing student looking to practise within the NHS), it would in our judgment necessarily follow that the second appellant's removal on a permanent basis would also breach Article 8.

9. The assessment of proportionality by us as at the date of the hearing in the Upper Tribunal is therefore to be made in respect of a family who, but for the FTT's error of law, would *ex hypothesi* have been granted leave to remain during the second half of 2021. Their continued residence and the even greater integration which necessarily follows from having spent a further 18 months in the UK can only have strengthened their Article 8 rights. The fact that the third appellant turned 18 two days before the hearing of this appeal is of limited relevance to that, it being trite that someone does not fall to be treated differently for Article 8 purposes on the stroke of their 18th birthday. He remains a member of the household in his final year of his secondary education and is, we consider, dependent on his parents in the same way as he was as a 17-year-old child, a mere few days ago. We also note that the third appellant has now spent more than half of his life in the UK and so, were he to make a fresh application from within the country today, he would be entitled to leave within the rules under Appendix Private Life, PL 4.1.

10. What then of Ms Lecointe's submission that it would not be disproportionate for the appellants to have to leave the UK so that they could make an entry clearance application? As a preliminary, it is regrettable that this argument has been run for the first time in this Tribunal and without notice to the appellants that the respondent intended to do so. It was not raised in the respondent's decision dated 16 April 2019, nor run by the respondent's counsel before the FTT. Nonetheless, we consider that we are in a position fairly to deal with the point. Turning to its substance, as the Court of Appeal has very recently confirmed in *Alam v SSHD* [2023] EWCA Civ 30, that in a case where the respondent takes the 'narrow procedural point' that an appellant must leave the UK in order to make an application for entry clearance, a full analysis of the Article 8 claim remains necessary, including by applying Part 5A of the 2002 Act. Turning then to the position of the appellants:

    a. As already noted, the third appellant would not have to leave the UK as he has been here for more than half his life and could therefore make a successful fresh application within the rules from within the UK. The submission therefore does not arise in respect of him and, given that the rules permit this, there is no real public interest in his removal for the purposes of making an application: *TZ (Pakistan) v SSHD* [2018] EWCA Civ 1109, [2018] Imm AR 1301.

    b. In respect of the first and second appellants, it follows from Ms Lecointe's concession in relation to the family's permanent removal that it would only be proportionate for them to be removed temporarily if they will (or, perhaps, will be likely to) be entitled to entry clearance once they have been removed. Ms Lecointe however did not seek to

show that they would be so entitled and, when pressed, accepted that she was unable to say whether such an application would succeed or not. Given that the removal of the first and second appellants even for a temporary purpose would undoubtedly interfere with their family life with the third appellant and Mr Egharevba, we do not consider that the respondent has shown that the removal of the first and second appellants for the purposes of making an application to re-enter would be proportionate. That is notwithstanding the significant public interest in the maintenance of effective immigration controls and that little weight should be given to private life or a relationship established when a person is in the UK unlawfully. In the absence of any explanation or evidence as to whether and how their application would succeed, there is no basis for concluding that their ostensible removal for a temporary purpose would not in fact be permanent.

11. We accordingly allow the appellants' appeal.

Notice of Decision

12. The decision of the First-tier Tribunal is set aside.

13. The decision in the appeal is re-made as follows: the appeal is allowed on human rights (Article 8) grounds.

Paul Skinner
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 January 2023