Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: IA/28126/2015**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision Promulgated**
On 27 April 2017	**On 11 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

CAROLINE AKOMU ABRAHAM

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jagadesham counsel instructed by GMIAU

For the Respondent: Mr C Bates Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Appellant was born on 9 May 1973 and is a national of Nigeria. There are 4 dependants in this appeal: the Appellants husband Collins Chidi Abraham; their three children who were all born in the UK: [DA] born 2006, [DCA] born 2009 and [DChA] born 2012.

3. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.

4. This was an appeal by the Appellant against the decision of First-tier Tribunal Judge Gladsone promulgated on 31 August 2016 which allowed the Appellant's appeal against the decision of the Respondent dated 22 July 2015 to refuse her human rights application to remain in the UK on the basis of her family and private life.

5. In a decision dated 6 February 2017 Deputy Upper Tribunal Judge Lever found at paragraph 25:

> "*... the judge while conducting an exemplary and detailed analysis of this case made an error of law by failing to take account of section 117B(4) and (5) and potentially placing too much reliance on the Home Office IDI and potentially misdirecting herself in terms of what was finally concluded in* ***MA*** *. A failure to fully consider or at all the public interest inherent in Section 117B(4) and (5) may have led to a material error of law in that if the judge had considered the public interest and adopted the approach taken by the court in MA and MM (Uganda) she may well have come to a different conclusion particularly bearing in mind her earlier analysis regarding relocation*."

6. The decision was set aside in so far as it related to the reasonableness of return to Nigeria under section 117B6.

7. The following findings were preserved:

   (a) The Appellant does not succeed under the Immigration Rules.

   (b) There is a genuine and subsisting relationship with a qualifying child.

The Law

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

9. 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.

10. 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).

11. 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

12. 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;"

13. Reference is made to the guidance given in R (on the application of MA (Pakistan) and Others) v UT (IAC) & Anor [2016] EWCA Civ 705 in relation to the issue of reasonableness in section 117B 6 of the 2002 Act at paragraph 45 it states:

"In my judgment, if the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the "unduly harsh" concept under section 117C(5), so should it when considering the question of reasonableness under section 117B(6)…

But the critical point is that section 117C(5) is in substance a free-standing provision in the same way as section 117B(6), and even so the court in MM (Uganda) held that wider public interest considerations must be taken into account when applying the "unduly harsh" criterion. It seems to me that it must be equally so with respect to the

reasonableness criterion in section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of section 117B(6) is that where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted."

14. In addressing the relevance of the Respondents policy in relation to Appendix FM and children MA at paragraph 46-49 states:

"46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. 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). These instructions were not in force when the cases now subject to appeal were determined, but in my view, they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

47. Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interest's assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so.

...

49. Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. 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."

Submissions

15. At the hearing I heard submissions from Mr Bates on behalf of the Respondent that :

(a) He relied on the reasons for refusal letter.

(b) The Appellant did not meet the requirements of the Rules and this informs the public interest.

(c) He conceded that the two eldest children were now qualifying children but there was, for example no suggestion that in speaking English they did not speak the primary language of Nigeria.

(d) In relation to their financial circumstances they were not financially independent in that their 3 children were not British citizens but had utilized public funds in accessing education and had all been born courtesy of the NHS.

(e) Both their family life and private life were precarious.

(f) MA made clear that all of these factors while not relevant to an assessment of the best interests of the children were relevant to the assessment of the reasonableness of return.

(g) In relation to the reasonableness of the children returning to Nigeria the fact that they had lived in the UK for more than 7 years was capable of adding weight to their claim. However their private life could be reformed in Nigeria. Their parents would be returning with them to a country they were familiar with and could assist the children in adapting. While they might prefer to remain this was not determinative and their best interests can be

outweighed by the adverse immigration history and the reliance on public funds.

(h) Even allowing for the 7 years they had been in the UK they had not had 7 years in education because of their ages.

(i) The Appellant and her husband could work in Nigeria and were therefore capable of supporting themselves in addition to anything they were entitled to with an assisted voluntary return.

(j) He asked what was unreasonable about requiring them to return to the country of their nationality: language was not an issue and while they may have Manchester accents Nigeria was a country of many accents and those amongst the ex-pat community in the UK who returned were likely to return with an accent; education was available.

(k) There has to be more than a mere difficulty or dissatisfaction at returning.

16. On behalf of the Appellant Mr Jagadesham submitted that :

(a) The starting point must be that the two eldest children were qualifying children.

(b) He relied in paragraph 10 of his skeleton argument on paragraph 49 of MA that powerful reasons were required for refusing leave where there was a qualifying child.

(c) He suggested that in relation to the best interests of the children [DA] had now been in the UK 10 years and 6 months and [DCA] had now been here for 7 years and 4 months. They have social and cultural roots and it would be highly disruptive for them if they were required to leave.

(d) Paragraph 117B6 lays out the relevant factors as required by parliament, there was no requirement of compelling reasons.

(e) If the answer in relation to the child's best interests was an emphatic yes that this answered the test of reasonableness.

(f) In addition to the ties already referred to there was direct evidence of the children's own views having spoken to a social worker. They had never

been to Nigeria or had any contact with family there. They would not be returning to the extended bosom of a welcoming family. [DA] was old enough to express concerns about Boco Haran and the kidnapping of children. It was overstating the matter to suggest that because the parents were Nigerian they were familiar with Nigerian culture.

(g) In relation to [DA] the Appellant had also submitted an application for citizenship on 26 January 2017. His application reflected a recognition by parliament that 10 years residence since birth entitles an applicant to British Citizenship.

(h) It was emphatically in their best interests to remain in the UK. Their best interests outweighed the public interest factors arising out of the adverse immigration history of the parents.

Findings

17. 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.

18. The Appellant is now a 44 year old citizen of Nigeria who was refused leave to remain in the United Kingdom on the basis of her family and private life. She is the Appellant in this case but there are 4 dependants named whose circumstances are relevant to the issues which I must resolve. There is reference to a younger child, [D], who was not born at the time of the application.

19. The Appellant appeals the decision of the Respondent on the basis that the decision is unlawful under section 6 of the Human Rights Act 1998.

20. 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?

21. I am satisfied that the Appellant has a family life in the United Kingdom with her husband and 3 children but given that they would be removed as a family I do not accept that there would be any interference with their exercise of the right to family life. I am satisfied that the Appellant has a private life in the UK given the period that the family has lived in the UK.

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

22. 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?

23. 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 Appellant to regulate her 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?

24. 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 her private and family life.

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

25. I am satisfied that in assessing the proportionality of the removal decision I am obliged to consider firstly the best interests of the children who are affected by and those best interests are assessed without reference to the parents circumstances. In making the assessment of the best interests of the children I

have also 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."*

26. 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".*

27. The starting point is that children should be brought up by both of their parents whether that be in the UK or Nigeria.

28. They are all healthy children and have no apparent physical or mental issues that would render a return to Nigeria contrary to their best interests and there is, of course, a functioning health service in Nigeria.

29. It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. I note therefore that in this case that all of the children were born in the UK and have lived here since birth and have never been to Nigeria: [DA] has lived in the UK for 10 years and 6 months , [DCA] for 7 years and 4 months and [DChA] for 4 years 8 months. I also note as an additional factor than in respect of the older boy the family made an application for British citizenship for him but at the time of the hearing before me that application had not been considered and had certainly not been granted. The

two older boys have however lived in the UK in excess of 7 years and past and present policies have identified seven years as a relevant period. Their length of residence is perhaps the strongest argument that they have in relation to their best interests as I remind myself that in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) (Blake J) it was said that lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. Again I note that in Azimi-Moayed it was also said that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable: given the respective ages of the boys in this case therefore the strength of this factor is somewhat less than it might have been had they been older when they came to the UK.

30. The boys have both attended school in the UK and there are a number of positive school reports in the bundle reflecting the fact they are socially and educationally well settled in the community. They engage in out of school activities organised by both the school, the Church and the local community but there is of course a functioning education system in Nigeria, Churches that they could attend and nothing to suggest that activities are not organised for children as they are here albeit they would be different in nature and the parents were both educated to degree level there and would be best placed to ensure that their children engaged with and benefited from the system available: while the system is not free if the parents were both working, something they assert they are eager to do in the UK so should be equally be prepared to do in Nigeria. There is therefore nothing to suggest it could not be accessed by them and that return would therefore be contrary to their best interests. The disruption caused by moving school and its impact on the children should not be exaggerated as I note that that [DA] appears to have started his education in a school in Southend in Sea and then moved to the Manchester area in the middle of a school year without any apparent difficulty as none is noted in any of the school reports provided.

31. The boys speak English which is clearly spoken in Nigeria and while I accept that they do not speak Edo which is the dialect of the area the Appellant is from, I do not accept that this is of any particular significance as it is a 'dialect', English is the official language of Nigeria and the family would not apparently wish to return to their home area. I do not accept that there is evidence that having a Mancunian accent would adversely affect them.

32. I have taken into account the report at pages 16-19 of the Appellants bundle from a student social worker Grace Osuokota. I accept that given the length of time they have lived in the UK they identify as British as much as a 10 year old and 7 year old have unprompted thoughts about such matters as this is confirmed in the report of Ms Osuokota. Not surprisingly the children expressed their desire to remain in the UK. The report suggests that it is in their best interests to remain in the UK. I give some weight to this although the weight I attach must be inevitably limited by the lack of information about her qualifications, experience, confirmation of her expertise in relation to children/social care or indication of the social educational and other provisions available in Nigeria when suggesting that return would have a detrimental impact on them.

33. Nevertheless ,taking all of those factors into account , particularly the length of residence of the two older boys and their integration into UK society I accept that it is in the best interests of the children to remain in the UK but not overwhelmingly so because while they were settled in their schools, had developed sporting and other interests, were benefiting from an English education and had developed close friendships which they did not want to lose and whose loss would cause them some emotional distress there is nothing to suggest that education and friendships would be unattainable in Nigeria. I am satisfied that they could with the help of parents who have lived the majority of their life in Nigeria be able to settle there and would be able to pursue their sporting interests and further education there, where English continues to be the official language. I do not think that the distress from losing friends would be long-lasting or irreversible. Returning to Nigeria would not adversely affect their health or frustrate their long-term ambitions.

34. I now turn to section 117B 6.

35. The assessment of the reasonableness of return must not however focus entirely on the position of the children and this has been made clear in MA referred to above and more recently in AM (Pakistan) [2017] EWCA Civ 180 unless it is overwhelmingly in the children's best interests to remain in the UK which I have not found to be the case here.

36. When considering where the balance lies between the best interests of the children on the one hand and the importance of maintaining immigration control on the other I am entitled to take into account that the Appellant did not meet the requirements of the Rules either in relation to family or private life which are intended to promote consistency, predictability and transparency in decision-making where issues under article 8 arise, and to clarify the policy framework. The Rules are also intended to reflect where the balance should be struck between the right to respect for private and family life.

37. I am entitled to take into account and give significant weight to the fact that the parents have breached UK immigration law whose maintenance is in the public interest. The Appellant and her husband have remained in the UK unlawfully for periods in 2009 when the Appellant overstayed a visit visa between November 2012 - December 2013. They have never had any legitimate expectation that they could live permanently in the UK as they came as students .At all times that the Appellant was in the UK her status was therefore either unlawful or precarious and therefore must be accorded little weight. I remind myself that at paragraph 88 of MA it states '*the conduct of the parents is relevant to their own situation which bears upon the wider public interest and does not amount to blaming the children even if they may be prejudiced as a result*.' The family have indirectly benefited from public funds in that four children were born in NHS hospitals and are those of school age are being educated in UK schools at public expense.

38. Having considered all of the evidence carefully and factoring in my conclusion that on balance it is in the best interests of the children to remain in the UK I have come to the conclusion that it is reasonable for the purposes of section 117B6 to

require the children to leave the United Kingdom. Whilst it will inevitably cause them 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 the parents lived the majority of their life. They suggest there is estrangement from other family members but I am satisfied that they are independent and well educated enough to live as a nuclear family apart from those family members they are estranged from. The Appellant and her husband are both educated up to degree level and the Appellant with the Appellant having qualifications in Catering and Hotel Management. Her husband obtained a Diploma in Law in Nigeria and further legal qualifications in the UK. The Appellant undertook employed work in Nigeria before coming to this country in a hotel in Port Harcourt working as a Marketing Executive and in other departments. There is no reason before me why they should not obtain suitable employment on their return so as to be able to continue to support their family

39. In determining whether the removal would be proportionate to the legitimate aim of immigration control I find that none of the facts underpinning the Appellants life in the United Kingdom taking into account the best interests of the children taken either singularly or cumulatively outweigh the legitimate purpose of the Appellants removal.

Conclusion

40. On the facts as established in this appeal, there are no substantial grounds for believing that the Appellant's removal would result in treatment in breach of ECHR.

Decision

41. The appeal is dismissed.

Signed Date 10.5.2017

Deputy Upper Tribunal Judge Birrell