



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/01309/2014
AA/01348/2014
AA/01349/2014

THE IMMIGRATION ACTS

Heard at Bradford
On 7 June 2018

Decision & Reasons Promulgated
On 19 June 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

**OO (FIRST APPELLANT)
AO (SECOND APPELLANT)
MO (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Hussain, instructed by Kamden Community Law Centre
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision which was promulgated on 20 June 2017, I found that the First-tier Tribunal had erred in law such that the decision fell to be set aside. My reasons for reaching that decision were as follows:

“1. The first appellant, OO, is a female citizen of Nigeria who was born in 1984. The second and third appellants are her children who were born in 2011 and 2013 respectively. The first appellant has a further child who was born in 2015. In this decision, I shall refer to the first appellant as “the appellant”.

2. The Secretary of State by decisions dated 11 February 2014 refused the appellants’ applications for asylum. The appellant appealed to the First-tier Tribunal but her appeal was dismissed. Following a hearing in the Upper Tribunal, that decision was set aside and the case was remitted to First-tier Tribunal Judge Turnock who, in a decision following a hearing on 22 November 2016, dismissed the appeal. The appellants now appeal, with permission, to the Upper Tribunal for a second time.

3. The appellant suffers from mental health problems. The family as a whole have been examined by Dr Audrey Oppenheim, a consultant child and adolescent psychiatrist. It is in relation to the effect of removal upon the family as a whole and in particular upon the appellant that permission has been granted by Judge Grant on 14 March 2017. Judge Grant stated that the other grounds were not arguable and gave reasons for so finding. The other grounds concern challenges to the credibility findings of Judge Turnock which the Upper Tribunal shall, in the circumstances, not revisit. The remaining ground focuses on the psychiatric evidence. The psychiatric report of 12 November 2014 indicated that if the first appellant returned to Nigeria she would be “very much at risk” of contemplating suicide [9.1.4]. The grounds assert that Judge Turnock failed to make any finding of the suicide risk to the appellant on return to Nigeria.

4. At [103–109] of his decision, Judge Turnock stated:

“103. Miss Mottershaw submitted that the Appellant's sons who are parties to the appeal, both have significant health problems. Abdul has ongoing and severe chest problems including pulmonary tuberculosis, kidney problems, skin problems and asthma. (Medical letters - Appellants’ bundle 224-259). His treatment is ongoing and his consultant provided evidence that would be difficult to transfer his care (Appellant’s bundle page 240). Muslim also suffers from chest infection and has behavioural issues that require weekly support from a social worker. (Appellant’s bundle pages 38-85). She pointed out that in addition to identifying in the older two boys’ development Dr Oppenheim points to progress and potential for further progress with the kind of professional support available to the family in the UK. It was submitted that such should be taken into account in assessing the children’s best interests.

104. Miss Mottershaw further drew my attention to the Report of Dr Oppenheim in which she indicates that, in the absence of a Child Protection Plan, the children would be “at significant risk of parental neglect” (paragraph 5.2), with removal to Nigeria possibly leading to “a severe deterioration in Lola's resilience and ability to provide for her children, both materially and emotionally (paragraph 5.3). She further pointed out that the doctor considers that the family requires “a range of professional services if further harm, as both an individual and family level it is to be prevented” (paragraph 5.7).

105. I also noted that the recent medical evidence indicates that treatment and support has been effective but it is an ongoing process. As Mrs McGowan set out in her letter dated 25 July 2016 is a clear connection between the ongoing high level of support and her current improvement.

106. Assessing the Appellant's claim, in light of the guidance of the caselaw set out above, I reach the following conclusions: I accept that the Appellant has mental health issues which make her vulnerable but I do not accept she would have no support from family if returned to Nigeria. I therefore find that she would not be a lone female without a support network.

107. I am satisfied that it is in the best interests of the children of the Appellant to remain with the Appellant as a family unit. That would, of course be achieved, either if the Appellant remained in the UK or if she and her family removed together from the UK. The children are receiving education and considerable support with their health problems in the UK which appears to be superior to the support they would receive on return to Nigeria.

108. The Appellant and her family have been in the UK for a number of years, although none of the children have been in the UK for seven years and so they do not meet the definition of 'qualifying child' under the provisions of the Immigration Act 2014. The children who are now in education have integrated in school although the Appellant appears to have spent most of her time in the UK in 'isolation'. There was no evidence produced to show that she has developed a significant private life in the UK. The Appellant entered the UK on a valid visa but has remained in the UK unlawfully for most of the time that she has been in the UK. The Appellant is not economically self-sufficient and in fact requires a considerable input of public funded support. There is no doubt that the Appellant and her children will face some significant difficulties on a return to Nigeria and the health care provision available in Nigeria will not be comparable to that which is available in the UK. There will almost certainly be some deterioration in the health of the Appellant and of her children but I cannot find that it would be such as to meet the high threshold required and as clearly set out in the caselaw.

109. I reach the conclusion that the return of the Appellants to Nigeria would not be in breach of the Appellants' rights under Articles 3 and 8 of the ECHR as the public interest in maintaining effective immigration control outweighs the factors in favour of the Appellants being granted leave to remain, including the best interests of the children."

5. The appellant asserts that, although the judge made a finding that the appellant had family in Nigeria to whom she could return, that premise had not formed the basis of the psychiatrist report and that there were other reasons, in particular, the subjective fear which may or may not be objectively well-founded, of the appellant which would influence the possibility of her attempting suicide on return. Further, as the helpful skeleton argument of Miss Mottershaw, Counsel

for the appellant, states, “notwithstanding the First-tier Tribunal Judge’s findings on family support, it was still necessary to consider both the existence of state mechanisms and whether the first appellant would have access to them”.

6. Judge Turnock has produced an extremely detailed and thorough decision and I note that the challenges in particular to his findings on credibility have not been upheld by the judge considering the grant of permission. However, the judge has not dealt in terms with the risk of suicide to the appellant. In my opinion, the judge should have dealt specifically with suicide given that this had been raised in the first of the psychiatric reports. Mrs Pettersen, for the respondent, submitted that there was no mention of suicide risk in the second report which would indicate that the risk had diminished. I consider it problematic to read the two reports in that way. Whilst what Mrs Pettersen submits may be true, it is equally possible that the psychiatrist did not consider it necessary to refer again directly to the suicide risk on the basis that she had already dealt with that in her first report. That leaves the finding as to family support and its relevance to the mental health of the first appellant which, as Judge Turnock acknowledged, is likely to deteriorate on return to Nigeria. Although at [106], Judge Turnock specifically found that the appellant would not be a lone female without a network of family support in Nigeria, he has not addressed the appellant’s subjective fear (possibly ill-founded) of being unable to cope with the children and the psychiatrist’s observation that the children are likely to suffer neglect if the appellant, in turn, does not receive adequate support. It is, of course, possible that that support may be provided by the family which the judge finds she has in Nigeria but it is equally possible that the psychiatric expert considered it of particular and primary importance that the appellant should have professional assistance as well as that which may be provided by family members. Given the seriousness of the impact upon this family if all the evidence, including the psychiatric evidence, is not properly assessed, I consider that it is prudent to set aside Judge Turnock’s decision although I shall preserve all his findings of fact save for those relating to the appellant’s mental health and her ability to cope with the children and her own difficulties upon return to Nigeria.

7. Many of the issues which I have touched upon above depend upon there being further psychiatric evidence from Dr Oppenheim addressing those particular matters. I consider there needs to be a further psychiatric report which addresses specifically (i) the risk of the appellant committing suicide upon return to Nigeria at the present time; (ii) on the basis that the appellant does have family members who will be able to assist her in Nigeria the extent to which they may be able to diminish that risk to the appellant; (iii) the extent to which the appellant’s mental condition requires professional medical help as opposed to support from family members; (iv) given the expert’s previous concerns regarding the ability of the appellant to cope adequately with the children, whether those difficulties may be overcome should the appellant enjoy family support.

8. I direct the appellant to obtain a further medical report from Dr Oppenheim which deals with the issues which I have outlined, brings the family’s mental health up to date and addresses any other issues which either the appellants’ representatives, the respondent or Dr Oppenheim may consider relevant to the risk on return facing this family. I shall fix a resumed hearing before me in Bradford on the first available date after 1 August 2017. If either party considers that such a date does not give sufficient time to obtain all the evidence including

the psychiatric report, that party should write to the Upper Tribunal as a matter of urgency to indicate an alternative timetable. I direct that both parties should send to the other party and to file at the Upper Tribunal any evidence (including medical evidence) upon which they may respectively seek to rely no less than ten days prior to the date of the resumed hearing.

Notice of Decision

The decision of the First-tier Tribunal which is dated 22 November 2016 is set aside. All of the findings of fact are preserved save for those relating to the likely risk to the appellants as a consequence of the first appellant's mental condition. The Upper Tribunal will remake the decision following a resumed hearing at Bradford before Upper Tribunal Judge Clive Lane on the first available date after 1 August 2017."

2. Somewhat to my surprise and notwithstanding what I had indicated in the error of law decision regarding further medical evidence from Dr Oppenheim, no such further evidence has been adduced. I had only the bundles which had been before the First-tier Tribunal. Having considered the oral submissions of both Mr Hussain, who appeared for the appellants, and Mrs Pettersen, who appeared for the Secretary of State, I reserved my decision.
3. I shall begin by giving my reasons for finding that the appeals of these appellants against the decisions of the Secretary of State should be allowed. These appeals have an unfortunate litigation history. The first appeals were lodged more than four years ago and there have been a number of decisions in the First-tier Tribunal which have subsequently been set aside and the appeals remitted. As can be seen from my error of law decision, the appellant herself entered the United Kingdom as a student as long ago as 2005. The second and third appellants are the first appellant's children who were born in the United Kingdom in 2011 and 2013 respectively. There is no suggestion that the appellant or the children have left the United Kingdom for any reason. Having been born on 28 March 2011, the second appellant and eldest son of the appellant, has now been living in the United Kingdom for more than 7 years. So far as the Tribunal is aware, the children are not British citizens. The second appellant is, however, now a "qualifying child" for the purposes of Section 117B(6) of the 2002 Act (as amended):
 - '(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.'
4. For convenience, I set out below the relevant paragraphs of the Upper Tribunal's decision in *MT and ET (Nigeria)* [2018] UKUT 88 (IAC). In that case, which was very recently promulgated and provides a helpful precis of the principles relevant to the instant appeal, the Upper Tribunal has addressed passages of *MA (Pakistan)* [2016] EWCA Civ 705. At [27–34], the Upper Tribunal stated:

"... In MA Elias LJ held as follows:-

"43. But for the decision of the court of Appeal in MM (Uganda), I would have been inclined to the view that section 117C(5) also supported the appellants' analysis. The language of "unduly harsh" used in that subsection is not the test applied in article 8 cases, and so the argument that the term is used as a shorthand for the usual proportionality exercise cannot run. I would have focused on the position of the child alone, as the Upper Tribunal did in MAB.

45. However, the approach I favour is inconsistent with the very recent decision of the Court of Appeal in MM (Uganda) where the court came down firmly in favour of the approach urged upon us by Ms Giovannetti, and I do not think that we ought to depart from it. 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). I recognise that the provisions in section 117C are directed towards the particular considerations which have to be borne in mind in the case of foreign criminals, and it is true that the court placed some weight in section 117C(2) which states that the more serious the offence, the greater is the interest in deportation of the prisoner. 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."

28. At paragraph 46, Elias LJ held that:-

"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". Elias LJ then referred to the guidance of August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes". There, 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)."

At paragraph 49, we find the following:-

"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."

29. Matters have, of course moved on from 15 May 2017, when the respondent issued her Statement of Issues and Response. In re-making this decision, accordingly, the Upper Tribunal does not find itself in the same position as that of Judge Martin. We are not bound by the constraints of the Proof of Concept process. Mr Nicholson therefore did not urge us to find that we must allow the appeal, without more, if we find that ET's best interests lie in remaining in the United Kingdom.

30. The fact that ET's best interests do so lie is, we find, manifest. In this regard, we entirely agree with and endorse Judge Martin's findings on this issue in her decision. ET has been in the United Kingdom for over ten years. She arrived here when she was only 4. She is well advanced in her education in this country. As a 14 year old, she can plainly be expected to have established significant social contacts involving friends in school and outside (such as at church). She has embarked on a course of studies leading to the taking of GCSEs.

31. Conversely, ET has no direct experience of Nigeria. Whether or not there is a functioning education system in that country, her best interests, in terms of section 55 of the 2009 Act, manifestly lie in remaining in the United Kingdom with her mother rather than, as the respondent contended, returning to Nigeria with her mother. A much younger child, who has not started school or who has only recently done so will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part.

32. This is why both the age of the child and the amount of time spent by the child in the United Kingdom will be relevant in determining, for the purposes of section 55/Article 8, where the best interests of the child lie.

33. On the present state of the law, as set out in MA, we need to look for "powerful reasons" why a child who has been in the United Kingdom for over ten years should be removed, notwithstanding that her best interests lie in remaining.

34. In the present case, there are no such powerful reasons. Of course, the public interest lies in removing a person, such as MT, who has abused the immigration laws of the United Kingdom. Although Mr Deller did not seek to rely on it, we take account of the fact that, as recorded in Judge Baird's decision, MT had, at some stage, received a community order for using a false document to obtain employment. But, given the strength of ET's case, MT's conduct in our view comes nowhere close to requiring the respondent to succeed and Mr Deller did not strongly urge us to so find. Mr Nicholson submitted that, even on the findings of Judge Martin, MT was what might be described as a somewhat run of the mill immigration offender who came to the United Kingdom on a visit visa, overstayed,

made a claim for asylum that was found to be false and who has pursued various legal means of remaining in the United Kingdom. None of this is to be taken in any way as excusing or downplaying MT's unlawful behaviour. The point is that her immigration history is not so bad as to constitute the kind of "powerful" reason that would render reasonable the removal of ET to Nigeria."

5. I do not seek to compare the facts of *MT and ET* with those of the instant appeal but the principles of law applying in both cases are very similar. In the instant appeal, the first appellant arrived as a student and has subsequently sought to remain in the United Kingdom by making what has transpired to be a false asylum claim. Through no fault of hers, it has unfortunately taken a number of years for her appeal to be finally determined and, during that time, she has given birth to a child who is now a "qualifying child". As in *MT and ET*, I can identify no "powerful reasons" in the instant appeal which might suggest that the second appellant should be removed to Nigeria. Given the failure of her asylum appeal, the first appellant's immigration history is not entirely without blemish but she has not absconded, has remained in touch with the authorities and has not committed any criminal offence for which she has been convicted. It is also significant that the seven years which the second appellant has spent living in this country represents his entire life. The second appellant's best interests manifestly lie in the United Kingdom where he should be cared for by his mother and live with his younger sibling. Consequently, I allow the appeals under Article 8 ECHR.
6. In the light of that finding, I shall deal only briefly with the remainder of the appeal. As I have noted above, there was no new medical evidence relating to the first appellant's mental condition. Having considered again very carefully the medical evidence which does exist, I am not satisfied that the appellant would be at risk of committing suicide *either en route* to Nigeria or subsequent to arrival in that country. I had the opportunity of hearing oral evidence at the resumed hearing from the appellant who did not impress me as a witness. I strongly formed the view that she was exaggerating her difficulties in particular as regards coping with the children at times of stress. I am reminded the burden of proof is on the appellant and the standard of proof is whether or not there were substantial grounds for believing there to be a real risk that the appellant would be at risk of Article 3 ECHR ill-treatment on return to Nigeria. Considering the evidence as a totality, including the oral evidence given by the first appellant at the resumed hearing, I am not satisfied that she is a reliable witness at all. I find that, contrary to what she claims, she is likely to have relatives living in Nigeria who would be able to assist her should she have to return there. The basis of her asylum/Article 3 appeal has already been rejected in the preserved findings of the First-tier Tribunal (Judge Turnock). In the circumstances I dismiss her asylum and Article 3 ECHR appeals.

Notice of Decision

7. The appeals against the decisions of the Secretary of State dated 11 February 2014 are allowed on Article 8 ECHR grounds.
8. The appeals are dismissed on asylum/ Article 3 ECHR grounds.

9. The appellants are not entitled to grants of humanitarian protection.
10. An anonymity direction is made.

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

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. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 14 JUNE 2018

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date 14 JUNE 2018

Upper Tribunal Judge Lane