Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22699/2016

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision & Reasons Promulgated**
On: 1 March 2018	**On: 7 March 2018**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Atuegbe, R & A Solicitors
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant.

1. I have made an anonymity order because the respondent ('R') is a 14-year-old child.

Background facts

2. R is a citizen of Nigeria, born there in 2003. She has resided in the United Kingdom ('UK') since 2010 with her grandmother (a British citizen, born in the UK), her aunt and her aunt's two children (all British citizens). R's mother applied for leave to enter the UK in early 2007, but was advised by an Immigration Officer to apply for a certificate of entitlement to the right of abode ('right of abode certificate') instead, which she did successfully later that year for herself, and then in 2010 for R and her two other children. When R entered the UK in November 2010, she therefore did so as a person with a right of abode, valid from 15 June 2010 until 24 January 2013. R's parents and two siblings remained in Nigeria. R remained in the UK with her grandmother, to enable her mother to complete her studies in Nigeria, with a view to the family relocating to the UK at the end of her studies.

3. In July 2015, the appellant ('the SSHD') informed R that her certificate of a right to abode in the UK had been issued in error and apologised for the difficulty this caused. No explanation has been provided for this. Significantly, the SSHD has never alleged any form of deception on the part of R or her family members, and simply asserts that she was mistaken in advising R that she was entitled to the certificate and in granting her the certificate. Shortly after this, R applied to remain in the UK outside the Immigration Rules, which was refused in a decision dated 20 September 2006. R appealed against this decision to the First-tier Tribunal.

Appeal proceedings

4. The SSHD has appealed against the decision of the First-tier Tribunal dated 5 October 2017 in which it allowed R's appeal on Article 8 grounds. The SSHD contends that the First-tier Tribunal erred in law in:

(i) treating R's best interests as determinative;

(ii) failing to factor in the public interest considerations into the balancing exercise;

(iii) failing to take into account and attach weight to the fact that the R would be returning to live with her own family in Nigeria.

5. In a decision dated 7 December 2017 First-tier Tribunal considered these grounds to be arguable and granted permission to appeal.

Error of law discussion

6. As Mr Harrison accepted, in many respects the First-tier Tribunal decision is a carefully drafted one. The law was correctly summarised at [3] to [7], and the First-tier Tribunal made comprehensive and detailed findings of fact at [9], entirely open to it. These findings are summarised at [2] – [3] above.

7. I however accept, as Mr Harrison submitted, that in failing to apply the public interest considerations at section 117B of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') and in focussing solely upon the best interests of R, the First-tier Tribunal committed a material error of law. The relevant provisions of section 117A state:

> "(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)."

8. The considerations referred to in section 117A(2)(a), which are said by that provision to be applicable in all cases where the public interest question is under consideration, are set out at section 117B 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.

9. The factors set out at section 117B(1)-(5) make no distinction between adults and children, and in Miah (section 117B NIAA 2002 - children) [2016] UKUT 131 (IAC) they were held to apply to all, regardless of age.

10. By contrast, the position of a child with seven years of residence in the UK, but without reference to the child's parental relationship, is addressed in the Immigration Rules at 276ADE. This states (my emphasis):

"276ADE. 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

...

(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…".

11. When making its findings, the First-tier Tribunal failed to have regard to the section 117B considerations in the context of this case and specifically failed to consider what role the reasonableness test in 276ADE should play.

12. I do not accept Mr Atuegbe's submission that it was sufficient to simply refer to the wording of section 117B when summarising the legal framework. Section 117A(2) of the 2002 Act requires the Tribunal, when considering the public interest question for the purposes of Article 8, to have regard to the considerations listed in section 117B. The First-tier Tribunal failed to do this and focussed solely upon R's best interests.

13. After hearing from both representatives, I indicated that I was satisfied that the decision contains an error of law. Both representatives accepted that I should remake the decision myself given the absence of any factual dispute, and the detailed, unappealed factual findings made by the First-tier Tribunal.

14. Having had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual agreement in this case, I decided that it was appropriate to remake the decision in the Upper Tribunal.

Remaking the decision

Hearing

15. Mr Atuegbe confirmed that the factual matrix remained the same, and it remained R's mother's intention to leave Nigeria to reside with her family in the UK as soon as they were able to make the necessary arrangements. Mr Harrison was content to accept this evidence and indicated that he did not intend to cross-examine R's grandmother, who was present with a view to providing oral evidence, if considered necessary. Both representatives agreed that it was unnecessary to hear any further oral evidence, and invited me to simply apply the findings of fact to the relevant legal framework.

16. Having heard brief submissions from both representatives, I announced that the appeal was allowed on Article 8 grounds, for the reasons I now set out below.

Best interests

17. I turn firstly to R's best interests, viewed through the lens of Article 8 private life.

18. I have applied the general principles when considering the interests of a child in the context of an Article 8 evaluation. These have recently been summarised by Kitchin LJ in TA (Sri Lanka) v SSHD [2018] EWCA Civ 260 at [22] as follows:

> "In particular, the respondent has an overriding obligation to have regard to the welfare of a child in the exercise of her various statutory functions. The best interests of a child are therefore an integral part of the proportionality assessment under Article 8. In carrying out that assessment it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before determining whether those interests are outweighed by the force of other considerations. In carrying out that evaluation, the best interests of the child must be a primary consideration although not necessarily the only primary consideration. It necessarily follows that the best interests of a child can be outweighed by the cumulative effect of other considerations; but no consideration can be treated as inherently more significant than the child's best interests. Ultimately the decision maker must carry out a careful examination and evaluation of all relevant factors with these principles in mind. The question is whether, having regard to the foregoing, there are compelling circumstances which justify the grant of leave to remain outside the immigration rules."

19. Having considered all the relevant circumstances, I find that R's best interests are served by remaining in the UK, by a considerable margin. There are five dominant factors:

(i) She has spent over seven years in the UK.

(ii) She came to the UK as a young child and has spent some of her most formative years (7 to 14) and half her life in the UK.

(iii) R clearly has significant ties to Nigeria as her parents live there with her siblings. However, she was just a young child when she left Nigeria and I accept she sees herself as British with an identity based on British multi-cultural society. Her integration into UK society can be described as advanced, albeit she clearly has a mixed Nigerian and British cultural identity.

(iv) R will find it difficult to return to Nigeria at this particular stage of her education and childhood. She has already commenced her GCSEs and is doing well at school.

(v) R resides with her grandmother and aunt, together with her two first cousins, aged 14 and 11, who she regards as siblings. She will have to repeat a process of leaving siblings behind to begin a new life elsewhere, and is likely to find this difficult.

20. I have reached this conclusion having borne in mind that R's

biological siblings reside in Nigeria with their parents in what appears to be an entirely stable and loving environment, which R would be able to join, having resided with them in Nigeria from birth to 2010. The difficulty for R would be leaving all that she has become accustomed to in Britain in terms of family and private life, over an extended period of over seven years, and at a formative stage of her life. Whilst R would be able to visit her grandmother, and 'adopted' family, I accept that she is likely to find the process of leaving them, her education and her friends distressing (notwithstanding the availability of communication by modern means), at this particular stage of her life, in the short to medium term. The factual matrix can therefore be distinguished from that in TA (Sri Lanka) (supra), wherein that child had only lived away from her parents and siblings for 3 years and 10 months.

21. I am mindful that the best interests assessment is not determinative and the approach summarised above at [18] must be applied. As Elias LJ noted in MA (Pakistan) v SSHD [2016] EWCA Civ 705 (7 July 2016) at [47] even where the child's best interests are to stay, for the purposes of 276ADE of the Immigration Rules or section 117B(6) of the 2002 Act it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and Nigeria, as well as any other relevant wider considerations – see [45] of MA (Pakistan) and EV (Philippines) v SSHD at [34-37].

Section 117B considerations

22. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act. By section 117A(2) I am obliged to have regard to the considerations listed in section 117B, and do so below.

23. The public interest in the maintenance of effective immigration controls is engaged but to a limited extent. The whole family (and the SSHD, at least to 2015) proceeded on the basis that R was lawfully entitled to reside in the UK. This was based upon a right of abode certificate granted in good faith in 2010. It was only in 2015 that the SSHD pointed out that this was granted in error and apologised for this mistake. It follows that R has spent the majority of her time in the UK holding the reasonable belief that she was entitled to remain lawfully and has taken steps to clarify her immigration status since then.

24. I also bear in mind that as at the date of application on 17 March 2016, R did not have seven-years residence, and as such 276ADE cannot be met. However as at the date of hearing before the First-tier Tribunal and before me, R has been resident in the UK for over

seven years. If an application was to be made now, R would clearly meet the residency requirement, albeit consideration would have to be given to the reasonableness test.

25. There is no infringement of the "English speaking" public interest as R speaks fluent English. The economic interest must be engaged because R has been, and will continue to be, educated at public expense and will have the capacity to access other publicly funded services and benefits. However, she is doing well at school and is ambitious. She has already integrated fully into UK society and there is every reason to believe that in the medium to long term she will not be a burden on taxpayers.

26. I have regard to the considerations at sections 117B(4) and (5) that little weight should be given to R's private life at a time when her immigration status was precarious or unlawful. In my judgment, R's immigration status did not become truly precarious until 15 July 2015, when she was told that she had been provided with a right of abode certificate in error. Further, prior to that date she cannot be properly said to have been in the UK unlawfully. It follows that I am entitled to attach full weight to her private life between 2010 and 2015.

27. The private life established by R after 15 July 2015 can be taken into account, given the particularly unusual and exceptional circumstances that led to R being in the UK with an immigration status that is precarious. Even at this point, R sought to regularise her status. In Rhuppiah v SSHD [2016] EWCA Civ 803, the Court of Appeal examined the interaction of section 117A(2) and section 117C. Sales LJ made this observation regarding the "little weight" provisions in section 117B:

> "It is possible to conceive of cases falling within section 117B(4) (unlawful presence in the UK) or section 117B(5) (precarious immigration status in the UK) in which private or family life (as appropriate) of an especially strong kind has been established in the host country such that it should be accorded great weight for the purpose of analysis under Article 8: Jeunesse v Netherlands is a prime example."

28. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) the Upper Tribunal agreed with this reasoning, concluding that the "little weight" provisions *"do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case."*

29. Sales LJ observed at [53] of Rhuppiah (supra) that the "*generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in*

question, where it is not appropriate in Article 8 terms to attach only little weight to private life." In my judgment, this is such a case: the private life of this child has a special and compelling character in that it was established firmly in the UK at a formative stage of her development over a lengthy period when all concerned believed she was entitled to a right of abode certificate.

Proportionality / balancing exercise

30. In my consideration of R's best interests above I have already highlighted the salient facts and factors. On the one hand, removal to Nigeria would be hugely distressing and disruptive for R, and would decimate the friendships, relationships and activities that form the core of her private life. It would also obstruct her education given that she has started her GCSE course, and is more than half way through the first of a two-year course. It would involve her transfer to a society whose values and norms are less familiar to her. Emotionally, it would undoubtedly be stressful and damaging. In addition, she would have to cope without the two children she regards in practical, everyday terms as her siblings. Furthermore, this transformation of her life and lifestyle would occur at an age and stage of critical importance to her development – she is nearly 15.

31. In addition, significant weight must be given to R's residence of over seven years. In MA (Pakistan) V SSHD [2016] EWCA Civ 705 (7 July 2016) Elias LJ said this:

> "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.
>
> …
>
> 49. … 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."

32. This policy guidance was updated on 22 February 2018, but the terms remain similar for children who have resided in the UK for seven years (pg 75):

> "Significant weight must be given to such a period of continuous residence. The longer the child has resided in the UK, and the older the age at which they have done so, the more the balance will begin to shift towards it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more."

33. On the other hand, taking into account R's age and the support of a stable family unit in Nigeria, she would, foreseeably, adapt over time. I attach weight to the powerful interest in reuniting a child with her parents when there remains a clear bond of love between them. In addition, there is no suggestion that her health would be detrimentally affected. Although R and her family members reasonably believed she was entitled to a right of abode certificate and resided here on that basis for five years, the SSHD clarified that she is not so entitled. The requirements of immigration control therefore support her removal.

34. The main countervailing factors are that R has no legal right to remain in the UK and has a stable family unit she can return to in Nigeria. However, this is not a case in which a family has brazenly made a decision to overstay. In this case, the family reasonably believed that R was entitled to remain and her attachment to the UK has developed over a significant period when the SSHD also considered that she was entitled to remain.

35. Although R has a family in Nigeria at present, the First-tier Tribunal accepted that R's mother intends to come to reside with her family in the UK, as she has completed her accountancy exams. At the hearing before me, R's grandmother gave express instructions that this remains the intention. Mr Harrison did not wish to cross-examine the grandmother on this, or any other issue. Mr Harrison was unable to confirm whether R's mother is entitled to a right of abode certificate. However, the certificate she has held and renewed has not been revoked by the SSHD. Given that R's grandmother is a British citizen by birth, there is no reason to doubt her daughter's entitlement to a right of abode certificate. In any event, the SSHD has not done so. This means that R's mother's intention to relocate to the UK, in accordance with the First-tier Tribunal's findings, has

every chance of taking place.

36. As set out above, I consider that there are strong factors supporting the conclusion that it would not be reasonable to expect R to leave the UK at this juncture, and it would not be in her best interests to do so. There are no strong reasons that bear upon her personally pointing in the other direction. It is undeniable that R would have the benefit of a loving and stable family unit in Nigeria, albeit there is a likelihood that the family will be relocating in the near future to London.

37. Having considered all the relevant matters in the round, including the public interest considerations set out above, I am satisfied that the preponderance of strong factors in support of R remaining in the UK are not outweighed by the countervailing considerations, as outlined above.

38. I conclude that it would be a disproportionate breach of Article 8 for R to be removed. Accordingly, her appeal succeeds under Article 8.

Decision

39. The decision of the First-tier Tribunal contains an error of law and is set aside.

40. I remake the decision by allowing R's appeal on Article 8 of the ECHR grounds.

Signed: Ms Melanie Plimmer Dated: 5 March 2018
Judge of the Upper Tribunal