



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/01331/2016  
IA/01645/2016  
IA/01646/2016

**THE IMMIGRATION ACTS**

Heard at Newport  
On 20 August 2018

Decision & Reasons Promulgated  
On 5 September 2018

Before

**UPPER TRIBUNAL JUDGE GRUBB**

Between

P K A  
J A A  
E-O A A

(ANONYMITY DIRECTION MADE)

Appellants

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr S Tampuri of Tamsons Legal Services

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellants. A failure to comply with this direction could lead to Contempt of Court proceedings.

## **Introduction**

2. The appellants are nationals of Nigeria born on 11 June 1959, 15 June 1970 and 1 February 2007 respectively. The first and second appellants are married. The third appellant is their daughter.
3. The first and second appellants entered the United Kingdom on 1 February 2003 as visitors. Thereafter, they overstayed. The third appellant was born in the UK on 1 February 2007.
4. On 30 July 2010, the first appellant applied for leave to remain (with the second and third appellants as his dependants) on human rights grounds under Article 8 of the ECHR. The application was refused on 21 September 2010.
5. A further application was made by the first appellant on 13 March 2014 but this was again refused on 15 April 2014.
6. Following the commencement of Judicial Review proceedings, and a consent order on 2 March 2015, the first appellant's application was reconsidered but the application was again refused on 17 February 2016.
7. The appellants appealed against that decision to the First-tier Tribunal.

## **The First-tier Tribunal's Decision**

8. The appeal was heard by Judge I D Boyes. In a determination promulgated on 4 May 2017, he dismissed the appeals of all three appellants. He was not satisfied that the first and second appellants could succeed under the Rules as a "partner" or as a "parent". Likewise, he was not satisfied that the third appellant could succeed under the Rules as a "child". The judge further concluded that none of the appellants could succeed on the basis of their private life under para 276ADE(1) of the Rules. Finally, the judge concluded that it was in the best interests of the third appellant to return to Nigeria with her parents and that it would be "reasonable" to expect her to leave the UK. He concluded that there were no compelling reasons outside the Rules to make the removal of any of the appellants disproportionate.

## **The Appeal to the Upper Tribunal**

9. The appellants sought permission to appeal to the Upper Tribunal on the basis that the judge had failed properly to take into account that at the date of the hearing the third appellant had made an application to be registered as a British citizen on the basis that she had been born in the UK and, having attained the age of 10, had lived in the UK for ten years. Further, the grounds contended that the judge had failed to consider the position of each appellant individually and cumulatively in accordance with PD and Others (Article 8: conjoined family claims) Sri Lanka [2016] UKUT 108 (IAC).
10. On 8 November 2017, the First-tier Tribunal (Judge Adio) granted the appellants' permission to appeal.
11. On 18 December 2017, the Secretary of State filed a rule 24 response seeking to uphold the judge's decision.

## Discussion

12. Mr Tampuri, who represented the appellants before me, did not suggest that the judge had fallen into error in reaching his conclusions that the appellants could not succeed under Appendix FM of the Rules either as a 'parent' or as a 'partner'. Neither did he rely upon para 276ADE(1) in relation to the first and second appellants. Instead, he focused his submission upon the judge's finding that it would be "reasonable to expect" the third appellant to leave the UK. As regards the third appellant herself, that issue arises under para 276ADE(1)(iv) and in relation to the first and second appellants under s.117B(6) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002").
13. Paragraph 276ADE(1)(iv) provides that:
  - "(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:  
  
....
    - (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; ..."
14. Section 117B(6) of the NIA Act 2002 provides that:
  - "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."
15. At the date of application, namely 13 March 2014, the third appellant was 7 years of age. As a result, para 276ADE(1)(iv) applied to her if it "would not be reasonable to expect" her to leave the UK.
16. Likewise in applying s.117B(6), as at the date of the hearing before Judge Boyes, the third appellant was a "qualifying child" within s.117D(1) because she was 10 years old and, therefore, had "lived in the United Kingdom for a continuous period of seven years or more".
17. It is not disputed that the first and second appellants have a "genuine and subsisting parental relationship" with the third appellant and neither is "liable to deportation". As a consequence, in applying Article 8, their removal would not be in the public interest if it "would not be reasonable to expect" the third appellant to leave the UK.
18. Mr Tampuri acknowledged that the judge had considered the application of para 276ADE(1)(iv) and s.117B(6) on the basis that the third appellant was a "qualifying child" because she had lived in the UK for at least seven years. However, he submitted that the judge had failed to give proper weight to the fact that she was entitled to British citizenship because she had been born in the UK and had lived in the UK for ten years. Mr Tampuri pointed out that the third appellant was in the process of

applying for British citizenship on that basis at the date of the hearing before the judge. Mr Howells, who represented the Secretary of State confirmed that, subsequent to the judge's decision, the third appellant had, in fact, been registered as a British citizen on 30 May 2017.

19. Mr Tampuri submitted that, in the light of this, the judge was required to give greater weight to the third appellant's circumstances. He referred me to the respondent's guidance cited by the Upper Tribunal in SF and Others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC) at [7]. That guidance is entitled "Family migration – Appendix FM, Section 1.0B: Family Life as a Partner or Parent and Private Life, ten-year routes" (August 2015). There, at para 11.2.3 under the rubric "would it be unreasonable to expect a British citizen child to leave the UK?", Mr Tampuri submitted that the respondent accepted that in relation to a British citizen child it would only be reasonable to expect that child to leave the UK if that would require the first and second appellants also to leave the UK, where there was:
  - criminality falling below the threshold set out in para 398 of the Immigration Rules;
  - a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."
20. Mr Tampuri submitted that none of these circumstances applied to the appellants and so all three appellants' appeals should have been allowed on the basis that it would not be "reasonable to expect" the third appellant to leave the UK.
21. In response, Mr Howells relied upon the rule 24 response. He submitted that Judge Boyes had properly weighed up all the factors and was entitled to find that all three appellants could reasonably leave the UK. He submitted that the fact that the third appellant was now a British citizen was a material change that could only form the basis of a fresh application rather than establishing an error of law by the judge in this appeal. He submitted that the judge was aware that the application had been made on the third appellant's behalf for citizenship but it had not yet been granted at the time of the hearing. Mr Howells accepted that if the appeal had come on for hearing a month later, after the third appellant had been registered as a British citizen, the outcome would have been different. He accepted that on the basis of the respondent's guidance it would not be reasonable to expect the third appellant, as a British citizen, to leave the UK since the first and second appellants did not fall within the rubric of the guidance of being involved in criminality or having a very poor immigration history. He accepted, as regards the latter, that their overstaying since 2003 did not in itself amount to a "very poor immigration history" as envisaged by the guidance.
22. I turn now to the judge's reasoning. The judgment is a careful and detailed one setting out the relevant legal provision including s.117B(6) of the NIA Act 2002 and referring to the relevant case law in R (MA (Pakistan) and Others) v UTIAC [2016] EWCA Civ 705 in respect of s.117B(6). Further the judge refers to the relevant case law concerned with the assessment of a child's best interests in ZH (Tanzania) v SSHD [2011] UKSC 4; EV (Philippines) v SSHD [2014] EWCA Civ 874 and Zoumbas v SSHD [2013] UKSC 74. At para 41, the judge recognised that under s.117B(6) the third appellant was a "qualifying child" because she had been in the UK for over seven years. However, he

recognised that she was not a “qualifying child” on the basis that she was a British citizen. At para 40 he noted that: “She has applied for but not yet been granted British citizenship and the relevant documents were provided to me at the hearing.” The judge acknowledged that, in effect, the appellants’ claims turned upon a finding as to whether it was “reasonable to expect” the third appellant to leave the UK applying para 276ADE(1)(iv) and s.117B(6) (see paras 45-47).

23. Having set out the relevant law and case law, the judge considered the third appellant’s best interests at paras 53-69 as follows:

- “53. So, what do we know of appellant 3 and what are her best interests? We know that is a normal, healthy school child. Her Mother talked of her taking part in church and attending church. She did not pursue any other outside activities. The school reports, although dated, pay testament to a normal child, developing. She is bi-lingual, speaking both English and Yoruba. She has lived exclusively with appellant 1 and 2 since birth.
54. At age 9 it is apparent that the child will have a private life capable of interference with. She has spent her entire life in the UK. She has never been to Africa, let alone Nigeria. She is one year away from entering High School education. No doubt she has friends in the UK.
55. A child’s best interests invariably lie with the consideration that they will remain in a family unit, looked after and nurtured by both Mother and Father. It is not a possibility that the child could remain if the parents were not to nor vice versa. I have also taken into account the fact that the child is on the cusp of gaining British Citizenship.<sup>1</sup>
56. I must consider what it is reasonable, that is the test to be applied. I apply all the relevant factors from S.117 in considering my decision. I must, as a matter of law, consider the interests of the child as the primary consideration and that I have done. What is best for her shall be the guiding consideration however it is not the sole consideration.
57. The principal complaints of the parents were that the schooling was not as good in Nigeria as it is in the UK. The health system was not as good and that the child would not have as good a life.
58. These are all viable and cogent considerations. One must weigh them in the balance when it comes to deciding where that balance is.
59. I have taken into consideration all that I could possibly take into consideration and all that I am required to take into consideration and have concluded that the best interests of the child lie in removal from the UK together with her parents.
60. I reach this conclusion for the following reasons; the child is young. She has shown she can make friends, be educated and learn in an environment which is not of her first language. This shows a great resourcefulness and ability to strive. She is able to speak both English and a very common language in Nigeria. This will assist her integration into Nigerian life. She will be with her parents who are both citizens of Nigeria. They are familiar with life in Nigeria and can teach, guide and nurture their Daughter there.

61. The parents are of working age. They can obtain employment, there is no reason for them not to. The almost poverty like position the child is enduring as it is cannot be argued is in her best interests. Her parents cannot work in the UK, they are accessing healthcare unlawfully and they cannot have access to state benefits. Their living position is hand to mouth, at best.
62. They will be able to enjoy the full rights, freedoms and opportunities as a citizen of Nigeria. There is no bar to their employment there or healthcare. They all speak the language and can utilise the linguistic abilities they have gathered in the UK to their advantage.
63. The child can go to school. She can go to Church in Nigeria. None of the things she currently enjoys in the UK will be denied her.
64. I have weighed in the balance the fact that the child has never been to Nigeria however she will not be going there alone. She will be as a family, with both her parents who no doubt will ensure that she is well cared for and looked after.
65. The child will be able to join a new school at the beginning of a new school year. It will be High School and although she may not know anyone it is not beyond the realms of possibility that she will soon have friends, similar to the position she was in in the UK when she first went to school.
66. I therefore conclude that remaining as a family unit, bearing in mind she is not an only child, is in the best interests of appellant 3. It is not unreasonable for her to be removed to Nigeria together with her parents.
67. Accordingly, it is a proportionate interference in the third appellant's private life that she is removed. It is, as I have determined, in her best interests.
68. It follows that as the third appellant's case fails in that it is not unreasonable to remove her from the UK, the claims of appellant 1 and 2 must also fail.
69. I have considered whether there exists anything compelling outside the rules in order that the family could remain. I have concluded that there is not. The first appellant's illness is not compelling. Treatment is available to him in Nigeria."

24. In paragraph 55, when referring to the fact that the third appellant is "on the cusp of gaining British citizenship", in a footnote the judge said this:

"This aspect, once it comes to fruition, may well change the outcome following this decision however I make this decision as of the date of application and decision."

25. The judge was, of course, correct to consider the application of s.117B(6) as at the date of his decision. At that date, the third appellant was not a "British citizen". She was only a "qualifying child" by virtue of having lived continuously in the UK for "seven years or more". It is suggested that the judge erred by not treating the third appellant as a "British citizen" at the date of hearing, I reject that submission. The third appellant was not a British citizen at that time. The third appellant was relying on s.1(4) of the British Nationality Act 1981. As a person born in the UK who had attained the age of 10 years and had spent each of the first ten years of her life in the UK as required by s.1(4) - and the contrary has not suggested - she was "entitled" to be registered as a British citizen but was not one until registration took place.

26. Where, however, in my judgment the judge did fall into error was not taking properly into account that, in the ordinary course of events, the third appellant would be registered as a British citizen. That was, of course, what happened shortly thereafter, Mr Howells did not suggest that there was anything in the appellants' history that would tell against the third appellant's entitlement to registration under s.1(4) of the British Nationality Act 1981. I accept that the judge had in mind that the third appellant was "on the cusp" of gaining British citizenship but thereafter in his consideration of her "best interests" the judge did not, in my judgment, factor in insufficiently, or at all, that her interests would include those benefits attributable to her British citizenship. The importance of those interests, derived from citizenship, were emphasised by Baroness Hale in ZH (Tanzania) at [32] when she said this:
- "Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults."
27. It was, in my judgment, incumbent upon the judge to have regard to those additional aspects of the third appellant's best interests given her entitlement to British citizenship. It is, of course, the need to give additional weight to the interests of a British citizen child that, no doubt, led the Secretary of State to recognise in his guidance that it would not be reasonable to expect a British citizen child to leave the UK unless those interests were outweighed by criminality or a very poor immigration history on the part of the child's parents. That language, used in the August 2015 edition of the respondent's guidance which I have set out above, is repeated in the more recent guidance ("Family Migration: Appendix FM Section 1.0b – Family Life as a Partner or Parent (and Private Life): ten-year routes" (22 February 2018) at pages 76-77). And, as Mr Howells accepted in his submissions, applying that guidance to the third appellant now would inevitably result in a finding that it was not "reasonable to expect" her to leave the UK such that the removal of the first and second appellant would not be in the public interest by virtue of s.117B(6) of the NIA Act 2002.
28. In the circumstances, therefore, I am satisfied that the judge erred in law by failing to give due weight to the third appellant's best interests because of her entitlement to British citizenship and what that entails in assessing her best interests, and in reaching his finding that it would be reasonable to expect her to leave the UK. For those reasons, the judge's decision to dismiss the appeals is flawed and I set the decision aside.
29. I have already indicated that Mr Howells accepted that if the decision had to be remade, the first and second appellants were entitled to the benefit of the application of s.117B(6) because it would not be reasonable to expect the third appellant as a British citizen child to leave the UK applying the respondent's guidance that such would only be the case if the parents' conduct included criminality (albeit falling below the threshold for deportation) or a very poor immigration history having "repeatedly and deliberately" breached the Immigration Rules. Both the respondent's guidance of August 2015, and now 22 February 2018, is in these terms. He accepted that, in those circumstances, each of the appellant's appeals should be allowed under Article 8 of the ECHR. The removal of the first and second appellants was not in the public interest

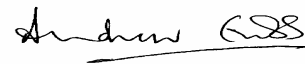
and, of course, there can be no question of the third appellant being removed from the UK as a British citizen.

30. Mr Howells' concession was, in my judgment, properly made. Section 117B(6) applies to the first and second appellants as it would not be "reasonable to expect" the third appellant to leave the UK.

**Disposal**

31. Consequently, I set aside the First-tier tribunal's decision as it involved the making of an error of law.
32. I re-make the decision and I allow each of the appellants' appeals under Article 8 outside the Rules.

Signed



A Grubb  
Judge of the Upper Tribunal

29 August 2018

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal, I consider it appropriate to make a fee award in respect of any fee paid or payable by the appellants.

Signed



A Grubb  
Judge of the Upper Tribunal

29 August 2018