Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09950/2018
HU/10664/2018

THE IMMIGRATION ACTS

Heard at FIELD HOUSE	**Decision & Reasons Promulgated**
On 16.4.2019	**On 09.05.2019**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL
G A BLACK

Between

DONALD [A] &
ROSELINE [A]
NO ANONYMITY ORDER MADE

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I. Khan (Counsel)
For the Respondent: Mr E Tufan (Home Office Presenting Officer)

ERROR OF LAW DECISION AND REASONS

1. This is an error of law hearing. The appellants appeal the decision of the First - tier Tribunal (Judge G. Jones QC) (FtT) promulgated on 12th December 2018 in which the appellants respective applications were

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dismissed on human rights grounds. The first appellant applied for ILR based on his long residence of 10 years lawful leave and the second appellant applied as a dependant partner under Appendix FM and Article 8 ECHR.

Background

2. The appellants are citizens of Nigeria. They have three children aged 9, 8, and 5 years old all of whom were born in the UK. The first and second children are "qualified children" to whom section 117B(6) applies.

Grounds of appeal

3. In grounds of appeal the appellant argued that the FTT erred by making an error of fact in terms of the first appellant's lawful residence in the UK [13]. The appellant had lawful leave until 25.7.2010 and returned to Nigeria from where he was granted further leave as a dependant on 23.6.2010. The FTT erred in respect of the second appellant's period of residence in the UK which was from 2008 and not 2011.

4. The FTT was wrong to find that the first appellant was dishonest for his failure to disclose his income to HMRC and failed to properly apply paragraph 322(5) which applied to cases involving criminality.

5. The FTT failed to consider the test under section 117B(6) as to whether or not it would be reasonable for the children to return to Nigeria, following **MA** (Pakistan) [2016] EWCA civ 705.

Permission to appeal

6. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ Saffer on 4.1.2019. In granting permission the FTJ considered that there was no merit in respect of the ground arguing that the second appellant had established 10 years residence in the UK. The FTT arguably erred regarding the length of lawful residence of the first appellant and whether there were powerful reasons to require the two older children to have to leave the UK.

Submissions

Lawful leave for first appellant

7. At the hearing before me Mr Khan argued that the facts as to the period of residence of the first appellant were wrong. The appellant had leave until 25.7.2010 and in early July he returned to Nigeria from where he had made an application as a dependant relative which was successful. He was granted leave issued on 28.6.2010 until 30.1.2012. Mr Khan relied on a skeleton argument.

8. Mr Tufan was able to access the records held in Nigeria and confirmed that the appellant had indeed made the application in Nigeria and was granted

leave until **30.1.2012.** It was conceded that the appellant had established lawful residence for 10 years.

Paragraph 322(5)

9. Mr Khan submitted that the FTT ought not to have made a finding that the appellant had acted dishonestly as not all the evidence was considered; there was no evidence of deliberate failure to declare income. Mr Khan relied on the **Opinion [2018] CSOH 127**.

10. Mr Tufan responded by referring to a JR decision before UTJ Rimmington (**JR/13807/ 2016** at paragraph 77 in which the UT held that it was open to the SSHD to apply paragraph 322(5) to cases involving deficiencies in tax returns.

Section 117B(6)

11. Mr Khan cited the recent UT decision of **JG** (s 117B(6): "reasonable leave " UK) Turkey [2019] UKUT 00072 (IAC). The headnote states that this section requires the court or Tribunal to hypothesise that the child in question would leave the UK, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so.

12. Mr Tufan submitted that the position was as per **KO (Nigeria)**. The children should return to Nigeria with their parents which was in accordance with the "real world" view.

Discussion and conclusion

13. I find that there were errors of fact made by the FTT that were material to the appeals. Firstly, in respect of the period of lawful leave of the first appellant, no account was taken of the leave granted following the appellant's application made in Nigeria. I was fortunate that Mr Tufan was able to confirm this with reference to visa records in Nigeria which showed that he was granted leave until 30.1.12. Further I find that the FTT [9] erred in recording the second appellant's date of entry into the UK as 24.11.2011 when her first visa was granted on 14.11.2008. Clearly these facts are relevant and material to the first appellant's application for long residence under the rules. Further, I found that there was a material error in law in the decision of the FTT in that it failed to make an assessment pursuant to section 117B(6) as to the reasonableness of the qualified children having to leave the UK. The UT President in has now clarified **KO** (Nigeria) (paras 18 & 19) in **JG** at (24-41).

14. As to paragraph 322(5) I consider that there was sufficient evidence before the FTT [24 & 25] to make a finding that the respondent had discharged the burden on him to establish that the appellant had acted dishonestly [26]. Mr Khan submitted that the respondent failed to take into account all the available evidence in reaching its conclusion. The refusal letter sets out the reasons in support and made it clear that the allegation made was that appellant acted dishonestly. The respondent considered

the response made by the appellant and found it to be lacking. In this regard I conclude that there was no error in law.

15. There are material errors of law in the decision which shall be set aside. I was satisfied that the appellants had made out their case in respect of the ground as to the failure of the FTT to consider the test in section 117B(6) in terms of whether or not it was reasonable to expect the children to return to Nigeria with their parents. In short there simply was no proper consideration by the FTT. I proceeded to hear submissions and decided to remake the decision with reference to section 117B(6).

Re making decision - section 117B(6)

16. I offered to Mr Khan the opportunity to apply for an adjournment in the event that he wished to adduce any further evidence about the children. He relied on the bundle submitted for the hearing which contained relevant information about the children. Mr Khan further submitted that the second appellant had now attained 10 years residence in the UK and that in 8 months time the children would be able to make an application for British citizenship. I accept that the appellants have lived lawfully in the UK for 12 and 10 years respectively.

17. I am satisfied that all three children are settled and doing well and achieving their educational milestones. I have school reports, progress certificates and letters of support. Two of the children have lived in the UK for more than 7 years and will be in a position to apply for British citizenship shortly. None of the children have travelled to Nigeria and have no direct experience of that country or of its educational system. Whilst they are clearly dependant on their parents, I find that the two eldest children are now of an age where their life at school is of significant importance and they are developing independence. I am satisfied that the best interests of the children lie in their remaining in the UK with their parents. I find that it would not be reasonable to expect them to leave the UK as it would be a very significant disruption for them socially, emotionally and educationally given the length of residence in the UK. If they were to return to Nigeria they would have to start again socially and educationally in a country where they have no real connection. Their parents have lived for a long period of time in the UK and are entitled to apply under the long residence rules for ILR and the two older children would be eligible to apply for British citizenship in due course. The FTT erred in its factual analysis of the lawful residence period of the first appellant, and it has now been accepted that he met the residence requirements subject to the application of paragraph 322(5). The second appellant is now in a position to apply for long residence leave. Both appellants have regularised their stay in the UK and obtained leave as required. A return to Nigeria would necessitate having to find new accommodation and employment in order to provide a home and financial support for the family. That would result in considerable disruption for the

family as a whole, in particular the children who have integrated into the UK.

18. In terms of Article 8 I am satisfied that there are compelling circumstances such that Article 8 is engaged to the extent that the appellants have resided for a long period of time and the children are established in the UK. Article 8(1) is engaged because the children have established private life and family life in the UK. Similarly the appellants themselves have family life in the UK and have lived and worked for a significant period of time in the UK. There would be an interference with that life in the event that the parents were removed. The decision made was lawful.

19. I consider the public interest factors as provided in section 117A-D 2002 Act. The appellants are working and earning and there is no reliance on public funds for financial support. They speak English. Their private lives were built up when they had lawful leave but it was leave under the PBS as students and general migrants, and so to that extent it was precarious but that carries little weight in my view. Both are established in the UK through employment and socially and are members of their local Catholic church. Neither appellant has strong family connections with Nigeria. Neither appellant is liable to deportation and so section 117B(6) applies as both appellants have a genuine and subsisting relationship with two qualifying children. Following **MA** (Pakistan) & ors. [2016] EWCA Civ 705 the nature of section 117B(6) is free standing. I considered above where the best interest of the children lie. **JG** requires the Tribunal to hypothesise that the child in question would leave the UK and ask whether it would be reasonable to expect the child to do so. I have concluded that it would not be reasonable for the children to be expected to leave for the reasons set out in paragraph 17 above.

20. In terms of proportionality I find that the interest of the children outweighs the public interest in immigration control. Section 117B(6) applies and so there is no public interest in removal. The parents have established lawful leave for over 10 years and are employed. The only factor weighing against the appellants is paragraph 322(5) with reference to the first appellant's failure to declare income. Whilst accepting that paragraph 322(5) can apply to such conduct, it is clear that the conduct of the parents will not be taken into account when considering the interests of the children (**MA** (Pakistan) [2016] EWCA civ 705), **Zoumbas** and **EV** (Philippines). I take into account that the appellant is paying off the outstanding amount and that there had been no prosecution and that the amount was not significant. I acknowledge that it is not the HMRC issue rather the immigration advantage that it relevant in this context. The appellants have otherwise lived in the UK making a positive contribution and been employed throughout. The second appellant has no negative issues in terms of her immigration history or conduct. There is therefore no public interest in requiring the removal of the appellants and to do so would be a disproportionate interference.

Decision

21. I substitute a decision to allow the appeals on human rights grounds.

Signed Date 23.4.2019

GA Black
Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER
NO FEE AWARD

Signed Date 23.4.2019

GA Black
Deputy Judge of the Upper Tribunal