**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/06869/2015**

**THE IMMIGRATION ACTS**

**Heard at Glasgow** **Decision & Reasons Promulgated**
**On 28 April 2017** **On 3 May 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**BUKOLA ADIJAT LAWAL**
(ANONYMITYDIRECTION NOT MADE)
Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms K Stein (counsel) instructed by Hamilton Burns WS
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. 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. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Blair promulgated on 24 October 2016, which dismissed the Appellant's appeal on all grounds.

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Background

3. The Appellant was born on 26 June 1983 and is a national of Nigeria. On 11 September 2015 the respondent refused the appellant's application for leave to remain in the UK on article 8 ECHR grounds.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Blair ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 22 March 2017 Upper Tribunal Judge Chalkley gave permission to appeal stating

> There *may* be some merit in the suggestion that the First-tier Judge erred in failing to recognise that at the date of hearing the oldest child was aged seven at the date of hearing, but I hope that I do not raise the appellant hopes to high, because on closer examination by the Upper Tribunal this *may* be found not to be material. I grant permission on ground one only; ground 2 is nothing more than a disagreement with the decision.

The Hearing

6. (a) For the appellant, Ms Stein moved the grounds of appeal. She told me that between [22] and [24] the Judge considers the law and then carries out a balancing exercise from [48] onwards. She drew my attention [61] to [63] and told me that it is there that the Judge makes a material error of law. Ms Stein reminded me of the terms of section 117B(6) of the Nationality Immigration and Asylum Act 2002. She told me that between [61] & [63] the Judge finds that, by the date of the hearing, one of the appellant's children has lived in the UK for more than seven years. She told me that that child is therefore a qualifying child and the appellant benefits from the provisions of section 117B(6) of the 2002 Act.

(b) Ms Stein referred me to R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705. She told me that the Judge had applied the wrong test in law before reaching his conclusion, and has placed undue emphasis on the public interest in removal in carrying out his balancing exercise. She told me that the Judge should, but did not, ask whether or not it is reasonable for a qualifying child to leave the UK.

(c) Ms Stein told me that if the two-part test set out in section 117B(6) of the 2002 Act had been applied the outcome of this appeal could have been different. She told me that the decision is unsafe because it is tainted by material error of law. She urged me to set the decision aside.

7. For the respondent, Mr Govan told me that the decision does not contain any errors, material or otherwise. He took me to the grounds of appeal and explained that the appellant cannot meet the requirements of

either appendix FM or paragraph 276 ADE of the rules. He told me that the appellant could not benefit from EX.1 because the Judge finds that she does not meet the suitability requirements and because, at the date of application, the appellant's oldest child had been in the UK for less than seven years.

(b) Mr Govan relied on the case of Dube (ss.117A-117D) [2015] UKUT 00090 (IAC)**.** He told me that although the Judge does not cite section 117B(6) in the decision, between [61] and [76] of the decision he carries out a careful analysis of all the factors contained within section 117B(6) and carries out a detailed consideration of the best interests of the children

(c) Mr Govan urged me to dismiss the appeal and allow the decision to stand.

Analysis

8. The grounds of appeal relying on paragraph EX.1 of appendix FM as well as section 117B6 of the 2002 Act. The focus in this case is on the appellant's oldest child who was born in the UK and has only ever lived in the UK. Her seventh birthday fell after the date of application but before the date of appeal hearing.

9. Paragraph EX1 sets out the criteria to be applied in assessing whether to grant leave to a family member on the basis of their family life with a child in the UK. The criteria reflect the duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK. Paragraph EX.1 says

> EX.1 This paragraph applies if
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
> (aa) is under the age of 18 years;
> (bb) is in the UK;
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
> (ii) it would not be reasonable to expect the child to leave the UK;

10. Because the appellant's daughter's seventh birthday fell after the date of application, paragraph EX.1 cannot apply. In any event, there is merit in Mr Govan's submission that because the Judge finds that the appellant does not meet the suitability requirements of appendix FM, and because the Immigration Rules are progressive, paragraph EX.1 cannot be considered. Ms Stein is correct to focus her submissions on section 117B(6) of the 2002 Act.

11. By virtue of section 117D a "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. If a child is a qualifying child for the purposes of section 117B of the 2002 Act

as amended, the issue will generally be whether it is not reasonable for that child to return to the country of origin under scrutiny. Although R(on the application of Osanwemwenze) v SSHD 2014 EWHC 1563 was not specifically concerned with section 117B it has some relevance in terms of the reasonableness of a child leaving the UK. In that case, the Claimant's 14-year-old stepson from Nigeria had been in the United Kingdom for more than 7 years and had leave to remain in his own right. It was held that this was an important but not an overriding consideration and it was reasonable to expect the Claimant's family including the stepson to relocate to Nigeria. The parents had experienced life there into adulthood and would be able to provide for the children and help them to reintegrate.

12. Section 117B(6) is in two parts which are conjunctive. Section 117B(6)(a) weighs in favour of the Appellant because it is not disputed that she has a genuine and subsisting paternal relationship with a qualifying child. It is Section 117B(6)(b) which is determinative of this case. Is it reasonable to expect the appellant’s oldest daughter to leave the UK?

13. Between [22] and [32] the Judge takes correct guidance in law before moving on to make his findings of fact. At [31] the Judge reminds himself that he must consider the public interest considerations in section 117A-D of the 2002 Act. Between [61] & [63] the Judge clearly sets out that one of the appellant’s children has lived in the UK for more than seven years. He does not then say that the child is a qualifying child, but he makes clear reference to section 117 of the 2002 Act in its entirety and makes clear and deliberate finding that one of the appellant’s children has lived in the UK for more than seven years.

14. Between [64] and [76] the Judge carries out a careful analysis, balancing the evidence in relation to all of the appellant’s children, including the qualifying child. There is no criticism of the Judge’s fact-finding. All that is suggested is that the Judge has failed to ask himself whether it is reasonable for the qualifying child to leave the UK.

15. In Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) it was held that it is not an error of law to fail to refer to ss.117A-117D considerations if the Judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form.

16. Between [64] and [76] the Judge considers the language that the appellant’s children speak; the availability of education to the appellant’s children in Nigeria; the support available to the appellant’s children from their parents if removed from the UK; the degree of disruption to the appellant’s children if they are removed from the UK, and the impact of losing primary school friends and having to establish new friendships in another country. His conclusion is that the appellant’s children, including the qualifying child, have the benefit of youth and resilience and are both adaptable and young enough to remain focused on their parents. The Judge finds that education and support are available to the appellant’s children in Nigeria.

17. In carrying out that assessment the Judge has manifestly considered whether it is reasonable for the qualifying child to be required to leave the UK. He reaches the conclusion that it is reasonable, after separating the interests of the child from the conduct and immigration history of her parents.

18. In Rhuppiah [2016] EWCA Civ 803 it was held that given the statement in section 117C(6) that the public interest “required” deportation in the absence of very compelling circumstances, over and above those described in Exceptions 1 and 2, it was not open to the court or tribunal to hold that deportation was not required in such circumstances. The same reasoning applied to section 117B(6) which stipulated when removal was not required.

19. The evidence placed before the First-tier tribunal is found in the witness statements of the appellant and her husband. Those witness statements focus almost exclusively on the circumstances of this family in the UK. The statements say very little about what awaits the qualifying child on return to Nigeria. What is contained in the witness statement is reflected in the Judge’s findings of fact concerning the children of the appellant. What is said in the appellant’s witness statement amounts to little more than declaring that her children are settled in the UK and that removal would cause a temporary period of upheaval.

20. The appellant’s partner’s witness statement sets out his own immigration history, the development of his relationship with the appellant, and that he is the father of the appellant’s children. The appellant’s partner’s witness statement does not address whether or not it is reasonable for the qualifying child to leave the UK.

21. The evidence led before the first-tier was not evidence from which a conclusion can be drawn that it is not reasonable for the qualifying child to leave the UK. The Judge can only make findings of fact based on the evidence placed before him. It is to the Judges credit that he carried out such a detailed analysis of the impact of removal on the appellant’s children, including the qualifying child, between [60] and [76].

22. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held (notwithstanding reservations) that when considering whether it was reasonable to remove a child from the UK under rule 276ADE(1)(iv) of the Immigration Rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2002, a court or tribunal should not simply focus on the child but should have regard to the wider public interest considerations, including the conduct and immigration history of the parents. It was also confirmed however that if section 117B(6) applies then "*there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal.*"

23. In Zoumbas v SSHD UKSC it was held that there was no "*irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being*".

24. The Judge manifestly takes account of section 117B of the 2002 Act. There is no error in the Judge's interpretation of section 117B(6) of the 2002 Act. It is clear from a fair reading of the decision that the Judge is mindful of the entire terms of section 117B of the 2002 Act when carrying out the proportionality balancing exercise required in this case.

25. In AA v Upper Tribunal (Asylum and Immigration Chamber) [2013] CSIH 88 it was held that a Claimant child's British nationality was not a trump card. It was necessary to take account of the whole circumstances which included the availability to the child of family life with parents in one of their countries of origin, and the extent to which the Claimant's immigration history involved dishonesty. In AF v SSHD 2013 CSIH 88 it was re-iterated that nationality is not a trump card and the tribunal is required to take into account the full circumstances.

26. The Judge takes account of the impact that removal of the appellant is likely to have on this family. He clearly identifies the crucial aspects of the established family and private life enjoyed by the appellant and carries out a well-reasoned proportionality balancing exercise informed by s.117B(6) of the 2002 Act and by s.55 of the Borders Citizenship and Immigration Act 2009. The Judge clearly applies the correct test, and answers the reasonableness question set out in s.117B(6) of the 2002 Act.

27. The Judge draws those findings of fact to a conclusion by applying the correct test in law. The Judge has regard to part 5A of the Nationality, Immigration and Asylum Act 2002. That is the correct test in law. The decision contains sufficient findings of fact to support the conclusion that the Judge comes to. The correct test in law has manifestly been applied.

28. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country

Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her.

29. In this case, there is no misdirection in law & the fact-finding exercise is beyond criticism. The decision is not tainted by a material error of law. The Judge's decision when read as a whole, sets out findings that are sustainable and sufficiently detailed.

## CONCLUSION

**30. No errors of law have been established. The Judge's decision stands.**

## DECISION

**31. The appeal is dismissed. The decision of the First-tier Tribunal stands.**

Signed Paul Doyle Date 1 May 2017

Deputy Upper Tribunal Judge Doyle