Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06526/2017

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
On: 21st June 2019

Decision & Reasons Promulgated
On: 15th July 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Monica Oyasor
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Ms N. Braganza of Counsel instructed by Latitude Law**
For the Respondent: **Mr A. McVeety, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Nigeria born on the 5th January 1998. She appeals to this Tribunal against the decision of the First-tier Tribunal (Judge Brookfield) to dismiss her appeal on human rights grounds.

2. The history of this matter is as follows:

5 January 1998	Appellant born in Nigeria

2001-2008	The Appellant first visits the United Kingdom aged 3, and makes no fewer than seven subsequent trips during her childhood
28 August 2009	The Appellant's last entry to the United Kingdom, aged 11
23 December 2015	Application made for leave to be granted on human rights Grounds, Appellant then aged 17
12 May 2017	Application is refused
5 February 2018	Appeal to First-tier Tribunal dismissed by Judge Brookfield
16 March 2018	First-tier Tribunal Judge Osbourne refuses permission
14 June 2018	Upper Tribunal Judge Kekic refuses permission
5 September 2018	HHJ Pelling QC grants permission upon application for *Cart* judicial review of Upper Tribunal's decision
16 October 2018	HHJ Choudhary quashes decision of Judge Kekic
2 November 2018	Vice President UTIAC Mr CMG Ockelton grants permission to appeal to the Upper Tribunal

3. The first matter before me is therefore whether the decision of Judge Brookfield is flawed for error of law such that it should be set aside. If the answer to that question is yes, I am required to remake the decision in the appeal.

Error of Law

4. By way of introduction it is appropriate that I set out the basis of the Appellant's claim under Article 8 ECHR. The salient facts asserted are:

- The Appellant has lived in the United Kingdom since she was 11 years old (she is now 21)
- She has throughout that period lived with her sister Gloria, who is seventeen years her elder. Gloria and the Appellant consistently describe their relationship as akin to mother and daughter
- The Appellant also lives with Gloria's British husband Richard, whom she describes as a 'father figure'
- Gloria and Richard have three children, who are now aged 12, 10 and 3. The Appellant has a close sibling-like bond to all of them

- The Appellant has in addition two uncles in the United Kingdom who are both married with young families of their own. The Appellant enjoys a close family relationship with all of these aunts/uncles/cousins
- All of these family members are either British, or have settled status
- The Appellant has not been back to Nigeria since 2009. Her parents have now divorced. Her father is remarried and she has not seen him for many years. Her mother periodically visits the United Kingdom but the Appellant has no real contact with her
- The Appellant suffered from significant health problems as a child which meant that when she arrived in the United Kingdom she was suffering from oedema in her legs, kidney issues and was prone to infection

5. Before the First-tier Tribunal the Appellant asserted that the combined force of these factors makes the decision to refuse her leave to remain in the United Kingdom disproportionate and therefore a breach of her Article 8(1) right to a family and private life.

6. Judge Brookfield was not satisfied that the Appellant could meet any of the requirements of the Rules as they relate to Article 8. She went on to consider whether the decision to refuse to grant leave was nevertheless a disproportionate interference with the Appellant's Article 8 rights.

7. At paragraph 8(vi) of the decision the First-tier Tribunal accepted that the Appellant shares a family life with her sister and that Article 8 is engaged. In the same paragraph she found that the decision was taken in pursuit of a legitimate Article 8(2) aim and that it was one that the Secretary of State was lawfully entitled to take.

8. Proceeding to consider proportionality the First-tier Tribunal directed itself to s117B of the Nationality, Immigration and Asylum Act 2002 and at 8(vii) said this:

> "The appellant has been educated in the United Kingdom for seven years and accordingly speaks fluent English. The appellant is financially reliant on her sister and brother in law in the UK who do not receive direct public benefits. The appellant's sister has accessed education and routine medical treatment under the NHS for the appellant in the UK. The appellant is not entitled to education or routine healthcare in the UK under the NHS. There was no evidence that the appellant or her sister have paid for the treatment or education that the appellant has received in the UK. I find the appellant has been in receipt of public funds during her residence in the United Kingdom".

9. It was this paragraph that formed the centrepiece of Ms Braganza's case before me. She submitted that the Tribunal had there weighed against the Appellant the fact that she had been sent to school and taken to the doctors, without at any point taking into account the fact that she was then a young child. In granting permission HHJ Pelling QC considered that this was an arguable error of law,

amounting to a failure to take relevant considerations into account. Whilst the decision might not, in the final analysis, be changed he found that "given the acutely fact-sensitive nature of the enquiry…it is almost impossible to conclude that the outcome would have been the same". This was a sentiment with which Mr McVeety for the Secretary of State agreed. He accepted that if this ground was made out, then the entire decision would need to be re-made, since such a finding could not be safely extricated from the decision overall.

10. That said, Mr McVeety did not accept that there was an error of law identified in the passage cited at my §8 above. He argued that it was not clear whether in fact the Tribunal had weighed those matters against the Appellant. It was possible to read the paragraph as amounting to a statement of fact, or alternatively to be criticism of the Appellant's sister, the adult who had at all material times responsibility for her. I am unable to read the passage in that way. The context in which the reasoning appears is in the Tribunal's consideration of the mandatory public interest factors set out in s117B of the Nationality, Immigration and Asylum Act 2002. It is clear therefore that the finding that the Appellant has been in receipt of public funds is a matter that is weighed against *her* in accordance with the third sub-section of s117B:

> '(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.'

11. The applicability of the public interest factors at Part 5A of the 2002 Act to children was a matter considered by the Upper Tribunal (myself and Mr Justice McCloskey) in Miah (section 117B NIAA 2002 – children) [2016] UKUT 00131(IAC). We found that there was no legal basis upon which to conclude that the statute did not apply to children. We found however that the fact of minority remained a highly relevant factor, and that the section had to be read, and the consequences of it weighed, with that in mind:

> "While the impact of sections 117B (1)-(5) on children will appear harsh and unfair to many, this is the unavoidable consequence of the legislative choice which Parliament has made. In this context, we draw attention to what this Tribunal decided in Forman (Sections 117A – C considerations) [2015] UKUT 412 (IAC). This decision emphasises that while it is obligatory to have regard to the considerations listed in Section 117B in all cases where proportionality under Article 8(2) ECHR is being determined, the statutory list is not exhaustive. Accordingly, in any given case, the obligatory statutory considerations will be weighed by the Tribunal with all other facts and factors which have a legitimate bearing on the issue of proportionality. In the case of a child it is possible to envisage, in the abstract, a series of considerations which could potentially outweigh the public interest. These might include matters such as parental dominance and influence; trafficking; other forms of

> compulsion; and the absence of any flagrant, repeated or persistent breaches of the United Kingdom's immigration regime by the child concerned. Furthermore, the child's age and personal circumstances at the commencement of the period under scrutiny and thereafter will be obviously material considerations. Viewed panoramically, it seems uncontroversial to suggest that an Article 8(2) proportionality exercise which strikes the balance in a manner which overcomes the public interests engaged is more likely to occur in the case of a child than that of an adult.

12. There was therefore no error of law in the First-tier Tribunal directing itself to the terms of s117B(3), or applying them. The error was in failing to temper that matter with consideration of the fact that the Appellant was sent to school by an adult (in accordance, one might add, with the law). It was her sister who made that decision, and who took her to the GP. It would I think be a perverse outcome, and not one which parliament could conceivably have intended, to weigh without qualification, against a child applicant, the actions of an adult third-party. I am therefore satisfied that this first ground is made out. Mr McVeety having accepted that this would be fatal to the decision overall, I need not address any of the other three points that Judge Pelling considered to be arguable errors of law.

13. That being my finding, the parties invited me to re-make the decision on the evidence before me.

The Re-Made Decision

14. I am satisfied that the Appellant cannot meet any of the competing requirements of paragraph 276ADE(1) of the Immigration Rules:

> '276ADE (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:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (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
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.'

15. That is because she cannot qualify under:

a) Sub-paragraph (iii) because she has not lived here for 20 years;

b) Sub-paragraph (iv) because at the date of application she had not lived here for 7 years;

c) Sub-paragraph (v) because she was not at the date of application over 18;

d) Sub-paragraph (vi) because she is fit, well and able and has no serious mental, social or physical challenges which would prevent her in time establishing relationships with other people in Nigeria such that would constitute a 'private life'.

16. I further find that if she made an application today, she would similarly fail to meet the very particular requirements of the rule. Although she has now lived here for longer than seven years she is no longer a child. Although she has lived here for what is approaching "at least half her life" she has not yet reached that point. That will not be, by my calculations, until the 21st April 2021.

17. I therefore proceed to consider the case on a classic *Razgar* footing. Before I embark on that assessment I must mark that the Appellant was unable to meet any of the alternative requirements of the relevant immigration rule. Ordinarily that would be a matter to attract substantial weight in the balancing exercise, since parliament has specifically mandated that the rules now signify where the balance should, in the generality of Article 8 cases, be struck. There is however in this case, a significant gap between the issues arising under the rule, and the issues arising on the facts. Sub-paragraphs (iii)-(v) of 276ADE(1) are only concerned with the *quantity* of time spent in the United Kingdom; the Appellant seeks to rely on the *quality* of her family and private life. Sub-paragraph (vi) is only concerned with the *potential* situation in Nigeria; the Appellant is concerned with the *actual* situation in the United Kingdom. With those considerations in mind I turn to address Article 8.

18. It was found by Judge Brookfield that the Appellant shares a family life with her sister. Although ordinarily one would not assume there to be 'family' life ties between adult siblings in this case that was plainly a finding open to Judge Brookfield. The relationship has been, since the Appellant was 11 years old, essentially maternal; the Appellant was 19 at the date of the First-tier Tribunal hearing and today is 20, but she continues to live under her sister's roof and be an integral part of her family.

19. I would add that I am satisfied that the Appellant's family life ties extend beyond her relationship with her sister to other members of the household. Gloria's

children have grown up with the Appellant being an integral part of their family, and I see no reason to doubt the evidence that they are extremely close to her. They look to her as a big sister. She in turn regards them as her younger siblings. She plays a significant role in their upbringing, for instance taking them to and from school when Gloria and Richard are at work. She takes the 3 year old to nursery, and when she is not at nursery cares for her all day. She has given the elder children support and guidance, in particular the 12 year old:

> "I share a room with [B] and we are very close. [B] is a very emotional child and she sees me as a big sister who she will discuss anything with. Even when she was being bullied at school".

I note in respect of the latter Gloria's acknowledgment that her daughter did not feel able to open up to her about what she was experiencing at school, instead turning to the Appellant.

20. Similarly I see no reason to reject the Appellant's evidence that her relationship with her brother-in-law Richard is in substance paternal, particularly since she has not had any contact with her own father for many years. In his statement he says life without the Appellant as part of the family would be "just unthinkable" and "extremely devastating". He describes her as a "blessing and a wonderful person".

21. I am not satisfied that this quality of relationship could be said to pertain to the Appellant's relationships with her other two adult brothers, their wives and children. Although I do not doubt her when she says that they are close, there is no evidence before me to indicate that these relationships go beyond the "normal ties of affection" discussed in Kugathas [2003] EWCA Civ 31. I accept however that these relationships with her wider family are an important aspect of the Appellant's private life in the United Kingdom.

22. In common with the First-tier Tribunal I am satisfied that the Secretary of State was entitled, as a matter of law, to take the decision that it did. The question is whether, taking all relevant circumstances into account, it is proportionate.

23. I begin with the matters that weigh against the Appellant.

24. The first is that the maintenance of immigration control is in the public interest. She has not had any leave to remain since the 19th February 2010, when she overstayed her visit visa[1]. She does not, as far as I can tell, qualify for leave under the terms of the Immigration Rules today. That is a matter that weighs against her. I bear in mind however that for most of that time the Appellant was a minor. She played no part in the decision to bring her here and leave her with her sister (indeed it would seem from the Appellant's ambivalence towards her mother that this was a decision that has led to some emotional difficulties for the Appellant). That said the Appellant is now 20 years old and to that extent I must weigh

[1] The Appellant was in possession of a multiple entry visa valid until the 14th March 2013; I take that date from 6 months of her last entry, the last date upon which she was permitted to enter/remain the United Kingdom in accordance with paragraph 41 of the Rules

against her the failure to regularise her position, or to meet the requirements of the Rules.

25. The Appellant speaks fluent English. This is, properly understood, a neutral factor in the balancing exercise although it is worth noting the purpose underlying s117B(2), that those seeking to settle in this country are able to speak English because, *inter alia*, such persons are better able to integrate into society. That this is so is well-illustrated by the Appellant who has fully integrated since her arrival as a child. She has passed her GCSE's, made numerous friends and played a role in her local community as a carer to a family friend.

26. 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 remain in the United Kingdom are financially independent. I accept that the Appellant and her family have had no recourse to 'public funds', as they are defined at paragraph 6 of the Immigration Rules, since her arrival. The Appellant has been housed and maintained by Gloria and Richard with no support from any external agency. For at least some of the medical treatment that the Appellant has had, they have paid privately (as evidenced by receipts in the Appellant's bundle). It is right to find however, as the First-tier Tribunal did, that there has been some reliance on the public purse inasmuch as the Appellant attended state school and went to her GP. The question is whether that is capable of undermining the Appellant's claim to 'financial independence' under s117B(3).

27. The 2002 Act does not define what is meant by 'financial independence'. There is nothing in Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 that assists. Nor am I able to find any other authority on the point. The section has been drafted with an evidently wider scope than the other formulation often found in the immigration rules "without recourse to public funds", which has a specific meaning, set out in policy and in the Rules themselves, that definition consisting of a list of benefits. I am not however persuaded that its scope is so wide so as to take in access to state education. Applying an 'ordinary usage' principle I suspect most people in this country who regard themselves as 'financially independent' still send their children to state schools. If I am wrong I am not satisfied that the section in any event adds any significant weight to the Secretary of State's side of the scales. Applying the principle in Miah I bear in mind that the Appellant was a child and that her place of education was a matter of choice for Gloria and Richard.

28. The effect of s117B(4) and (5) is that little weight should be given to the private life that the Appellant has established since she arrived in the United Kingdom, since her presence here has been precarious at best, unlawful at worse. Again, the Miah principle applies and I take into account the fact that the Appellant was, for most of her time here, a child. As such it would be unrealistic, even unfair, to imagine that she would closet herself away and decline to make friends or to socialise with her peers because her immigration status was uncertain. For much of that time she

was blissfully unaware of that fact. In those circumstances the force of s117B(5) is somewhat blunted.

29. The Appellant has no criminal convictions. Nor is there any suggestion that there are any matters arising from her conduct that might give the Secretary of State, or the public, concern should she be permitted to remain in the United Kingdom.

30. I now turn to consider the matters that weigh in favour of granting leave to remain to the Appellant.

31. I accept and find as fact that the Appellant is in effect estranged from her parents, who are themselves now divorced. She was sent to the United Kingdom at the age of 11 for what she thought was another of her regular holidays here. She never got to go home. In her evidence before the First-tier Tribunal the Appellant gave unchallenged evidence that her parents have never sent her any money since the day she arrived here. She does not speak to them. She did not however deny that she has had *some* contact with her parents. They have both visited the United Kingdom – separately – in the past few years. They have stayed with her brothers, and with Gloria. In her evidence to me the Appellant wished to underline that she does not regard it as appropriate that she objects to these arrangements – it is up to Gloria whom she invites into her home. It is just that the Appellant is no longer close to either parent and does not ask anything of either of them. Gloria's own evidence confirmed that of the Appellant. She said that she now has virtually no contact with their father. He has remarried and has a new family. She has contact with her mother on "very rare occasions", the last of which was in 2017 when she came to the United Kingdom. Gloria explained that she had not herself been brought up by their mother. She had been raised by their paternal grandmother who passed away in 2016. The sisters' dislocation from their mother was further emphasised by Gloria's evidence that when she visited Nigeria in 2016 she did not even see her mother once, instead visiting the village where she had lived with her grandmother.

32. By contrast the family life that the Appellant shares with Gloria, Richard and their three children is, in substance, one of an adult daughter with her mother, father and three younger siblings. She has always been close to Gloria but has actually been part of her family for ten years now, a long time in the life of a young person. It is a warm and loving environment. All of the evidence before me indicates that Gloria and Richard have not differentiated between the Appellant and their own biological children. The question at the heart of this appeal is whether this young woman should be granted leave to remain in order that she can remain part of this family unit. I answer that question bearing in mind that in a short time she will reach an age where she will qualify for leave to remain under paragraph 276ADE(1)(v) of the Rules in her own capacity.

33. Whilst he did not challenge any of the evidence regarding the quality of the family life that the Appellant enjoys in the United Kingdom, Mr McVeety rightly pointed out that the Appellant is now 20 years old. She is at an age where she could be

expected to start moving away from the family, and live independently. I have considered that submission carefully but in the Appellant's case there are a number of reasons why I accept that she is not yet ready to make that transition.

34. The first, I think, is her family history. Whilst the Appellant now enjoys more than a sororal bond with Gloria, this has been borne of the broken relationship with their parents. That dislocation, at a young age, when the Appellant herself was unwell and so particularly vulnerable, must have been extremely difficult for the Appellant. It is in that context that I read the language used in the witness statements when the Appellant's separation from this family is contemplated: "unthinkable", "devastated", "heartbroken". Her connection to this family is particularly potent because of that corresponding lack of connection to her own mother.

35. The second, and related, matter is the Appellant's extremely close relationship with the children. The Appellant has shared a room with the eldest, B, for a number of years and both she and Gloria attest to the special nature of that relationship. It is not always the case that sisters – particularly sisters who share a room – will get on, but the unchallenged evidence here is that B is strongly attached to the Appellant, looking to her for guidance as well as fun. B and her siblings have known nothing other than the Appellant being part of their family and I accept that it would be contrary to their best interests if there was a forcible interference with that family life.

36. The third matter is that the Appellant still has some personal challenges to deal with before she is able to stand on her two feet. She is clearly an intelligent young woman but she has faced several hurdles in completing her education. As a child at school in Nigeria she always struggled, partly because she missed so much school as a result of repeated bouts of typhoid, malaria and related infections. Her education was then interrupted by her move to the United Kingdom, where she was required to fit into a completely alien education system. It was not until she was 15 that she was diagnosed with dyslexia. Today this has left her feeling indecisive about her future education, and career choices. At the time that this application was made it was the Appellant's stated ambition to study medicine. Whatever her eventual choice will be, she will find it difficult to make, and to pursue, without the support and assistance of Gloria and Richard. It is also worth noting that the Appellant has deep concerns about her ability to cope with her dyslexia in Nigeria, where it is a condition little understood or recognised. It is not taken into account by admissions boards at universities, for instance. Here she was offered a place at Bolton University and by Leeds Beckett (which she was unable to take up because of her status) but there she would find it difficult to gain admission to university and continue her education.

37. For those reasons I accept that this particular 20 year-old is not about to strike out on her own and move away from the family home. I accept that she is, and will for the foreseeable future remain, a 'child' of this family: see for instance PT (Sri

Lanka) v Secretary of State for the Home Department [2016] EWCA Civ 612, Ghising v Secretary of State for the Home Department [2012] UKUT 00160 (IAC)

38. It is in this context that I must evaluate whether the decision to refuse her leave is a proportionate response, necessary in order to pursue the legitimate aim of protecting the economy.

39. I have considered all of the evidence in the round. I remind myself that the Appellant is currently unable to meet the requirements of the Rules. Even though that is a matter that weighs heavily against her, I am quite unable to conclude that the decision – and the Appellant's consequent removal – would be proportionate or necessary.

40. The consequences for her would be devastating. Whilst I do not accept that the Appellant would be *unable* to – or face "very significant obstacles in" – making her way in Nigeria, I do recognise her personal antipathy towards that outcome. In her witness statement she put it like this:

> "I was 11 years old and I cannot remember anything about my life there. Although I have lived with Nigerian people in the United Kingdom, I have not continued to adopt the Nigerian culture, in fact I have found that I do not agree with a lot of values in Nigeria, particularly the status of women in the country".

41. She would be giving up everything she has known in the United Kingdom – her family, her home, her prospective education, her friends and entire private life – in order to start afresh in a country of which she has little understanding and no adult experience. As I say I do not consider that this intelligent and personable young woman would be unable in time to re-establish a private life for herself (the true test in 276ADE(1)(vi): see Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813) but I do recognise that the obstacles that she will face are likely to be difficult to surmount. She will be lonely. She may feel vulnerable. She will, as she puts it: "not know where to start".

42. More significant though, that any of that, would be the personal loss to the Appellant of her strong family life in the United Kingdom. Her returning to Nigeria would present a very serious obstacle to that family life continuing in the same way that she has hitherto enjoyed it. I accept that the children would be badly affected. It would not be the same as an older sibling going away to university. University students come back at weekends and the holidays. Their movement away from the family is gradual, and never complete. If the Appellant were to return to Nigeria the likely consequence would be a very substantial interference in the relationships that she has with these children. They could speak to her online, and might enjoy the occasional visit to Nigeria. Other than that their big sister would have been completely removed from their lives, in a traumatic and upsetting way. As for the Appellant herself, she would be facing a loss of significant family relationships for the second time in her life. I accept that the

emotional impact of such a separation would be extremely difficult for all of them. In all of the circumstances I find that it would be unjustifiably harsh.

43. I therefore allow the appeal on human rights grounds.

Decisions

44. The determination of the First-tier Tribunal contains an error of law and it is set aside.

45. There is no order for anonymity.

46. The appeal is allowed on human rights grounds.

Upper Tribunal Judge Bruce

8th July 2019