Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07938/2018**

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 18 February 2019	**On 13 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

MISS KENNY SARAH AKINDE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Nnamani, Counsel instructed by Chris Alexander Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Roopnarine-Davies promulgated on 9th November 2018 following an appeal heard at Taylor House on 30th October 2018 in which the First-tier Tribunal Judge dismissed the Appellant's human rights appeal. The Appellant now seeks to challenge that decision. Permission to appeal has been granted by First-tier Tribunal Judge Grant-Hutchison on 18th January 2019, who found it was arguable that the judge had misdirected herself by failing to consider Section 117 of the Nationality, Immigration and Asylum Act 2002 when dealing with the Appellant's Article 8 claim.

2. It was the Appellant's case that she was born in the United Kingdom on 23rd November 1989, but was a national of Nigeria. It was said that she left the UK and went to live in Nigeria and then re-entered the United Kingdom in 2000 with her father. It is her case that she had been left in the care of his relatives and she had remained in the UK since then. She says that she had a son from a previous relationship, who was born on 29th July 2010 and that all of her close family and relatives were presently settled in the UK, including her mother and she is also in relationship with a Mr Kareem, who has permanent residence in the UK.

3. Judge Roopnarine-Davies did not find the Appellant to be a credible witness. In fact at paragraph 9 of the judgment she found the Appellant reluctant to volunteer details of her circumstances under cross-examination and considered the discrepancies and contradictions in her evidence. The Judge stated that the Appellant had failed to provide examples of evidence that were material to her claim, which the Judge considered could have easily been provided. The Judge found there was insufficient evidence the Appellant had been living in the UK since 2000.

4. Judge Roopnarine-Davies noted that the Appellant had said she had been to primary school in Nigeria and then to a secondary school and college in the UK, and had obtained GCSEs and A levels here and that she had obtained admission to university on production of a British birth certificate. The Judge found it to be wholly implausible that the Appellant did not have documentary evidence in support of those claims, on the basis that the Appellant said she had entrusted documents to her mother who had lost them over time, because of her mother's mental health condition. The Judge noted that the Appellant's relationship with her partner was said to have broken down around April 2018, a year after application, which she found was 'pithy'. The judge did not accept evidence given on the morning of the hearing regarding a telephone call from the Appellant's sister indicating that the sister had been granted leave on the basis of a lesbian relationship and the judge found that that was wholly unsubstantiated.

5. The Judge considered an OT occupational therapist's report in respect of the Appellant's mother and the fact that she suffered from paranoid schizophrenia and osteoarthritis of the lumber spine. The Judge also considered the Appellant's own health difficulties in paragraph 16 regarding the Appellant undergoing surgery for a tumour at the front of her skull in 2010 and further surgery when a plate was inserted. The Appellant said she still suffering from severe headaches linked to problems with the plate. The Judge found that there was no evidence of the reoccurrence of the tumour and that the Appellant was simply waiting reconstruction of her skull vault which surgery had been described as being 'a challenge'. The Judge took account that the Appellant had been given appointment for surgery in December 2018, but the judge found that there will not be very significant obstacles to her reintegration back into life in Nigeria for the purposes of paragraph 276ADE of the Immigration Rules.

6. The Judge found that the Appellant had not been truthful about her circumstances and did not accept that she had been in the UK since the year 2000 as claimed. On the evidence before her she found that the Appellant had actually spent the majority of her life in Nigeria. The Judge found that although there was family life between the Appellant and her mother the interference with that was proportionate and the mother had indefinite leave to remain and can access support from her daughter in Manchester or social services, and also had the option of moving to Nigeria with the Appellant and her son.

7. In respect of the son the Judge found at paragraph 21 that he was only 8 years old and had a Nigerian passport and had only started school in 2006. She stated he was in good health and was not at a crucial stage in his education. His best interests were to be with his mother and she found that it was reasonable to expect him to leave the UK with his mother. She did not accept that the Appellant did not have family in Nigeria to whom she could return. The Judge found that the removal decision was proportionate under Article 8 and further that there were no compelling or exceptional circumstances, resulting in justifiably harsh consequences, to mean that the appeal should be allowed, following the case of **R (on the application of Agyarko) v SSHD** [2017] UKSC 11.

8. The Appellant seeks to appeal against the judgment on four grounds, which as accepted by Ms Nnamani on behalf of the Appellant, are actually interlinked to some degree. The first ground is that it is argued that the Judge failed to properly assess the Appellant's credibility and it said that the Judge made flawed findings in respect of credibility and provided unsustainable reasons for rejecting the Appellant's account. It said the Appellant had explained why she had struggled to submit evidence confirming her length of residence since 2000 and that the judge failed to assess the supporting material, which was before her and gave inadequate reasons for rejecting the Appellant's account on the basis of her credibility.

9. In the second ground it is argued that the judge failed to adequately consider the Appellant's son's best interests and failed to undertake an evaluative assessment of the child's best interests and did not justify or substantiate the conclusion that it was reasonable for the child to leave the UK. It is argued that the Judge failed to take into account that 'seven years' has been identified as a crucial length of residence for the child both under the Immigration Rules and for the purposes of Section 117B(6) of the Nationality, Immigration and Asylum Act 2012.

10. In the third ground it said that the Judge failed to adequately consider the Appellant's mother's circumstances having accepted that family life existed between the Appellant and her mother and that the Judge's analysis was flawed, taking into account the absence of any involvement or care currently being provided by the Appellant's sister and the insufficiency of care available from social services. It is argued that the finding that the mother could move to Nigeria with the Appellant and her son, failed to take into account the significant health concerns and the infringement of the mother's human rights.

11. In the fourth ground it is argued that the Appellant's medical condition was such that it is argued that she could not be expected to return to Nigeria and that the Judge has inadequately reasoned as to why there will not be very significant obstacles to the Appellant's reintegration in Nigeria since her departure in 2000.

12. I am grateful to the helpful submissions of both Ms Nnamani, Counsel on behalf of the Appellant and Ms Isherwood, Senior Home Office Presenting Officer on behalf of the Secretary of State.

My Findings on Error of Law and Materiality

13. In respect of the first Ground of Appeal in which it is argued that the Judge failed to take proper account of the explanation given by the Appellant as to why she struggled to submit evidence confirming her length of residence since 2000, in my judgment when one considers the findings made by the learned First-tier Tribunal Judge in respect of that issue, the Judge did not simply take into account the lack of corroborative documentary evidence. The Judge also found that the Appellant was not a credible witness, who appeared reluctant to volunteer details of the circumstances under cross-examination and found that there were discrepancies and contradictions in her evidence. The Judge did not accept and found wholly implausible the explanation that the Appellant had simply entrusted her schooling and other documents to her mother who had lost them over time because of her mother's condition and the judge found that basically those documents could have been obtained again if various bodies had been approached and asked for confirmation of her attendance and what those records showed. In respect of that ground I find that the judge did make findings which were open to her on the evidence. The judge was entitled to take account of the discrepancies and contradictions in the Appellant's evidence and the lack of documentary evidence but she has also considered the explanation given but did not accept the explanation given that she had actually simply left the documentary evidence to show that she had lived in the UK since 2000 with her mother. That was a finding open to her.

14. In respect of the second and third Grounds of Appeal in fact both make reference to the failure of the First-tier Tribunal Judge to adequately deal with Section 117 of the Nationality, Immigration and Asylum Act 2002 as amended, both in respect family life with the child and also in respect of the family life with the Appellant's mother.

15. Under Section 117A of the Nationality, Immigration and Asylum Act 2002 Part 5A applies where a Court or Tribunal is required to determine whether a decision would amount to a breach of a person's right to family or private life under Article 8 and as a result would be unlawful for the purposes of Section 6 of the Human Rights Act 1998. In considering the public interest question under Section 117A(2) the Court or Tribunal must have regard in all cases to considerations listed in Section 117B. That is a mandatory requirement it is not optional and although in that regard Ms Isherwood is quite correct in saying that in the case of **Dube (ss117A-**

117D) [2015] UKUT 90, the Upper Tribunal made it clear that substance rather than form has to be considered, such that even if there is not specific reference to Section 117 if the relevant considerations have been taken into account that is sufficient. But in this case what we have in this decision is not only a failure to actually make reference to Section 117A-D, and in particular 117B, but no proper analysis of the considerations applicable in all cases under Section 117B.

16. Although the Judge makes reference to the fact that the Appellant is in receipt of child benefit, child tax credits and working tax credits, she has not actually specifically dealt with whether or not the Appellant is financially independent. There is no consideration as to whether or not the Appellant can speak English for the purposes of Section 117B(2) and no reference to the consideration that little weight should be given to any private life or relationship formed at a time when the person was in the UK unlawfully and that little weight should be given to private life established by a person at a time when the person's immigration status is precarious. Particularly, when considering the Appellant's child there is no consideration Section 117B(6) which states 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 UK*."

17. Section 117D makes it clear that a qualifying child either means a British citizen or a person who is under the age 18 who has lived in the United Kingdom for a continuous period of seven years or more. In this case the Appellant's son by the date of the hearing had lived in the UK continuously for eight years and therefore would have been a qualifying child. That is not sought to be challenged by Ms Isherwood before me today. There is no reference to s.117B(6) or to the criteria set out therein. All there is at paragraph 21 is a simple one sentence finding by the Judge that she found it reasonable to expect the child to leave the UK with his mother, having found that he was only 8 years old and he had a Nigerian passport and he started school in 2016, was of good health and not at a crucial stage of his education and that his best interests were to be with his mother. But there is no consideration of the fact that after a child has been here for seven years as stated by Lord Justice Elias in the case **MA (Pakistan) [2016] EWCA Civ 705** at paragraph 46 that:

> "*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 for the child to be required to leave. That may be less so when the child is very young because the focus of their lives is likely to be on their families, but the disruption becomes more serious as they get older*."

18. In this case the Judge has simply relied upon the fact that the son is only 8 years old she does not seem to have noticed that there is a difference between children who have lived her for under seven years and those who have lived here for more than seven years. Although she says he had only started school in 2016 clearly by the date of the hearing he had been in school for two years, as the decision was in November 2018. The Judge then went on to find that the child was not at a crucial stage of his education. As Ms Isherwood said the crucial stage of any education is often something like GCSEs or A levels. A crucial stage of his education would be when he has actually reached the age of 15 or 17. That wholly misses the consideration of the fact that children who have been here for more than seven years are in a separate category. Then consideration has to be given as to whether it is reasonable to expect the child to leave the United Kingdom obviously taking account of their social, cultural and educational ties and the like at that stage.

19. I find that this is not simply an error of substance over form. The judge has not properly considered Section 117B(6) in respect of the child and has not adequately considered what ties the child had developed.

20. It is argued by Ms Isherwood that effectively any error in that point in that regard is not material. In that regard she relies upon little evidence regarding the son's position in the UK or his life here. However, in terms of materiality obviously at this stage we had an 8 year old child who had been in education for two years. I am not in a position to say that the decision of the First-tier Tribunal Judge would necessarily have been the same had she properly looked at this case through the lens of Section 117B(6) and the case law both of **MA (Pakistan)** and **KO (Nigeria)**. Neither case was actually considered and in my judgment therefore the failure to properly consider section 117B(6) does amount to a material error of law in this case.

21. Also when considering the Appellant's family life with her mother, the judge has also not made reference to Section 117B or taken account of the relevant considerations. I am less persuaded that that error therein in terms of Ground 3 is material. There seem to be none of the factors in Section 117B which actually accounts in the Appellant's favour in that regard given the judge's consideration of family life with the mother. Although it is said there was an absence of involvement of care from the Appellant's sister and insufficient care from social services does not mean that it would necessarily be wrong to expect the sister, given her own circumstances, to help in the future. The judge did not accept what was being said of the evidence regarding the sister having been granted leave on the basis of her own relationship, on the basis that that was unsubstantiated. The problems in terms of her helping out were unsubstantiated. The mother had been assessed for care to be provided by social services. There is no evidence to support the assertion that such care would be inadequate.

22. Finally, in respect of the fourth Ground of Appeal the judge again has considered the extent of the Appellant's medical problems and the fact of

the surgery for the tumour but found that there is no evidence of recurrence of the tumour and found that she was waiting reconstruction of the skull vault and had an appointment for surgery in December 2018. The judge then did go on to consider the extent to which she could reintegrate back into life in Nigeria for the purposes of paragraph 276ADE. Although it is argued by Ms Nnamani that there is no evidence of the judge having considered the Appellant's medical evidence in that regard or her state of health, the Judge has given clear, adequate and sufficient reasons as to why the Appellant would be able to reintegrate back into Nigerian society and did take account of her medical condition and that appointment for surgery in December was for reconstruction of the skull vault rather than due to a recurrence of the tumour. ***

23. However for reasons set out above I do find that the decision of First-tier Tribunal Judge Roopnarine-Davies does contain a material error in terms of her failure to properly consider Section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

24. Having discussed the issue with both legal representatives, they have both agreed that as this is a human rights appeal such that any re-hearing before the First-tier Tribunal will have to consider the situation on human rights grounds based at the date of the rehearing, that there should be no preserved findings of fact.

25. I therefore do set aside the decision of First-tier Tribunal Judge Roopnarine-Davies in its entirety and order that the case be remitted back to the First-tier Tribunal for a re-hearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Roopnarine-Davies.

Notice of Decision

The decision of First-tier Tribunal Judge Roopnarine-Davies does contain a material error of law and is set aside.

No anonymity direction is made. No such direction was sought before the First-tier Tribunal and no such direction was sought before me.

Signed Date 7th March 2019

DUTJ McGinty

Deputy Upper Tribunal Judge McGinty