IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005224
First -tier Tribunal No: PA/55642/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

6th February 2024

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

L N E

(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Presenting Officer
For the Respondent :Ms Brakaj, instructed on behalf of the respondent

Heard at (IAC) on 22 January 2024

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal(Judge Hands) promulgated on 17 June 2023. By its decision, the Tribunal dismissed the appellant's appeal on protection grounds against the Secretary of State's decision dated 1 December 2022 but allowed her claim on human rights grounds, in the context of the circumstances of her eldest child.

2. The FtTJ did make an anonymity order and no grounds were submitted during the hearing for such an order to be discharged. Anonymity is granted because the facts of the appeal involve a protection claim and the interests of minors.

3. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

4. Whilst the application for permission to appeal is that of the Secretary of State for the purposes of this decision, I shall refer to the Secretary of State as the respondent and to LNE as the appellant, reflecting their positions before the First-tier Tribunal.

The background:

5. The factual background can be summarised as follows. The appellant is a national of Nigeria. She has 3 children all of whom are present with her in the United Kingdom, the youngest of whom is dependent on her claim. The other 2 children, M and S had claimed on protection grounds and that had been considered along with the appellant's claim.

6. The appellant arrived in United Kingdom on 21 February 20 with permission to enter as a visitor. She was accompanied by her children. She made a protection claim on 23 April 2020. The basis of her protection claim was that she fell within 2 separate particular social groups; firstly as a person suspected of being a lesbian and secondly, as her daughter was at risk of serious harm because she would be subjected to FGM. It was also the appellant's case that she feared serious harm from her estranged husband as she had been a victim of domestic violence as had the eldest child. The protection claim was refused in a decision taken on 1 December 2022. The respondent accepted the appellant's nationality and that she had 3 children born in Nigeria. However the remainder of the appellant's claim was rejected.

7. In a decision promulgated on 17 June 2023 the FtTJ dismissed the appellant's claim on asylum grounds and on humanitarian protection grounds but allowed the appeal on human rights grounds. The FtTJ set out her findings of fact between paragraphs 14 – 29 and that the appellant would not suffer persecution on return to Nigeria either based on their membership of a Particular Social Group as she did not have a well-founded fear or real risk of harm either to herself because of her imputed sexuality or her daughter because the risk of being subjected to FGM. It also found no reasonable likelihood that the appellant would suffer persecution on return at the hands of a non-state actor being her estranged husband. The appellant has not sought to challenge the dismissal of her protection claim.

8. The FtTJ however allowed the appeal on human rights grounds (Article 8). The assessment is set out between paragraphs 35 – 47 of the decision of FtTJ Hands. The decision reached on Article 8 grounds related to whether the removal of the children, along with the appellant would be a disproportionate and unjustified breach of their Article 8 rights for respect for their family and private life (see paragraph 35). Between paragraphs 36 – 39 the FtTJ concluded that there would be no breach of Article 3, or Article 8 based on medical grounds relating to the appellant herself and in particular based on her mental health. However in relation to the Article 8 in the context of the return of the child M to Nigeria, the FtTJ undertook an assessment of the evidence which had been set out in a number of reports from the local authority, an educational psychologist and from the school. Those factual findings are set out between paragraphs 40 –46. It is

relevant to observe that those detailed findings of fact are not the subject of any challenge by the respondent in the grounds or at the hearing before the Upper Tribunal.

9. Those factual findings referred to the support that all 3 children had received when coming to the attention of the authorities in the UK when they were seen as vulnerable as a result of behavioural issues and financial issues. Whilst the behaviour of all the children was challenging initially, the FtTJ concluded from the evidence that after time and input from official agencies, the 2 younger children appeared to have settled into their way of life and did not pose problems and that other than the threat to their well-being from the appellant's behaviour and health, they had integrated well into their life in the United Kingdom (and see paragraph 45).

10. However the FtTJ's assessment of the evidence in relation to the eldest child M was in a different position. The FtTJ set out her assessment of the evidence in relation to him between paragraphs 42 – 45. Her assessment of the documentary evidence in relation to M, was that his position was "more challenging and that the "reports recorded history of mental health issues which have manifested themselves in bizarre and disturbing behaviour." The reports referred to the behaviour being linked to previous trauma he had suffered, whether or not that was in the way described by the appellant or not. The FtTJ set out the input from various agencies as a result of his behaviour suggesting that it would require therapy for an extended period of time in order for him to obtain some level of normality. The FtTJ identified that the most recent report in respect of the child's behaviour and his ability to integrate with his peers was "more positive" that recognise that was still a lot of intervention needed to support him and to help them overcome his behavioural difficulties and progress.

11. In her assessment the FtTJ considered what she referred to as the "limited background evidence" presented to her in respect mental health but what there was supported the appellant's evidence that the child M was unlikely to receive the treatment or support required for his mental health in Nigeria. The FtTJ considered the respondent's CPIN of January 2022 on this issue which highlighted that treatment for mental health had been neglected in Nigeria that not all the States had adopted the Mental Health Bill and still depended on the Regional Lunacy Law of 1958. On the consideration of the background material, the FtTJ found that there was still stigma attached to those with mental health difficulties with some believing that people are possessed by the devil and taking action accordingly. She referred to the reports of thousands of people with mental health issues remaining chained and locked up in various facilities including state hospitals and other facilities run by variety of religious faiths.

12. At paragraph 44 the FtTJ concluded that "in my judgement, it is highly unlikely M will be able to access the treatment he needs for his mental health issues in Nigeria, no matter where in the country the appellant settles. I find that it would be in M's best interests to remain in the United Kingdom to enable him to access the treatment he requires in coming to terms with his past trauma".. The FtTJ went on to conclude that to return M to Nigeria would be an unjustifiable and disproportionate breach of his Article 8 rights.

13. At paragraph 45, the FtTJ returned to the best interests of the other 2 children, and that their positions were different to that of M whom she found continued to struggle with his mental health. The FtTJ therefore concluded that the appellant had established that returning her eldest child Nigeria would be a

disproportionate or unjustified interference with his rights in terms of Article 8 of the ECHR. The FtTJ further concluded that the separation of M from his mother and siblings on the basis that he remained in the UK, would mean that the family would be "torn apart" and this would not be a justifiable interference in their family life and would be a "disproportionate" for all of them."

14. The FtTJ summarised the decision at paragraph 47, having considered all the circumstances that refusing the appellant's claim would be a disproportionate or a unjustifiable interference with the family and private life of M and as it would not be in his best interests to separate him from his siblings and his mother; the FtTJ found the decision of the respondent to result in a breach of the Article 8 rights of the appellant and her children. She therefore allowed the appeal on Article 8 grounds.

15. The Secretary of State sought permission to appeal and FtTJ Saffer granted permission on 30 November 2023 for the following reasons:"

> "It is arguable that the Judge materially erred in not appearing to consider s117B of the Nationality, Immigration and Asylum Act 2002 within the article 8 proportionality balancing exercise. There is no merit in the suggestion in (f) of the grounds that the Judge has incorrectly treated the best interests of ME as the paramount consideration, instead of a primary consideration as she identified the test in [40]. I grant permission regarding (a-e) only of the grounds."

16. At the hearing Mr Diwncyz appeared on behalf of the respondent and Ms Brakaj appeared on behalf of the appellant. Mr Diwnycz stated that he did not seek to argue against this being a limited grant of permission given FtTJ Saffer's conclusion that he would only grant permission regarding (a)-(e) of the grounds and in light of the reasons that he gave. Furthermore he did not seek to rely upon ground (c) which referred to the appellant's ability to speak English as he accepted that the material before the FtTJ demonstrated that she was interviewed in English for her protection claim; that she had said English was her first language in the screening interview at paragraph 1.10 and it was her main language, and that the interview was read back to her in English. He submitted that the author of the grounds may not have been aware of that evidential material.

17. He further submitted that whilst there was no express reference to the public interest, the FtTJ must have had the public interest at the back of her mind as the FtTJ had weighed the evidence very carefully and thus must have been weighing the parameters against the public interest. He submitted that it would have been better if the judge had referred to those public interest considerations. He submitted that the FtTJ findings as to the children's needs and in particular M's mental health and that the findings between paragraphs 41 onwards were quite detailed and therefore the judge did not just accept the evidence but engaged with it. Mr Diwnycz submitted that when reading this the judge had the public interest at the back of her mind and that was the only conclusion he (meaning himself) could come to. Whilst the other children were in a different position, the only child which swung the appeal in the appellant's favour was M. He did not seek to make any further submissions.

18. Ms Brakaj relied upon the skeleton argument produce prior to the hearing. That stated the FtTJ considered the respondent's case in it is entirety and placed adequate weight on the best interests of the children in accordance with Section 55 and Article 8 of the ECHR which could be seen in the findings paragraph 43-44

of the determination. The FtTJ had set out the extent of her son's mental health support and treatment and adequately reasoned that to return to Nigeria her sons mental health would suffer.

19. In her oral submissions, Ms Brakaj submitted that whilst the FtTJ did not expressly refer to section 117, her findings demonstrated it was part of the decision-making process.

20. In response to the issue of financial independence, it was set out that she had been in employment receiving a good income as evidenced by the payslips. The question of the appellant's work and her financial independence or ability to work was relied upon by the respondent to show that she could reintegrate to Nigeria. The finding made by the judge at paragraph 36 expressly considered her ability to work. Therefore it was common ground that she would be able to work and was therefore not a negative factor in the balancing exercise. Nor had it been put forward in the respondent's review that she was unable to work.

21. She submitted that whilst the grounds referred to her inability to speak English, the appellant was in fact fluent in English. Ms Brakaj pointed to the evidence before the FtTJ that her interview was conducted in English and that the screening interview had similarly been conducted in English which she had said was her first language. Thus this was not an issue between the parties and was an accepted fact. This was now accepted on behalf of the respondent by Mr Diwnycz.

22. Ms Brakaj submitted that the other point raised was that the appellant had established a private and family life whilst her leave was precarious. However the previous findings on the appellant's credibility of her protection claim were negative. It is therefore clear that the judge had at the forefront of her mind the negative aspects of her immigration history and therefore it could not be realistically said that the FtTJ did not take this into account as she had set out in detail the negative aspects in relation to the appellant. However it was open to the FtTJ in respect of M to override those negative aspects of the case and allow the appeal on Article 8 grounds.

23. Ms Brakaj submitted that had the FtTJ noted the issue of language and the ability to work, they could only be seen as positive findings and therefore there is no merit in the grounds.

24. She submitted that when looking at the decision the FtTJ plainly had in mind the substance of the reports, but in the context of the full history and whether M would be able to access the treatment he needed. She reminded the tribunal that the respondent did not challenge those findings and there was no error of law in her reasoning in reaching those findings of fact.

25. When asked about the respondent's review of the issues, Ms Brakaj submitted that the judge resolved the medical issues as set out in the respondent's review, in respect of M in his favour and therefore resolved the cultural and educational issues raised and this was relevant to the proportionality balance. The FtTJ resolved the issue of the consequences for the children and their life in the UK and links to the UK as relevant and consequently she addressed and turned her mind to the issues between the parties as set out at paragraph 44, and her reference to it being highly unlikely that M could access the treatment he needed for his mental health issues in Nigeria, and that in reaching that decision she was

answering the question set out in the respondent's review as to the consequences for M. She therefore submitted that the FtTJ grappled with the issues but before her by the respondent.

26. Both advocates were invited to provide any submissions they want to make as to the materiality of any error or what each would wish to say on the remaking of the appeal. Mr Diwnycz stated that he would not seek to persuade the tribunal that the needs of M and the proportionality of him returning to Nigeria would be argued against. He submitted that FtTJ Hands had set out the paucity of mental health provision in Nigeria that the respondent's review dealt with mental health in a brief consideration, and whilst the other children could adapt, the position was different with M.

27. Ms Brakaj submitted that any error would not be material and that even if the S117B factors that were in issue (the others relating to ability to speak English and financial independence, now not being relied upon by the respondent) the outcome of the appeal a to proportionality would have been the same. The FtTJ's factual findings in relation to M have not been challenged by the respondent and demonstrated that it will be unjustifiably harsh consequences for M to be returned Nigeria in the light of the evidence. She submitted that the FtTJ was aware of the negative aspects of the appellant's claim and also immigration history but that they did not outweigh the positive aspects of the case in relation to M and therefore were not material to the outcome.

28. She further submitted that in any event and looking overall as to the decision with the unchallenged findings and conclusions upon the effect of M and the consequences of removal, even if the section 117B factors relating to the precariousness of the private life and the public interest in immigration control were considered it has not been shown to outweigh the strong findings made as to the consequences for M as a child with significant mental health problems and would not be able to access medical treatment.

29. At the end of the hearing I reserved my decision which I now give.

Discussion:

30. Section 117(A) of the Nationality, Immigration and Asylum Act 2002 sets out that where Tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for their private or family life under Article 8 the tribunal must (in particular) have regard to the public interest considerations listed in section 117B.

31. The respondent has not sought to challenge the factual findings made by FtTJ Hands in relation to the Article 8 assessment, nor is it submitted in the grounds or before this tribunal that this was an appeal which could not on any rational view succeed on Article 8 grounds. What is submitted is that the decision discloses an error of law based on the failure of the FtTJ to apply the section 117 public interest considerations.

32. The written grounds refer to the decision of the Upper Tribunal in *Dube (ss 117A-D) [2015] 00090 (IAC).* In that decision the Upper Tribunal set out the way Part 5A of the NIAA 2002 should be applied, namely that the considerations are mandatory in any proportionality balancing exercise; they reflect principles of Strasbourg case law which are not exhaustive but are seen as an expansion of

the 5th Razgar principle. It was also held that it would not be an error of law for Tribunal to fail to expressly refer to each of the subsections as long as each feature of the public interest is taken into consideration. What matters is substance not form.

33. The respondent's case in the written grounds is that the FtTJ failed to have regard to 3 of the considerations listed in section 117B. Firstly, section 117B (2) provides that it is in the public interest that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English are better able to integrate into society, and less of a burden on taxpayers. Whilst the written grounds submit that the FtTJ failed to have regard to that consideration, Mr Diwnycz in his submissions accepted that this was not an issue at the hearing in the light of the evidence that was before the FtTJ and contained in the respondent's own documentation which demonstrated that her interview was conducted in English, which was read back to her in English (p320 CE File), that she had set out in a screening interview that English was her 1st language (see 1.10 of S I). He stated that his colleague who had drafted the grounds was not aware of this.

34. The 2nd consideration raised is the requirement at S 117B(3) that persons who seek to enter or remain in United Kingdom are financially independent, because such persons are not a burden on taxpayers, and are better able to integrate into society.

35. The written grounds assert that the FTJ's decision failed to refer to this. In respect of this issue, Mr Diwnycz on behalf of the respondent noted the documents annexed to the skeleton argument which were the appellant's payslips. The hearing before the FtTJ was in May 2023 and promulgated in June 2023. Mr Diwnycz pointed out that the payslip for July demonstrated that the figure given for gross earnings paid to date suggested that she had been working prior to the July payslip and at the time of the FtTJ's decision. He accepted that whilst the payslips were not before the FtTJ it demonstrated that her financial independence was not in issue. Furthermore as set out in the decision, and as set out in the submissions made by Ms Brakaj, it was the respondent's case that the appellant would be able to work and that the FtTJ found that her mental health did not manifest itself by inhibiting her ability to work (see paragraph 39 of the FtTJ's decision). Mr Diwnycz did not seek to rely upon that point either.

36. The decision of the FtTJ does not expressly refer to section 117B of the 2002 Act. The application of S117 is mandatory although as both advocates have submitted it is matter of substance and not form. In fact, there has been a degree of agreement between the advocates as to what was at the forefront of the FtTJ's mind and that Mr Diwnycz on behalf of the respondent submitted that the FtTJ must have been aware of her immigration history given her negative findings on the protection claim and that the FtTJ must have had the public interest at the back of her mind as the FtTJ had weighed the evidence very carefully and thus must have been weighing the parameters against the public interest. He submitted that it would have been better if the judge had referred to those public interest considerations. I agree with that very fair assessment. Whilst the FtTJ did not refer to the S 117 factors expressly and having heard the submissions of both advocates and considered the decision made by the FtTJ on the basis upon which she allowed the appeal on article 8 grounds, I am satisfied on balance that this is not an error of materiality such that the decision should be set aside for the following reasons.

37. In light of the concession made on behalf the respondent in relation to S117B(3) as to financial independence and section 117B (2) and the appellant's ability to speak English, both parties accept they were not factual issues in contention between the parties in light of the evidence. This is reflected in the respondent's review and the factual findings made by the FtTJ expressly at paragraph 39 concerning the appellant's ability to work. Similarly her ability to speak English was not an issue given the evidence before the FtTJ as set out in the respondent's own documentation. Whilst Ms Brakaj submitted they were "positive factors," as pointed out in the decision of Ruppiah at paragraph [57], whilst those 2 factors might be legitimate factors in assessing the strength of private and family life they could not affect the public interest under section 117B(1) . The sections are concerned with if the appellant is not self-sufficient or cannot speak English they are viewed as negative factors. In essence, had they were, or would have been neutral factors in the proportionality assessment.

38. The other consideration set out in the written grounds is that at paragraph (d) that the FtTJ has failed to attach adverse weight to the fact that the appellant's family and private life has been established at all times with a precarious or unlawful immigration status as required by section 117B(4) and 117B(5) of the 2002 Act.

39. The appellant's immigration history did count against her and where precariousness exists, or unlawful residence it plainly affects the weight to be attached to the private and family life established in the United Kingdom and as relevant to immigration control. However section 117 considerations are to be consistent with Article 8 and thus a limited degree of flexibility arises so that the application of the provisions will lead to an end result consistent with Article 8. The factual findings underpinning the Article 8 assessment related to the interests of M rather than the appellant and even if little weight should be given to the establishment of her and M's private life, it does not mean that no weight could ever be given, even if limited.

40. It seems to me that the issue is one of materiality based on the limited grounds and the submissions made on behalf of the advocates at the hearing. Both advocates in their oral submissions agree that the FtTJ had made detailed factual findings as to the circumstances of the child M consistent with the reports set out in the appellant's bundle which came from a number of sources alongside the country materials. They were issues raised in the respondent's review which were resolved in favour of the appellant. None of those detailed factual findings have been challenged in the grounds and when properly viewed provided adequate and sustainable reasoning for reaching her overall conclusion that based on the specific factual circumstances relating to M, that there would be unjustifiably harsh consequences for M which when viewed in the context of the country materials and the reports were sufficient to outweigh the public interest, as set out in the summary reached at paragraphs 46 and 47 of the FtTJ's decision. Mr Diwnycz on behalf of the respondent recognised that that it could not be said that this was an appeal which could not on any rational view succeed on Article 8 grounds when viewing those detailed findings of fact and the FtTJ's analysis of the evidence.

41. Consequently, any error of law by a failing to refer expressly to the public interest considerations under section 117, have not been demonstrated as material to the overall outcome, nor has it been argued on behalf of the

respondent at this hearing that it was material to the outcome in the sense that in the light of the detailed factual findings made by the FtTJ relating to M, that had the FtTJ applied the relevant considerations it would have led to any other outcome. In other words, the analysis of the evidence specifically relating to M, which the respondent does not challenge, were of sufficient strength to outweigh the public interest when the limited basis of the grounds are analysed.

Notice of Decision:

42. The decision of the FtTJ to allow the appeal on Article 8 grounds shall stand.

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

5 February 2024