Upper Tribunal
(Immigration and Asylum Chamber)

MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 January 2018	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE LINDSLEY

Between

MT AND ET

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the appellants: Mr J Nicholson, Counsel, instructed by Greater Manchester

Immigration Aid Unit (via video-link)

For the respondent: Mr P Deller, Senior Home Office Presenting Officer

1. A very young child, who has not started school or who has only recently done so, will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part.

2. The giving of ex tempore decisions furthers the aim of dealing with immigration and asylum appeals as efficiently as possible. But any formal attempt to identify and manage in advance those cases which may lend themselves to the giving of ex tempore decisions needs careful handling; not least to ensure procedural fairness.

DECISION AND REASONS

1.
The appellants, citizens of Nigeria, are respectively mother and daughter. The mother, MT, arrived in the United Kingdom with the daughter in July 2007. At that time the daughter, ET, was 4 years old. The appellants entered as visitors and overstayed. The mother made several applications for leave to remain on Article 8 grounds, which were refused. Following her last refusal, she appealed to the First-tier Tribunal. Her appeal was dismissed by Immigration Judge Birrell in January 2011.

2.
The mother applied for asylum in 2011, which was refused and certified. Following a successful judicial review by the mother, the respondent made a new decision, carrying an in-country right of appeal. The mother appealed to the First-tier Tribunal and her appeal was dismissed by First-tier Tribunal Judge Baird in November 2012.

3.
Further applications ensued, leading to the respondent's decisions in August 2016 to refuse the appellants' human rights claims.

4.
The appellants appealed to the First-tier Tribunal. On 6 July 2017, their appeals were heard in Manchester by Upper Tribunal Judge Martin, sitting in the First-tier Tribunal. She dismissed the appellants' appeals in an oral (ex tempore) decision delivered at the hearing and subsequently reduced to writing.

5.
Permission to appeal was granted by the Upper Tribunal on 26 September 2017.

6.
The appellants' appeals were dealt with as part of the "Proof of Concept for the Extempore Judgment Pilot 2017". A letter to the mother from the First-tier Tribunal, dated 7 March 2017, explained the Proof of Concept:-

"The Appeal process will be front loaded with exchanges of evidence so that issues can be identified at an early stage. It is anticipated that by the time of the hearing there will be a document, very much like a Pleading, which identifies the issues to be decided and specifies what an Appellant needs to establish in order to succeed. The hearing will then be restricted to those issues.

It is hoped that this will shorten hearings and weed out appeals which would succeed. It will allow judges to give an extempore judgment on the day.

It is anticipated that the Judge will hear two appeals in a day and that the proceedings will be recorded and the Extempore Judgment will also be recorded and a transcript of the Judgment typed. That will be the Decision and Reasons and while grammatical errors will be corrected it is not envisaged that it will otherwise be amended.

As this system involves a change in the way of working for both Appellants, Representatives, and for the Home Office, in order to succeed it is dependent on all parties fulfilling their obligations. Before a full pilot is commenced there will be a much smaller "Proof of Concept" pilot. This will be run at Manchester and Taylor House over one week. The Proof of Concept will allow the Home Office to identify what resources it will need to have available for a full pilot and both sides will be able to identify any issues.

This particular appeal has been identified as suitable for the Proof of Concept and you will see detailed directions attached. You will also note the strict timescale and probable consequences for default. Obviously, if there are genuine problems/reasons for needing more time either side should apply to the Tribunal. Otherwise the Tribunal expects the time table to be adhered to."

7.
Also on 7 March 2017, the First-tier Tribunal issued the parties with the following directions:-

"1. The Respondent shall, no later than 4 April 2017 file and serve a consolidated, indexed and paginated bundle of documents containing all the evidence relied upon by the Secretary of State.

2. The Appellant shall, no later than 2 May 2017, file with the Tribunal and serve on the Respondent all evidence relied upon (including evidence already served on the Respondent). This shall be contained in a consolidated, indexed and paginated bundle of documents. The bundle must include a skeleton argument setting out a summary of the Appellant's case, including any new matters, which should be set out (in brief) under the hearing 'New Matters'.

3. Failure to comply fully with Directions 1 and 2 above is conduct likely to fall within rule 9(2) of the Tribunal (First-tier Tribunal) Immigration and Asylum Chamber) Rules 2014, which may require the Tribunal to exercise its power under rule 9(3) of those rules to make Orders for payment of costs and interest on costs (or, in Scotland, expenses).

4. Any application for an extension of time in which to comply with Direction 1 and 2 above shall be filed with the Tribunal and served on the Respondent promptly and be accompanied by reasons.

5. The Respondent shall, no later than 30 May 2017 file with the Tribunal and serve on the Appellant a Statement of Issues in the prescribed format which appears at Annex 1 specifying (by means of completion of Sections A and B of the Form) whether:

(a) permission is sought to withdraw the decision giving rise to the appeal; or

(b) the appeal is conceded; or

(c) the appeal continues to be opposed (or opposed in part), in which case particulars must be provided in the Statement)

In the event that (c) above applies, the Respondent shall set out in the Statement those facts which the Respondent contends must to be proved by the Appellant to the required standard in order for the Appellant to succeed in the appeal. The Respondent must also indicate whether or not consent is given with regard to any new matters raised by the Appellant.

6. The Appellant shall, no later than 13 June 2017 file with the Tribunal and serve on the Respondent a Response in the prescribed format which appears at Annex 2 by means of completion of Sections C and D.

(a) confirming agreement with the Respondent's Statement (where 5 (c) above applies) in relation to the facts required to be shown in order for the Appellant to succeed; or

(b) if the Appellant disagrees with the Respondent's Statement, identify the facts the Appellant believes must be shown (and proved) to succeed in the appeal and shall, at the same time, refer to the part or parts of the bundle(s) where the relevant supporting evidence appears.

(c) In addition, the Appellant to state if an interpreter is required and if so in which language.

THE TRIBUNAL WILL NOT, SAVE IN EXCEPTIONAL CIRCUMSTANCES, PERMIT ANY AMENDMENT BY EITHER PARTY OF THE CASE INDENTIFIED FOLLOWING COMPLETION OF DIRECTIONS 5 AND 6 ABOVE.

A failure to comply with these directions may engage the Tribunal's powers under Rule 9 of the FtT (IAC) Procedure Rules 2014. Furthermore, the parties will be in breach of their obligations under Rule 2(1) & 2(2) of the 2014 Rules in failing to assist the Tribunal with its overriding objective to determine cases fairly and without unforeseeable delay. "

8.
On 2 May 2017, Greater Manchester Immigration Aid Unit, on behalf of the appellants, submitted a bundle of documents. This included a skeleton argument, which, having set out extracts from case law, summarised the appellants' case as follows:-

"[ET's] best interests are clearly met by remaining with her mother, but that is not the end of the matter. She has lived her [life] from the age of 4 until 14 in the UK. This is the country where she has grown up, developed and formed friendships and relationships within her school and community. This is to be contrasted to the situation in Nigeria where she has no support network, and no guarantee of even completing her education so as to fulfil her potential. It is submitted that it is in her best interests to remain in the UK.

Conclusion

[ET] is a qualifying child and cannot reasonably be removed from the UK. To require her to leave the UK would be in breach of the Immigration Rules, Article 8 and s55 2009 Act. Accordingly her mother cannot be removed either. It is submitted that the appeal should be allowed."

9.
In her statement within the bundle, the mother, MT, said that "I have already explained the problems that I have with my ex-husband in Nigeria, and I still maintain that what I have said about him is true". So far as ET was concerned, the mother's statement said that "She was only 4 years old when she came. Since that time she has grown up in the UK. She has attended nursery in the UK, following which she attended primary school, and then high school". The statement referred to ET "preparing for her GCSE's", when she was going to be "studying maths, science, history, geography, PE, English language and literature, French, Spanish and Religious Education". ET was said to be involved in the activities of a church in the United Kingdom and to have a circle of friends who were said to be "stable" and to provide her with support. The statement referred to ET's knowledge of the wider world having started only after she arrived in the United Kingdom and that she was now "thoroughly familiar with and comfortable with the English way of life. She does not know what life is like in Nigeria". The mother's statement ended by pointing out that the Home Office had not taken any steps to remove her and her daughter, since the mother's last appeal was dismissed in 2012.

10.
ET provided a handwritten letter, which was also in the bundle. In this she said that "Till this day, I still have the fear of going back to Nigeria where my school teachers beat me severely because my dad refused to pay my school fees". She also said:-

"I have lived in this country for my whole life and feel like I am part of the country so I find it sad how I'm still not classed as a British citizen even though a lot of my childhood memories are in this country. I would love for my mum to work and for us to have a house that we can call home forever

and not to worry about having to move from house to house. The thought of me not having my stay scares me. ”

11.
The report from ET’s Roman Catholic High School, also in the bundle, said that:-

“ET is generally a polite and thoughtful young lady who is making good progress in many areas. She now needs to take on the advice from her teachers contained in this report and make sure she is fully focussed in all lessons. She must also continue to try and avoid conflict and dramas with individuals in her free time. If she can do this I am sure 2017 will be a calm and productive one for her.”

12.
On 15 May 2017, the respondent provided a “Statement of Issues and Response” in connection with the forthcoming appeals. Under “Section A” the respondent stated that she had decided to oppose the appeals on the basis that the appellants did not meet the requirements of the Immigration Rules and that they could not succeed “on Article 8 outside the rules”.

13.
Under “Section B”, the respondent stated that the appellant (sic) was entitled to succeed if she proved to the required standard of proof that “the burden of proof is on [MT] to show that there would be very significant obstacles to her integration to Nigerian society and “the burden of proof is on [ET] to show that it is unreasonable for her to be removed to Ghana (sic) with her mother [MT]”. The respondent stated that she continued to rely on the detailed reasons for refusal letter of 16 August 2016 and that in the view of the Secretary of State “the factual issues to be resolved at the hearing are as set out above”.

14.
The reasons for refusal letter of 16 August 2016 set out the reasons why the respondent considered that the appellants did not meet the requirements of the Immigration Rules. So far as ET was concerned, it was noted that at the date of application she had lived in the United Kingdom for eight years and nine months. In response to the submission that it would be unreasonable to expect ET to return to Nigeria, the respondent considered that ET would be returning to Nigeria with her mother “clearly the most important person in her life”. Her mother “would be able to assist [ET] whilst she re-adapts to life in Nigeria”. Although ET was enrolled in a school in the United Kingdom, it was clear from objective information available that Nigeria had a functioning education system, which ET would be able to enter. Although ET had not lived in Nigeria since she was 4 years old, she had remained in the care of nationals of Nigeria and would therefore be aware, to some extent, of the language and culture of Nigeria (the official language of which is English). Finally in this regard, the letter stated that:-

“It is generally accepted that the best interests of a child whose parents are facing removal from the UK are best served by that child remaining with their parents and being removed with them. This represents the centrality of a child’s relationship with their parents in determining their well-being.”

15.
At the hearing, the Judge allowed the respondent’s representative to admit the written determination of First-tier Tribunal Judge Baird, from 2012, concerning the appellants. In that determination, Judge Baird made adverse credibility findings regarding the claim that ET’s father in Nigeria posed a risk of harm to her. Judge Baird found as follows:-

“I have particular concerns about the content of the child’s letter but I must take the view that she was influenced by her mother and indeed was manipulated into writing that letter. That is not to say that I do not accept that the child has these fears or that they are not real to her, but I have concluded that these fears are groundless and I do not in any event accept, even putting the appellants’ case at its very highest, there would be any risk of the child being killed by her father and/or stepmother, especially when there is not a shred of credible evidence that her father has shown any interest in taking her away … It is unfortunate the child had been subjected to anxiety about such a scenario and one would hope that this can be remedied.”

16.
Judge Martin noted that:

“There was no mention of that particular risk in the current letter, but there is the reference to having been beaten for lack of payment of school fees, and [ET] clearly is afraid and knows little about Nigeria. That, I find, is because mother has painted a negative picture. Judge Baird found that she could not place a great deal of reliance on those express fears and I take a similar view.”

At paragraph 16 of the decision, the Judge disagreed with the respondent’s case, which had been that the best interests of ET lay in returning to Nigeria with her mother. Judge Martin considered that ET’s “best interests are clearly to live with her primary carer who is her mother and to be in the UK. … [ET] has been in the UK from the age of 4 till the age of 14 and has no memory of Nigeria. She is well integrated in school and socially”.

17.
Having made that finding, Judge Martin did not consider that it required the appeals to be allowed. She noted that section 117B(6) of the Nationality, Immigration and Asylum Act 2002 had been interpreted by the Court of Appeal in MA (Pakistan) and Others v Secretary of State for the Home Department [2016] EWCA Civ 705. That provision states that the public interest does not require a person’s removal where the person (who is not liable to deportation) has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. In MA , the Court of Appeal held that in determining what was reasonable, the issue is not solely to be looked at from the child’s perspective but requires a balancing exercise between what was in the public interest and what was in the interests of the child.

18.
Judge Martin’s decision continued as follows:-

“28. In this case on one side of the balance, are the matters that I have indicated above. It is in E’s best interests to remain here and she has been here for more than seven years, which MA (Pakistan) accepts is a weighty matter. She has not only been here more than seven years, she has been here more than ten. She is well integrated, has little knowledge of Nigeria and as I have said it is in her best interests to remain.

29. However, I have to consider the other side of the balance, and on the other side of the balance is mother’s poor immigration history. She came as a visitor and overstayed, so she has therefore been unlawfully in the UK for almost ten years. She has made an unfounded asylum claim and was found to be a dishonest witness. She committed a criminal offence, an offence of fraud, and she is not financially independent. I am also concerned that in the conduct of these proceedings she neither mentioned the previous determination of Judge Baird nor did she mention her education qualifications.

30. Also in Nigeria the Appellants have many extended family members with whom E can build relationships. She has grandparents, two aunts, two uncles and various cousins. Those family members can offer support and assistance and I have not accepted that their circumstances are as described by the first Appellant. Mother is highly educated and I find she will be able to secure employment. As Judge Baird found, she is a resourceful woman.

31. I have found that E's fears about Nigeria are unfounded and it is in mother's power to protect and reassure her and to help her to adjust. E is a bright, intelligent girl and she has no health issues. There is an education system in Nigeria; mother is proof of that, and E will be able to access it. Their continued presence in the UK puts a drain on the public purse, accessing education, health services and accommodation at public expense.

32. On arrival in the UK, obviously E was too young, but mother could never have had any expectation that she would be permitted to remain. Both are Nigerian nationals and in the same way that British children are entitled to be brought up in the country of their nationality, heritage and culture, the same applies to Nigerian children. Nigeria is an English speaking country. There are no other relatives in the UK that E has formed a relationship with. Her only relationship is with her mother, and that of course will continue.

33. It is of course the case that children move, change schools, change homes, lose contact with friends, both within the UK and moving outside the UK, on a very frequent basis. Of course they do so because that is what their parents want to do, and there is never any suggestion that it breaches their right to a private and family life or that it is unreasonable to expect them to accompany their parents.

34. All of the factors that I have indicated, when taken cumulatively together, I find render it reasonable to expect E to go with her mother to Nigeria, and those cumulative matters outweigh her best interests. The only factor on her side of the scales I find, and I acknowledge it to be a weighty one, is her ten years in the UK. However, all of the other considerations point in the other direction, and so I find that it is reasonable for her to go to Nigeria.

35. Accordingly, neither Appellant succeeds under the Immigration Rules, and for the same reasons they do not succeed under Article 8 outside the Rules and the decision is not a disproportionate interference with the Article 8 rights of either Appellant."

Discussion

(a) Error of law

19.
We are satisfied that the Judge fell into legal error, both as regards the way in which she conducted the Proof of Concept pilot hearing and otherwise. Mr Deller, for the respondent, did not seek to persuade us otherwise. Indeed, he accepted that such errors had occurred.

20.
The Proof of Concept letter and the directions issued with it made it clear that the respondent was expected to identify the factual issues which, if determined in favour of the appellants, would lead to their appeals being allowed. It is quite apparent from the Statement of Issues and Response of 15 May 2017, read with the reasons for refusal letter of 16 August 2016, that the respondent's case on Article 8 depended upon the First-tier Tribunal finding, as a fact, that ET's best interests lay in moving to Nigeria with her mother. Importantly, there was no indication in the letter that the respondent was seeking to support the case that, even if ET's best interests now lay in remaining in the United

Kingdom, the particular immigration history of MT was such that the Article 8 proportionality balancing exercise nevertheless fell to be struck in favour of the respondent, on public interest grounds.

21.
It should, therefore, have been apparent to the Judge on 6 July 2017 that the decision of the respondent's Presenting Officer to put before the Judge and to seek to rely upon the determination of First-tier Tribunal Judge Baird from 2012 represented a material shift on the respondent's part, from her stance as indicated in the Statement of Issues and Response of some seven weeks earlier.

22.
It is nothing to the point that the "starred" case of Devaseelan v Secretary of State for the Home Department [2002] IAT 702 requires a judicial fact–finder to take a previous judicial finding of fact in respect of an appellant as the starting point for consideration of that appellant's current case. Nor is it anything to the point that appellant MT and her advisers could be expected to know about the 2012 determination. The approach taken by the Proof of Concept exercise depended upon the respondent being willing to state to the First-tier Tribunal that, if certain matters were found in favour of the appellants, then the respondent accepted that the appeal fell to be allowed. On the facts of the present case, that manifestly did not enable the Judge to embark upon a proportionality balancing exercise that placed weight upon (a) findings from 2012 regarding the reliability of ET's evidence to Judge Baird; (b) the fact that MT had made "an unfounded asylum claim and was found to be a dishonest witness" in 2012; (c) that she had committed "an offence of fraud"; and (d) that MT had "neither mentioned the previous determination of Judge Baird nor did she mention her education qualifications" (paragraph 29 of the decision).

23.
The stance of the Presenting Officer on 6 July 2017 was, we consider, analogous with the situation where the respondent seeks to withdraw a concession, previously made in appellate proceedings. In MSM (journalists; political opinion; risk) Somalia [2015] UKUT 413, the Upper Tribunal explained that a judge needs to adopt a broad approach to the issue of whether the respondent should be allowed to withdraw a concession. Amongst other matters, fairness to the litigant will need to be considered (paragraph 24). At the very least, what the Judge should have done was to consider whether, in the interests of the overriding objective, the respondent should have been permitted to change her stance. There is no indication that she considered this point. Were she to have done so and to have decided to allow the respondent to do so, then the appeal should have been removed from the Proof of Concept programme, so as to enable the appellants to have a fair opportunity of responding.

24.
Furthermore and in any event, we agree with Mr Nicholson and Mr Deller that the Judge fell into error in the way in which she dealt with the evidence of ET. In her judgment, the Judge found that ET had not told the truth about her memory of her schoolteachers beating her because her father had refused to pay ET's school fees. It is evident, reading the decision and reasons as a whole, that the Judge regarded this matter as reflecting adversely on the behaviour of ET's mother, with the result that the public interest in removing the mother became stronger.

25.
ET gave evidence at the hearing. Notwithstanding the fact that the Presenting Officer chose not to cross-examine ET, the Judge should have asked ET questions about this aspect of her evidence. Her failure to do so was a further error of law.

(b) Re-making the decision

26.
The Judge's errors were, we find, such as to require this Tribunal to set her decision aside. We do so and proceed to re-make a decision in the appeal.

27.
In MA Elias LJ held as follows:-

"43. But for the decision of the court of Appeal in MM (Uganda) , I would have been inclined to the view that section 117C(5) also supported the appellants' analysis. The language of "unduly harsh" used in that subsection is not the test applied in article 8 cases, and so the argument that the term is used as a shorthand for the usual proportionality exercise cannot run. I would have focused on the position of the child alone, as the Upper Tribunal did in MAB .

45. However, the approach I favour is inconsistent with the very recent decision of the Court of Appeal in MM (Uganda) where the court came down firmly in favour of the approach urged upon us by Ms Giovannetti, and I do not think that we ought to depart from it. In my judgment, if the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the "unduly harsh" concept under section 117C(5), so should it when considering the question of reasonableness under section 117B(6). I recognise that the provisions in section 117C are directed towards the particular considerations which have to be borne in mind in the case of foreign criminals, and it is true that the court placed some weight in section 117C(2) which states that the more serious the offence, the greater is the interest in deportation of the prisoner. But the critical point is that section 117C(5) is in substance a free-standing provision in the same way as section 117B(6), and even so the court in MM (Uganda) held that wider public interest considerations must be taken into account when applying the "unduly harsh" criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in section 117B(6), It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of section 117B(6) is that where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted."

28.
At paragraph 46, Elias LJ held that:-

"Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise". Elias LJ then referred to the guidance of August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes". There, it is "expressly stated that once the seven years' residence requirement is satisfied, there need to be 'strong reasons' for refusing leave (para 11.2.4)."

At paragraph 49, we find the following:-

"However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it

establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."

29.
Matters have, of course moved on from 15 May 2017, when the respondent issued her Statement of Issues and Response. In re-making this decision, accordingly, the Upper Tribunal does not find itself in the same position as that of Judge Martin. We are not bound by the constraints of the Proof of Concept process. Mr Nicholson therefore did not urge us to find that we must allow the appeal, without more, if we find that ET's best interests lie in remaining in the United Kingdom.

30.
The fact that ET's best interests do so lie is, we find, manifest. In this regard, we entirely agree with and endorse Judge Martin's findings on this issue in her decision. ET has been in the United Kingdom for over ten years. She arrived here when she was only 4. She is well advanced in her education in this country. As a 14 year old, she can plainly be expected to have established significant social contacts involving friends in school and outside (such as at church). She has embarked on a course of studies leading to the taking of GCSEs.

31.
Conversely, ET has no direct experience of Nigeria. Whether or not there is a functioning education system in that country, her best interests, in terms of section 55 of the 2009 Act, manifestly lie in remaining in the United Kingdom with her mother rather than, as the respondent contended, returning to Nigeria with her mother. A much younger child, who has not started school or who has only recently done so will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part.

32.
This is why both the age of the child and the amount of time spent by the child in the United Kingdom will be relevant in determining, for the purposes of section 55/Article 8, where the best interests of the child lie.

33.
On the present state of the law, as set out in MA , we need to look for "powerful reasons" why a child who has been in the United Kingdom for over ten years should be removed, notwithstanding that her best interests lie in remaining.

34.
In the present case, there are no such powerful reasons. Of course, the public interest lies in removing a person, such as MT, who has abused the immigration laws of the United Kingdom. Although Mr Deller did not seek to rely on it, we take account of the fact that, as recorded in Judge Baird's decision, MT had, at some stage, received a community order for using a false document to obtain employment. But, given the strength of ET's case, MT's conduct in our view comes nowhere close to requiring the respondent to succeed and Mr Deller did not strongly urge us to so find. Mr Nicholson submitted that, even on the findings of Judge Martin, MT was what might be described as a somewhat run of the mill immigration offender who came to the United Kingdom on a visit visa, overstayed, made a claim for asylum that was found to be false and who has pursued various legal means of remaining in the United Kingdom. None of this is to be taken in any way as excusing or

downplaying MT's unlawful behaviour. The point is that her immigration history is not so bad as to constitute the kind of "powerful" reason that would render reasonable the removal of ET to Nigeria.

(c) Observations on the Proof of Concept Extempore Judgment Pilot 2017

35.
Before concluding, it may be helpful to make some general observations about the Proof of Concept for the Extempore Judgment Pilot. The aim of dealing with immigration and asylum appeals as efficiently as possible is plainly a laudable one. It is recognised across the legal system that the giving of ex tempore decisions furthers that aim. Any formal attempt to identify and manage in advance those cases which may lend themselves to the giving of such decisions will, however, need careful handling. Where, as here, the immigration history of the appellant involves previous judicial decisions, the appellant and the respondent need to be aware of the stance taken by the other in respect of those decisions.

36.
Both protection and human rights claims will involve the judicial fact-finder in making a value judgment, such as whether the appellant faces a well-founded fear of persecution or whether removal would be a disproportionate interference with the appellant's Article 8 rights. If the 2017 Proof of Concept were to lead to a pilot exercise, the cases that might appropriately be covered by it would in our view include those where the respondent and the appellant are agreed on the value judgment, but not on the facts, so that if the facts are found in the appellant's favour, the respondent accepts that the appeal falls to be allowed. An obvious category would be where the appellant, if credible, faces a real risk of Article 3 treatment, if returned to his country of nationality.

37.
Another category would be where there is no dispute as to the facts but the parties are not agreed as to the result of the application of the relevant value judgment; for instance, whether removal would be a disproportionate interference with article 8. We have seen in the present case how, in this category, care needs to be taken to ensure that all the relevant facts are truly agreed. In particular, if the respondent intends to rely upon a particular aspect of the appellant's history, as going to the public interest in removal, then that needs to be clearly explained.

38.
On the face of it, where neither the facts nor the result of applying the value judgment to the facts is agreed, it is unlikely that the case would be suitable for a pilot project, along the lines of the Proof of Concept.

Decision

The decision of the First-tier Tribunal contains a material error of law. We set it aside and substitute a decision of our own, allowing the appeals on human rights grounds (Article 8).

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

The Hon. Mr Justice Lane

President

1 February 2018