Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10823/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 July 2017	**On 29 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MS OLAJUMOKE ADESOLA ALUKO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Garrod of Counsel
For the Respondent: Mr P Armstrong, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 3 March 1979. The appellant entered the United Kingdom on 29 September 2005 with a student visa valid until 31 January 2007. She thereafter applied for leave to remain as a student nurse and was granted leave valid until 30 April 2008. On 17 September 2008 the appellant applied for leave to remain as a Tier 1 General Migrant and was granted a visa valid until 22 March 2013.

2. On 14 March 2013 the appellant applied for leave to remain as a student. That application was refused. On 18 September 2013 the appellant applied for leave to remain outside the Immigration Rules. That application also was refused. On 11 February 2014 the appellant was served with form IS151A. On 24 February 2014 the appellant applied for leave to remain on a human rights basis. She was granted leave outside the Immigration Rules until 7 August 2015.

3. On 6 August 2015 she made a human rights application for leave to remain in the United Kingdom on the basis of her daughter's time spent in the UK and in order to attend her PhD degree ceremony in December 2015. The respondent refused the appellant's application on 28 October 2015. It is that decision that the appellant appealed against to the First-tier Tribunal.

The appeal to the First-tier Tribunal

4. In a decision promulgated on 13 December 2016 First-tier Tribunal Judge Colyer dismissed the appellant's appeal. The First-tier Tribunal found that it would not be unreasonable for the appellant's daughter, D, to leave the United Kingdom, that the appellant did not satisfy the requirements of the Immigration Rules and that it would be proportionate to expect her and her daughter to leave the United Kingdom. The appellant applied for permission to appeal against the First-tier Tribunal's decision.

5. On 13 June 2017 First-tier Tribunal Judge Hodgkinson granted the appellant permission to appeal.

6. The grounds of appeal assert that the issue is very narrow, namely whether the reasonableness test applied by the First-tier Tribunal Judge was correct in law. It is stated that the child has been in the UK for over seven years, that the child's father is estranged and that these facts were accepted by all the parties.

7. It is submitted that the only issue is at paragraphs 70 to 89 where Judge Colyer states why it would be reasonable to expect the child to leave the United Kingdom and applies an unduly harsh test which is incorrect as the test is reasonableness.

8. It is asserted that the judge materially erred in law because the Home Office policy clearly states that it would not be reasonable to expect a British child to leave the UK. Reference is made to the Immigration Directorate Instruction Family Migration: Appendix FM, Section 10.0(b): Family Life (as a Partner or Parent) and Private Life: Ten Year Routes: August 2015.

9. The appellant asserts that what could not be considered would be the conduct and immigration history of the parents - **MA (Pakistan) [2016] EWCA Civ 705** at paragraph 47. Reference is made to the case of **Treebhawon and Others (section 117B(6)) [2015] UKUT 674 (IAC)** and it is submitted that if the criteria in 117B(6) are met then Article 8 will be infringed, no further balancing consideration is needed. The grounds assert that the starting point of an assessment of a child in the UK who has seven years' residence is to remain in the UK as part of the family unit.

10. It is asserted that Judge Colyer erred in law at paragraph 84 in stating that "I find the welfare and best interests of the appellant's child would be to continue to live with and be brought up by the mother". This is not the test to follow. The deep roots developed by the child are well established in the evidence. The seven year residency of a child needs to be given significant weight -paragraph 49 of **MA (Pakistan)**.

11. It is submitted that the fact a child has been in the UK for seven years would need to be given significant weight in the proportionality exercise. Judge Colyer's approach to the assessment of the best interests of the child was materially wrong. Reference is made to the case of **PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 108 (IAC)** at paragraph 43. It is submitted that the First-tier Tribunal has failed to assess the exceptionality and the impact on the family unit. It is asserted that at paragraph 34 of the decision the First-tier Tribunal erred in law in concluding that Section 117B applied only to a child who is a British citizen or has settled status.

12. In oral submissions Mr Garrod adopted the grounds of appeal and submitted that there were two key issues. Everything considered by Judge Colyer was seen through the prism of the appellant, not considered through D's interests in her own right. At the date of the hearing D had been in the United Kingdom for seven years and Article 8 requires matters to be considered as at the date of the hearing. He referred to paragraph 13 of **MA (Pakistan)** which makes that clear. He submitted that throughout the decision the judge has failed to consider reasonableness correctly. There is no consideration of the evidence of the witnesses and there is no findings with regard to the effect on those witnesses of D's removal from the United Kingdom. He submitted that in accordance with **Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department [2005]EWCA Civ 828** the judge ought to have considered the effect on those witnesses.

13. He submitted that the whole approach taken by the judge was to treat 117B(6) as not applicable. The principles in **Treebhawon** set out that the test is whether it would be reasonable for the child to be expected to leave the UK. The conduct and the immigration history of the parents cannot be taken into consideration. The judge considered matters based on the appellant's rights, rather than the rights of the child. He submitted that the approach the judge took was deficient as the interests of the child were not at the forefront. He referred to **MA (Pakistan)** at paragraph 13 where it stated that if it is in the best interests of the child to remain in the United Kingdom then that should decide the matter. He referred to paragraph 14 of the grounds of appeal and said that the balancing exercise has not taken place by the judge in light of the child's interests.

14. Mr Armstrong relied on the Rule 24 response and submitted that the judge has considered all the matters and that the grounds amount to a disagreement with the findings of the judge. He submitted that the assessment made by the judge of reasonableness was considered fully. It was not a failure of the judge to consider the appellant's position as well, as that links into whether or not it is reasonable to expect the child to leave the United Kingdom. For example, the ability of the appellant to integrate into Nigeria will factor into a reasonableness assessment and into the assessment of the best interests of the child.

15. He submitted that when considering the case of **MA (Pakistan)** as a whole it is clear that the conduct of the parents is a relevant factor to take into consideration in the proportionality assessment. He referred to paragraphs 88 and 107. He submitted that the fact that the child has been in the United Kingdom for seven years, whilst attracting considerable weight, is only one factor to be taken into consideration. The appellant from 22 March 2013 was an overstayer and that she had been encountered in 2014 and served with IS15A.

16. He submitted that the judge applied the reasonableness test when considering the application outside the Immigration Rules and that the judge has given a number of reasons for reaching his conclusions. He referred to the case of **AM Pakistan and Others [2017] EWCA Civ 180**. He submitted the appellant came here as a student, her stay was always precarious, she had her daughter against the backdrop of having no expectation that she could stay in the United Kingdom indefinitely. She is no longer in a relationship with the child's father. He has no status in the United Kingdom according to the appellant's evidence. The appellant and her daughter have parents and grandparents and other relatives in Nigeria. The appellant is highly educated and can find employment in Nigeria.

17. Mr Garrod in reply submitted that the judge has not considered the child's father and whether it is in the best interests of the child to have both parents. He submitted that no proper consideration has been given to the relationship with the father.

Discussion

18. The core of the appellant's appeal is the judge's approach to and application of the reasonableness test. The reasonableness test arises under both paragraph 276ADE of the Immigration Rules and under s117B(6) of the 2002 Act. However, the child had not been in the UK for 7 years at the date of application so does not satisfy the requirement in 276ADE (iv). Both sides relied on the case of **MA (Pakistan).**

19. In **MA (Pakistan**) the court of appeal considered how a court should approach the reasonableness test. The approach in **Treebhawon** (the 2015 decision) (i.e. that s117B(6) precluded consideration of the public interest issues in 117B(1)-(3)) was not approved. The court held:

> 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 on 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.[emphasis added]

21. It is clear that when assessing reasonableness either under paragraph 276ADE(iv) or s117B(6) the conduct of the appellant and matters relevant to the public interest should be taken into consideration.

22. The court of appeal emphasised that the fact that a child has been in the UK for seven years must be given significant weight when carrying out the proportionality exercise (paragraph 46).

23. With regard to the best interests assessment the court held:

> 47. … Even where the child's best interests are to stay, it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed he should return. What could not be considered, however, would be the conduct and immigration history of the parents…
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> …
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> …There is nothing intrinsically illogical in the notion that whilst the child's best interests are for him or her to stay, it is not unreasonable to expect him or her to go. That is so even if the reasonableness test should be applied so as to exclude public interest considerations bearing upon the parents.

20. It is necessary to consider in some detail the approach of the First-tier Tribunal judge in this case. There is certainly some looseness of language in parts of the decision. At paragraph 34 the First-tier Tribunal Judge set out:

> 34. …Sub-Section (6) provides for the exceptional case where the public interest does not require the removal of a person who is not liable to deportation (i.e. the Home Secretary does not deem his deportation to be conducive to the public good) in a case where (i) he has a genuine and subsisting parental relationship with a child who is either a British citizen or has settled status and (ii) it would not be reasonable to expect the child to leave the United Kingdom.

21. The judge refers to settled status incorrectly as that is not what Section 117B requires. It might be that the judge was referring to the 7 year residence requirement as settled status. However, even if the judge was considering that a status other than the 7 year's residence was the test I do not consider that this is a material error of law for the reasons which are set out below.

22. With regard to the appellant's daughter the judge set out from paragraphs 48 to 54 the evidence that she had considered. Later in the decision under a heading "the best interests of the child" the judge set out:

> 70. The respondent and any other decision maker is obliged to consider and to take into account the need to safeguard and promote the welfare of children in the United Kingdom in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009.

23. In paragraphs 71 and 72 the judge set out in some detail aspects of the relevant case law. At paragraph 73 the judge set out the respondent's decision when refusing to grant leave and when considering the best interests of the child. At paragraph 79 the judge set out:

> 79. At the date of the appellant's application on 5 August 2015 the child was aged 6 years and 8 months. She had not lived in the UK continuously for at least seven years and was not aged 18 years or above and under 25 years of age and therefore the child could not meet the requirements of Rule 276ADE(iv) and 276ADE(v).
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> 80. I have given consideration to the child's private life under Article 8 applying the requirements of paragraph 276ADE(1) of the Immigration Rules. I find that at the date of the appellant's application that the child had lived in the UK for six years and eight months so she had not lived continuously in the UK for at least twenty years. Consequently she fails to meet the requirements of paragraph 276ADE(1)(iii) of the Immigration Rules.
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> 81. A further area of relevant consideration is whether the child is likely to be able to integrate readily into life in another country. I find that the children (sic) are citizen of Nigeria and both parents are also citizens of that country. The appellant and the child will be able to enjoy the full rights of being citizens of Nigeria. It is probable that both parents have lived in Nigeria for their formative years. I accept the evidence that the child has not lived in Nigeria before however she is young enough to adapt and therefore that this is not a significant factor. In addition the child has been brought up in a Nigerian household in the United Kingdom and therefore Nigerian culture and social considerations will be familiar to the child.
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> 82. I find that it is not unreasonable for the child to relocate to Nigeria with one or both parents and given her dependency on her mother, whilst at a relatively young age she can do so without facing undue hardship in the process. I find that the child fails to meet the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules.
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> 83. Section 55 does not override the Immigration Rules. Public interest remains the starting point. In this case the parents and the child do not have settled status to be in the United Kingdom. It may be argued that the action of the parents should not have a direct impact on the child. I accept that it is in the child's best interests that she accompany the mother (the appellant), therefore they would remain as a family unit and would be such a unit living in Nigeria on removal to their country of nationality.
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> 84. I find that the welfare and best interests of the appellant's child would be to continue to live with and to be brought up by her mother. The child's removal with her parent does not involve any separation of family life.

85. I find that in the course of the time that the child has been in the UK some roots have been put down, her personal identity has started to be developed, some friendships were formed and limited links have been made with the community outside the family unit. The child's ties are primarily with her mother, her school and her church. The child will remain with her mother; her education can continue in Nigeria as can her participation in the Christian Church.

86. This child is still in her very early years, and she is primarily focused on self and the caring parent. The child has started to have formed ties outside the family through a school and church but she is still young and these ties are not yet so significant as to outweigh the requirements of the Immigration Rules.

87. The commenced her family during a period of study in the UK and in the light of expectation of return.

88. I find the school reports indicate that the child is intelligent and able. I find the ability of this young child is indicative that she will be able to adapt to life in a new country with the help of her mother.

89. I find that it would not be unduly harsh to remove the child with her mother as they would be removed as a family unit and the child is still at a developmental age. Integration in Nigeria would not be difficult especially when returning to a country that embodies the same culture and language of the parents.

24. The judge was wrong to consider that the public interest is the starting point. I do not consider that this (if an error of law) is material as when analysing the approach of the judge it is clear that she has applied the relevant principles from the case law and has taken into account all the factors that are relevant when assessing what D's best interests are. Although there is some conflation of the consideration of best interests and the reasonableness test, many of the issues are pertinent to both. The judge has undertaken an appropriate exercise to consider what the child's best interests are under Section 55. As set out above, at paragraph 84 the judge has made a finding that the welfare and best interests of the appellant's child would be to continue to live with and to be brought up by her mother. The judge considered the evidence regarding her education, friendships and the links she is starting to form (outside her life with her mother) with the community and church when assessing her best interests. As set out by the judge this is a 'child still in her very early years, and she is primarily focused on self and the caring parent'. Looking at all the evidence taken into consideration by the judge, her conclusion that D's best interests are to continue to live with and be brought up by her mother is uncontroversial and to some extent an inevitable conclusion on the facts of this case. The judge is not required to make a finding on whether or not the child's best interests are to remain in the UK as opposed to in another country. In any event, as found in **MA (Pakistan)** it is not necessarily inconsistent even with a finding that a child's best interest are to remain in the UK for it to be considered reasonable for a child to leave the UK. There was no error of law in the judge findings on D's best interests.

25. The judge has taken into consideration, when assessing whether or not it would be reasonable for D to leave the UK, the impact upon her of settling in Nigeria. This includes consideration of how her mother will be able to integrate which is a relevant

factor to take into account when assessing reasonableness. I do not consider that the judge has approached either the best interests of the child or the reasonableness test through the prism of the appellant. The judge considered issues such as the fact that D's education can continue in Nigeria as can her participation in the Christian Church into account as well as the child's educational ability. These all factor into whether or not it is reasonable to expect D to leave the UK. Although the judge considers that D can do so without facing undue hardship in the process this was preceded by 'and'. When that sentence is considered properly I do not consider that the judge has applied an undue hardship test rather than a reasonableness test. The judge found 'that it is not unreasonable for the child to relocate to Nigeria with one or both parents **and** given her dependency on her mother, whilst at a relatively young age she can do so without facing undue hardship in the process.' Properly analysed what the judge found was that in addition to it not being unreasonable to leave the UK D could do so without undue harshness. If I am wrong on that there was in any event a clear separate finding that it was not unreasonable for D to leave the UK. There was no evidence of any particular difficulties that this child would face if she were to be removed with her mother. The judge has not erred in the assessment of reasonableness and has applied the correct test.

26. The judge considered the evidence in relation to the child's father (as set out by the judge in paragraph 77). The judge had no confirmation as to his whereabouts or where he is in the UK or his status or whether or not he is even still in the UK. There was no evidence from the father. I note in the grounds of appeal at paragraph 3 it is stated that the child's father is estranged. It is not clear that the child's father has any right to be in the United Kingdom. The appellant's arguments, that the judge has failed to take into consideration the relationship with the father do not take the matter any further as the child's father is estranged (according to the grounds of appeal) and it is not clear that he is even in the UK.

27. With regard to paragraph 117B(6) the judge does not make a finding specifically that it does not apply, however clearly the judge has not considered this section when assessing the proportionality of removal under Article 8 outside of the Immigration Rules. However, I do not consider this is a material error of law. The judge made specific findings on the reasonableness of the appellant's daughter, D, leaving the United Kingdom when assessing the best interests of the child as set out above. At paragraph 82 there was a clear finding of the judge that it was not unreasonable for the child to relocate to Nigeria. As the test under Section 117B(6) is whether or not it would be reasonable to expect the child to leave the United Kingdom – the same as the test under paragraph 276ADE(1)(iv) -, the judge would inevitably have arrived at the same conclusion had he considered the child to be a qualifying child which at the date of the hearing the child clearly was for the purposes of Section 117B(6). The judge considered all the relevant factors and undertook an appropriate balancing exercise when considering Article 8 outside the Immigration Rules.

28. There was nothing in the grounds of appeal regarding the argument advanced at the hearing that the judge had failed to take into account the effect on the witnesses of removal of the appellant and D. In any event none of the witnesses were family members. They were friends of the appellant and members of the church community.

Beoku-Betts concerned family relationships. The court considered that family life encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed. I do not consider that the ratio of **Beoku-Betts** extends to the sort of relationships that exist between the witnesses and the appellant and her daughter.

29. I find that there is no material error of law in the First-tier Tribunal's decision. The appellant's appeal is dismissed.

Notice of Decision

There was no error of law in the First-tier Tribunal's decision. The decision of the Secretary of State stands.

No anonymity direction is made.

Signed P M Ramshaw Date 27 August 2017

Deputy Upper Tribunal Judge Ramshaw