Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16174/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 November 2017	**On 19 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MR S F (FIRST APPELLANT)
BOF (A MINOR) (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms J Rothwell, Counsel
For the Respondent: Mr D Clarke, HOPO

DECISION AND REASONS

1. The appellant appeals with leave against the decision of First-tier Tribunal Judge J H H Cooper to dismiss his appeal against the decision of the respondent made on 5 May 2016 to refuse to grant him leave to remain in the United Kingdom.

2. Upper Tribunal Judge Gleeson granted the appellant permission to appeal on 15 September 2017. She stated at paragraph 6 that there was a patent error of law in that the appeal of the second appellant had not been determined. The other matters raised in the grounds of appeal are also arguable. Ms Rothwell at the hearing before me confirmed that there was no separate appeal for the child. She was included as a dependant of the first appellant and therefore did not have an appeal in her own

right that had to be determined. In any event as Upper Tribunal Judge Gleeson said that other matters raised in the grounds were also arguable, Ms Rothwell proceeded to make submissions in respect of those grounds.

3. The appellant has a partner and two children, a daughter, BOF, born on 13 November 2008 (second appellant) and a son, SOF, born on 28 May 2016. Both children were born in the UK. The appellant claims to have entered the UK illegally on 1 December 2005. On 17 November 2006 he applied for an EEA residence card, which was refused on 30 July 2007, but then granted following reconsideration on 28 June 2010, valid until 28 June 2015. On 27 June 2015 he applied for an EEA permanent residence card on the basis that he was an extended family member (EFM) of an EEA national. This application was refused on 3 December 2015.

4. On or about 10 February 2016 the appellant submitted an application under cover of a letter from his solicitors, indicating that the application was made on behalf of the appellant and his daughter BOF, who had been born in the United Kingdom on 13 November 2008. The letter claimed that the appellant and his daughter had both established a private and family life in the United Kingdom, and should be granted leave to remain.

5. It was explained that the EEA residence card that had expired on 28 June 2015 had been granted on the basis that he was an extended family member of his brother, J M F, a Dutch national who was exercising treaty rights in the United Kingdom, but that his brother had declined to support the application he had made in June 2016 for a permanent residence card.

6. It was stated that the daughter lived with the appellant and attended primary school in London. She had been in the United Kingdom for seven years continuously, and the appellant himself had been here for more than ten years continuously. Various documents were submitted in support of the application, confirming the daughter's school attendance and registration with a GP and showing that the appellant had been lawfully working in the United Kingdom until the refusal of his last application in December 2015. It was stated that at present the appellant was her main carer.

7. The judge noted from the respondent's Reasons for Refusal Letter that the respondent accepted that the minor child had resided in the United Kingdom for seven years which gave a basis for considering paragraph EX.1. However it was not considered that there were insurmountable obstacles to her returning to Ghana and it was reasonable to expect her to do so. The respondent had stated that she had taken into account the need to safeguard and promote the welfare of children in the United Kingdom, in accordance with her duties under Section 55 of the Borders, Citizenship and Immigration Act 2009. However it was generally accepted that the best interests of a child whose parents were facing removal from the United Kingdom were best served by that child remaining with their parents and being removed with them. This according to the respondent represented the centrality of a child's relationship with their parents in determining their wellbeing. Other general factors were considered and the respondent stated that the minor daughter would be removed

with her father, who was clearly the most important person in her life, and this would help her readapt to life in Ghana. The child was a national of Ghana and would therefore be able to enjoy all the benefits and advantages citizenship entailed. Educational provision existed in Ghana. There was no evidence of any special educational or medical needs for the child.

8. The judge's findings and decisions are set out at paragraphs 38 to 60.

9. The grounds pointed out that the consideration by the judge in respect of the older child was at paragraphs 49, 51, 56 and 57. The latter two paragraphs were concerned with Article 8 outside the Rules where exceptional features would have to be present in order for an appeal to be successful. So, the grounds looked to paragraphs 49 and 51 to argue that the judge failed to follow the principles in **MA (Pakistan) [2016] EWCA Civ 705.** The judge held as follows:

> 49. Mr Jones referred to the case of *FY (Bangladesh)*, and I do not accept Ms Benitez' submission to the effect that the facts there were so different to those before me as to make the case irrelevant. In that case the child on whom the appeal turned had been born in the United Kingdom in August 2006 and the application for leave had been made soon after he acquired the age of 7 years. It was claimed that it would not be reasonable to return him to Bangladesh with his parents. By the time the matter came before the Court of Appeal he had been in the United Kingdom for some 9 years, but the court still found that it was reasonable to return him to Bangladesh. In giving the court's judgment, Burnett LJ said:
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> > 24. The circumstances of the Appellants are relatively commonplace. As a result of the successive grants of leave to remain as a student, they have been lawfully in the United Kingdom since 2006. A was born here not long after the First Appellant's arrival and so unquestionably at the time of the application satisfied the 7-year test.
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> > 25. The reference to it being a key test seems to me to be no more than a statement that that is the starting point for consideration whether a child will be able to remain in the United Kingdom.
> >
> > 26. This is what might be regarded as a classic bootstraps application which depends entirely upon the position of A.
> >
> > 27. I do not accept that there is any mystery about the meaning of the word reasonable in this rule any more than in other rules and legislation. It is extremely difficult to see why it should be unreasonable for A to travel with his family to Bangladesh in circumstances where the parents had no expectation of remaining here. Mr Yeo was candid in recognising that the circumstances are not in any way unusual.

28. The use of the word precarious in this case, as Underhill LJ observed in the course of his reasons, was explained by the Deputy Upper Tribunal Judge as meaning no more than that the family was here on successive grants of limited leave which carried with it no expectation of permanent residence.

29. In those circumstances, I conclude that there is no arguable basis for demonstrating that the conclusion of Deputy Upper Tribunal Judge Chana under the Rules was wrong. As I have already indicated, it is accepted that there could be no separate Article 8 claim with any prospect of success. For these reasons, this renewed application is refused.

51. Whilst I accept that the evidence before the Respondent showed that BOF was settled at her primary school and doing well, it has long been recognised that the first 7 years of life are less significant in terms of putting down roots and the degree of disruption that removal to another country would cause than a period of 7 years later on in a child's life. Both Beatrice and her father are Ghanaian nationals. As I find no grounds of finding that it would be unreasonable to return the Appellant to Ghana, I do not find it would be unreasonable to expect Beatrice to return with him.

10. The grounds relied on **MA (Pakistan)** where the Court of Appeal held that "significant weight" must be given to the fact of seven years' residence (paragraph 46) and (ii) "as a starting point … leave should be granted unless there are powerful reasons to the contrary" It was stated in the grounds that while the judge did take account of the seven years' residence, he failed to

(i) attach it "significant weight"; and

(ii) failed to approach it on the basis that "leave should be granted (to the child) unless there are powerful reasons to the contrary".

It was argued that the decision of the judge focused on reasonableness of returning the child as an adjunct of the parents only, without regard for her discrete interests, without affording the seven years' residence "significant weight" and without assessing if there were "compelling reasons" for not granting the child leave to remain. Rather than following the guidance in **MA (Pakistan),** the judge cited extensively from **FY (Bangladesh)** to justify his conclusions.

11. Ms Rothwell relied on the grounds and submitted that the judge misdirected himself on this issue. Whilst he quotes **MA (Pakistan)** in his consideration at paragraph 56, he did not then apply it. She submitted that paragraph 46 of **MA (Pakistan)** gives guidance as to how to apply the reasonableness test. Seven years must be given significant weight relying on the policy guidance of the respondent.

12. Ms Rothwell submitted that **FY Bangladesh** was a Court of Appeal decision made on 20 October 2015 in respect of a permission application. **FY Bangladesh** does not have the same gravitas as **MA**. At no stage in his decision did the judge give any consideration to the Home Office policy that there needs to be strong reasons to the contrary in respect of a child with seven years' residence. For these reasons Ms Rothwell submitted that the judge made a material error of law.

13. Ms Rothwell submitted that Mr Walsh in his grounds at paragraph 6 relied on the Court of Appeal decision in **Remi Akinyemi [2017] EWCA Civ 236** that held that a person born in the UK was not one who necessarily required leave to remain and if he were not removable his residence could not be treated as unlawful. Consequently, Section 117B should not be applied to the child's circumstances. Ms Rothwell said that this ground did not take the case any further.

14. She submitted that the fresh evidence a year on since the judge's decision is that BOF is 9 years old today, the date of the hearing.

15. Mr Clarke said that the first ground raised by Ms Rothwell was a narrow ground. He said that the judge raised **MA (Pakistan)** at paragraph 56 and therefore must have been aware of the basic principle which is that he had to consider the best interests of the child and the countervailing interests. He said the question was whether the judge applied significant weight to the child's residency. He submitted that the judge did at paragraph 42 when he said

> *"Case law makes clear that the provisions of EX.1 in this regard are to be the starting point i.e. that once a child has spent seven years in the United Kingdom, careful consideration must be given as to the reasonableness of expecting her to leave."*

Mr Clarke submitted that **MK** says that the reasonableness test is the same. Whilst it does not say significant weight, it is difficult to construe that the judge was not applying the weight referred to in **MA (Pakistan)**. Consequently, he submitted that the judge followed **MA (Pakistan)** in that regard.

16. Mr Clarke went through the appellant's immigration history. He submitted that the weight in a proportionality exercise is a matter of discretion for the judge. He submitted that the grounds amounted to a disagreement over the weight the judge attached to various aspects in his proportionality exercise.

17. Mr Clarke submitted that the second ground was not addressed by Ms Rothwell. The second ground arguing about the judge's approach to Section 117B was erroneous and not made out.

18. In reply Ms Rothwell submitted that the judge's reference at paragraph 42 to "careful consideration," is not the test. We have the Secretary of State's own policy that there needs to be strong reasons and the Court of Appeal refers to significant weight given to a child's seven-year residence. She submitted that the judge's reference to every piece of evidence needs careful consideration at paragraph 42 does not deal with the error. She said the judge's decision cannot be repaired because the judge failed to

take **MA (Pakistan)** into account and erroneously misdirected himself in his application of **FY (Bangladesh)**.

19. Following consideration of the submissions made by the parties, I found that the judge erred in law for the reasons given in the grounds of appeal which were relied upon by Ms Rothwell. I found that the judge focused on the reasonableness of returning BOF returning to Ghana with the parents. This was particularly notable at paragraph 48. The judge failed to apply the principles in **MA (Pakistan).** In the circumstances the judge's decision could not stand.

20. In making the decision, I took into account the submissions made by the parties.

21. Ms Rothwell submitted that in accordance with Section 117B(6) the child who is 9 today is a qualifying child. On the immigration control side of matters, in 2005 the child's father the appellant came to join his brother who was an EEA national exercising treaty rights in the UK. His application was accepted and under EEA law was granted a residence card although she accepted that the appellant came illegally into the country in 2005. He made an application in 2006 and leave was granted until December 2015. A subsequent application for a permanent residence card was refused.

22. Ms Rothwell relied on **Rupiah** and **Kaur (children's best interests/public interest interface) [2017] UKUT 00014 (IAC)** to submit that there are different degrees of precariousness. Whilst he entered the UK illegally, there was no evidence of illegal working. That is the extent of the public interest.

23. She said that on the appellant's side, significant weight should be given to the child who is now 9 years old. There must be strong reasons as to why the child ought not to remain in the United Kingdom. The child has formed her own private life here and is doing well at school.

24. Ms Rothwell submitted that in conducting the balancing exercise, very little evidence should be in the balancing side for the Secretary of State. The family applied in 2006 as extended family members of an EEA national and the application was granted. The appellant was therefore an extended family member of an EEA national in 2005 because the residence card is a recognition of the status quo. The Secretary of State would rely on the few weeks when the application was not granted because he was no longer reliant on his brother. Ms Rothwell said this was just a little gap. There was also a little gap when the application was refused in 2015. That was less than two months. This is not a strong reason for this child not to be granted leave to remain and for the father to be granted leave to remain in line.

25. Mr Clarke submitted that the best interests of the child is not fixed. It is a fact that is dependent on other factors and what weight to be given to it. He accepted that significant weight should be given to the fact that the child has been in the UK for seven years. He accepted that the child was 9 years old today and therefore has been in the United Kingdom for nine years. In educational terms she is in year five,

another year before entering secondary school. The stage of her education is not a critical factor.

26. He submitted that the appellant has ties with a Mr Pinto with whom he lived in Ghana before leaving the country. The first appellant has no right to remain in the UK and the child will be returning with him. He was not aware of any linguistic issues or any interference in the family circumstances were they to be removed to Ghana. He submitted that there are schools available in Ghana where English is the language taught to children. He submitted that according to **MK** it is for the appellant to demonstrate that his move to Ghana would be detrimental to the child.

27. He submitted that against the appellant in the balancing exercise is the public interest. He accepted that the appellant entered illegally but was then granted a residence card. The appellant was aware of the limited nature of that leave. Given the paucity of evidence beyond seven years in respect of the child's residency, he submitted that the public interest in the family returning to Ghana outweighs the child's best interests.

28. Ms Rothwell submitted that **EV Philippines** had a different set of facts. The appellants in that case were here illegally. As regards the appellant's relationship with Mr Pinto, Ms Rothwell submitted that the appellant has spoken to Mr Pinto briefly. She questioned whether Mr Pinto would take the appellant, his child, his partner and other child in. There was no evidence that he would.

29. She submitted that because the appellant's application was successful, he must be seven or eight on the degree of precariousness when considering whether "little weight ought to be given to those who have been here illegally when considering Section 117B".

Findings

30. The appellant has no right to remain in the United Kingdom. On his own facts, his case has no chance of succeeding. I accept Ms Rothwell's submission that the gaps in the first appellant's immigration history are not huge; they are little ones. I also accept in the light of **Rupiah** and **Kaur** that there are degrees of precariousness. Although the appellant entered the UK illegally, he was successful in his application for a residence card as a dependant of his brother who was an EU national in the UK exercising treaty rights. I accept that the degree of precariousness in this case is not as high as that of an appellant who has remained here illegally throughout most of their stay. Nevertheless, as already stated on his own facts the appellant's case would stand no chance of success.

31. It is said that the appellant has had very little contact with Mr Pinto and it is not likely that Mr Pinto would accommodate the appellant, his wife and their two children. I do not place much weight on this evidence. The appellant is an adult. He is 32 years old and now has a family of his own. He was resourceful in finding employment in the UK. He could use the same resourcefulness in finding a job on

his return to Ghana with his family. There was no evidence before me that his brother the EEA national would not assist him to settle down in Ghana with his family.

32. The appellant's strongest argument is his dependent daughter who is now 9 years old. The appellant relies on **MA (Pakistan) [2016] EWCA Civ 705** which provides that significant weight must be given to a child who has been in the United Kingdom for seven years when carrying out the proportionality exercise and as a starting point leave should be granted unless there are powerful reasons to the contrary.

33. Applying Section 117D of the Nationality, Immigration and Asylum Act 2002, I find that the appellant's daughter is a qualifying child. She is not a British national. She is a Ghanaian national. The strongest factor put forward by Ms Rothwell was that the child is now 9 years old and has established her own human rights. I ask myself if these two factors alone are enough to satisfy the requirement that she ought to be granted leave to remain. If I were to answer that in the affirmative, then I would be making the best interests of the child a trump card. As stated by Mr Clarke, BOF is not at the critical stage in her education. She has yet to enter secondary school. I take notice of the fact that there are very good schools in Ghana where English is the medium through which children receive their education. BOF is still dependent on her parents who remain who remain the important people in her life. She is a national of Ghana and would therefore be able to enjoy all the benefits and advantages of being a Ghanaian national. She has no medical needs. When the appellant made the application for leave to remain, he had no legitimate expection that his application would be successful. On the evidence it is not unreasonable to expect BOF to leave with the appellant.

34. I am not persuaded that the reasons given for the child remaining in the UK sufficiently outweigh the public interest in the appellant returning with his family to Ghana.

35. The appellant's appeal is dismissed.

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

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

Signed Date: 19 December 2017

Deputy Upper Tribunal Judge Eshun