Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: HU/23273/2016

THE IMMIGRATION ACT

Heard at Field House	**Decision & Reasons Promulgated**
On 10th December 2018	**On 19th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

M D F O

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Fletcher of Counsel, instructed by Nathan Aaron Solicitors

For the Respondent: Ms Isherwood, Senior Home Officer Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge N M K Lawrence promulgated on the 21st February 2018 whereby the judge dismissed the appellant's appeal against the decision of the respondent to refuse the appellant's claims based on Article 8 of the ECHR.

2. I have considered whether or not it is appropriate to make an anonymity direction. Having considered all the circumstances I do not consider it necessary to do so.

3. Leave to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Storey on 29th October 2018. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.

4. The material part of the grant of leave provides:-

> *"It is arguable that in concluding that there were not strong reasons for expecting the child in the UK for eight years to leave the UK, the judge failed to carry forward or weigh in the balance the finding made in para 28 that the parent appellant was likely to find difficulties in finding employment and a home in Nigeria."*

5. The grounds of appeal are lengthy and do not seem to categorise the grounds. In substance the grounds seek to highlight the position of the appellant's child, the child's right to remain in the UK and whether there is any right to remain stemming from that that benefits the appellant.

The Factual background

6. The appellant is a national of Nigeria born on 2 July 1985. The appellant entered the United Kingdom as a student on 7 October 2004. The appellant did not complete her studies in the United Kingdom because the college, which she was attending, closed. The appellant remained in the UK.

7. In 2009 the appellant gave birth to a child, who has been resident in the United Kingdom throughout. The child has started school and is doing well in the education system in the United Kingdom. There were no concerns as to the welfare of the child under the care of the appellant. The child had no health concerns. As noted by the judge the primary concern of the appellant in the appeal was the education of the appellant's daughter and her health and security in Nigeria. (see paragraph 21).

8. The father of the child was noted to be a fellow Nigerian, who also did not have leave to be in the United Kingdom. The appellant claims not to know where father of the child is and to have had no contact with him for some time.

9. The judge noted that it was only after the child was seven years of age that the appellant submitted an application to the respondent. At that stage the child having been in the United Kingdom for seven years was entitled to rely upon various statutory, immigration and policy provisions whereby as a qualifying child she was giving potential protection against being removed from the UK.

10. The appellant's evidence otherwise was that her parents in Nigeria had passed away. The appellant claimed never to have worked in Nigeria. It was claimed that there would be significant obstacles into integrating in Nigeria with the young daughter to look after without any prospects and no home.

11. The appeal was based upon the parent relationship to the child in that the appellant was claiming to have a genuine and subsisting relationship with the child who had lived continuously in the United Kingdom for at least seven years and it would not be reasonable to expect the child to leave the United Kingdom.

12. The 2002 Act has been amended to take account of the position of a child. The provisions are also set out in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 which provides: –

> *'6 In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-*
>
> *a) the person has a genuine and subsisting parental relationship with a qualifying child, and*
>
> *b) it would not be reasonable to expect the child to leave the United Kingdom'*

13. In the context of the provision qualifying child includes a child that has been resident in the United Kingdom for seven years.

14. Further provisions is made in the Immigration Rules in Appendix FM paragraph EX1. The paragraph provides:-

> *'Section EX Exceptions to certain eligibility requirements for leave to remain as a partner or parent*
>
> *Ex .1 This paragraph applies if:*
>
> *(a) (i) the applicant has a genuine and subsisting parental relationship with the child who*
>
> *(aa) is under the age of 18 or was under the age of 18 when the applicant was first granted leave on the basis that this paragraph applied;*
>
> *(bb) is in the UK;*
>
> *(cc) is a British citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of the application; and*

(ii) it would not be reasonable to expect the child to leave the UK;'

15. I note that EX1 is not a free standing right, see Shazia Sabir 2014 UKUT 63(IAC).

16. It was not challenged that the appellant's daughter was a qualifying child and that the appellant had a genuine and subsisting relationship with the child. The issues thereafter to be considered were the best interests of the child in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009, the provisions of Section 117B, the Immigration Rules as set out and Home Policy and whether it was reasonable for the child to accompany the mother to Nigeria.

17. A number of cases were referred to in argument. Specific reliance was placed by the appellant's representative on the cases of MA (Pakistan) [2016] EWCA Civ 705 and MT & ET [2018] UKUT 88. In the case of MT & ET, relying upon the case and principles set down in MA, Mr Justice Lane having reviewed the Home Office policy and the statutory provisions states in paragraph 33 and 34:-

> *"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 10 years should be removed notwithstanding that of 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 abuse the immigration laws of the United Kingdom..... We take account of the fact that...MT had... 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 near close to requiring the respondent to succeed and Mr Deller [the respondent representative] did not strongly urge us to so fine. Mr Nicholson submitted that, even on the findings of Judge Martin, MT was what might be described as 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 in who has pursued various legal means of remaining in the United Kingdom. None of this 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."*

18. The decision indicates that there have to be powerful reasons rendering removal reasonable.

19. In considering the issues an assessment was made of the Home Office policy- Family Migration: Appendix FM Section 1.0b. That gives specific guidance's as to how to approach the rights of children that have been in the United Kingdom for seven years or more. The guidance sets down a series of criteria to be considered including: –

    a) whether the child would be accompanying its parents, where the best interests would be to remain with the parents

    b) the degree of support by wider family members

    c) the ability of the child to integrate into the country to which it was going

    d) the degree of cultural ties

    e) on the ability of the child to read write or speak the language of the country

    f) whether the child would be able to attend or has attended school in the country.

20. The authorities and the law has been reviewed in the case of KO (Nigeria) & Ors v SSHD 2018 UKSC 53. The case of KO 2018 UKSC 53 was raised during the hearing. The appellant's representative was given the opportunity of dealing with the issues raised in the case. The case is specifically relevant with regard to how one deals with children and their best interests, where otherwise a parent would not have the right to remain in the United Kingdom.

21. I draw attention to paragraphs 18-19 of the judgment. Having acknowledged that there was nothing in section 117B of the Nationality, Immigration and Asylum Act 2002 which referred to the conduct of the parents in the context of whether or not it was reasonable for the child to leave the UK, the judgment continues:-

> *"18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT 1245, [2017] ScotCS CSOH_117:*
>
> > *"22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the*

> *child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made ..."*
>
> *19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874, para 58:*
>
> > *"58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"*
>
> *To the extent that Elias LJ may have suggested otherwise in MA (Pakistan) para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves."*

22. I also draw attention to paragraphs 46-51 in which the factual basis of NS and AR, two of the appellants before the Supreme Court, was considered. [NS and AR were the 3rd and 4th appellants in the case of MA v SSHD 2016 EWCA Civ 705 see paragraphs 76-89]. NS & AR had entered as students in 2004 and 2003. The appellants and their respective spouses, who had also entered the UK at the same time, had children who had been in the UK over 10 years, including a child or children born in the UK. The appellants had been involved in applications to extend their leave, which involved fraudulent or false documents, claiming to have studied at Cambridge College of Learning for postgraduate qualifications.

23. In paragraph 51 having found that the judge had correctly directed himself as to the wording of section 117 Lord Carnwarth continues:-

> *"51. … The parents' conduct was relevant in that it meant that they had to leave the country. As I have explained (para 18 above), it was in that context that it had to be considered whether it was reasonable for the children to leave with them. Their best interests would have been for the whole family to remain here. But in a context where the parents had to leave, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable."*

24. The cases of NS & AS in KO were not deportation cases but a removal cases. Whilst the children had been in the UK a significant period of time, in excess of ten years, the fact that the parents were to leave the UK was material in assessing whether it was reasonable for the children to accompany them.

25. The judge in paragraph 17 has identified that the issue is whether it would be reasonable to expect the child to leave the United Kingdom. In paragraph 19 the judge identifies that he is concerned with the child leaving with the appellant, her mother, and settling in Nigeria.

26. In paragraph 21 the judge identifies the principal concerns of the appellant with regard to the education, health and security of the child. With regard to education he satisfied that there was no evidence that the child would do any less well in Nigeria than in the United Kingdom. With regard to healthcare the judge concludes that there is a functioning healthcare system in Nigeria which the appellant and the child would be able to access.

27. The judge repeats in paragraph 25 that the test is whether or not it would be reasonable to expect the child to leave the United Kingdom effectively with the parent. The judge identifies factors which would render such unreasonable.

28. However in the middle of paragraph 28 the judge seems to turn test around and seems to be requiring strong reasons for granting leave to the child. That having been said the judge continues by identifying that there is no evidence of any adverse consequences to the child if the child were to accompany the parents to Nigeria. Included in that exercise carried out from paragraph 29 to 33 is an assessment that the starting point for the best interests of children is for the child to remain with the mother.

29. As set out in the case of KO considering position of the child one has to consider it in the context of what will happen to the parent. In the present circumstances were it not but for the child the parent would have no right to remain in the United Kingdom and would be expected to return to Nigeria. The judge in making the findings of fact

has looked at whether or not the child would be adversely affected so as to render the decision unreasonable. It is arguable from the conclusions reached the judge finds that there is no reason that would render the same unreasonable and that would be no adverse consequences to the child.

30. Whilst the judge has in various paragraphs said it whether there are strong reasons for granting leave apparently placed the burden on the appellant to show reasons why the child should be allowed to remain, when one looks at the decision overall is clear that the judge had in mind the relevant factors in assessing whether or not it was reasonable with the child to accompany the parents. The judge has concluded that there are no circumstances would render the welfare education or health child at risk and as such it was reasonable for the child to accompany the parents. The conclusion being that as the parent was to be removed from the United Kingdom it was reasonable for the child to accompany the parent, the appellant.

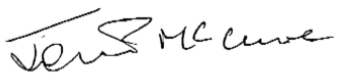
31. Even if the judge within the paragraphs identified has applied the wrong test, given the findings of fact made otherwise the judge has clearly given reasons as to why the child would suffer no adverse consequence of being returned to Nigeria with the mother. Whilst the grounds of appeal have identified that the mother would have no support and would have to establish itself, the judge was well aware of those facts and did take such into account in concluding that no adverse consequence would come to the child.

32. In the circumstances even if the judge has made an error of law, on the basis of the findings fact I do not find that the error is material and in any event I would on the facts as found have come to the same conclusion that is that it is reasonable for the child to accompany the mother.

33. In the circumstances there is no material error of law.

Notice of Decision

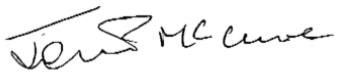
34. I dismiss the appeal on all grounds.

Signed 

Deputy Upper Tribunal Judge McClure Date 20th December 2018

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 the appellant or any member of the appellant's family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings

Signed 

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