Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: IA/09660/2015**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision & Reasons Promulgated**
On 14th March 2016	**On 13th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

MAO

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Singh

For the Respondent: Mr Duffy

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. A direction for anonymity was made previously as this case impinges on the rights of a child. I am satisfied that the order should continue.

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2. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.

3. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Nicol promulgated on 6 July 2015 which dismissed the Appellant's appeal against a decision to remove her following a decision dated 17 February 2015 refusing her application dated 20 October 2014 for leave to remain on family and private life grounds.

Background

4. The Appellant was born on [ ] 1972 and is a national of Nigeria, She has a child who was born on 30 December 2006 in the UK and who was therefore 7 years old at the date of application, 8 years old at the time of the hearing.

5. The refusal letter gave a number of reasons:

(a) The Appellant first entered the UK on 1 March 2004 using fraudulent documents.

(b) 2 January 2008 was convicted of Possession of a False Instrument and sentenced to 5 months' imprisonment.

(c) 25 February 2014 the Appellant made an application for leave on Article 8 grounds which was refused on 10 June 2014 with no right of appeal.

(d) 16 September 2014 the Respondent confirmed that there was an in country right of appeal.

(e) The Appellant could not meet the suitability requirements of Appendix FM because of her conviction.

(f) The application was considered under EX.1 as there was nothing to suggest that it would not be reasonable for the child to accompany his mother in returning to the country of his nationality, Nigeria given that she had close family there with whom she had maintained contact and his private life relationships in the UK would be limited given his age. The child's medical condition was taken into account and there was nothing to suggest that medical services were unavailable in Nigeria that could treat him.. There is also a functioning education system in Nigeria that he could benefit from.

(g) The Appellant herself could not meet the private life requirements of the Rules.

(h) There were no compassionate circumstances warranting a grant of leave outside the Rules for either the Appellant or the child.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Nicol ("the Judge") dismissed the appeal against the Respondent's decision. The Judge :

(a) Set out the law and facts based on the documentary evidence and the oral evidence before him.

(b) Found that neither Appellant could meet the requirements of the Rules.

(c) He considered the appeal under Article 8 outside the Rules taking into account the best interests of the Appellants child.

(d) He found it was in the best interest of the child to stay with his mother, the father having never had a role in his upbringing.

(e) He found that if returned to Nigeria with his mother they would have her family to support them and he could be educated there.

(f) He took into account the child's medical condition but on the basis of the limited information available there was nothing to suggest the treatment he required would be unavailable in Nigeria.

(g) He noted that the Appellant herself was well educated having heard her evidence that she did a degree in Nigeria and had overcome the difficulties that arose from her imprisonment.

(h) He did not find that there were circumstances that warranted a grant of leave outside the Rules and found the removal to be proportionate

7. Grounds of appeal were lodged and on 29 October 2015 Upper Tribunal Judge Mc William gave permission to appeal stating:

"I have considered the grounds of appeal submitted on her behalf which generally recite the law and legal principles without identifying a properly arguable error on a point of law.

However, it is arguable that the appellant's son is a qualifying child for the purposes of Section 117B of the 2002 Act and if so it was incumbent on the judge to consider reasonableness in this context and it is arguable that he failed to do so."

8. A Rule 24 notice from the Respondent argued that paragraphs 30-34 of the decision addressed all those issues that were relevant to the test of reasonableness of return to Nigeria at paragraphs30-34 0f the decision.

9. At the hearing I heard submissions from Mr Singh on behalf of the Appellant that:

(a) The issue was whether the Judges reasoning in relation to the child was clear and precise. The Judge applied the wrong test in the case in that in paragraph 27 he uses suggests the test is one of exceptionality and there is no assessment of the concept of reasonableness.

(b) The Judge failed to assess whether the Appellant could meet EX.1.

(c) The Judge failed to consider the ties of a 8 year old child to the UK.

(d) It was unclear what factors he had taken into account.

10. On behalf of the Respondent Mr Duffy submitted that :

(a)The test was one of reasonableness of return whether inside the Rules under EX.1 or under Article 8 outside the Rules.

(b)The Judge assessed all of the family circumstances in paragraphs 29 onwards.

(c)While not specifically identifying the test as one of reasonableness he identified all of those factors that were relevant to the test so any failure to refer to the reasonableness of return was not material to the outcome in the case.

(d) Mr Singh appeared to rely on the case of Abdul (section 55-Article 24(3) Charter [2016] UKUT 00106 (IAC) but that case only refers to EU nationals and can otherwise be distinguished.

(e) The Judge dealt with all of the evidence before him and nothing had been identified that he failed to take into account.

11. In reply Mr Singh on behalf of the Appellant submitted:

(a) The Judge applied the wrong test.

(b) He conceded that Abdul did deal with an EU child paragraphs 14-15 as it emphasised identifying the best interests of a child was relevant to this case.

Legal Framework

12. Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the 'public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

13. The permission in this appeal relates to section 117B (6) 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."*

14. A "*qualifying child*" is a child who is either British (s.117D(1)(a)) or has lived in the United Kingdom for seven years (s.117D(1)(b)).

15. In relation to the granting of leave outside the Rules I remind myself of what was said in the Court of Appeal in SS Congo [2015] EWCA Civ 387 in paragraph 33:

> *"In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It*

also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ.

16. In relation to the materiality of any error I have considered the decision of the Court of Appeal in SSHD – v – AJ (Angola) [2014] EWCA Civ 1636 where the court found that an error of law by the First-tier Tribunal may be considered immaterial –

" *… if it is clear that on the materials before the Tribunal any rational Tribunal must have come to the same conclusion or if it is clear that, despite its failure to refer to the relevant legal instruments, the Tribunal has in fact applied the test which it was supposed to apply according to those instruments.*"

17. In relation t the adequacy of reasons I note that in MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

Finding on Material Error

18. Having heard those submissions, I reached the conclusion that the Tribunal made errors of law that were material to the outcome.

19. The grant of permission in this case identified only one arguable error of law that the Judge had failed to assess whether the Appellants child was a qualifying child for the purpose of section 117B(6) of the 2002 Act and therefore whether it was reasonable for the child to return with his mother to Nigeria the country of their nationality.

20. The Judge acknowledged that he was obliged to take into account those factors set out in section 117B in the assessment he did under Razgar in paragraph 8-9 of the decision. I accept that while the Judge did not specifically address whether section 117B(6) applied to the Appellant in this case the exercise he did conduct can only be read as an assessment of whether it was reasonable and in the best interests of the child to return to Nigeria with his mother against the undisputed

fact that he had been in the UK for more than 7 years at the date of hearing. While he used the word ‘exceptional’ he also referred to the need for compelling circumstances where an Appellant, as in this case, did not meet the requirements of the Rules(paragraph 7)

21. The Judge identified a number of factors that the Appellant had raised as to why in their case her and her child could not return to Nigeria and then analysed them against an unchallenged finding at paragraph 30 that it was in the best interest of the child to remain with his mother who had no right to be in the UK and whose father played no role in his upbringing and. I am satisfied that these are the same factors that would have been taken into account of the Judge had specifically identified that he was assessing the reasonableness of return:

(a) He considered the fact that the Appellants child was born out of wedlock and her family’s attitude to this at paragraphs 26 and found that there was no evidence beyond a letter in 2008 to suggest that her family would not be supportive if she returned.

(b) He addressed the claim that her sons medical conditions would impact on his return. in respect of which he heard oral evidence and had documentary evidence (paragraphs 16-17 and 31 of the decision) and concluded that ‘on the basis of the limited information available to me it does not appear that he requires specialist medical care that would not be available in a country like Nigeria.’

(c) He addressed the private life of the Appellants child in so far as it related to his education. He would have been entitled to note that there was no evidence from an independent social worker or other professional that suggested that the child’s best interests would be adversely affected by a move to Nigeria or that it would be unreasonable for him to return there with his mother.

(d) He identified that the Appellant herself was well educated and had faced nd overcome those problems associated with her criminal convictions and while not explicitly stating it the implication was that she could assist her son in dealing with the challenges of relocation.

22. I note that neither in the grounds nor in arguments before me was there any factor identified that the Judge failed to take into account that would have been relevant to an assessment of reasonableness. I am therefore satisfied that failing to use the term 'reasonable' made no material difference to the outcome of the decision in this case based on the evidence before the Judge. There was no evidence that would have led a Judge to conclude that in the facts of this case it would be unreasonable for the Appellant and her son to return to Nigeria.

23. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1): "*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge."*

24. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

25. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

26. **The appeal is dismissed.**

Signed Date

Deputy Upper Tribunal Judge Birrell