Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/01302/2015**

HU/01305/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 June 2017	**On 5 July 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

NN (FIRST APPELLANT)
AEA (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Ariyo (Apex Solicitors)
For the Respondent: Mr N Bramble

DECISION AND REASONS

1. The appellants are citizens of Nigeria. The first appellant is the mother of the second appellant. The first appellant was born in 1975. Her daughter was born in May 2007. The first appellant arrived in this country in August 2004 on her account.

2. The immigration history shows that the appellants applied for an EEA residence card on 12 June 2012 which was rejected in August of that year.

A further application was made on 2 July 2014 for leave to remain on family and private life grounds but this was refused on 24 September 2014. However, following judicial review proceedings the matter was reconsidered and a further decision was taken on 16 June 2015. The application was again refused and it is this decision that gives rise to the appeal proceedings herein. The appellants' appeal against the decision came before a First-tier Judge on 25 August 2016.

3. It was common ground as the judge stated in paragraph 2 of his decision that the appellants' applications did not fall to be considered under Appendix FM of the Immigration Rules and that the applicable provisions were paragraph 276ADE of the Rules, Article 8 of the ECHR and Section 117B(6) of the Nationality, Immigration and Asylum Act, 2002. The judge stated:

> "In these contexts the critical question for consideration is whether it would be unreasonable to expect the minor child of the appellant to leave the United Kingdom".

4. The judge set out the legislation and the relevant Rules. The judge heard oral evidence from the first appellant who told the judge that she had formed a durable relationship with an EEA national – she said her partner had mental health difficulties. Her daughter was bonded with him.

5. The judge noted that the issue had recently been the subject of authoritative consideration by the Court of Appeal in a similar legal context as the present case in **MA Pakistan and Others [2016] EWCA Civ 705** and set out paragraphs 45 to 47 of the decision as follows:

> "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.

Applying the reasonableness test

46. 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. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled 'Family Life (as a partner or parent) and Private Life: 10 year Routes' in which 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). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

47. Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interest's assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so. The concept of 'best interests' is after all a well-established one. 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".

The judge then noted what the Court of Appeal had said about the weight to be attached to the fact that a child had at least seven years' continuous residence in the UK in paragraph 71 to 74 of its decision:

> "71. Second, it is alleged that the FTT failed to have any regard to, and did not purport to apply, the guidance given by the UT in ***Azimi-Moayed (Decisions Affecting Children: Onward Appeal) [2013] UKUT 197 (IAC)*** for determining the reasonableness of removal in cases involving children present for more than 7 years in the UK. That was a case determined after the policy in DP5/96 had been repealed and before any other rules had been put in place. Blake J held that after a period of lengthy residence, which he took from past and previous policies to be seven years, it would be inappropriate to disrupt the child's life in the UK 'in the absence of compelling reason to the contrary'. No such compelling reasons were identified here.
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> 72. I have already stated why I reject the contention that a court is obliged as matter of law to adopt a two staged approach (see paras 56-57 above) even though it will usually be a sensible way of proceeding.
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> 73. I would not either grant leave on the second ground. The appropriate test can no longer be compelling reasons; that is not the language of section 117B(6) or paragraph 276ADE and it sets the bar too high. It may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling.
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> 74. It was also suggested that in any event the judge did not give sufficient weight to the fact that the appellant had resided here for over seven years and that his best interests were to remain here with his family. I do not accept that submission. The judge made specific reference to the seven year rule and its significance. It may be that other judges would have struck the balance differently, but the question is whether this judge reached a conclusion which was not open to him. Given that he was required to have regard to the wider public interest in effective immigration control, I do not think that he did".

6. The judge summarised the respondent's position in paragraph 10 of his decision as follows:

> "In support of your application you have raised the fact that your child is aged 8. She has been living in the United Kingdom all her life. This has been carefully considered. However, you would be returning to Nigeria with your child and would be able to support her whilst she became used to living there and she would have full rights as a citizen of Nigeria. Your child may be currently enrolled in education in the United Kingdom, but it is clear from the objective information

available that Nigeria has a functioning education system which your child would be able to enter. You have not provided any evidence which indicates that you would be unable to maintain your child in Nigeria or that you would be unable to provide for their safety and welfare.

You and your child would return to Nigeria. As a family unit and continue to enjoy your family life together. Whilst this may involve a degree of disruption to your private life, this is considered proportionate to the legitimate aim of maintaining an effective immigration control and is in accordance with our section 55 duties".

7. The judge concluded his determination as follows:

"11. It is common ground that a consideration of the merits of the appellant's article 8 appeal, whether it be under paragraph 276 ADE, or, under article 8 with reference to section 117B(6), turns essentially, on the question whether it would be unreasonable to expect of the minor children to leave the United Kingdom.

12. In respect of the first appellant's claim to private life under paragraph 276 ADE, I find that she clearly failed to establish that she meets the requirements, as it cannot be said, even on her own case, that there would be very significant obstacles to integration in Nigeria, save, to the extent, that it is contended that the difficulties in her child integrating into Nigeria, would place her in the same situation.

13. I turn therefore to consider whether it would be unreasonable to expect the appellant's daughter to leave the UK. I am satisfied the appellant and her child have established private and family life United Kingdom. I am further satisfied, that the respondent's decision does constitute interference with the rights of both appellants, to private and family life under article 8 of the ECHR.

14. In considering whether interference with the family life of the appellants is proportionate, I must first have regard to the best interests of the minor child as these are a primary consideration.

15. The second appellant was born on 19. May 2007 and is aged 9. She has spent a little over seven years residing in the UK continuously. She is well integrated into the school system and the records show that she has made very good progress. Her removal to Nigeria would unquestionably interrupt her academic progress. She would have to form new relationships in Nigeria, a country she has not known. I accept that she is in a family unit in the United Kingdom that includes her mother and her mother's partner. There is not a great deal of evidence on this point but I am prepared to accept that she does have a relationship with her

mother's partner. I am satisfied therefore that the best interests of the second appellant are for her to continue living in the UK without disruption to her private and family life and more importantly, to the bonds that she has formed at school and in her community.

16. I now turn to consider whether it would be reasonable to expect the appellant to leave the United Kingdom, notwithstanding, that her interests are best served by her remaining in the UK in the present family unit.

17. I attach very significant weight to the fact that this is a young child, who has spent more than seven years of his [sic] formative life, since birth, in the United Kingdom. He would, in the period he has been living here have put down roots and developed social, cultural and educational links. I therefore accept that it is likely to be highly disruptive if their child is required to leave the UK. It is always easier for a very young child who has not begun school because the focus is on their families. In the case of older children however the disruption becomes more serious. Hence there is a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit.

18. The evidence of the mother is that she does not have any close relatives in Nigeria to whom she could return. Even if that be so, I do not accept that the appellant's mother would have any serious difficulties in re-establishing her life in Nigeria, and in Lagos, where she says she lived before she arrived in the UK. She stated that her mother is in the United Kingdom and that they are in contact. There is no evidence, however, that has been presented to prove her mother's presence in the United Kingdom. I further take into account that the first appellant claimed that she had fallen out with the mother, because her mother has abandoned her at an early age.

19. The second appellant would not have any serious language difficulties because English is widely spoken in Nigeria. There is no suggestion that the educational facilities that she would have access to Nigeria would be of such an inferior standard as to seriously threaten the educational future of the second appellant.

20. I accept that the second appellant's removal would mean the severance of the relationship she has developed with the appellant's partner, and more importantly, it would mean the severance of the relationships she has formed at school. I accept that there would be a measure of disruption to her education in that she would have to adapt to an entirely different school environment and cultural setting.

21. I do not accept the evidence of the first appellant that she would be entirely destitute in Nigeria. The first appellant has shown herself to be a resourceful person by finding the means to travel to the UK, several years ago, and to sustain herself in a new environment for a number of years. I do not accept that the appellants would be exposed to such a degree of hardship, in Nigeria, as to threaten the very well being of the minor child.

22. There are important public policy considerations that I have to take into account in deciding whether it is reasonable to expect the minor child to leave the United Kingdom. The first appellant arrived in United Kingdom, it would seem, clandestinely. She has remained in the United Kingdom in breach of the immigration rules for several years. Her conduct does seriously undermine the public interest in the maintenance of effective immigration control.

23. These public interest considerations, though relevant to the question that this appeal poses, must be weighed against the best interests of the second appellant. This is a difficult case. On the one hand, the second appellant has lived in the only country that she knows for the last nine years; her removal to Nigeria would cause a real disruption in her life. On the other hand, the public interest considerations in the maintenance of effective immigration control, and, indeed, in the economic well-being of the United Kingdom are equally compelling considerations.

24. The conclusion at which I arrive, having regard to the totality of the evidence is that it would be reasonable to expect the second appellant to leave the United Kingdom".

8. There was an application for permission to appeal. The First-tier Tribunal refused permission but the application was renewed. Permission was granted by the Upper Tribunal on the basis that the First-tier Judge had arguably failed to give sufficient reasons to explain why he had concluded as he had done.

9. The respondent filed a response on 30 May 2017 arguing that the judge had given sufficient reasons for finding that it was reasonable to expect the second appellant to leave the UK and had cited the correct legal framework and case law. Cogent reasons had been given in paragraphs 16 to 24. There was a response filed by the solicitors on 22 June 2016 arguing that when the private, family and other circumstances of the appellant's were taken cumulatively they would outweigh any legitimate aim sought to be protected in the proportionality exercise.

10. Mr Ariyo submitted that it had been acknowledged that the best interests of the second appellant were to continue to live in the UK. The case law was clear and reference was made to paragraph 47 of **MA**. The judge had

only taken into account the first appellant's immigration history whereas in paragraph 47 it was made clear that that could not be considered.

11. Furthermore in paragraph 15 the judge had erred in stating that the appellant's daughter had spent "a little over seven years residing in the UK continuously" when a span of two years could not be described as "a little over seven". The judge had referred to the economic wellbeing of the United Kingdom when considering the public interest considerations in paragraph 23 of his decision although he acknowledged that this particular complaint did not feature in the grounds.

12. The mother's partner was an EU national exercising treaty rights in the UK. It appeared that there had been no oral evidence from the appellant's partner at the First-tier hearing.

13. The child was now over 10 and an application was pending for her to be given UK citizenship. This had been sent on 25 May 2017. There had not yet been a response.

14. Mr Bramble said he had received a copy of the application although it had not yet been logged on the Home Office system.

15. In relation to the arguments advanced he submitted there had been no error of law.

16. The hearing had taken place in August 2016 and while the child was over 7 it was quite clear that the judge had taken her age into account. The determination had been satisfactorily reasoned as submitted in the Rule 24 response.

17. The judge had correctly directed himself when considering the best interests of the child. Having found that her interests were best served by remaining in the UK in paragraph 16 of the decision he turned to consider the issue of reasonableness.

18. With reference to paragraph 46 of **MA** Mr Bramble helpfully put in the guidance referred to by the Court of Appeal (para.11.2.4). The judge had correctly addressed himself to the appellant's case in the light of the guidance. There was sufficient reasoning and the complaints were merely disagreement with the decision. There was very little evidence in relation to the position of the appellant's partner and there did not appear to be a witness statement.

19. There was in this case the issue of the appellant's partner exercising treaty rights in the UK. The daughter would not be leaving with both her parents. She had never left the UK. She had known nowhere else. Strong reasons were required as established in paragraph 11.2.4 if a child had been in the UK for over seven years.

20. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.

21. The judge correctly addressed himself on the legal issues and had fully in mind the guidance given by the Court of Appeal in **MA (Pakistan).** In paragraph 45 of the decision the Court of Appeal made it clear that a court should have regard to the public interest under Section 117B(6). The public interest considerations apply when assessing the reasonableness criteria in Section 117B(6).

22. As the court noted even when applying the reasonableness test advocated by the Secretary of State the fact that a child had been in the United Kingdom for seven years had to be given significant weight. This is a factor highlighted by the judge in paragraph 17 of his decision when he attached "very significant weight" to the second appellant's seven year residence in the United Kingdom. It is to be noted that paragraph 47 of the judgment in **MA (Pakistan)** is dealing with a narrow reasonableness test and in that context the court stated that the conduct and immigration history of the parents could not be taken into account. The construction of the reasonableness test the court adopted is made very clear in paragraph 87 of the judgment:

> "The appellants submit that the UT's consideration of article 8 contained material errors of law. First, the UT's consideration of s. 117B(6) was unlawful. Once the judge was satisfied that the parents were not liable to deportation and had a genuine relationship with their children, the only question was whether it would not be reasonable for the child to leave the UK. The judge answered that question by focusing on the conduct of the parents, which was an illegitimate approach. For reasons I have given above at some length, the judge was adopting the proper approach to the interpretation of the section when he had regard to the conduct of the parents. If that is the right test then given the dishonesty of these appellants, the decision to refuse leave to the children was manifestly proportionate even though it was in their best interests to remain in the UK. This was a very careful judgment in which all relevant factors were considered, and in my view the judge was well entitled to strike the proportionality balance as he did."

23. The judge took into account that while there was little evidence before him the child's removal would mean the severance of the relationship that she had developed with the appellant's partner and the severance of relationships formed at school. He had regard to the disruption to her education and indeed all relevant circumstances. He took into account that the first appellant was resourceful and that on return the appellants would not be exposed to hardship such as to threaten the child's wellbeing.

24. He had to weigh up the impact on the child and her best interests and the other matters referred to against the important public policy considerations bearing in mind the decision of the Court of Appeal in **MA**. He carried out his task conscientiously noting that the appeal was a difficult one. As was said in paragraph 74 of **MA** "It may be that other judges would have struck the balance differently, but the question is whether this judge reached a conclusion which was not open to him". Just as in that case as the judge was required to have regard to the wider public interest in effective immigration control I do not find that he materially erred in law. I agree with the respondent that the grounds do no more than express disagreement with the judge's decision. Although it was faintly argued at the hearing that the judge had misdirected himself in referring to economic wellbeing of the UK the point did not feature in the grounds and I find no material error in law in what the judge stated. The judge had fully in mind the age of the child.

25. The determination was not flawed by a material error of law and I direct that it shall stand.

    In relation to anonymity, as the decision involves a young child it is appropriate to make an anonymity order in this case.

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.

TO THE RESPONDENT
FEE AWARD

The First-tier judge made no fee award and I make none.

Signed Date 5 July 2017

G Warr, Judge of the Upper Tribunal