Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/01067/2016**

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On 21 July 2017	**On 24 July 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

M J (+3)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Akinbolu, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr P Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Following a grant of permission to the respondent to appeal against the decision of the First-tier Tribunal allowing the appellant's appeal, on Article 8 grounds, against the decision of 22 January 2016 refusing her asylum and human rights claim, it was found, at an error of law hearing on 25 January 2017, that the First-tier Tribunal had made errors of law in its decision. The decision was accordingly set aside.

2. The appellant, a citizen of Sierra Leone born on 19 July 1979, arrived in the UK in December 2004 with leave to enter as a student until 6 December 2006. She made various unsuccessful applications for further leave as a student/nurse but then successfully applied for further leave on 5 March 2007, and was granted leave until 31 May 2007. Further to that, and between 2007

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and 2014, she made several unsuccessful applications for leave to remain as a student/nurse, for an EEA residence card and for leave to remain on family/ private life grounds. On 4 September 2015 she applied for asylum, with her husband and two children being dependent on her claim. Her asylum claim was refused on 22 January 2016.

3. The appellant appealed against that decision. Her appeal was heard before First-tier Tribunal Judge Cohen on 1 November 2016. The appellant did not pursue the asylum grounds of appeal but appealed on Article 8 human grounds only. She relied on her family life with her husband and two children, her son J born in 2006 and her daughter Ja born in 2013, all nationals of Sierra Leone. Judge Cohen found that the appellant succeeded under EX.1(a) of Appendix FM on the basis that it was not reasonable to expect her son J to leave the UK, as he had lived in the UK for more than seven years and was entitled to British nationality and could meet the requirements of paragraph 276ADE. He concluded that it was unreasonable to separate J from the rest of the family and that it was in the best interests of the children to remain in the UK. He dismissed the appeal under the immigration rules but allowed it on human rights grounds.

4. The respondent sought, and was granted, permission to appeal to the Upper Tribunal. At an error of law hearing on 25 January 2017, I found errors of law in the judge's decision and set it aside, as follows:

"DECISION AND REASONS

(9) I agree entirely with the Secretary of State's grounds of appeal. I reject Ms Akinyinka's submission that the principles in the case of MA were followed even if the case itself was not cited, when that is clearly not the case. The judge embarked on an assessment of reasonableness in respect to the appellant's son without any regard to the principles in MA and made his findings purely on the question of his best interests without having any regard to the public interest. Ms Akinyinka submitted that the judge focussed on the best interests of the child because the respondent had failed to do so, as he stated at [21], yet the respondent clearly did consider the best interests of the children in some detail in her decision of 22 January 2016 when considering "exceptional circumstances" under Article 8. In any event that was not a reason to ignore the guidance in MA and to fail to consider any of the public interest factors weighing against the appellant, which is what the judge did.

(10) Ms Akinyinka submitted that the judge had given due consideration to the public interest and she relied on his reference at the end of [21] of his decision. However it is clear that the judge's reference at that point to the public interest was in relation to section 117B(6) of the Nationality, Immigration and Asylum Act 2002, having already decided that it was unreasonable for appellant's son to leave the UK. Nowhere in the decision was there any consideration given to the public interest factors in assessing reasonableness itself. What the judge did was to assess the children's best interests and treat his conclusion in that regard as determinative of the Article 8 claim, particularly in view of the fact that J had resided in the UK for over seven years and was entitled to register for British citizenship, but without placing that conclusion in the overall proportionality assessment and without

balancing it against the relevant public interest factors. That was a material error of law and for these reasons Judge Cohen's decision has to be set aside.

(11) Ms Akinyinka asked that the case be remitted to the First-tier Tribunal to be heard *de novo* in the event that Judge Cohen's decision was set aside. Mr Duffy did not object, but also submitted that the decision could be re-made in the Upper Tribunal. It seems to me that a remittal for a *de novo* hearing is not appropriate since there is no challenge to the essential facts. Rather, the re-making of the decision simply involves a consideration of the facts within the correct legal framework, considering the best interests of the children and then balancing those against the relevant public interest factors in considering the question of "reasonableness". There is no reason why that should not be undertaken by the Upper Tribunal. However I agreed to have the case listed for a resumed hearing rather than going on to re-make the decision at that stage, so as to enable any further evidence to be produced and considered, subject to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. I do not rule out any further oral evidence, but I would expect that the re-making of the decision will for most part be undertaken on the basis of submissions from the parties."

5. The appeal then came before me again on 21 July 2017. By that date the appellant's eldest child J had acquired British citizenship and had been issued with a British passport on the basis of ten years' residence in the UK.

6. Mr Singh advised me that it was accepted that J had acquired British citizenship. He was aware that the Home Office guidance on Appendix FM and family life cases stated that, in the absence of criminality, a case should be assessed on the basis that removal of a British child would be unreasonable. Whilst he submitted that British citizenship was not a trump card, he accepted that it would be difficult for him to argue matters above and beyond the guidance. He therefore made no further submissions.

7. Ms Akinbola relied on the decisions of Kaur (children's best interests / public interest interface) [2017] UKUT 14 and SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 120 and asked me to find that the fact that there was a British child was sufficient in this case to allow the appeal.

8. I advised the parties that I was allowing the appeal. The following are my reasons for so doing.

9. I see no need to make lengthy findings in view of Mr Singh's clear indication and in light of the terms of the Home Office guidance in the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes" of August 2015 and the decision in SF.

10. The full terms of the relevant part of the guidance are set out in SF at [7], but the most pertinent part states as follows at section 11.2.3:

"Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision

> would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano…
>
> Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer."

11. As in that case, the appellant's case is not one which involves criminality and, other than the fact of the appellant and her husband being overstayers, there is nothing in their conduct giving rise to such weight as to justify separation of J from his parents. In any event there is no suggestion that there is any other family member with whom he could reasonably be expected to live in the absence of his parents. Whilst the First-tier Tribunal's decision in the appellant's appeal was set aside owing to a failure to follow the approach in MA in regard to the question of reasonableness, it is clear that the Home Office guidance provides a full response to that question. This is clearly a case where the Home Office itself, in its own guidance, recognises that it would be unreasonable to expect the eldest child J to leave the United Kingdom. The appellant's child, J, is therefore able to meet the requirements in paragraph 276ADE(iv) and, in accordance with section 117B(6) of the Nationality, Immigration and Asylum Act 2002, the public interest does not require the removal of the appellant and her husband from the UK. As considered at [20] of MA, the only conclusion in the appeal must, therefore, be that Article 8 is infringed by the respondent's decision.

12. Accordingly, the appellant's appeal is allowed on the basis that her removal and that of her husband and children, to Sierra Leone would be disproportionate and in breach of Article 8 of the ECHR.

DECISION

13. The original Tribunal was found to have made an error of law. I re-make the decision by allowing the appeal on Article 8 human rights grounds.

Signed Date: 21 July 2017
Upper Tribunal Judge Kebede