Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21879/2016

THE IMMIGRATION ACTS

Heard at Liverpool
on 20 February 2018

Decision & Reasons Promulgated
on 26 February 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MBI
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Adewusi
For the Respondent: Mr Harrison Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge M Davies promulgated on 24 May 2017 in which the Judge dismissed the appellant's appeal against the respondent's refusal to grant the appellant leave to remain in the United Kingdom under both the Immigration Rules and Article 8 ECHR.

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Background

2. The appellant, a citizen of Nigeria, entered the United Kingdom in July 2002 on a visit Visa with leave to remain for six months. The appellant overstayed once the visa expired and has remained in the United Kingdom illegally since.

3. The appellant has a child who is a ‘qualifying child’ having spent at least seven years in the United Kingdom but the respondent did not believe it unreasonable to expect either the appellant or the children to return to Nigeria with her as they would be remaining as a family unit.

4. Having considered the written and oral evidence made available the Judge sets out findings of fact from [36] of the decision under challenge. The Judge is critical of what is described as the “wholly inadequate preparation of this appeal by the appellant’s representative”. The Judge finds that statements provided by the appellant’s representative on behalf of the appellant and her partner were “indeed sparse and totally lacking in detail”. It is also recorded the representative chose not to provide further detail by way of examination in chief and chose not to re-examine either the appellant or her partner. The appellant’s representative’s submissions are also said to be “equally sparse”.

5. At [37] the Judge finds when considering the appeal under the ‘ten-year parent route’ of the Immigration Rules, that whilst the appellant is in a genuine and subsisting parental relationship with a qualifying child there is “no evidence whatsoever to indicate that it would not be reasonable to expect the child to leave the United Kingdom”. The Judge takes into account that neither of the appellant’s children are British citizens as both of them are citizens of Nigeria by virtue of their mother being a Nigerian national.

6. The Judge did not find that expecting the children to return with their mother to Nigeria would have an adverse effect on their best interests and no evidence had been submitted to show that the children would not be maintained and accommodated in Nigeria or that the children could not continue their education in Nigeria where there is a fully functioning education system and where English is a language widely used.

7. The Judge took into account the fact the appellant’s partner appeared before him in a wheelchair and has a medical condition outlined what is described as the “outdated evidence” that has been submitted but there was no evidence that the partner could not receive similar treatment in Nigeria and no evidence he could not return to Nigeria and lead a life there similar to the life he leads in the United Kingdom.

8. At [40] the Judge writes:

> "40. There is no evidence before me to indicate that it would not be reasonable to expect the Appellants children and in particular the qualifying child to return to Nigeria with the Appellant."

9. When considering Article 8; the Judge did not accept the decision amounted to an interference with the right to respect for either family or private life as family life can continue in Nigeria although, in the alternative, if the decision did amount to such interference there was no evidence to indicate that any grave consequence would follow if the family had to return to Nigeria [41]. Further, in the alternative, the Judge finds that if the issue was one of proportionality that the decision is proportionate taking into account all the circumstances.

10. The Judge refers to section 117B but at [44] refers again to the fact that no evidence had been produced to indicate it would not be reasonable to expect the children to leave the United Kingdom.

11. The appellant sought permission to appeal which was initially refused by a Designated Judge of the First-tier Tribunal. The application was renewed to the Upper Tribunal which resulted in a limited granting permission in relation to the approach to the reasonableness test for the purposes of 276 ADE in section 117B(6).

Error of law

12. The "reasonableness of return" test for children in paragraph 276ADE applies to all applications decided on or after 13 December 2012. In R (on the application MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 the Court of Appeal held that paragraph 276ADE(iv) and section 117B(6) were similarly framed with both requiring seven years' residence and the critical question being whether it was unreasonable for the child to be expected to leave the UK. It was, therefore, a legitimate assumption that the question of reasonableness should be approached in the same way in each context. Read in isolation, the focus of section 117B(6)(b) was solely on the child and there was no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of the overall analysis of the public interest. That approach was, however, inconsistent with MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450 which the Court was bound to follow. As courts were obliged to take into account the wider public interest considerations when applying the "unduly harsh" criterion under section 117C(5), it had to be equally so with respect to the reasonableness criterion in section 117B(6). Further, the test for determining the reasonableness of removal in cases involving children present for more than seven years in the UK could no longer be "compelling reasons". That was not the language of section 117B(6) or paragraph 276ADE and set the bar too high. It might be reasonable to require the child to leave where there were good cogent reasons, even if they were not compelling (paras 13,

19 – 22, 36, 45, 46, 71 and 73). The fact that the parents were overstayers and had no right to remain in their own right could thereafter be weighed in the proportionality balance against allowing the child to remain, but that was after a recognition that the child's seven years of residence was a significant factor pointing the other way (paras 74, 75, 86 – 88 and 101 – 104). Accordingly, given the dishonesty of three of the Claimants, the decision to refuse leave to the children was manifestly proportionate even though it was in their best interests to remain in the UK.

13. The Court of Session has approved and followed the approach taken in MA (Pakistan) in the case of SA, SI, SI and TA v SSHD [2017] CSOH 117.

14. The Court of Appeal came to the same conclusion i.e. that it was inherent in the reasonableness test in section 117B(6) and paragraph 276ADE that the Court should have regard to wider public interest considerations, particularly the need for effective immigration control, in the case of AM (Pakistan) v SSHD [2017] EWCA Civ 180.

15. The IDIs on Family Migration, Paragraph 11.2.4 deals with non-British children. The August 2015 version states that the requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years. Relevant considerations are likely to include: (i) Whether there would be a significant risk to the child's health: For example, if there is evidence that the child is undergoing a course of treatment for a life threatening or serious illness and treatment will not be available in the country of return; (ii) Whether the child would be leaving the UK with their parent(s): It is generally the case that it is in a child's best interests to remain with their parent(s). Unless special factors apply, it will generally be reasonable to expect a child to leave the UK with their parent(s), particularly if the parent(s) have no right to remain in the UK; (iii) The extent of wider family ties in the UK: The decision maker must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of his or her life. (iv) Whether the child is likely to be able to (re)integrate readily into life in another country. Relevant factors include: (a) whether the parent(s) and/or child are a citizen of the country and so able to enjoy the full rights of being a citizen in that country; (b) whether the parent(s) and/or child have lived in or visited the country before for periods of more than a few weeks. The question here is whether, having visited or lived in the country before, the child would be better able to adapt, and/or the parent(s) would be able to support the child in adapting, to life in the country; (c) whether the parent(s) and/or child

have existing family or social ties with the country. A person who has extended family or a network of friends in the country should be able to rely on them for support to help (re)integrate there; (d) whether the parent(s) and/or child have relevant cultural ties with the country. The caseworker must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the country. For example, a period of time spent living mainly amongst a diaspora from the country may give a child an awareness of the culture of the country; (e) whether the parents and/or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period. Fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice; (f) whether the child has attended school in that country; (v) Any country specific information, including as contained in relevant country guidance; (vi) Other specific factors raised by or on behalf of the child: Parents or children may highlight the differences in the quality of education, health and wider public services or in economic or social opportunities between the UK and the country of return and argue that these would work against the best interests of the child if they had to leave the UK and live in that country. Other than in exceptional circumstances, this will not normally be a relevant consideration, particularly if the parent(s) or wider family have the means or resources to support the child on return or the skills, education or training to provide for their family on return, or if Assisted Voluntary Return support is available.

16. The IDIs also state that where the applicant does not meet the requirements of the family and private life Rules, refusal of the application will normally be appropriate, but in every case falling for refusal under the Rules the decision maker must consider whether there are exceptional circumstances warranting a grant of leave to remain outside the Rules. Occasionally these exceptional circumstances will be obvious, but generally it is for the applicant to raise them.

17. The appellants fail to identify any special factors or aspects not taken into account by the Judge which makes out legal error in the impugned decision. The parents have no right to remain in the United Kingdom and it has been found they can return. The best interests of the children are to remain with their parents. No member of this family has any right to remain in the United Kingdom between the date of decision and hearing before the First-tier Tribunal. The fact one of the children may now have acquired British citizenship was not a situation appertaining at the date of decision or hearing before the First-tier Tribunal.

18. The Judge clearly considered the evidence with the required degree of anxious scrutiny and has given adequate reasons in support of the findings made. The core finding is that the appellant failed to adduce sufficient evidence to warrant a finding being made in her favour. The medical evidence is a report dated 16 October 2013 which was supported by witness statements in which the appellant claimed her

partner was seriously ill and needed a frame to walk slowly which was clearly taken into account by the Judge.

19. Who is responsible for the failure to provide adequate evidence was a not a matter that needed to be explored. If the appellant's representative requested such evidence but the appellant failed to provide it the representative cannot be criticised. Similarly, evidence relating to the claim the appellant's partner has now been diagnosed as suffering from dementia is not evidence that existed at the time of the hearing before the First-team Tribunal.

20. The appellant has failed to establish any basis warranting the Upper Tribunal interfering with the decision of the First-tier Tribunal which shall therefore stand.

Decision

21. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Judge of the Upper Tribunal Hanson

Dated the 20 February 2018.