Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11643/2017

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 13 November 2018	**On 08 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

CMS
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person, assisted by Mr D Forbes
For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Ferguson promulgated on 25 January 2018 in which he refused the Appellant's appeal against a decision of the Respondent dated 30 October 2007 refusing protection in the United Kingdom.

2. The Appellant is a citizen of Nigeria born on 10 October 1976. She has a daughter, M, born in the United Kingdom on 30 March 2009 who is a dependent in these proceedings. Although at one point in the materials it was suggested that M was a British citizen, there is no evidence for this

and she has been treated on the basis that she is a citizen of Nigeria having taken the citizenship of her mother.

3. The focus of the arguments before the Upper Tribunal relate to the circumstances of the Appellant's child.

4. The Appellant's protection claim was rejected in clear and unambiguous terms by the First-tier Tribunal Judge and is not a 'live' issue before me. In such circumstances I do not propose to set out in complete detail the full immigration history of the Appellant, or indeed all the details of her asylum claim. For present purposes I set out the following summary.

5. The Appellant first came to the United Kingdom in 2004 with a visit visa; there are records of further visit visas having been obtained in Lagos in January 2005 and May 2007, although the Appellant - in testimony that has been rejected - claimed that she was not responsible for the making of those later applications. The Appellant claimed to have been trafficked and exploited whilst in the United Kingdom. It is not disputed that she was removed from the United Kingdom in 2007, nor is it disputed that she returned to the United Kingdom in January 2008 in a different identity. In this regard the Appellant claimed that she had again been trafficked to the UK, but shortly thereafter escaped the people who had trafficked her.

6. The First-tier Tribunal Judge, as had the Secretary of State, rejected the Appellant's claims in respect of trafficking.

7. The Appellant has remained in the United Kingdom since her re-entry in January 2008. In September 2012 she obtained a passport from the Nigerian Embassy in London in her current identity.

8. The Appellant gave birth to her daughter during this time. It is said that the father of M has no ongoing contact, and has no involvement with the child's life.

9. The Appellant made an application for an EU residence card as a spouse in May 2013. The application was refused in March 2014, and in April 2014 the Appellant was served with papers as an overstayer. A human rights claim was made in July 2015, but was subsequently 'voided' because the Appellant made her application for asylum at the end of July 2015. The asylum interview was conducted in November 2015 and in due course the application for protection was refused for reasons set out in the Respondent's 'reasons for refusal' letter ('RFRL') dated 30 October 2017.

10. The Appellant appealed to the IAC.

11. Before the First-tier Tribunal she pursued her case on both protection grounds and family/private life Article 8 grounds. In this latter context particular emphasis was put on the circumstances of M who had been born in the United Kingdom and had never left the United Kingdom.

12. The First-tier Tribunal Judge refused the appeal on all grounds for reasons set out in his Decision and Reasons.

13. The Appellant sought permission to appeal. Permission to appeal was granted by First-tier Tribunal Judge Birrell on 1 May 2018. Although the application was made out of time, extension of time was granted.

14. In material part the grant of permission to appeal to the Upper Tribunal is in these terms:

> "*3. The grounds assert that the Judge erred in his assessment of s117B 6 was flawed in that he failed to identify the best interests of the Appellant's child in making that assessment.*
>
> *4. In what is otherwise a detailed decision it is arguable that in addressing the Appellant's child's circumstances, which included some medical issues, the Judge failed to specifically identity what the best interests of the child were and in doing so his assessment under s 117B6 was flawed.*"

15. I pause to note that there is a nuanced difference between the basis of the grant of permission, and the pleaded grounds of appeal. The written grounds submit that the Judge failed to approach section 117B(6) as "*a self-contained provision*", and - notwithstanding a self-direction pursuant to the decision of **MA (Pakistan)** – the Judge failed to evaluate 'best interests' separately before considering proportionality, but rather "*fully intertwined*" the two. The grant of permission to appeal is more specifically focused on it being arguable that there was a discreet error in evaluating 'best interests'. Be that as it may, whichever way the appeal is considered I have reached the conclusion that there is no sufficient substance to warrant setting aside the decision of the First-tier Tribunal.

16. In the premises it is helpful to have regard to the materials and evidence that were before the First-tier Tribunal Judge with regard to matters that might touch upon the best interests of the Appellant's child.

> (i) There was a witness statement from the Appellant signed on 31 November 2017. For the main part that statement relates and addresses the immigration history, the different identities used by the Appellant, and the substance of her asylum claim. In respect of the Appellant's child, the following appears:-
>
> > "*My daughter was born here and has lived all her life here. She is 8 years old and she has recently been diagnosed with ADHD. She is receiving special treatment via the school and the psychologist*".

(I note that paragraph 22 of the decision summarises what the Appellant had said in her witness statement as regard matters relevant to Article 8, and makes some further reference to the supporting materials that were filed in the Appellant's bundle.)

(ii) The Appellant's appeal bundle included a number of documents in relation to the schooling of M and the concerns expressed by the school in respect of challenging behaviour which resulted in further consideration and investigation of behaviour and any underlying concerns. These materials are set out and adequately summarised in the decision of the First-tier Tribunal Judge, in particular at paragraph 29 which is in the following terms:

> "*The medical evidence about [M] is summarised in a letter from Dr Jackson following a referral from the SENCo at her primary school who had concerns about her being very active, with difficulties in concentrating and focussing on work and struggling with friendships and social norms. The report records that [the Appellant] said that "parents originate from Nigeria. They are separated and mum does not know much about dad's family history or his health". The paediatrician's summary of the examination is that "[M] is a girl who has challenging behaviour at school and at home and school are very concerned. They report difficulties with concentration and hyperactivity. Physical examination is unremarkable. The plan for [M] is to refer to audiology, Vanderbilt behaviour questionnaires, obtain report from school and review again in clinic in three months time." That is the most detailed medical evidence and it is from 2016. There is no medical evidence of any further diagnosis or treatment. The school reports she has behavioural problems which are being managed with a high level of adult support, mentoring, behaviour support and a referral to the education psychologist.*"

(I pause to note that no criticism has been made as to the accuracy or completeness of that summary. It is not suggested that the First-tier Tribunal Judge has omitted any relevant factors in rehearsing the evidence that was before him as to the particular issues and difficulties that M was experiencing in pursuit of her education and the nature of the assistance that the evidence suggested she was receiving.)

(iii) The Judge also recorded aspects of the oral evidence that was before him, both in respect of the protection issues and in the context of the circumstances of M. Accordingly, the following appears at paragraph 8:

> "*[The Appellant] said that her child would not get the support she needed for her education in Nigeria and she did not have money to pay for hospital treatment or school fees*".

(iv) The Appellant's submissions in the appeal are summarised at paragraph 11. In respect of M the following appears:

> "*I have problems with my daughter. She has ADHD. It affects me because whenever I take her out she insists that I buy her something. The school helped me to see this. If I returned to Nigeria I would not get proper help with her. She has psychologist to help her here.*"

17. With the assistance of Mr Forbes – and emphasising uncontroversially that the 'best interests' of M were to be taken as a primary consideration or starting point the Appellant argued that the First-tier Tribunal Judge in taking the evidential matters set out above forward failed to make any clear evaluation of M's best interests. Moreover, it was argued that the Judge elided the circumstances of the child and any consideration of best interests with the adverse immigration history of the Appellant.

18. Mr Mills, on behalf of the Respondent, acknowledged that there might be scope for criticising the First-tier Tribunal Judge in not setting out the decision with the clarity of structure suggested in cases such as **MA** and **Kaur**. However, he submitted that the Appellant's challenge was really one of form not substance, and that it was adequately clear looking at the decision as a whole that the Judge had had regard to best interests, had considered 'reasonableness' in isolation when evaluating section 117B(6), and had reached a decision that did not offend against principle or authority, including the most recent judgment of the Supreme Court in **KO (Nigeria)**.

19. Pursuant to the observations of First-tier Tribunal Judge Birrell in granting permission to appeal, and Mr Mills' acknowledgement as to the form and structure of the decision, I accept that the First-tier Tribunal Judge has not in terms included an express statement of any finding of what is in M's best interests. However, on the very particular facts of this case, and bearing in mind the way in which the decision is otherwise set out, I do not accept that any such deficiency could be said to constitute a material error of law.

20. In my judgement it is adequately clear that this experienced Judge sitting in a specialist Tribunal is well-versed with the case law and the principles - which are cited and set out in some detail in the body of the decision. Indeed, the recitation of relevant materials and case law includes express reference to the concept of best interests. This can be seen, for example, from paragraph 23 - where the Judge notes that consideration under section 55 of the Borders, Citizenship and Immigration Act 2009 was set out in the RFRL. In this context it may be seen from the RFRL that section

55 is cited at paragraph 10, and more particularly consideration is given at paragraphs 93 and 94. Paragraph 93 is in the following terms:

> "*93. In reaching this decision, regard has been given to the welfare of your children under* ***Section 55*** *of the* ***Borders, Citizenship and Immigration Act 2009*** *which places a duty on the Secretary of State to make arrangements for ensuring that immigration, asylum, nationality and customs functions are discharged having regard to the need to safeguard and promote the welfare of children in the United Kingdom. The best interest of the child is a primary consideration which is not to be interpreted as the primary consideration or even the paramount consideration, as confirmed within section 1.1 of the document entitled '****UNHCR Guidelines on Determining the Best Interests of the Child****' which provides that '... the best interest must be a primary consideration (but not the sole) consideration for all other actions affecting children ...' ...*".

Paragraph 94 goes on to cite passages from the headnote in **E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC)**.

21. The Judge also makes reference to the Respondent's policy in respect of paragraph EX.1. of Appendix FM and paragraph 276ADE of the Rules (paragraph 27). The Judge sets out relevant considerations in full, but in particular the following appears:-

> "*Relevant considerations are likely to include:*
>
> *...*
>
> *ii. whether the child would be leaving with its parent(a)? It is generally the case that it is in a child's bests to remain with its parents. Unless specific factors apply it will generally not be unreasonable to expect a child to leave the country with its parents, particularly if the parents have not right to remain in the UK*".

22. Further, at paragraph 31 the Judge has reference to the decision of **Kaur (children's best interests/public interest interface) [2017] UKUT 00014 (IAC)**.

23. In all such circumstances I do not accept that the Judge somehow 'lost sight' of the concept of best interests, or that the decision otherwise gives rise to concern that the Judge did not understand the concept, or did not have regard to it in the overall consideration of the appeal.

24. More particularly, it is manifestly clear that the Judge took account of the factors being advanced by the Appellant as potentially impacting on the welfare and best interests of her child - and addressed those matters. I

have already rehearsed those aspects of the evidence which the Judge set out as representing the substance of the Appellant's case as it realted to the circumstances of M: it is not suggested that the Judge omitted or overlooked any relevant detail; as such, in my judgement, it is clear that the Judge had full regard to the evidence and materials that were before him. Moreover, the Judge addressed these matters – they were not set out as some sort of rote rehearsal.

25. It is to be recalled that best interests of a child are only ever a starting point in the context of immigration decisions. What is significantly pertinent is the extent to which the best interests might be adversely impacted by the challenged immigration decision. The First-tier Tribunal Judge clearly considered the impact of the immigration decision on the circumstances of M, did so in isolation from the impact on the circumstances of the mother, and did so in isolation of any consideration of the immigration history of the mother.

26. I have already rehearsed the substance of paragraph 29 with regard to the circumstances of M; the Judge then said this at paragraph 30:

> "*There may well be a difference in the education and support services between what [M] is receiving in the UK and what she would be able to access in Nigeria. That was not established by reference to any evidence provided by the Appellant. Nor are the full circumstances of [the Appellant's] life in Nigeria established. As set out above she has not been truthful about the circumstances of her life before she came to the UK. She had sufficiently strong ties for her to be granted multiple visit visas however, and was in contact with her family in 2011 when her father was responsible for her customary marriage. It is established that there will be disruption to [M's] education but it will be temporary until she is able to engage in education in the country of her nationality, where she will be with her mother.*"

27. It seems to me abundantly clear that in paragraph 30 the Judge is taking into account that it has not been established that M will be returning to Nigeria in adverse circumstances. It is not accepted that the Appellant has shown that the life to which she will be returning with M has any features which might be considered to be adverse because it is not accepted that the Appellant has been truthful at any stage as to her circumstances in Nigeria. The Judge also notes that he was not shown any evidence to suggest that the educational facilities and support network that would be available in Nigeria would inevitably be different from that which is available to the M in the UK (albeit realistically observing that there might be a difference). Accordingly, the Judge concludes in a manner which in my judgement was open to him on the evidence that the only impact upon the Appellant's daughter of leaving the UK to return to Nigeria with her mother would be the disruption to education - which would be temporary until such time as M was able to engage in education in the country of her nationality.

28. Accordingly, what the Judge found in substance was that it had not been shown that the interests of M were going to be materially adversely impacted beyond the temporary disruption inherent in an international relocation. It seems to me that that was to encompass an evaluation of best interests and a consideration of the factors raised by the Appellant in respect of M. This approach also echoes the guidance that I have cited above, which tasks a decision-maker with considering whether there are any specific factors that apply such as to make it unreasonable to expect a child to leave the United Kingdom with a parent or parents.

29. Indeed this is the substance of the conclusion that follows in the opening sentence of paragraph 31: "*It has not been established by the Appellant that it would 'not be reasonable to expect the child to leave the UK'*". It seems to me that such a finding was entirely open to the Judge, and has been reached taking into account the interest - and necessarily therefore the 'best interests' - of M.

30. I remind myself in this context that the Judge's approach appears to be entirely consistent with the decision in **KO (Nigeria) [2018] UKSC 53**.

31. In **KO** relevant guidance is cited which includes the following - "*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*" (paragraph 10). At paragraph 18 the following appears:

> "*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 would 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 be give the parents a right to remain*".

32. In this context I note that the First-tier Tribunal Judge cited paragraph 17 of **MA (Pakistan) [2016] EWCA Civ 705** per Elias J (see paragraph 25); thereafter the Judge made it manifest that he adopted this approach:

> "*This is not to penalise the child for the actions of her mother, because if it was established that it would be unreasonable for [M] to return to Nigeria then that fact would have outweighed all others.*" (closing sentence of paragraph 31).

33. Accordingly, I am satisfied that the Judge has had regard to the best interests of the child, has considered the impact upon the child of the

immigration decision, has taken that impact on the child's interests forward into an analysis of section 117B(6), has conducted an analysis of section 117B(6) in a freestanding manner, has reached a sustainable conclusion that the Appellant has not established that it would not be reasonable to expect M to leave the UK, and has taken that factor forward into the overall Article 8 balancing exercise in the appeal.

34. In all of the circumstances I uphold the decision of the First-tier Tribunal.

35. I was told at the hearing that further evidence in respect of the circumstances of M had been sent to the Tribunal and served on the Respondent. However, at the time of the hearing any such evidence had not reached the Tribunal's file and was not before me. Accordingly, I have not seen such evidence. In any event such evidence could form no part of my consideration of the 'error of law' issue. For completeness I merely observe that hereafter it is a matter for the Appellant (perhaps with the assistance and guidance of any advisers) to decide how to take such further evidence forward, if at all.

Notice of Decision

36. The decision of First-tier Tribunal Judge Ferguson contained no material error of law and stands.

37. The Appellant's appeal remains dismissed.

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 her or any member of her 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.

Signed: Date: **5 January 2019**

Deputy Upper Tribunal Judge I A Lewis