UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: HU/06328/2017

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 9th August 2018	**On: 26th September 2018**

Before

Deputy Upper Tribunal Judge Mailer

Between

KAH [N]

NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: **Mrs H Ephraim-Adejumo, counsel, instructed by L & L Law**
For the Respondent: **Mr E Tufan, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The appellant is a national of Malaysia born on 18 April 1978. She is the mother of two children. [N], born in the UK on 7 October 2009, who has remained here since his birth. At the date of hearing he had lived in the UK for over eight years. He is at school. Her second child is [L], born in Malaysia on 13 January 2012, who was six years old at the date of hearing [1].

© CROWN COPYRIGHT 2018

2. In a decision promulgated on 16 May 2018, First-tier Tribunal Judge Pears dismissed the appellant's application for leave to remain.

3. He found that the appellant came to live in the UK in about 2003 and has not lived here continuously since then. She was absent from about 2009 until 2013. When she returned to the UK she came pursuant to a visit visa. She was arrested in October 2016 and was served with a notice as an overstayer. Her immigration status has always been precarious and for periods unlawful [39].

4. He accepted that she is in a relationship with Mr [LC] and cares for him. He has a serious illness but even on her case they have been cohabiting for less than two years He is not a British citizen and is not settled here and has neither refugee status nor humanitarian protection. The cohabitation commenced whilst neither had status in the UK. The appellant was here unlawfully. It would not be unduly harsh for her to leave the UK. The decision was accordingly not disproportionate. Nor were there any exceptional circumstances [40-43].

5. The respondent accepted that [N] had been in the UK for a continuous period of seven years or more. The appellant provided evidence however that her children are in the care of [SU], who is her cousin. There is a private fostering arrangement in place. Accordingly the appellant is not the sole carer of her children.

6. At the hearing before the first-tier Tribunal the appellant asserted that whatever the position was with her children at the date of her application, she is now their sole carer and has been since July 2017.

7. Judge Pears referred to the appellant's immigration history. She appeared to have been in the UK since before September 2004. Her husband was a work permit holder. She had leave to remain until March 2010 and [N] was born in the UK on 7 October 2009.

8. Judge Pears referred to a social circumstances report by an independent social worker (ISW). That was produced at the time when both children were cared for by [SU]. The ISW concluded that she would be "very concerned" about the appellant's ability to care for the children and that there would need to be a further social care assessment in order to assess whether the children's needs could be met by their mother either in Malaysia or in the UK. The Judge noted at [13] that the report was in the context of the breakdown of the mother's marriage.

9. The ISW stated that the mother retains regular contact with the children and her view is that the children should remain with [SU]. She saw 'the mother' and the children. When the mother became pregnant with her second child she returned to Malaysia. She returned to the UK to give her second husband "one last chance." The children were then placed with [SU] and she seemed to suggest that was in

2012 or 2013. However, [SU] said in evidence that they had lived together with her since 2009 [13].

10. The appellant's second marriage broke down in August 2015. Her husband told the ISW that he had had no involvement or contact with the children. She started her relationship with [LC] who is from China and has been in the UK for more than 16 years. She then said that the children have been in [SU]'s care for over two years which the Judge stated seems neither consistent with the earlier account or what [SU] told him. She sees the children either at [SU]'s home or at her own [13].

11. The ISW stated that the private fostering arrangement has been assessed by a social worker. The social worker stated that the private fostering arrangement started in August 2014 as there had been threats by the appellant's husband to kill the appellant and the children if the appellant separated from him. Even in October 2015 there was a continuing relationship between the appellant and her husband [14].

12. The ISW found that the appellant had acted responsibly in protecting the children by making a private fostering arrangement and she had been cooperative with the social work department. The Judge noted that the ISW directed questions to the social worker from Medway Council but were not answered for reasons of confidentiality. She also seeks to contact [SU] without success [14].

13. The Judge noted that the ISW stated that she would be very concerned if contact between the appellant and the children were broken, for example if she were forced to relocate to Malaysia. [L] has spent the majority of his life in the care of others rather than his birth parents. [N] has stability and security with his care and residence arrangements and has commenced primary education and is able to identify school friends with whom he has positive relationships and he is happy with friends and his life. The social worker concluded that she would be concerned that any change to [N]'s arrangements would have a negative impact on his emotional well being, his development and his current educational achievements – [15].

14. Judge Pears considered documents produced which related to the children who now attend [~] School, Mill Hill. There is a football club and a dance club at the school and other documents relating to attendance at the school and the monitoring of the children's progress. He noted that [N]'s Term 18 assessment was positive and various awards and certificates were produced. There were also school and other documents produced that related to [L] - [18].

15. He noted that in her statement, the appellant asserted that she came to the UK in 2003 and her first marriage broke down in 2006. She married her second husband in 2009 and [N] was born in October 2009, but then she and her husband were forced

to leave the UK and return to Malaysia leaving her son behind with her cousin, [SU] [19].

16. When she returned to Malaysia, she had a second child. The breakdown of her second marriage occurred when her husband became involved with loan sharks. She returned to the UK in 2013. She took the children and went to live with her cousin [19].

17. She stated that she is living with [LC] and given his diagnosis he could not be expected to relocate when he is facing "death or life." She is caring for him and he would be going to a country that is strange to him. He would face persecution from loan sharks like she would, as her husband owed money to them and was declared bankrupt in Malaysia. She is depressed, fears for her life and is on medication [19].

18. Judge Pears also had regard to the evidence of [SU] who claimed that she was appointed guardian for the two children and took care of [N] in the UK between 2009 and 2013.

19. Then Judge at the outset of the hearing asked whether, given the comments in the social circumstances report and that the children were now living with their mother, there was any evidence from social services indicating that they were aware of the change and that they approved it. He was told there was no such report [23].

20. In his findings, Judge Pears noted that even on her case the appellant had only been sole carer from July 2017. That occurred shortly after the refusal of her claim when one of the grounds for that refusal was that she was not their sole carer [33]. [SU] has been the sole carer of [N] from 2009 and he was left in her care when the appellant was in Malaysia for some four years [33]. He noted that the ISW stated that there needed to be a social care assessment in order that the children's needs could be met by their mother. Nevertheless, after a number of years the children went to live with their mother and there is no social service report.

21. Accordingly, whatever the current position is, Judge Pears could not conclude that she has always had sole care of the children as she has lodged the children for substantial periods of time with her cousin. The children's father is not involved with them and he concluded that the appellant now has sole parental responsibility for them and they now live with her, and even though they did not live with her in the past she exercised access rights to them [34].

22. He had regard to the children and considered whether it would be in their interests to expect them to leave the UK. Their best interests are a primary consideration [35]. [N] has been in the UK for more than seven years. He found that he appears to be interested in football with some friends. The respondent produced evidence of the availability of education in English in Malaysia. [N] has no infirmity or medical

condition. He would be moving to Malaysia with his mother and brother. His mother had lived there as recently as 2013 [35].

23. He noted at [36] that the appellant relied on the social circumstances report in relation to the children. It appears that she has not had access to any records and was not able to get any information from the social worker. She did not see [SU]. In consequence 'her views must be viewed with circumspection'. She concluded that she would be concerned that any change to [N]'s arrangements would have a negative impact on his emotional well being, his development and his current educational achievements. The Judge went on to state that in fact the mother chose to move his care from [SU] to her, as well as move his school and care for him with her new partner, with whom neither child had ever lived [36]. It would appear that the appellant is saying that he has coped well with these changes. He stated that the issue is whether there any evidence of a serious negative impact: He concluded that there is not [36].

24. He found that there would be no sufficient evidence to show that it would not be reasonable for the children to move to Malaysia. The requirements of paragraph 276ADE(1)(iv) are not met [36].

25. He considered Article 8 outside the rules and the issue of proportionality. He accepted that the appellant is in a relationship with [LC] and cares for him. However, they have cohabited for less than two years. He is not British and nor has he settled here. The relationship commenced when his status was at the least precarious and hers unlawful.

26. He concluded that it would not be unduly harsh to refuse the appellant leave to remain. The decision was not disproportionate.

27. Ms Ephraim Adejumo, who did not represent the appellant at the hearing, adopted the grounds for permission.

28. The IWS has identified the issues of concern in relation to the children, namely [N]'s wellbeing, which constituted a substantial issue, namely, whether his mother would be able to look after him and provide for him and whether he would be safe in Malaysia.

29. The Judge however did not properly consider the mother's current conditions. This included her medical condition, her financial condition and her ability to provide for the children.

30. She referred to the decision of the court of Appeal in MA (Pakistan) [2016] EWCA Civ 705 at [49]. This child has remained in the UK for more than eight years. Having found that his mother had parental responsibility for the children, he had to assess where his best interests lie. He was born and has grown up in this country,

formed all his relationships and friendships here, which included the wider community in the UK.

31. In Malaysia there would be no support network for him and no guarantee of even completing his education to fulfil his aspirations and potential.

32. She referred to the decision of the Upper Tribunal in MT and ET (Child's Best Interest; ex tempore Pilot) Nigeria [2018] UKUT 88. She referred to [28] where the Tribunal had regard to paragraph 46 of the decision of Elias LJ in MA. The fact that the child has been in the UK for seven years has significant weight in the proportionality exercise for two related reasons: first because of its relevance to determining the nature and strength of the child's best interests; and second because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary. The Tribunal had regard to whether or not there were "powerful reasons".

33. The appellant in MT was described as a somewhat run of the mill immigration offender who came to the UK on a visit visa and overstayed, made a claim for asylum that was found to be false and who pursued various legal means of remaining in the UK. This is not taken in any way as excusing or downplaying MT's unlawful behaviour. The point is that her immigration history is not so bad as to constitute the kind of "powerful" reason that would render reasonable the removal of ET, the child, to Nigeria. In re-making the decision the appeals were allowed on human rights grounds.

34. Ms Ephraim-Adejumo submitted that there was no proper assessment as to why the children had been left with the foster carer in the first place. The mother had been out of the country for four years. There was accordingly an insufficient inquiry made as to the best interests of the children.

35. On behalf of the respondent, Mr Tufan referred to the varying terms used in the recent decisions, which include: "powerful reasons", "significant", "cogent" and the like. He submitted that on a proper assessment of the decisions of the Court of Appeal, there has not been a material error of law.

Assessment

36. In granting permission to appeal, First-tier Tribunal Judge McCarthy noted that the Judge found that the appellant had a genuine and subsisting parental relationship with the children and that there needed to be a further social care assessment as to whether the appellant could meet the child's needs. Further, he recognised that the appellant has acted contrary to the assessment of the Medway Social Services and that her actions may have undermined the well being of the children. He stated that it is difficult to see how the Judge could conclude at [36] in the light of such

evidence that there was insufficient evidence to show that it was unreasonable to expect the children to leave the UK.

37. Judge Pears referred to the approach set out in MA (Pakistan) and in particular the judgement of Elias LJ, who held that there needed to be "strong reasons" for refusing the leave in such cases.

38. He noted at [36] that the appellant relied on the social circumstances report in relation to the children. He noted the conclusion of the ISW that any change to [N]'s arrangements would have a negative impact on his emotional well being, his development and his current educational achievements.

39. Judge Pears noted at [36] that his mother chose to move his care from [SU] to herself, his accommodation from Chatham to Dollis Hill, to move his school and care for him with her new partner with whom neither child had ever lived.

40. He noted that the ISW was only saying that change would impact on his emotional well being, his development and his current educational achievement, but it would appear that the appellant is saying that [N] had coped well with those changes and the issue was whether there is any evidence of a serious negative impact. He found that there is not - [36].

41. Further, he did not find evidence to support risks to the children should they return to Malaysia. He found that there is no sufficient evidence to show that it would not be reasonable for the children to move to Malaysia. He has also had regard to the fact that education was available in English in Malaysia. [N] had no medical condition or any infirmity. He would be moving there with his mother and brother. His mother had lived there as recently as 2013. He also had regard to the appellant's immigration status, which has always been precarious and for periods was unlawful.

42. He found that at the date of hearing the appellant had sole responsibility for the children and that they now live with her. Even when they did not live with her in the past she exercised access rights to them. He found that she is taking and intends to continue taking an active role in their upbringing. He concluded that the requirements of E-LTRPT.2.3 and 2.4 are met - [34].

43. Even though it might have been in the child's best interests to remain in the UK, he concluded that notwithstanding the assessment of the Medway Social Services, the current position was that it would be reasonable in the light of the evidence to expect the children to leave the UK. He has given sustainable reasons for that conclusion.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

Anonymity direction not made.

Signed Date 16 September 2018

Deputy Upper Tribunal Judge Mailer