Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/26771/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 November 2017	**On 4 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

PQ5
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Alam of Counsel by Direct Access
For the Respondent: Mr N Bramble of the Specialist Appeals Team

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.

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 17 September 1981. She has two children both born in the United Kingdom, aged 7 and 5. They are citizens of Nigeria. The Appellant married to their father in Nigeria shortly before coming to the United Kingdom as a student in 2008 but they separated in 2010. They both came from the same area in Lagos. The Appellant ascribes their separation to her husband's violence or anger management problems. The Appellant claimed she feared her female children would be subjected to female genital mutilation if returned to Nigeria and also if she resisted this she would be killed by her husband's family.

2. The Appellant's elder child has experienced difficulties with speech development. By the time of the hearing in the First Tribunal these problems had been satisfactorily resolved.

3. On 24 December 2008 the Appellant arrived with leave to enter for twelve months as a student. She next applied twice in 2012 together with her two children for Residence Cards under the Immigration (EEA) Regulations 2006. In August 2012 both these applications were separately refused. On 14 August 2013 the Appellant sought further leave on the same basis as the application leading to the present decision under appeal. On 11 June 2014 the application was refused. The Appellant brought proceedings for judicial review which were compromised on the basis the Respondent would make a fresh decision on the Appellant's application of 14 August 2013. The fresh decision was a further refusal made on 9 July 2015 which is the decision under appeal.

The Secretary of State's Decision

4. The Appellant was refused as a parent under the five year route to settlement because she had on occasion been present in the United Kingdom for more than 28 days without leave. Further, her children did not meet the relevant conditions in Section EX of Appendix FM to the Immigration Rules. For a similar reason she was refused leave as a parent under the ten year route. The Respondent noted that neither of the Appellant's children had at the date of the application for further leave lived in the United Kingdom for at least seven years.

5. The Appellant was refused leave by way of reference to paragraph 276ADE(1) of the Immigration Rules. She did not meet any of the time critical requirements and there were no very significant obstacles to her integration on return to Nigeria.

6. Both children were refused in line and on the basis that although they had lived all of their lives in the United Kingdom, at the date of the application neither of them had been here for at least seven years and it was reasonable to expect them to return to Nigeria of which they were citizens. There were no exceptional circumstances and

on return they would be able to enter the Nigerian education system and continue to enjoy family life with each other and with their mother.

The Original Grounds of Appeal and the First-tier Tribunal hearing

7. On 24 July 2015 the Appellant lodged Notice of Appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The appeal was lodged under her own name. The grounds refer to the length of time the Appellant and her children had lived in the United Kingdom, the fear that the children would be abducted by their father. Following a hearing at which the Appellant was represented at the hearing by Counsel, Judge of the First-tier Tribunal A Khawar promulgated on 13 January 2017 his decision dismissing the appeal on all grounds, having made an adverse credibility finding against the Appellant.

8. On 27 July 2017 Judge of the First-tier Tribunal Doyle refused the Appellant permission to appeal. She renewed her application for permission to the Upper Tribunal and on 20 September 2017 Upper Tribunal Judge Plimmer granted permission on the basis it was arguable the First-tier Tribunal had failed to attach significant weight to the length of the children's length of the elder child's residence pursuant to the guidance in *R (MA (Pakistan) and Others) v SSHD [2016] EWCA Civ. 705*.

The Hearing in the Upper Tribunal

9. The Appellant attended but took no active part in the proceedings.

10. For the Appellant Mr Alam submitted that at the date of the hearing in the First-tier Tribunal the Appellant's eldest child had been continuously present in the United Kingdom for at least seven years. Both children were in full-time education. It was accepted that the elder child no longer had any speech problems.

11. The Judge had not adequately considered the presence for at least seven years of the elder child and the reasonableness of the decision to refuse the Appellant further leave which would result in her children also having to leave. He referred to paragraph 46 of the judgment in *R (MA (Pakistan))*. He had also not considered the children's ties to the United Kingdom. He accepted that the only evidence of such ties was in the Appellant's statement of 18 July 2016. The Judge had not conducted a balancing exercise and had not given weight to the length of time the eldest child had been in the United Kingdom. Where a child had been present for at least seven years strong reasons were required for removal. The Judge had materially erred in law and his decision should be set aside.

12. For the Respondent, Mr Bramble relied on the Respondent's response under Procedure Rule 24 although references to paragraph 276ADE of the Immigration Rules should be replaced by references to Section EX1 of Appendix FM.

13. The response correctly noted that at the date of the application the requirements of Section EX1 had not been met and in particular the eldest child had not been present in the United Kingdom for at least seven years at the date of the application. The

Judge's findings whether the requirements of paragraph 276ADE(1) were met covered the same ground as the issues referred to in s.117B(vi) of the 2002 Act. The Judge had considered the best interests of the children and had correctly taken into account the wider public interest in the maintenance of proper immigration control.

14. Mr Bramble reiterated that the Appellant's eldest child did not meet the requirements of the Immigration Rules. The Judge had been given very limited information about the children and had principally to base his decision on the assertions contained in the Appellant's 2016 statement. He had sufficiently dealt with the circumstances of the children at paragraphs 33-36, 40 and 41 of his decision and at paragraph 49 had noted the Appellant had been unlawfully in the United Kingdom since 2009. Although the Judge had not referred expressly to s.117B(6) of the 2002 Act, these paragraphs in his decision adequately dealt with the children's interests and the factors required to be considered by Section 117B(6).

15. In response, Mr Alam submitted the Judge should have considered the appeal by way of reference to s.117B(6) and he had not. His approach to the assessment of the reasonableness of the decision was wrong and his assessment of the evidence flawed because he had not made any mention of the length of time the eldest child had been in the United Kingdom and the reasonableness of the removal of the children. He repeated that the decision should be set aside. Mr Bramble pointed out that at para 31 of his decision the Judge had accepted the eldest child had at the date of the First-tier Tribunal hearing been in the United Kingdom seven years. Mr Alam added that the Judge had not considered the ties to the United Kingdom which the children had developed. I reserved my decision.

Consideration

16. The Judge had made findings of fact about the Appellant and her children which have not been challenged. He correctly applied the provisions of Section EX1, noting that at the date of the application neither child had lived in the United Kingdom continuously for at least seven years as required by Section EX.1(cc). He then expressly directed himself that nevertheless he still had to consider the position at the date of the hearing, noting by which time the eldest child had lived continuously in the United Kingdom for at least seven years.

17. In this appeal the crucial factor identified by s.117B(6) of the 2002 Act is in sub-section (b), whether it would not be reasonable to expect the children to leave the United Kingdom. While the Judge did not expressly refer to s.117B or Part VA of the 2002 Act, he assessed the best interests of the children and referred extensively to the criteria identified in *EV (Philippines) v SSHD [2014] EWCA Civ. 874*.

18. I refer to paras 5 and 22 of the judgment in *R (MA (Pakistan))* in which Elias LJ stated that the application of the reasonableness test is the same as for s.117B(6) and paragraph 276ADE(1). The Judge assessed the reasonableness of return in the course of his consideration of the relevant factors identified in *EV (Philippines)* and generally at paras 32 following of his decision.

19. The Appellant has not made out that there was a material error of law on the part of the Judge which was the sole ground upon which Permission to Appeal was granted. The consequence is that the decision of the First-tier Tribunal shall stand and the appeal of the Appellant is dismissed.

ANONYMITY

20. The First-tier Tribunal made an anonymity order although the appeal was dismissed. There were no representations made in the Upper Tribunal on anonymity and in the circumstances I continue the anonymity direction. .

NOTICE OF DECISION

The decision of the First-tier Tribunal did not contain an error of law and therefore it shall stand.

Signed/Official Crest Date: 03.01. 2018

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal