Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01008/2018

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 14 May 2019	**On 5 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MARTINA [O]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Forbes (McKenzie friend)
For the Respondent: Ms H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria born on 5 November 1970. She arrived in the UK on 15 April 2009 as a visitor with six months' leave to enter. She was accompanied by her husband but states that the relationship subsequently broke down after she discovered she was pregnant. Her husband denied that the child was his and returned to Nigeria. The Appellant chose to remain in the UK. She gave birth to a daughter on 5 October 2009 and has been an overstayer since 18 September 2009. On 6 January 2017 the Appellant applied for leave to remain on the basis of her human rights. This application was refused in a decision dated 17 August 2017 with reference to Appendix FM and

paragraph 276ADE of the Rules. The Appellant appealed against that decision and her appeal came before Judge of the First-tier Tribunal E M M Smith for hearing on 24 May 2018 in Birmingham.

2. In a Decision dated and promulgated on 5 June 2018, the judge dismissed the appeal finding that it would be reasonable to expect the Appellant's daughter to leave the UK with the Appellant. Notably the Appellant was unrepresented at her appeal, although she was assisted by a McKenzie friend, Mr Forbes.

3. Permission to appeal was sought in time on the basis that:-

   (1) the judge had erred in failing to identify the child's best interests as a primary consideration as opposed to a factor;

   (2) in his understanding of the appropriate weight to be given to the seven year rule;

   (3) in supporting his findings with authorities which were only tangential to the case rather than those that focus on the child's best interests (see MT and ET [2018] UKUT 88 and MA (Pakistan) [2016] EWCA Civ 705); and

   (4) in failing to give any weight to his findings of fact which were in favour of the Appellant.

   This latter ground was made with regard to the assessment of whether or not there will be very significant obstacles to the Appellant's integration in Nigeria.

4. Permission to appeal was granted by First-tier Tribunal Judge Mailer in a decision dated 16 July 2018 on the following basis:-

> "*3. The grounds contend that the Judge failed to identify the child's best interests as a primary consideration, as opposed to a factor. It is contended that the actual requirement is that they be 'given priority'.*
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> *4. It is also contended that relevant authorities relevant to the seven year rule, were not referred to and considered, including MA (Pakistan) at 48 to as reaffirmed in MT and ET [2018] UKUT 88. The focus was on the adverse history of the Appellant.*
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> *5. It is arguable that the Judge did not consider the relevant authorities. MT and ET was referred to and produced in the Appellant's bundle at pages 48 to 53. Whilst I do not consider it correct that the child's best interests must be given priority I grant permission on the remaining grounds as well.*"

Hearing

5. At the hearing before the Upper Tribunal, Mr Forbes again appeared as a McKenzie friend for the Appellant. He sought to rely on the judgment of KO (Nigeria) [2018] UKSC 53, submitting that a decision requires a

discrete finding on the best interests of the child and the judge had failed to focus specifically on that area but rather has concentrated on the failure of the parent to establish facts credibly enough in respect of the lack of connection with her three children who remained with a friend in Nigeria. He submitted that the judge found that the child was culturally integrated into Nigeria through the church here but gave no consideration at all of the possible consequences for the child to have been rejected by the father if returned to Nigeria given there had been no contact for eight years.

6. In her submissions, Ms Aboni stated that the Respondent had not served a Rule 24 response but the appeal was opposed. She submitted that whilst the judge accepted that the child had been living in the UK for over seven years and was therefore a qualifying child, the judge had given adequate reasons for finding that it would be reasonable for the child to leave the UK. The judge had adequately considered the child's circumstances and found she was familiar with Nigerian culture through her church in the UK, that she had no ill-health and had grown up with her mother in Nigerian culture. The judge also considered the fact the Appellant's childhood had some education, but it was open to him to find that the child would be able to adapt to life in Nigeria supported by her mother. The judge did not find the main Appellant to be credible in respect of her claims as to a lack of connections with Nigeria and a lack of contact with her other children who remain there.

7. Ms Aboni submitted that in the real world context the mother had no basis for staying in the UK. She was dependent on public funds, and in those circumstances it was open to the judge to find it was reasonable for the child to leave the UK with her mother. She submitted that the judge had considered the public interest and found it would not be unreasonable for this child to leave the UK and that there were no material errors in the judge's Decision and Reasons.

8. In response to a question from the Upper Tribunal Ms Aboni stated that the Presenting Officer, Mrs Venables, had sought to rely on the decisions in EV (Philippines) [2014] EWCA Civ 874 and Azimi-Moayed [2013] UKUT 00197 (IAC).

9. In reply, Mr Forbes sought to rely on the fourth ground of appeal in respect of very significant obstacles to integration. He denied that the Appellant had chosen not to return to Nigeria with her husband as was indicated by [8] of the judge's decision, but rather the husband had abandoned her and the judge had accepted that the Appellant was not being untruthful despite discrepancies in terms of dates as to what had taken place when she came to the UK as a visitor.

10. I reserved my decision, which I now give with my reasons.

Findings and reasons

11. I find material errors of law in the decision of First-tier Tribunal Judge E M M Smith. Despite the fact that the key issue in the appeal was the

reasonableness of expecting the Appellant's child to leave the United Kingdom, the judge did not refer to any of the jurisprudence material to this issue, but rather at [28] referred to the judgment of the Supreme Court in Agyarko [2017] UKSC 11 and TZ and PG [2018] EWCA Civ 1109. However, these do not go to that particular issue. The Appellant was unrepresented, albeit assisted by a McKenzie friend, but as Ms Aboni acknowledged the Presenting Officer, Mrs Venables, did refer to EV (Philippines) and Azimi-Moayed. No reference or consideration has been given to the judgments in MA (Pakistan) [2016] EWCA Civ 705 or MT and ET [2018] UKUT 00088 (IAC) and I find that it was incumbent upon the judge to consider the jurisprudence which was up-to-date at that time in determining the key issue in the appeal and that that underlined the safety of his decision.

12. In relation to the best interest considerations, whilst at [22] the judge did direct himself that section 55 of the BCIA 2009 must be factored in, however I accept and find that there is no reference to the best interests of the Appellant's child in respect of the assessment of whether it would be reasonable to expect her to leave the UK.

13. In relation to the fourth ground of appeal, at [27] the judge held as follows:-

> "*For the purposes of paragraph 276ADE(vi) I cannot conclude that there are very significant obstacles to the Appellant and her child living in Nigeria. Any private life acquired by this Appellant has been acquired whilst she resided in the UK unlawfully and to that extent the public interest set out in section 117B of the Nationality, Immigration and Asylum Act 2002 applies.*"

14. I find that the judge has failed adequately to engage with or provide reasons for reaching this conclusion, in particular whilst referring to section 117B reference should have also been made to section 117B(6) which the judge has failed to do.

15. For these reasons I set the decision of Judge Smith aside.

16. I sought submissions from the parties at the hearing as to their views as to how the appeal should be re-determined were I to find an error and there were no objections to me re-determining the appeal myself. This I proceed to do.

17. The material facts are not in dispute. The Appellant has resided as an overstayer in the United Kingdom since 18 September 2009. She gave birth to a daughter in the United Kingdom on 5 October 2009. It was not disputed that she is a qualifying child, who is 9 years of age, but has never had leave to remain in the United Kingdom.

18. There is no dispute that the Appellant and her daughter, E, speak English: section 117B(2) of the NIAA 2002. E attends a Catholic primary school where she appears to be thriving. They are not financially independent but are supported pursuant to section 17 of the Children Act 1989: section 117(3) of the NIAA 2002 and their stay in the United Kingdom has been

unlawful since before the birth of E: section 117B(4) of the NIAA 2002. The issue is whether it is reasonable to expect E to leave the United Kingdom: section 117B(6) of the NIAA 2002.

19. This is an issue which has been given recent consideration by the President of the Upper Tribunal in JG (s 117B(6) : "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) where it was held at [40]-[41]:

> "*40. Such an assessment would, however, have to take account of the immigration history of the person subject to removal; so there could well be a very real difference between the outcome of that exercise, and one conducted under section 117B(6). But, the real point is that this submission does not begin to affect the plain meaning of subsection (6). If, as we have found, Parliament has decreed a particular outcome by enacting section 117B(6), then that is the end of the matter.*
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> *41. We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B(6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of MA (Pakistan).*"

20. On the facts of the case, despite the fact that the children's mother was a long term overstayer and had fraudulently subsequently obtained a Schengen visa in order to unlawfully re-enter the United Kingdom [15]-[17] and was "dishonest and unscrupulous" [80] the Upper Tribunal found that it was not reasonable to expect he children to leave the United Kingdom.

21. Subsequently, in AB (Jamaica) [2019] EWCA Civ 661, the Court of Appeal per Lord Justice Singh held *inter alia* as follows at [71]-[75]:

> "*... The fundamental point, as it seems to me, is that Parliament meant what it said when it enacted section 117B(6) and it is the duty of courts and tribunals to give effect to that provision on its correct statutory interpretation. Furthermore, it should be noted that it was common ground between the parties before this Court that Article 8 must always be complied with. There is no intention evinced in the amendments to the 2002 Act to breach the obligations of the UK under the ECHR. Furthermore, one always has to bear in mind that the strong obligation of interpretation in section 3 of the HRA applies to all legislation, including Part 5A of the 2002 Act. Section 3 requires all legislation to be read and given effect, so far as possible, in a way which is compatible with the Convention rights, including Article 8.*

> *72. I respectfully agree with the interpretation given by the UT to section 117B(6)(b) in JG …*
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> *74. Finally, in that regard, I agree with and would endorse the following passage in the judgment of UTJ Plimmer in SR (Subsisting Parental Relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC), a case which was decided before decision of the Supreme Court in KO (Nigeria), at para. 51:*
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> > *"… It is difficult to see how section 117B(6)(b) can be said to be of no application or to pose a merely hypothetical question. Section 117B(6) dictates whether or not the public interest requires removal where a person not liable to deportation has a genuine and subsisting parental relation with a qualifying child. The question that must be answered is whether it would not be reasonable to expect the child to leave the UK. That question as contained in statute, cannot be ignored or glossed over. Self-evidently, section 117B(6) is engaged whether the child will or will not in fact or practice leave the UK. It addresses the normative and straightforward question – should the child be 'expected to leave' the UK?"*
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> *75. I respectfully agree. It is clear, in my view, that the question which the statute requires to be addressed is a single question: is it reasonable to expect the child to leave the UK? It does not consist of two questions, as suggested by the Secretary of State. If the answer to the single question is obvious, because it is common ground that the child will not be expected to leave the UK, that does not mean that the question does not have to be asked; it merely means that the answer to the question is: No."*

22. On the facts of the cases, the Court of Appeal dismissed the Secretary of State's appeal in respect of AB, who had direct contact with his son three times a week, and dismissed the appeal in respect of AO, who has only indirect contact with his son.

23. There is no doubt that requiring the Appellant to leave the United Kingdom would also mean that her daughter would be required to leave, her father having abandoned her mother whilst she was pregnant in the United Kingdom in 2009. There has been no contact between father and child and there was no evidence of any relatives or alternative carers for E in the United Kingdom. E is now more than 9 and a half years of age and will be eligible to apply for British nationality in 4 months time. When the facts are considered through the prism of the recent jurisprudence set out above, I find that it would not be reasonable to expect E to leave the United Kingdom.

24. I find, following Razgar [2004] UKHL 27 that the Appellant and her daughter have established a private and family life in the United Kingdom since 2009 and that their removal to Nigeria would represent an interference with their private life, but not their family life as they would

be removed together as a family unit. It is clear from the evidence in the Appellant's bundle that E is integrated into her school and local Catholic Church, as is her mother. I have taken into consideration a handwritten letter from E dated 22 May 2018, in which she states that she had many friends and her teacher helps her with her maths and that she does not want to leave her friends and doesn't want to be separated from her mum or her friends. Whilst the decision to remove them would be in accordance with the law, it would amount to a disproportionate interference with their right to private life in the United Kingdom in light of my findings above.

Notice of Decision

The decision of First tier Tribunal Judge Smith contained material errors of law. I set that decision aside and re-make the appeal, which is allowed on human rights grounds.

No anonymity direction is made.

Signed Rebecca Chapman Date 3 June 2019

Deputy Upper Tribunal Judge Chapman

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable (adjusted where full award not justified) for the following reason.

Signed Rebecca Chapman Date 3 June 2019

Deputy Upper Tribunal Judge Chapman