



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/30819/2015

THE IMMIGRATION ACTS

Heard at Field House

On 9 June 2017

**Decision & Reasons
Promulgated
On 23 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[F S]

~~{ANONYMITY DIRECTION NOT MADE}~~

Respondent

Representation:

For the Appellant: Mr P Nath, Senior Home Office Presenting Officer

For the Respondent: Mr R Solomon, of Counsel, instructed by Jein Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals against the decision of First-tier Tribunal Judge Ghaffar promulgated on 10 November 2016, in which the appeal against her decision of 17 August 2015, to refuse [FS] leave to remain on the basis of private life was allowed under the Immigration Rules pursuant to paragraph 276ADE(1)(iv). For ease, I continue to refer to the parties as they were before the First-tier Tribunal,

with [FS] as the Appellant and the Secretary of State for the Home Department as the Respondent.

2. The Appellant is a citizen of Nigeria born in the United Kingdom on [] 2008. At the date of hearing before the First-tier Tribunal she was 8 years old.
3. The Respondent refused the application on the basis that the Appellant could not meet the requirements of the Immigration Rules set out in Appendix FM and paragraph 276ADE. Specifically, her parents were Nigerian nationals, present unlawfully in the United Kingdom, such that the child route was not available to her.
4. In relation to the requirements of paragraph 276ADE(1)(iv), while it was accepted the Appellant had lived in the United Kingdom continuously for at least seven years, it was stated that it would not be unreasonable to expect her to return to her country of origin with her parents.
5. The Respondent considered whether there were any exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules and, in doing so, took into account her duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to consider the best interests of the Appellant as a child. It was considered that the family would return to Nigeria together and the Appellant would be able to continue her education there, and that, she remained familiar with the culture. There was nothing to suggest that her parents would be unable to maintain and provide for their daughter on return.
6. Judge Ghaffar allowed the appeal in a decision promulgated on 10 November 2016. Before him, were witness statements from the Appellant, her mother (who also gave oral evidence) and her uncle. The evidence before the Judge was that the Appellant's father left the family as of June 2015 and his whereabouts were unknown. The Appellant was living with her mother and uncle. She was born in the United Kingdom and had no ties to Nigeria. She was scared and saddened by the prospect of having to leave the United Kingdom. The Appellant's mother had no job, family, employment or monies to secure accommodation in Nigeria. The Appellant's mother entered the United Kingdom in February 2006 to visit her brother-in-law. Her husband was already in the United Kingdom. He had entered on a visit visa and overstayed. The Appellant's mother discovered that she was pregnant and decided that it was too dangerous for her to travel to Nigeria in her condition. Following the birth, the Appellant developed breathing problems and has been on medication since.
7. In respect of the Immigration Rules, it was found that the Appellant satisfied the requirements set out in paragraph 276ADE(1)(iv) as she had, at the date of application, been continuously resident in the United Kingdom for seven years and it would be unreasonable to expect her to leave and return to Nigeria. This is because she had resided in the United

Kingdom since birth and had spent all her school life being educated here. She was excelling academically. Her only connection to Nigeria was through her nationality. The Appellant had no relatives in Nigeria. Her parents were in the United Kingdom. Her mother had an outstanding application that was submitted ten months after the Appellant lodged her application. The delay had not been explained. The Appellant's father had not participated in her life since 2015. The Appellant was not to be blamed for the poor immigration history of her parents.

8. Against that backdrop, Judge Ghaffar found that it would be unreasonable to expect the Appellant to return to Nigeria. Judge Ghaffar accordingly allowed the appeal under the Immigration Rules and stated that it was not therefore necessary to consider the appeal on human rights grounds contrary to Article 8 of the European Convention on Human Rights.

The appeal

9. The Respondent's grounds of appeal are brief and state as follows:

"Judge Ghaffar has failed to properly assess the "best interests" of the appellant and has failed to give adequate reasons for finding that it would be unreasonable for the A to return to Nigeria with her mother."

10. Permission to appeal was granted by First-tier Tribunal Judge Osbourne on 24 April 2017.
11. At the hearing, Mr Nath relied on the written grounds of appeal and submitted briefly, that the Judge had not considered the best interests of the child and that paragraph [17] and [18] of the decision was inadequately reasoned.
12. In response, Mr Solomon for the Appellant submitted that there was no material error of law in the decision and that adequate reasons had been provided. He submitted that the Immigration Rules were Article 8 compliant and that it was implicit the Judge considered the child's best interests. Mr Solomon referred to various passages in **MA (Pakistan) [2016] EWCA Civ 705** and **PD and Others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC)** and submitted that the Judge adopted the correct approach. Mr Solomon further submitted that if there was an error it was not material.
13. In reply, Mr Nath submitted the Judge was required to consider the Appellant's private life. He reiterated the Judge had not spelt out what was in the Appellant's best interests.

Discussion

14. The applicable Immigration Rule in contention in this appeal is the requirements of paragraph 276ADE (1), which so far as is relevant, provides as follows:

“the requirements to be met by an applicant to leave to remain on the grounds of private life in the UK that at the date of application, the applicant;

(i) ...

(ii) ...

(iii) ...

(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; ...”

15. There was no dispute and the Judge accepted that the Appellant was born and had resided in the United Kingdom continuously for more than seven years at the date of application. Thus, the appeal under the Immigration Rules, concerned the sole issue of whether it would not be reasonable to expect the Appellant to leave the United Kingdom.
16. Lord Justice Elias in **MA (Pakistan)** made the following preliminary observations about paragraph 276ADE(1)(iv) of the Immigration Rules (and section 117B (6)) at [13]:

“... First, they are similarly framed: both require seven years’ residence and in both the critical question is whether it is unreasonable for the child to be expected to leave the UK. Second, the concept of seven years’ residence may not be calculated in precisely the same way in the two provisions. Rule 276ADE (1) states in terms of the period must be assessed as at the date of application. However, the Secretary of State conceded that as a result of section 85(4) of the 2002 Act, the relevant date for the purpose of section 117B is the later date when the court is making a determination. We have acted on the assumption that this is correct. Third, only the child can apply under rule 276ADE(1)(iv), whereas section 117B is concerned with article 8 applications under which both the child and the parents can apply. Fourth, rule 276ADE is concerned with applications made on the basis of private life, whereas claims article 8 may rely on both private and family life. Fifth, it is in my judgement a legitimate assumption that the question whether it is reasonable to expect the child to leave should be approached in the same way in each context, and no party has sought contend otherwise.”

17. Lord Justice Elias went on to hold that the concept of reasonableness required regard to be had to the conduct of the applicant and any other matters relevant to the public interest, but that where the seven-year rule was satisfied, it was a factor of some weighing in favour of leave to remain to be granted and at [46] stated thus:

“Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years’

residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment."

18. In **PD**, a Presidential panel of the tribunal stated thus:

"39. We remind ourselves that the test to be applied is that of reasonableness. Other legal tests which have gained much currency in this sphere during recent years - insurmountable obstacles, exceptional circumstances, very compelling factors - have no application in the exercise we are performing. Self-evidently, the test of reasonableness poses a less exacting and demanding threshold than that posed by the other tests mentioned.

40. Judicial decision making in the sphere of immigration and asylum law is rarely straightforward. The present appeals are no exception in this respect. We consider that the application of the reasonableness test involves a balance of all material facts and considerations. The application of this test will invariably be intensely fact sensitive, see EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41, at [7] - [12], per Lord Bingham. Ultimately, the factors to which we give determinative weight are the length of the third Appellant's residence in the United Kingdom (some 11 years), which has spanned three quarters of his life; his deep immersion in all aspects of life in this country; the critical stage of his personal and educational development which has been reached; his minimal connections with his country of origin; and the likelihood that he will make a useful contribution to United Kingdom society."

19. In the present case, Judge Ghaffar found that the Appellant was fully integrated into life in the United Kingdom. She had spent all her life here and was excelling academically at school. He referred to **MA (Pakistan)** and **PD** and noted the Appellant had "*participated in the United Kingdom culture, values, pastimes, living standards, language and the prevailing education system*". Conversely, the Judge noted the Appellant's connections to Nigeria was "*minimal*"; she had no relatives or support in Nigeria. The Judge further acknowledged that the Appellant's residence in the United Kingdom for more than seven years must be given significant weight. The Judge factored into his assessment the "*poor*" immigration

histories of her parents to which no blame could be attached to her, and the fact that the mother had an outstanding application.

20. I find that in substance, there is no material error of law in the First-tier Tribunal allowing the appeal of the Appellant under the Immigration Rules, for the reasons given by Judge Ghaffar following an assessment of the reasonableness of expecting the Appellant to leave the United Kingdom. That assessment considered and gave appropriate weight to all relevant factors including the circumstances of the Appellant's parents. I reject the submission that inadequate reasons were provided. While the Judge's decision could have been more structured and detailed, his findings and reasoning at [13]-[14] and [17]-[18] are adequate and are fully supported by the evidence set out at [5]-[8]. While the Judge did not expressly refer to the best interests of the child, I am not satisfied that this is an error or, if it is, that it is material. The Respondent's guidance confirms that "*the criteria set out in paragraph 276ADE(1)(iv) reflect the duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK, by which we mean their best interests.*" That supports the submission of Mr Solomon that the best interests' assessment is an intrinsic part of the applicable Immigration Rule and thus it can be inferred that the Judge's findings are supportive of such an assessment. Even if the Judge had given voice to the expression, I am satisfied given his findings in respect of the Appellant's integration and education and her lack of ties to Nigeria supported by the evidence of her mother which he fully accepted, the likely conclusion would have been is that the best interests of the child were to remain in the United Kingdom.
21. Notwithstanding, it does not automatically follow that leave must be granted whenever the child's best interests are in favour of remaining - the best interests assessment does not automatically resolve the reasonableness question (see paragraph 47 of **MA (Pakistan)**). Judge Ghaffar took into account the wider public interest considerations including the parents' immigration histories and the circumstances in Nigeria and the United Kingdom. In my judgement, the limited criticisms to his approach do not identify a material error of law. It may be that another Judge would have reached a contra conclusion, but the question is whether this Judge reached a conclusion which was not open to him. I am not satisfied that he did.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error of law. The Respondent's appeal is dismissed. The decision of the First-tier Tribunal shall stand.

Signed

Date

15 August 2017

Deputy Upper Tribunal Judge Bagral