Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/06626/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th December 2017	**On 2nd January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS C.A.O.
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Ahmad, Senior Home Office Presenting Officer
For the Respondent: Ms A Muzira, Solicitor

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made by the First-tier Tribunal. As a protection claim and one which refers to minor children, it is appropriate to continue that direction.

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of a First-tier Tribunal (Judge Rayner) which in a decision promulgated on 7th July 2017, allowed Ms C.A.O.'s appeal against the Secretary of State's refusal to grant her leave to remain in the United Kingdom. The Appellant's appeal was allowed on human

rights grounds only. The appeal against the refusal of her protection claim was dismissed.

2. For the sake of clarity, I shall throughout this decision refer to the Secretary of State as "the Respondent" and to Ms C.A.O. as "the Appellant", reflecting their respective positions before the First-tier Tribunal.

Background

3. Judge Rayner noted in his decision that the Appellant has a complicated immigration and litigation history. He set out the Appellant's background fully and it is reproduced here for the purposes of this decision:

> "2. The appellant has a complicated immigration and litigation history:
>
> (i) She has a daughter, C, born in Kenya on 4 March 2000.
>
> (ii) The appellant entered the United Kingdom on 20 January 2002, on an entry clearance visa as a student valid from 11 October 2001 to 30 October 2003. No application was made in respect of C.
>
> (iii) In 2003, the appellant married in the United Kingdom. She applied for leave to remain as a spouse, on 23 October 2003. That application was refused on 1 December 2003.
>
> (iv) The appellant applied for leave as the dependant spouse of a work permit holder on 29 December 2003, and was granted leave in that category until 20 February 2008.
>
> (v) The appellant's relationship with her husband broke down in 2004.
>
> (vi) The appellant applied for leave for C to enter the United Kingdom on 25 October 2004. She attended the British High Commission in Nairobi to make that application, which was refused on 1 November 2004. An appeal against that decision was refused: information about this application recorded from the appellant's Professional Conduct Panel hearing, page 181 of the appellant bundle.
>
> (vii) In 2005 the Appellant met and subsequently went through a customary ceremony of marriage with Mr EO.
>
> (viii) On 30 August 2005, C entered the United Kingdom with an entry visa issued in Nairobi, valid from 9 August 2005 to 9 February 2006. That visa had been unlawfully obtained, under a false identity.
>
> (ix) The appellant returned to Kenya in 2007, leaving C in the care of friends in the United Kingdom. She applied for an entry clearance

visa from Kenya as a work permit holder. She was a teacher. That visa was granted from 24 August 2007 to 24 August 2008. The appellant did not mention C's continued presence in the United Kingdom on that application.

(x) On 25 June 2008 the appellant applied for leave remain (sic) as a work permit holder. Her leave was extended until 24 August 2011. The appellant did not mention C's presence in the United Kingdom on that application.

(xi) In total the appellant left and returned to the United Kingdom on five occasions in 2008 and 2009, having visited Kenya or America on each occasion: Q 2.10 Screening Interview.

(xii) On 11 January 2010 the appellant and Mr EO had a daughter born in the United Kingdom, V.

(xiii) The appellant made an application for leave to remain under Tier 2 on 19 August 2010, but withdrew that application on 10 October 2012.

(xiv) On 22 June 2011 the appellant was arrested for passport and immigration offences in relation to the entry of her daughter [C] in the United Kingdom on 30 August 2005.

(xv) On 22 July 2011 the appellant applied for leave to remain outside of the Immigration Rules and this was refused on 16 August 2011.

(xvi) On 24 August 2011 the appellant made an Article 8 human rights application. That application named Mr EO, C and V as her dependants.

(xvii) On 14 December 2011 the appellant was sentenced for offences of possession/control of an identity document with intent and assisting unlawful immigration into an EU member state. She received an eight month prison sentence suspended for two years and was ordered to undertake 120 hours of community work.

(xviii) On 10 April 2012, the respondent refused the appellant's application made on 24 August 2011. She appealed against that decision, and on 20 June 2012 the appeal was allowed to the limited extent that the Tribunal required the respondent to reconsider her decision.

(xix) On 15 January 2013 the respondent reconsidered and confirmed her decision. The appellant appealed against that decision on 30 January 2013.

(xx) On 22 March 2013 the Professional Conduct Panel found that the appellant's conviction were (sic) "relevant", but did not recommend a prohibition order: pages 181 ff appellant bundle.

(xxi) On 5 June 2013, the appellant claimed asylum in the United Kingdom. She was interviewed in respect of that claim on 18 February 2014.

(xxii) On 17 December 2013 the appellant was convicted of failing to provide a specimen of breath for analysis, and was fined and disqualified from driving for 16 months.

(xxiii) The appeal against the respondent's decision of 15 January 2013 was allowed on 30 October 2014, again to the limited extent that that (sic) respondent was required to consider her decision: page 122 ff appellant bundle.

(xxiv) On 18 May 2016 the respondent refused the asylum claim. That refusal letter dealt with the appellant's situation under Article 8 of the ECHR. On 22 June 2016 the appellant appealed against that refusal.

(xxv) On 9 June 2016 the respondent reconsidered and refused the appellant's appeal in respect of her human rights claim. On 22 June 2016 the appellant appealed against the refusal – HU/17249/2016. **Note** - the Tribunal file in respect of this appeal was not before the Tribunal. The only copy of the decision was at pages 51 ff of the appellant bundle. The Tribunal history report of the file showed that the appeal had been administratively closed on 19 August 2016 due to non-payment of the fee. However, in a determination by Tribunal Caseworker Early on 24 October 2016, the fee requirement was waived, and an extension of time granted for lodging the appeal: page 11 appellant bundle. There was therefore a valid appeal before the Tribunal.

(xxvi) The appeals came before the Tribunal on 15 December 2016. First-tier Tribunal Judge Wellesley-Cole adjourned the appeal at the respondent's request to enable her to reconsider the matter in light of the additional documents provided in the appellant bundle: the only records of this hearing are on the right hand side of the Tribunal bundle.

(xxvii) The appeals again came before the Tribunal on 9 June 2017. The respondent had not reconsidered the matter in the meantime, but there was no application for a further adjournment, and the parties accepted that whatever the technicalities, all relevant matters were before the Tribunal."

4. Following the background information, the judge went on to consider the Appellant's appeal against the Respondent's refusal of asylum. In setting out his decision on that part of the Appellant's claim, the judge analysed the claim itself. He summarised the claim and noted that in essence the Appellant said she feared her half-brother, whom it was said was instrumental in helping bring C unlawfully into the UK. It was said that the Claimant's half-brother had threatened to kill her on account of her mentioning his name in the criminal proceedings following her arrest for immigration offences.

5. Suffice to say for the purposes of this decision, the judge comprehensively disbelieved the asylum claim and found no part of what the Appellant said to be creditworthy. Setting out his properly constructed reasons over several lengthy paragraphs, the judge concluded at [43] the following:

> "The appellant is not a credible witness. She has used many methods to secure leave to remain in the United Kingdom, and has been selective about the information she discloses on many such applications. I remind myself that even if the appellant is not credible and elements of her account are not proved to the required standard, the essence of her account may be truthful and form the basis of a valid asylum claim. However, I do not find that is the case in this instance. The protection claim is another method by which the appellant has attempted to secure leave to remain, at a time that her status in the United Kingdom had been precarious. She has not established to any degree of likelihood that she faces a threat from her half-brother in Kenya."

6. The judge then went on to dismiss the Appellant's protection claim. I pause here to note that the appeal before me against the FtT's decision has been brought by the Respondent. There has been no challenge raised by the Appellant's representative either by way of cross-appeal or by way of challenging any of the findings that the judge made with reference to the Appellant's protection claim. Therefore I record that the judge's finding that the Appellant is not in need of international protection stands, as does his finding that the Appellant is not a credible witness who has used many methods to secure leave to remain in the United Kingdom.

7. This brings me to the issue now before me. The FtTJ, having made his findings that the Appellant's protection claim was not made out, turned his mind to the Appellant's Article 8 ECHR claim. He noted the following within [44]:

> "Ms Muzira however relies heavily in her representations and skeleton argument on the situation of the appellant's children in the appeal. She is right to do so. The appellant's offending and immigration history is poor. For the reasons I give below, there is no prospect that considered separately from her children that her appeal, could succeed on any ground."

8. The judge then made findings within [50] considering the Appellant's private life and said the following:

> "I discount any suggestion that she would be at risk on return. Her mother still lives in Kenya. According to paragraph 31 of her witness statement, she has a

number of brothers, sisters and other family in Kenya, many of whom still live with her mother. Until 2009 she regularly visited Kenya. She is well educated with a professional qualification. It may be a very different life for her in Kenya, and not one to which she wishes to return. However, she would have every prospect of maintaining herself in Kenya, with support from her family, while she re-establishes herself. Indeed, she acknowledged that to be the case when she answered Ms Hitschman's questions. The appellant cannot satisfy the private life provisions of the Immigration Rules."

There is no challenge to those findings and accordingly I see no reason to interfere with them. They stand.

9. The FtTJ then looked at what now amounts to the central issue before me. He directed himself at [52] that this is an appeal which involves children and that it is well-established that any consideration of their status must consider their best interests as a primary factor. He found at [53] that for both children their best interests are to remain with their mother, whether that be in the United Kingdom or Kenya.

10. The FtT then made several findings saying:

"54. In relation to C, I find the following:

(i) She was born on 4 March 2000 in Kenya. She came to the United Kingdom on 30 August 2005, and has lived here since then. There have been periods of time when the appellant has left C in the United Kingdom and returned to Kenya or visited America, including in 2007, when she returned to Kenya to make application for leave to enter.

(ii) There are no issues raised about C's contact with her stepfather Mr EO.

(iii) C is a highly gifted pupil at her school. There are numerous positive testimonials from her school: pages 128-168 appellant bundle. She passed nine GCSEs at grade A and one at Grade C in 2016: appellant's supplemental evidence bundle. She has what her school believe to be realistic aspirations to attend Cambridge University. The testimonials all attest to her integration into the school and her local community.

55. In relation to V, I note the following:

(i) She was born in the United Kingdom on 11 January 2010. She has lived her whole life in the United Kingdom.

(ii) The appellant has provided no information about the relationship between V and her father. In principle, it would be in V's best interest to have at least contact with him, but given the appellant's

reluctance to elaborate on her own relationship with Mr EO, I can place little reliance on that.

(iii) The appellant has provided information from when V was in a nursery placement: undated letter from Health Visitor page 169 appellant bundle. Similarly, a letter from the nursery is undated (pages 170-171 appellant bundle) but it refers to the family, including V's father, being a "*close nit* (sic) *family*". I have nothing subsequently about V's schooling or private life in the United Kingdom. I assume that she is in similar circumstances to any other child who has lived for her whole life of seven years in the United Kingdom.

(iv) V suffers from sickle cell anaemia. Dr Gattens provides a comprehensive report, dated 7 December 2016, on her condition and treatment at pages 126-127 of the appellant bundle. Dr Gattens gives a general account of sickle cell anaemia, and goes on to describe V's recent emergency treatment:

'V ... has previously required admission to her local hospital for pain relief and intravenous fluids during a crisis. She has recently (03.12.16) required admission to the paedeatric (sic) intensive care at Addenbrokes (sic) with a chest crisis. During this admission she was ventilated and required intravenous fluids, opoid (sic) pain relief and exchange transfusion. She currently remains an inpatient. Without access to the paediatric intensive care services this crisis would have proved fatal.

Dr Gattens describes the ongoing treatment that V requires. He is concerned that '*... if V was to be sent back to Kenya that she will not receive the required medical care and she could potentially have many of the complication of her sickle cell disease that have been describe above leading to her experience a high level of mortality and an increased risk of morbidity.*'

Dr Gattens goes on to describe, with appropriate references, the treatment of sickle cell anaemia in Kenya, which he describes as wholly inadequate, quoting, for example, that '*The Kenyan children's sickle cell foundation ask for donations on their website to help cover the cost of basic drugs such as penicillin V and folic acid which are the minimum standard requirements for sickle cell patients, as they are not widely available otherwise.*'

(v) The respondent also deals with the availability of treatment for sickle cell anaemia in Kenya at paragraph 116-117 of the 18 May 2016 refusal letter. The assessment is based on the MedCOI report. The availability of treatment in Kenya for sickle cell anaemia is not at the same level as it is in the United Kingdom. However, the lack of resources in Kenya is not such that V's rights under Article 3 of the ECHR, would be breached. V's best interests would be to continue

> to receive medical treatment in the United Kingdom. However, the disparity of medical treatment does not of itself create an exceptional circumstance."

11. Finally at [60] the judge set out that a freestanding Article 8 consideration must be viewed through the prism of Section 117B of the 2002 Nationality, Asylum and Immigration Act. This then brought him to Section 117B(6) and, after finding that both C and V are qualifying children he turned his attention to whether or not it would be reasonable to expect both C and V to leave the United Kingdom. Having directed himself on the leading case of **MA (Pakistan) v SSHD [2016] EWCA Civ 705** the FtTJ said this at [62]:

> "Given my findings of fact about C and V, I conclude that it is in their best interests to remain in the United Kingdom. I weigh against that the appellant's poor immigration history, the public importance in maintaining immigration control and my finding that the appellant could maintain the family in Kenya. On balance however, I do find, given the length of time they have spent in the United Kingdom and their integration into United Kingdom culture, education and social norms, that it would not be "reasonable" to expect C or V to return to Kenya. By making that finding, it follows the (sic) C satisfies paragraph 276ADE(iv) of the Immigration Rules; that the appellant satisfies the provisions of EX.1 to Appendix M to the Immigration Rules; that both C and V are "qualifying children" for the purposes of section 117B of the 2002 Act, and their removal would not be "reasonable " to expect either of them to leave the United Kingdom. Under section 117B(6) of the Act therefore there is no public interest in the removal of the appellant. It follows, in terms of **Agyarko** that the decision to refuse the appellant's application is not proportionate, so that her appeal succeeds."

He then allowed the Appellant's appeal on human rights grounds.

Onward Appeal

12. The Respondent sought permission to appeal. The grounds seeking permission set out in summary:

- The judge has failed to conduct a proper balancing exercise, because when assessing the question of reasonableness under Section 117B(6), he has focused solely on the position of the Appellant's children.

- In particular the FtTJ erred in failing to consider the cost of educating both of the Appellant's children and failed to consider the cost of providing ongoing medical facilities to both children.

- The public interest in maintaining an effective immigration control had not been afforded sufficient weight as there are no factors relied upon which would amount to significant obstacles and there is no disproportionate breach of Article 8 family life which can continue in Kenya, as can comparable private life.

13. The grounds sought in particular to rely upon **AE (Algeria) v Secretary of State for the Home Department [2014] EWCA Civ 653** and **Zoumbas v SSHD [2013] UKSC 74**.

14. Permission was granted by the FtT (Judge Frankish) in the following terms:

> "2. The application for permission to appeal asserts erroneous balancing exercise primarily based on the two non British children whose best interests (§53) are conceded to be equally well served in the home country; non application of EV (Philippines) including the cost of educational and health services for this appellant and dependants likewise MA Pakistan -v- SSHD (2-16) EWCA Civ 705 at §61.
>
> 3. Without the children, the appellant had no case (§44). There were no significant obstacles under 276ADE to return home (§50). Very much applying all the considerations referred to in the application, with the children having been here for 7 and 12 years respectively, the FtTJ found for the appellant. Arguably, with no reference to the cost of continuing to educate the children and of sickle-cell treatment of the younger child, an error of law has arisen."

Thus the matter comes before me to decide if the decision of the FtT discloses an error of law sufficient to require the decision to be set aside and remade.

Error of Law Submissions

15. Before me Miss Ahmad appeared for the Secretary of State and Ms Muzira for the Appellant. I heard submissions from both representatives.

16. Ms Ahmad's submissions relied upon the grounds seeking permission. She referred to both **EV (Philippines)** and **MA (Pakistan)** and submitted that the FtTJ had failed to conduct a proper balancing exercise in this appeal. She acknowledged that the jurisprudence stated that the best interests of a qualifying child in Section 117B(6) are to be treated as a primary consideration but said that, in the instant appeal, the FtTJ had raised those interests to the paramount consideration. She said that although the FtTJ had said at [62] that he had weighed the Appellant's poor immigration history and the public importance in maintaining immigration control against the best interests of the two children, there was no express reference to the wider public interest considerations of cost to the public purse in providing education and medical care for them. This should be factored into a consideration when assessing the question of reasonableness of return to Kenya. **AE (Algeria) v SSHD[2014] EWCA Civ 623**.

17. Ms Muzira on behalf of the Appellant did not file a Rule 24 response but relied upon oral submissions. She said that the decision should stand. The younger child V had lived all her life in the UK. V suffered from serious medical problems. Additionally C had entered the UK when aged 5 years and was now months away from attaining adulthood. She would be 18 years of age in March 2018. All of C's education had taken place in the UK. She was at a critical point in her education, because she was

almost through her 'A' level course and would be taking her 'A' level exams in the summer.

18. At the close of submissions, both representatives indicated that there was no further evidence to call on behalf of either party. I reserved my decision which I now give with reasons.

Assessment of whether there is an error of law

19. I must first consider whether the FtT erred in law such that the decision must be set aside. In essence there were 3 main points of criticism put forward by Miss Ahmad which when taken cumulatively resulted, it was said, in an improper balancing of the Article 8 proportionality exercise.

20. In substance those criticisms amount to saying that the FtTJ raised the" best interests" of C and V to paramount importance. This was with particular reference to the cost to the public purse of educating and providing health care for them. In support of her argument, Miss Ahmad said the FtTJ had failed to take into account of the approach set out in **AE (Algeria)** where the Court of Appeal said this:

> "What was required was a structured approach with the best interests of [M] and her sibling as a primary consideration but with careful consideration also of factors pointing the other way. Such factors include but are not limited to the overstaying of the children and their mother and the illegal entry and bogus asylum claim of the Appellant father. The latter is no doubt what the UT had in mind when referring to 'the need to maintain immigration control.' Moreover I do not consider that it would be inappropriate for the future cost and duration of [M's] treatment and care in this country to play a part in the balancing exercise as matters relating to the economic wellbeing of this country, given the strains on the public finances."

21. V suffers from sickle cell disease (SCD). She is now 7 years of age, having been born in the UK and having lived all her life here. The Respondent's case is that appropriate medical treatment is available to her in Kenya and furthermore the cost of such treatment that she requires should not be borne by the British taxpayer. There is no good reason put forward why the Appellant, who is educated to degree level, could not gain employment and provide for her daughters. Self-evidently this would lessen the financial burden on the UK.

22. The difficulty is that what the FtTJ had before him was competing evidence concerning V's prospects in relation to her medical condition of sickle cell disease. He noted that the Respondent placed reliance on a MedCOI (country of origin information) report, referred to at paragraph 117 of the Reasons for Refusal letter. This detailed in general terms that the following medical treatment is available for sickle cell anaemia in Kenya:

- Outpatient medical treatment and follow up by a specialist;
- Inpatient/clinical treatment by a specialist;

- Clinical admission in case of sickle cell crises with clinical hyperhydration and pain treatment;
- Safe blood transfusions if necessary;
- Hydroxycarbamide (Hydroxyurea) to prevent/reduce the number of vaso-occlusive crisis (sickle cell crisis).

23. Against that there was the report dated 7th December 2016 from Dr Gattens, Consultant Paediatric Haematologist at Addenbrooke's Hospital. He provided a résumé of the common complications of sickle cell disease and the treatment that is available to reduce the morbidity and mortality associated with the condition. He then gave specific details indicating the seriousness of V's condition. He reported on previous hospital inpatient admissions for sickle cell crises and a recent admission to the paediatric intensive care unit with a chest crisis. He commented that without access to paediatric intensive care, this latest episode would have proved fatal. He provided information about V's current treatment which includes lifelong antibiotic prophylaxis with penicillin; folic acid; an immunisation schedule; an education programme; and annual transcranial Doppler scans up to the age of 16 years.

24. Dr Gattens strongly supported V's application to remain in the UK. He expressed grave concerns about the availability of the required comprehensive level of treatment in Kenya for a child in V's particular circumstances. He stated that, "...we do not believe that she would receive adequate care and medical support in Kenya." He further stated that, "Kenya is a country with limited resources available for medical interventions and research into sickle cell disease. .... the expectation is that 50 – 80% of children born with sickle cell anaemia will die before they reach the age of 5. Children with SCD in Kenya are at high risk of invasive bacterial infections. 25% of those with invasive bacterial infections who present in hospital will die of the infection. .... In addition to the risk of infection, interventions for reduction of stroke risk in higher risk paediatric patients may not be available due to limited care accessibility and the provision of simple medications for prophylaxis of infection and blood count support are not routinely available." He supported his conclusions with reference to published medical literature from sources including King's College and "The Lancet".

25. It is a long held principle that disparity of medical treatment does not of itself create an exceptional circumstance. Nevertheless, in this particular case, Dr Gattens deals with the specifics relating to V's condition. He says:

> "We are very concerned that if V was to be sent back to Kenya then she will not receive the required medical care and she could potentially have many of the complications of her sickle cell disease that have been described above leading her to experience a high level of mortality and an increased risk of morbidity."

26. Thus Dr Gattens clearly concluded that removal of V to Kenya would seriously affect her health and wellbeing. It is correct to say that as far as I can see this report has not been challenged by the Respondent. Without the particular treatment that is routinely available in the UK, there was a real risk to V of increased pain, suffering and morbidity, and a reduction in life-expectancy. I find that the FtTJ gave the

greatest weight to this evidence over the more general assertions made in the MedCOI report. This is reflected in his finding at [62] that the best interests of V are served by remaining in the UK. This was a finding open to the FtTJ to make.

27. Naturally the medical treatment that V receives in the UK comes at a significant cost to the British taxpayer. That much is self evident. I find that the FtTJ has sufficiently shown that he has balanced the public interest considerations against the cost to the public purse.

28. Whilst I agree with Miss Ahmad that the FtTJ does not expressly refer in terms to the cost to the taxpayer of providing public funds for V's education and medical care nevertheless I find it cannot be said that the judge has failed to keep in mind the relevant factors underpinning the public interest considerations. Firstly the judge explicitly sets out the statutory requirements of S.117B of 2002 Act [60]. Secondly he reminded himself at [57] that there are numerous factors weighing towards the public interest element, not least the Appellant's immigration history. It is self evident that allowing V and C to remain with the Appellant in the UK brings a cost to the taxpayer.

29. In short I find therefore that the FtTJ has shown that he had sufficient regard to the public interest considerations. This is apparent from his comments at [62]. It follows therefore that the FtTJ recognised that the public interest in removal of the Appellant could yield in the face of the best interests of C and V, should that be appropriate. The FtTJ deemed it appropriate, and I find that to be a sustainable finding in the light of the medical evidence concerning V.

30. This case essentially was a fact-based assessment for the judge to make. No doubt it was a difficult case to decide. Both parties put forward strong reasons supporting their case. It is also correct to say that a different Tribunal may have reached a different conclusion. However so far as this matter is concerned it has not been argued that the judge's findings are in some way perverse. I conclude therefore that the findings were ones which were open to him. It follows therefore that, as it has always been accepted that the V and C should remain with their mother who is their sole carer, then the Appellant succeeds in her appeal under S.6 Human Rights Act.

31. For the foregoing reasons the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal allowing the Appellant's appeal under S.6 Human Rights Act 1998 stands.

Notice of Decision

The decision of the First-tier Tribunal allowing Ms C.A.O.'s appeal under S.6 Human Rights Act 1998 stands. The appeal of the Secretary of State is 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 C E Roberts Date 23 December 2017

Deputy Upper Tribunal Judge Roberts