



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12766/2017

THE IMMIGRATION ACTS

Heard at Field House
On 3rd July 2018

Decision & Reasons Promulgated
On 5th July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

OS
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Shoye of CW Law Solicitors

For the Respondent: Mr Kotas, Senior Home Officer Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Martins promulgated on the 11th April 2018 whereby the judge dismissed the appellant's appeal against the decisions of the respondent to refuse the appellant's claims based on international protection and human rights. The decision by the respondent was taken on the 27th November 2017. The claim/application for protection or human rights relief was made on the 1st June 2017.

2. I have considered whether or not it is appropriate to make an anonymity direction. These proceedings concern and impact upon the status and rights of a minor. In the circumstances I consider it appropriate to make an anonymity direction.
3. Leave to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Pickup on 8th May 2018. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.
4. The grounds seeking leave to appeal asserts that the decision by the judge is irrational and unfair and that the judge has failed to give adequate reasons in making findings on the credibility of the appellant. The grounds raise issues relating to the claim to asylum. The remaining grounds seek to deal with the Article 8 claim made by the appellants.
5. The material part of the grant of leave provides:-

3) Whilst the children could not meet 276 ADE at the date of the application, it is arguable that the situation should have been considered under section 117B (6) as at the date of hearing they had been in the UK for more than 7 years. The judge did not address this statutory requirement, even though, following MA (Pakistan) and others v Upper Tribunal (IAC) & Anor [2016] EWCA Civ 705 the reasonableness assessment has to take into account the wider public interest considerations, including the public interest in immigration control and the immigration history of the parents.

Factual background

6. The appellant married his wife, TA, in Nigeria in 2007. Whilst the appellant has entered and left the United Kingdom on a number of occasions and whilst the last date of entry was sometime in 2012, his wife entered the United Kingdom on 20 July 2010 and has not been out of the United Kingdom since.
7. The appellant and his wife appeared to have 2 children, ODS born in 2008 in Nigeria and IS born in 2010 in the United Kingdom. The evidence being that the older child came to the United Kingdom at the same time as the appellant's wife in 2010 and has not been out of the country since. The child born in the United Kingdom has never left the United Kingdom.
8. As indicated above the appellant has made a number of applications over the years. The last application based on Article 8 human rights was made on 6 November 2015 and was refused on 25 November 2015.
9. On 24 May 2017 the appellant attended at the Croydon Asylum Intake Unit. The appellant and his wife returned on 1 June 2017 and formally claimed asylum. The basis of the claim with regard to asylum was that the two children of the appellant were at risk of being subjected to FGM if they were returned to Nigeria.

10. At the date of application the eldest child had been in the United Kingdom 6 weeks short of 7 years. The youngest child had been in the United Kingdom since birth and was some 6 ½ years old.
11. The appellant's application for asylum was refused on 27 November 2017. By that date both the children had been in the UK in excess of 7 years. The appellant appealed against the decision to refuse him asylum and human rights relief. The appeal as stated was heard on 16 January 2018.

Consideration

12. As stated the first challenge is to the decision with regard to asylum. The basis of the claim for asylum or international protection was that the 2 children of the appellant were at risk of being subjected to FGM, were they to be returned to Nigeria.
13. The judge considered the circumstances in which the appellant claimed asylum. In paragraph 19 the judge noted the current country policy issued by the respondent which indicated that FGM was outlawed in Nigeria and not supported by the authorities. The fact that the parents of the children were against FGM was also a significant factor. As was the fact that they were educated. The judge considered the pressures both cultural and otherwise to carry out the practice.
14. The judge noted the fact that the appellant had lived several years in Nigeria and his eldest daughter had not been subjected to the practice. Having assessed all the evidence from paragraph 71 onwards the judge makes findings. Whether or not there was genuine pressure from the family or other tribal groups, the judge was satisfied that there was no real risk that 2 children would be subjected to FGM and that the appellant and his wife would be able to protect the children from such practice.
15. The judge having considered all of the history was satisfied that the claim with regard to asylum had only been advanced at the last-minute in an effort to prevent removal and that there was no real substance within the claims.
16. Having considered the evidence presented those were findings of fact the judge was entitled to make on the basis of the evidence before him. The judge has given ample reasons for the conclusions reached.
17. Turning next to the assessment of the article 8 rights of the parties, important in that respect was the fact that the children of the appellant had been in the UK for over 7 years by the time of the hearing. The provisions of paragraph 276 ADE of the Immigration Rules and Section 117B of the Nationality, Immigration and Asylum Act 2002 contain provisions relevant to children who have been in the United Kingdom the periods of at least 7 years. Paragraph 276ADE makes the date of application the material date for the calculation of the 7 years. That

provision therefore would not assist the children of the appellant for as indicated above they had not been in the UK for 7 years at the time of the application.

18. However Section 117B of the Nationality, Immigration and Asylum Act 2002 does not contain that limitation. The relevant provisions of the sections 117B and 117D provide :-

117B Article 8 : public interest considerations applicable in all cases

...

6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-

a) the person has a genuine and subsisting parental relationship with a qualifying child, and

b) it would not be reasonable to expect the child to leave the United Kingdom

117D Interpretation of this part

1) in this part....

"Qualifying Child" means a person who is under the age of 18 and who

a) is a British citizen, or

b) has lived in the United Kingdom for a continuous period of 7 years or more

19. I also draw attention to the Home Office policy- Family Migration: Appendix FM Section 1.0b –Family Life (as a Partner or Parent) and Private Life: 10-year Routes, which deals with Article 8 rights and family life. In respect of a child that has been in the United Kingdom 7 years of more the policy contains the following.

The requirement that a non-British citizen child has lived in the UK for a continuous period of at least the seven years immediately preceding the date of application, recognises that over time children start to put down roots and to integrate into life in the UK, to the extent that it may be unreasonable to require the child to leave the UK. Significant weight must be given to such a period of continuous residence. The longer the child has resided in the UK, and the older the age at which they have done so, the more the balance will begin to shift towards it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more.

20. The guidance mirrors the approach advocated in the case of MA (Pakistan) 2016 EWCA Civ 705 specifically paragraphs 46 to 49 in Lord Justice Elias decision which provide:-

46 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.

47 Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interests assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so. The concept of "best interests" is after all a well established one. Even where the child's best interests are to stay, it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed he should return. What could not be considered, however, would be the conduct and immigration history of the parents.

....

49 Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. However, the fact that the child has been in the UK for seven years would need to be given 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.

21. In MA reference is made to the judgement of LJ Christopher Clarke from *EV Philippines v SSHD* 2014 EWCA Civ 874, wherein guidance is given as to how the Tribunal should approach the issues of assessing the best interests of the child under Article 8. The judgment at paragraphs 34 onwards provides:-

"34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. *A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (d) what stage their education has reached; (e) to what extent they have become distanced from the country to which it is proposed that they return; (f) how renewable their connection with it may be; (g) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.*

36. *In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.*

37. *In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."*

22. The emphasis in EV is on the balance to be struck between the interests of immigration control and the rights and best interests of the child in remaining in the United Kingdom in that context the immigration history of the parent may be a significant factor. The later case of MA in dealing with the balance indicates that where the child has been in the UK for in excess of 7 years there have to be powerful reasons to justify removal of the child.

23. I also draw attention to the case of MT & ET v SSHD Nigeria (UKUT) 88 (IAC), which also deals with the approach to be taken in respect of children that have been in the United Kingdom in excess of 7 years. At paragraph 33 in dealing with the child to be in the United Kingdom 10 years the Tribunal noted :-

On the present state of the law, as set out in MA, we need to look for 'powerful reasons' why a child who has been in the United Kingdom for over 10 years should be removed, notwithstanding that her best interests lie in remaining.

24. The conclusions to be drawn from the Home Office policy and the case law are that there have to be strong reasons justifying removal where a child has been in the United Kingdom in excess of 7 years.

25. The concentration within the judgement thereafter is on the issue of what the prospects for the child would be on returning to Nigeria. With respect that seems to ignore the issue of whether or not there are strong reasons justifying removal.

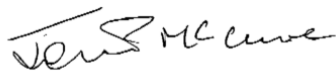
26. Given the case law it was incumbent upon the judge to examine whether or not there were strong reasons for removing the children from the United Kingdom. If there were no such strong reasons then public policy considerations did not require the removal of the children and consistent with section 117B again public policy considerations therefore did not require the removal of the parents.
27. Dealing with the judgement the judge has not adopted the approach advocated in the case law. Whilst the judge may not have been aware of the case of MT the judge should have been aware otherwise of the guidance given in the other case law. The judge certainly considers the effect of section 117B.
28. However the approach of the judge with regard to Article 8 and the best interests of the children is not consistent with the case law as it now appears. In the circumstances that is a clear material error of law. In the light of that the decision cannot stand on article 8 grounds.
29. At the hearing I invited the parties to make submissions as to how I should deal with article 8. Both parties agreed that I could deal with the issues raised without any further evidence. All of the evidence necessary to remake the article 8 decision was already before the tribunal.
30. I invited the representative for the respondent to make submissions as to whether there were strong reasons justifying the removal of the child appellants. Factor of significance could include:
 - a) consideration has to be given to the importance of maintaining immigration control as an aspect of the economic well-being of the country.
 - b) the circumstances in which the claims had been made and the fact that a number of claims had been over the years but many had been unsuccessful. The appellant delaying removal with unwarranted applications.
 - c) the factors that had been identified within the original judgement such as the support and assistance that would be available in Nigeria, the fact of the family being in Nigeria, fact that the children would be brought up in their own culture and the culture of their nationality.
 - d) the fact that there was no significant obstacles to the families reintegration on return to Nigeria.
31. Those factors have been identified in the case law of MT & ET. On the basis of the guidance given it is manifestly in the best interests of the children to remain in the United Kingdom with their parents and the factors identified did not such constitute strong reasons for removal. They may be factors which would suggest that the family could reintegrate in Nigeria. However they were not factors justifying removal.
32. Consistent with the case law cited the factors identified do not constitute strong reasons for removal. The best interests of the children are clearly to remain in the

United Kingdom with their parents. In the circumstances on the basis of article 8 I find that the children are entitled to remain in the United Kingdom having established a private life here. The decision would clearly interfere with that private life. Whilst the decision would be in accordance with the law and for the purposes of maintaining immigration control, the decision is not in all the circumstances proportionately justified.

33. As a consequence of the 2 children being entitled to remain in the United Kingdom the parents effectively piggyback upon their rights and themselves become entitled to remain in the United Kingdom in accordance with article 8 and section 117B.
34. For the reasons set out I find that there is a material error of law in the original decision of the First-tier Tribunal. The material error relates only to the article 8 rights of the parties. I uphold the decision with regard to the protection claim. I set aside the decision in respect of article 8 and remake the decision. I allow the appeal on article 8 grounds.

Notice of Decision

35. I allow the appeal to the Upper Tribunal on article 8 grounds only and substitute a decision allowing the appeal on article 8.



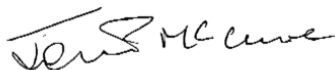
Signed

Deputy Upper Tribunal Judge McClure

Date 3rd July 2018

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 the appellant or any member of the appellant's family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings



Signed

Deputy Upper Tribunal Judge McClure

Date 3rd July 2018