



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12586/2017
HU/12830/2017

THE IMMIGRATION ACTS

Heard at Field House
On 6 February 2019

Decision & Reasons Promulgated
On 18 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

SALAMAT [A]
[K A]
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Mellon (for Southwark Law Centre)
For the Respondent: Mr S Walker (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. These are the appeals of Salamat [A] and her son [KA], citizens of Nigeria born respectively [~] 1983 and [~] 2009, against the decision of the First-tier Tribunal (Judge Davey) of 20 September 2018 dismissing their appeals, themselves brought against the refusals on 4 October 2017 of their human rights claims.

Introduction

2. The immigration history supplied by the Secretary of State sets out Ms [A]'s claim to have entered the UK on 10 January 2009. Applications for leave on private and family life grounds had been made on three occasions, during July 2015, October 2015 and May 2016, but each had been rejected, for failures to pay the application fee or the Immigration Health Surcharge.
3. Ms [A] gave a history of her past experiences leading to her present situation. For present purposes I summarise the facts as they appear in the decision of the First-tier Tribunal. She entered the UK on a visit visa obtained with a false passport in the name of [AO]. She had been brought to the UK by someone she believed to have been a Good Samaritan but who subsequently sought to exploit her, by prostitution or otherwise, though she escaped that possibility. She entered into a relationship with a man (who fathered [KA]), though that ended quickly thereafter and [KA] had never known him.
4. Ms [A]'s claim was essentially that a return to Nigeria would leave her and [KA] living in very straitened circumstances leading to destitution, poverty and ill treatment; she relied on medical evidence stating that she had ongoing problems with depression. She had no relatives in the UK but did have strong friendships. A social work report from Dr Farooqi set out [KA]'s speech and learning difficulties, which had been addressed via various measures. Ms [A] feared that [KA] would be disadvantaged in his development as, though he might well be taught in English in Nigeria, nevertheless his peers would speak Yoruba around him.

The decision of the First-tier Tribunal

5. In the light of concerns raised by the evidence that Ms [A] was vulnerable, it was considered appropriate for some regard to be had to the Vulnerable Witness Practice Direction, offering the possibility of appropriate breaks in proceedings, though this opportunity was not taken up.
6. The First-tier Tribunal rejected Ms [A]'s claim to have been brought to Nigeria via another person's agency, on the basis that had she truly been exploited in that way, she would have brought a protection or similar claim much sooner. Her claims to face impoverishment abroad were not accepted as she had made no enquiries as to the possibilities regarding employment; her fears represented un-evidenced assertions. It did not accept that the medical evidence indicated any inability to obtain the necessary psychiatric help, given the evidence referred to claims of depression associated with [KA]'s birth a long time ago; her anxieties largely flowed from her own immigration status, for which she was herself responsible. The mere fact economic circumstances were poor in Nigeria did not oblige the UK to provide nationals of that country with the opportunity of a home here; there was no country information indicating that mature women could not find employment.
7. No blame could be laid at [KA]'s door for his mother's actions. She had deliberately sought to obtain and pursue the benefits of life in the UK for both him and her. He

was in school in the UK, and had received special educational support at various times. Thus his best interests were in favour of remaining in the UK. Nevertheless, the evidence indicated that the courses and support that had been arranged for him had ended in 2017; his current class teacher's referred to his having made progress overall.

8. [KA] had no entitlement to an education in the UK and the social worker's report essentially stated the "rather obvious consequences of a life and development that has been achieved in the United Kingdom." There was nothing to suggest he would be removed if his mother was not removed. The concerns that he would be disadvantaged by his peers speaking Yoruba was met by the fact that children often had to begin again in new locations, circumstances and languages following international moves. The claim that [KA] had lost touch with his African roots was doubted, but even if partly true, his mother was well-placed to introduce him to Nigerian society. The Judge referred to the need to find strong or powerful reasons to justify a qualifying child's departure, having regard to decisions such as *Hesham Ali, Agyarko, MA (Pakistan)* and *MA (Pakistan)*. The Judge also noted the possibility that Ms [A] would enjoy some degree of support from the friends in the UK in getting herself re-established in Nigeria, albeit expecting them to provide her with ongoing financial support was "a far reach."
9. Summing up his thinking, the Judge concluded that [KA]'s best interests were clearly in favour of his remaining in the UK, but given his mother's unsubstantiated fears as to the consequences of return to Nigeria, it was reasonable to expect him to depart with her.
10. There were no very significant obstacles to [KA]'s integration in Nigeria, given he could speak English and had overcome the developmental problems he previously faced, and there being no evidence that he could not seek and obtain appropriate assistance in Nigeria.
11. The First-tier Tribunal concluded §18, "whilst the best interests, on their own, of the Second Appellant lie in remaining in the United Kingdom, his best interests truly lie in remaining within the care of his mother and returning to Nigeria with her".
12. Grounds of appeal contended that the First-tier Tribunal materially erred in law in
 - (a) Applying the "very significant obstacles to integration" test to an 8-year old child which was incompatible with a test of reasonableness;
 - (b) Notwithstanding having thrice found [KA]'s best interests to point in favour of remaining in the UK, having proceeded to make contradictory findings (§18 cited above) where [KA]'s individualised best interests were said to point in favour of remaining in the UK whilst his true best interests called for his departure with his mother;
 - (c) Failing to take account of the evidence from Ms [A]'s GP stating that since August 2017 she had regularly presented with depression which had been treated both medicinally and with psychotherapy. The country evidence

pointed to the lack of capacity of the mental health service in Nigeria, which was documented as being “unable to respond to overwhelming needs of those suffering mental health issues” and in consequence placed an immense financial burden on those so affected. This was therefore a material error in the decision, given any diminution in her mental health would necessarily impact on her ability to care for [KA];

- (d) Inadequate reasons had been given for the conclusion that there were powerful reasons calling for [KA]’s best interests to be compromised by leaving the UK; such reasons as were given amounted to blaming him for his mother’s immigration history, contrary to *ZH (Tanzania)* [2011] UKSC 4, and also in conflict with the benchmark indicated by the Upper Tribunal in *MT and ET*.

13. Permission to appeal was granted by the First-tier Tribunal on 27 December 2018 on the basis that all grounds were arguable.
14. Mr Walker for the Respondent accepted that the decision was inadequate due to the confusing findings as to [KA]’s best interests. He observed that there had also been rather a long gap between the hearing and the writing of the decision. Ms Mellon therefore did not need to develop the grounds of appeal.

Findings and reasons

15. For the reasons set out in the grounds of appeal, and particularly given the confusion epitomised by §18, I consider that the decision cannot stand.
16. Given the confusion that has afflicted the appeal so far, it is helpful to remind oneself of the relevant legal context. Under the Immigration Rules:

“Requirements to be met by an applicant for leave to remain on the grounds of private life

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant: (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and

...

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

...

(vi) ... is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant’s integration into the country to which he would have to go if required to leave the UK.”

17. Section 117B(6) of NIAA 2002 states:

"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."

18. Thus, both inside and outside the Rules, the existence of a seven-year resident child within an application significantly changes the test to be applied. There is no material difference here in the approach within and outside the Rules, given that [KA] had been resident in the UK for seven years by the application date (being born in October 2009 and the application being made in March 2017).

19. In *Azimi-Moayed and others (decisions affecting children; onward appeals) Iran* [2013] UKUT 197 (IAC) the President's Tribunal set out that:

"ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable."

20. The Secretary of State has published a policy document, *Every Child Matters - Change for Children*, as statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children, which refers to the definition of this task found in section 11 of the Children Act 2004 and in the policy guidance *Working Together to Safeguard Children*, as "ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully."

21. As stated by Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 §49, Ex.1 "establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary"; albeit that §73: "It may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling."

22. In *MT and ET Nigeria* [2018] UKUT 88 (IAC) the Upper Tribunal examined the “best interests” question in a seven-year resident child case, where a mother and daughter had lived in the UK for around a decade (for the latter, from the age of four to fourteen) by the time of the appeal hearing. The First-tier Tribunal had found that the daughter had no memory of Nigeria and was well integrated in school and socially; it was clearly in her best interests to remain in the UK. However, her mother had overstayed her original visit visa, pursued a false asylum claim and received a community order for using a false document to obtain employment. The Judge concluded that the child’s uprooting from school and loss of her friends would be no different to the common experience of any child whose parents decided to make a significant move abroad or otherwise.
23. The Upper Tribunal found a material error of law in the approach below, and upon re-determining the appeal, disagreed with the First-tier Tribunal’s assessment. It relied on *MA Pakistan* for the proposition that seven years’ residence in the UK “establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary”. The mother was (as the UT expressed it) merely a somewhat “run of the mill” immigration offender who came to the United Kingdom on a visit visa, overstayed, made a claim for asylum that was found to be false and subsequently pursued various legal means of remaining in the United Kingdom. The Tribunal concluded that these were not sufficiently powerful reasons to counteract the child’s best interests when assessing reasonableness: the appeal was accordingly allowed.
24. There has been a recent re-statement of the law regarding the best interests of the children: *KO (Nigeria)* [2018] UKSC 53 §32.
 - (a) “in the absence of clear language to the contrary ... the provisions are intended to be consistent with the general principles relating to the “best interests” of children, including the principle that “a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent” §15;
 - (b) “it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave” §18;
 - (c) “the issue of “reasonableness” under section 117B(6) is focussed on the position of the child” §32.
25. The upshot of the authorities above is that
 - (a) Where there is an evidence-backed case going to the connections that a qualifying child has with the UK, the Tribunal must engage in detail with their best interests and weigh the reasonableness of relocation with care;
 - (b) Where a child’s best interests point in favour of them remaining in the UK, powerful reasons need to be identified before the interests of immigration control will trump those considerations;

- (c) In a two-parent case, where neither parent has an enduring right to remain in the UK (leaving aside the direction in which the qualifying' child's best interests would point), then that forms part of the assessment, which must be conducted in the "real world": it can accordingly be seen that "real world" considerations *may* constitute powerful reasons sufficient to counteract the child's best interests of the kind identified in *MA (Pakistan)*;
 - (d) Ultimately cases will turn on the considerations such as those identified in *Azimi-Moayed* and in the statutory guidance *Every Child Matters*.
26. Strictly speaking the authorities hold that it is not essential to make findings on a child's best interests prior to assessing the reasonableness of their relocation abroad, though it would seem significantly more logical to take best interests first. In any event, it is vital for a clear finding to be made as to "best interests".
27. But the "real world" assessment is likely to be rather more complicated in a single-parent case, particularly where there is a real possibility that the sole primary carer has mental health issues that might impede their ability to make social connections abroad which might in turn impact on their ability to care for their child.
28. Now to take the grounds of appeal within the legal framework identified above.
- (a) Clearly the First-tier Tribunal was rather confused in the approach it took to the limbs of Rule 276ADE(vi): it can never be appropriate to assess a seven-year resident child's application by reference to the "*very significant obstacles to integration*" test, as that is plainly posits a much higher threshold than "*reasonableness*": that error would not, though, be material, if the reasoning on "*reasonableness*" was severable from that addressing 276ADE(vi);
 - (b) In fact however, the reasoning on "*reasonableness*" is confused: the First-tier Tribunal made unclear and contradictory findings as to where [KA]'s best interests actually lay;
 - (c) It also overlooked the evidence indicating that the First Appellant has *current* rather than simply *historic* depression;
 - (d) Many, if not all, of the matters taken as outweighing [KA]'s best interests appear to be directly attributable to matters for which his mother is solely responsible, contrary both to *ZH (Tanzania)* and *KO (Nigeria)*.
29. As these findings go to the very core of the appeal, it is accordingly necessary for the matter to be reheard afresh. As full findings of fact will have to be made when the appeal is next determined, remittal to the First-tier Tribunal is appropriate. It is to be hoped that the legal framework above will assist in the appeal's subsequent re-determination.

Decision:

The decision of the First-tier Tribunal contains a material error of law.

The appeal is allowed to the extent it is remitted for re-hearing before the First-tier Tribunal.

A handwritten signature in black ink, appearing to read 'M.A.S. Symes', with a long, sweeping underline that extends to the left and then curves back towards the right.

Signed:
Deputy Upper Tribunal Judge Symes

Date: 13 February 2019