Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11244/2018

THE IMMIGRATION ACTS

Heard at Bradford by Skype for business	**Decision & Reasons Promulgated**
On the 30 September 2020	**On the 06 October 2020**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

DH
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V. Adams, instructed on behalf of the appellant
For the Respondent: Mr S. Walker, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge (hereinafter referred to as the "FtTJ") who dismissed her appeal in a decision promulgated on the 31 January 2019.

2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings

relate to the circumstances of minors. 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 her family members. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Background:

3. The background is set out in the decision of the FtTJ and the evidence in the bundle. The appellant is a citizen of Sudan. In December 2010 she married her spouse, who is a British citizen with a Sudanese family background. They have three children who are all British citizens and British passports were obtained for them.

4. The appellant's spouse has been living on and off in the United Kingdom since December 1986 and has a number of university qualifications including a PhD. In 2007 he returned to Sudan where he held a number of academic and academic management positions. As a result of difficulties with the management he decided not to continue with his job. It was also said that there were difficulties with the security personnel which led to the family having to move and being split up for a time. The appellant's spouse returned to the United Kingdom in August 2016.

5. On 5 July 2017, the appellant made an application for entry clearance to bring the children to the United Kingdom to visit her husband. It was said the visit was for a period of six months and that the application made was because she could not qualify for spouse Visa as a result of her spouse's lack of employment. It was hoped that whilst in the country he would be able to obtain employment and application could be made for a spousal visa.

6. On 1 August 2017 she and the children were issued with entry clearance Visa's and they arrived on 25 September 2017.

7. Before the expiry of her Visa on 1 February 2018, she made an application on 31 January 2018 for leave to remain on human rights grounds.

8. In a decision issued on 4 May 2018 the respondent refused that application. It was noted that she did not qualify for leave to remain under the 10 year partner route as she did not meet all of the eligibility requirements of section E-LTRP 2.1-2.1 because she was currently in the UK would leave as a visitor. The decision referred to EX1 although no consideration was given to it in the body of the decision. As to private life, it was noted that she could not satisfy the provisions of paragraph 276ADE on the basis of her short length of residence, her age and that there were no very significant obstacles to her integration to Sudan if required to leave the UK taking into

account her previous length of residence, including her childhood, formative years and a significant portion of her adult life, having retained her knowledge of life language and culture and that she had family relatives remaining there. Under “exceptional circumstances” respondent considered whether there are any circumstances which would render refusal a breach of article 8 because it would result in unjustifiably harsh consequences for the appellant, her spouse or the children but on the evidence provided, it was considered that there were no compelling evidence that their health in the UK could not be maintained by her spouse to a sufficient level in her absence. It was considered reasonable to expect her to return to Sudan and apply for entry clearance in the appropriate category and whilst this may involve a degree of disruption to her private life, it was considered to be proportionate to the legitimate aim of maintaining effective immigration control.

9. The appellant appealed that decision and it came before the FtT on 7 November 2018. The FtTJ dismissed the appeal in a decision promulgated on 31 January 2019. There was no dispute that the appellant and spouse were validly married, that their relationship was genuine and subsisting, that they intend to live permanently in the UK and that her spouse was a British citizen living in the United Kingdom and that they had three children all of whom are British citizens and that all family members had a Sudanese family background. The judge also accepted on the balance of probabilities that the parties were telling the truth about their intentions both when she applied for entry clearance and when she first arrived in the United Kingdom with the children (at [36]). As to the best interests of the children, the assessment was made that it was in their best interest for them to stay with the appellant as their mother and their father whether in the United Kingdom or in Sudan. The FtTJ considered the evidence concerning the youngest child’s medical needs but concluded that he was not on the autism spectrum or that appropriate support and advice would not be available to him in Sudan. He found that the children were bilingual in Arabic and English and that they had spent the majority of their lives in Sudan and their cultural heritage was also their experience of having lived in Sudan. Having taken into account those factors, he did not consider that it been shown that their best interests required for them to live in the United Kingdom as opposed to Sudan. When considering the issue of proportionality and the public interest considerations under S117B, he found that the appellant could not meet the requirements of paragraph 276 ADE or Appendix FM and in relation to section 117B(6), the FtTJ did not find this to be a case whether the question as to whether it was reasonable to expect the children to leave United Kingdom did in fact arise. He proceeded on the basis that the appellant could return to Sudan and to apply for entry clearance with the possibility that the children and/or her spouse accompany her and thus it was proportionate to require her to leave the United Kingdom.

10. Permission to appeal was issued in March 2019. Initially permission was refused by the FtTJ on 5 March 2019 and an application was made for the application to be reconsidered by the Upper Tribunal. There appears to have been delay in considering that application but on 20 April 2020 permission was granted by UTJ Kamara.

The hearing before the Upper Tribunal:

11. In the light of the COVID-19 pandemic the Upper Tribunal issued directions, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face to face hearing and that this could take place via Skype. The hearing took place on 30 September 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

12. There was no Rule 24 response filed on behalf of the respondent. I also heard oral submissions from the advocates, and I am grateful for their assistance and their clear oral submissions.

13. Before the Upper Tribunal, Ms Adams relied upon the written grounds and the grant of permission which I have taken into account. The written grounds challenge the legal test applied to the issue of the assessment of reasonableness and whether the judge applied the correct test.

14. The submissions can be readily distilled into a challenge to the assessment of best interests and the overall assessment of the issue of reasonableness of return and issues relating to the circumstances in Sudan for the adult parties which had not been considered or findings reached. At the oral hearing, after hearing submissions on behalf of the Appellant, Mr Walker on behalf of the respondent conceded that there was a material error of law as set out in the grounds when read with the grant of permission. I find the Respondent's concession to be appropriately made, and in the circumstances, I give only summary reasons for finding that the decision of the First-tier Tribunal involved the making of a material error of law such that it is necessary to set aside the decision.

15. Whilst Ms Adams relied upon the grounds in which it was asserted that EX 1 was relevant, in reality the statutory provisions contained in section 117B (6) were at the forefront of the issues relied upon by Ms Adams and in this appeal which states that the public interest will not require the person's removal where that person has a genuine and

subsisting relationship with a 'qualifying child' and it would not be reasonable to expect the child to leave the United Kingdom.

16. There is no dispute that the three children are “qualifying children' for the purposes of section 117B (6) as they are all British Citizens.

17. The FtTJ set out his assessment of this issues at paragraphs [102]-[114]. At paragraphs [102]-[104] the FtTJ considered the circumstances of the family; that all of the children are British citizens and entitled to live in the UK but that the appellant’s spouse could look after the children if the appellant returned to Sudan.

18. At [103] the FtTJ stated that “perhaps the most obvious thing that needs to be said is that the children do not necessarily have to leave the United Kingdom even if the appellant was required to do so”. At [106] the FtTJ took into account that the family “had made choices” which had split the family previously. He then stated at [107] “that being so it does not seem to me that this is a case where the question as to whether it is reasonable to expect the children to leave the United Kingdom in fact arises. Given Mr A’s status as a British citizen living in this country and is obvious and natural involvement in their lives it is possible for them to stay with him here.”

19. Both parties are in agreement that the FtTJ applied the wrong test and that as a result he did not assess the issue of reasonableness in the correct legal context or address particular features of the evidence which were relevant to that assessment.

20. As to the issue of whether the child will leave the UK, the correct test being identified and summarised in Secretary of State v AB (Jamaica and AO (Nigeria) [2019] EWCA Civ 661, at paragraphs 72- 75; the question that the statute requires to be addressed is a single question; is it reasonable to expect the child to leave the UK?

21. The Court stated:

> “72. I respectfully agree with the interpretation given by the UT to section 117B(6)(b) in *JG*.
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> 73. Speaking for myself, I would not necessarily endorse everything that was said by the UT in its reasoning, in particular at para. 25, as to the meaning of the concept "to expect". However, in my view that does not make any material difference to the ultimate interpretation, which I consider was correctly set out by the UT in *JG*. In my view, the concept of "to expect" something can be ambiguous. It can be, as the UT thought at para. 25, simply a prediction of a future event. However, it can have a more normative aspect. That is the sense in which Admiral Nelson reputedly used the word at Trafalgar, when he said that "England expects every man to do his duty." That is not a prediction but is something less than an order. To take another example, if a judge says late in the day at a hearing that she expects counsel to have filed and served supplementary skeleton

arguments by 9 a.m. the following morning, so that there is no delay to the start of a hearing an hour later: although she may not be ordering the production of that skeleton argument, that is what she considers *should* happen. That is not a prediction of a future occurrence. It carries some normative force.

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:

> "… 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?"

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. That decision was not available to the FtTJ at the date of the hearing which took place in November 2018 (his decision being promulgated in January 2019) consequently it is not the position that he failed to apply a relevant decision but that since his assessment, the law has been clarified in a number of important decisions by both the Court of Appeal and also by the Upper Tribunal which has the effect of making that analysis wrong in law.

23. As Ms Adams submits at paragraph [114] the judge stated that he considered the decision in SR (Pakistan) [2018] UKUT 00334 was incorrect in law and would need to be revisited but subsequently that decision has been given approval in Secretary of State v AB (Jamaica and AO (Nigeria) [2019] EWCA Civ 661 at paragraph 74.

24. As a consequence, both parties agree that the wrong test was applied, and it affected the assessment of section 117B(6).

25. Ms Adams and behalf of the appellant also identified other relevant issues. She submitted that the FtTJ failed to consider the

circumstances of the youngest child's vulnerability in the light of the evidence. At [71] the FtTJ stated that he was not able to conclude that the youngest child was on the autistic spectrum nor that appropriate support assistance would not be available. However, Ms Adams submitted that there was no consideration of the evidence which referred to the multiple assessments that the child was undergoing in the UK and that he had also been noted as being assessed as requiring special educational needs (see witness statement at paragraph 16) and associated socialisation and communication issues.

26. In my view, I accept the submission that this was an issue that was therefore relevant to the reasonableness of return in two ways; firstly whether it was reasonable for a child in those circumstances to leave the United Kingdom on the basis that any identified vulnerability was relevant to assessing any sudden change of residence/disruption. Furthermore, a child in those circumstances would also be deprived of relevant healthcare and to be removed from the assessment process which the child was undergoing at the time of the hearing.

27. In SD (British citizen children - entry clearance) Sri Lanka [2020] UKUT 43(IAC) the Tribunal held (in the context of an entry clearance appeal)

> 1. British citizenship is a relevant factor when assessing the best interests of the child.
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> 2. British citizenship includes the opportunities for children to live in the UK, receive free education, have full access to healthcare and welfare provision and participate in the life of their local community as they grow up.
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> 3. There is no equivalent to s.117B(6) of the Nationality, Immigration and Asylum Act 2002 in any provision of law or policy relating to entry clearance applicants.
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> 4. In assessing whether refusal to grant a parent entry clearance to join a partner has unjustifiably harsh consequences, the fact that such a parent has a child living with him or her who has British citizenship is a relevant factor. However, the weight to be accorded to such a factor will depend heavily on the particular circumstances and is not necessarily a powerful factor.
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> 5. When assessing the significance to be attached to a parent's child having British citizenship, it will also be relevant to consider whether that child possesses dual nationality and what rights and benefits attach to that other nationality.

28. The decision not only highlights the importance of British citizenship, which the judge did make reference to at [75], but that in the assessment of reasonableness, the rights and benefits in the sense of having full access to healthcare and welfare provision is also a relevant consideration. The parties agree that this was not addressed in the assessment under S117B(6).

29. A further issue relied upon by Ms Adams relates to the assessment of proportionality. The FtTJ reached the conclusion that the appellant could return to Sudan to obtain entry clearance with the children being left with their father. Whilst the FtTJ did refer to there being emotional problems at [116], that assessment did not take account of the effect upon the children, and in particular the youngest child who has special needs and the effect upon that child of the separation of the family unit or any length of delay and the consequences of that delay.

30. In Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC) the Upper Tribunal held that in addressing the "real world" context, it included consideration of everything that related to the child/children, both in the UK and country of return and how removal would affect his or her education, health and relationships with family and friends (see [111]). The advocates agree that this was not considered, and thus no assessment was made of the evidence and no factual findings were made.

31. Ms Adams also relied upon paragraph 10 of the written grounds. She submitted that the FtTJ failed to make any findings on the circumstances in Sudan which related to the adult parties. She submitted that this was relevant also to the issue of reasonableness of return to Sudan for the children. If the parents were to return to Sudan in circumstances which would cause distress to them, it would have a similar outcome and effect upon the children. She pointed to the evidence given by the appellant and her partner that on two occasions they had separated due to the security forces and there had been significant upheaval for the family. She submitted that this was raised within the written evidence and that there was some consideration of this in the oral evidence reflected at paragraphs [59 – 61] of the decision. Whilst the judge referred to the appellant as being "fearful", she submitted that the FtTJ misconstrued the evidence.

32. Looking at the decision, the FtTJ considered the circumstances in Sudan at paragraphs 38 – 41 and in particular in the context of why the appellant's spouse decided to leave Sudan and move back to the United Kingdom in 2016. Two reasons were given; the first related to difficulties with the administration and the University. The judge plainly accepted that (see 38). However, the second was that he had come to the adverse attention of the Sudanese authorities because he had been critical of some of the policies. The judge stated at [39] that that reason was "somewhat more problematic". This is because he considered that it potentially raised a form of international protection and no claim had been made by the appellant. As a result, and because Counsel did not seek to rest any part of her case on that factor, the judge did not make any findings of fact (at [41]). Ms Adams submitted that it had been said in the witness statements that the appellant and a partner had lived apart as a result of the security forces following the appellant's spouse and that this was relevant to

determining the situation the children would be returning to. This was not a protection issue in the sense of an asylum claim but was relevant to the general circumstances in Sudan. I have considered this submission and it appears that the FtTJ did not make findings on this issue (at [41]) not only because an international protection claim had not been made but that because counsel did not seek to advance that particular factor and thus the judge stated he could only note that there was an allegation about this. I cannot accept the submission made by Miss Adams that even if it was not specifically advanced, it had to be considered by the FtTJ. Whilst there may have been evidence concerning difficulties in Sudan, it had not been made clear to the FtTJ how that was relevant to his assessment. However that said, I would accept as Ms Adams submitted that it was not necessary for the appellant to make a protection claim for any issues to be addressed and that at [61] the appellant had given evidence as to why the children had not gone to school in Sudan. She had given the explanation that she was “fearful” and that the judge found that to be an insufficient explanation in the context of the appellant’s case that they could only go to school United Kingdom. It appears from the evidence the basis of her fear was as a result of events in Sudan which had affected the children’s education and therefore that had been an issue which had been raised. It is therefore accepted that no findings of fact were made concerning the circumstances in Sudan that took into account all aspects of the claim.

33. At the hearing Ms Adams sought to amend the grounds of appeal to include a challenge to the decision of the FtTJ and the failure to consider the IDI’s. The application had not been made on notice to either the Tribunal or to the respondent and as Ms Adams conceded there has been a lengthy delay from when the grounds were issued in March 2019 to the date upon which the amendment was sought in September 2020. There has been no explanation for such a lengthy delay. However as it is conceded on behalf the respondent that there is a material error of law in the decision of the FtTJ which has the effect of undermining the findings of fact, analysis and outcome and therefore should be set aside, it is not necessary for me to address this.

34. However, I would observe that as I read the decision it was not a reluctance to take account of the IDI’s but that the FtTJ had not been provided with a copy by Counsel (at [112]) and further, the argument had not been developed (at[111]). Nonetheless it is now procedurally the position that the respondent, through the presenting officer has a duty to provide copies of IDI’s that are relevant to the issues.

35. For those reasons I am satisfied that it has been demonstrated that the decision of the FtTJ discloses the making of a material error of law and the decision should therefore be set aside as both parties agree.

36. Ms Adams submitted that the Tribunal should preserve the finding at [36] where the judge accepted that it was more likely than not that the appellant and her spouse had been telling the truth about their intentions both when she applied for entry clearance (that she was going to United Kingdom on a temporary basis as a visitor and that she was expecting to return see [115]) and when she first arrived in the United Kingdom with the children. I agree that that is an appropriate finding that should be preserved along with paragraph 31 which is uncontentious.

37. As to remaking the decision, Ms Adams in her oral submissions stated that if an error was found in the decision set aside that it should be remitted to the FtT for a full hearing on the issues identified. Mr Walker did not disagree with this.

38. I have therefore considered whether the appeal should be remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
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> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

39. I have considered Ms Adams' submissions in the light of the practice statement recited above. As it will be necessary for the parties to give evidence and to deal with the evidential issues, further fact-finding will be necessary alongside the analysis of Article 8 in the light of the relevant law and in my judgement the best course and consistent with the overriding objective is for it to be remitted to the FtT for a further hearing. The Tribunal will be seized of the task of undertaking an assessment of the evidence and any updated evidence (given that the hearing before the FtTJ took place in November 2018 and the medical evidence) making findings of fact relating and will be required to do so on the basis of the evidence as at the date of the hearing which includes the best interests assessment of the children. I therefore set aside the decision of the FtTJ by consent.

Notice of Decision

The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision shall be set aside and to be remitted for a further hearing before the First-tier Tribunal.

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 her family members. 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 Upper Tribunal Judge Reeds

Dated 1 October 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email