Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/09510/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 July 2016	**On 20 July 2016**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

VI
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge J Bartlett promulgated on 16 December 2015, in which he allowed the respondent's appeal against a decision to remove her from the United Kingdom.

2. Permission to appeal was granted by First-tier Tribunal Judge Lever on 28 May 2016

Anonymity

3. No anonymity direction was made by the First-tier Tribunal however I consider it appropriate for the following anonymity direction to be made given there is a child involved:

"Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. "

Background

4. The respondent is a national of Nigeria, born on 10 January 1976. There are no records of the respondent's entry to the United Kingdom, however she first came to the attention of the Secretary of State on 9 December 2003, when she sought a residence card as the spouse of an EEA national. The said card was issued, valid until 7 January 2009. Thereafter the respondent twice applied unsuccessfully for permanent residence and her appeals against those decisions were dismissed. An application submitted for the respondent's daughter was refused on 18 July 2011. A third unsuccessful application for permanent residence was made in 2013 and her appeal against that decision was dismissed on 5 June 2015. In the interim, the respondent sought leave to remain on human rights grounds based on her family life with her daughter, 'K' who was born in February 2006.

5. The Secretary of State refused the application on 18 February 2015, concluding that while K had lived in the United Kingdom continuously since birth it was not unreasonable to expect her to leave the United Kingdom. It was considered that the respondent could assist K in adjusting to life in Nigeria. There were said to be no exceptional circumstances.

6. The Appellant appealed to the First-tier Tribunal.

The hearing before the First-tier Tribunal

7. The appellant requested an oral hearing of her appeal but did not, ultimately, attend the hearing which was listed for 22 September 2015. The Secretary of State agreed that the appeal could proceed without representation on her behalf. The judge considered the matter on the papers on 4 December 2015 and concluded that the appellant could not meet the requirements of paragraph 276ADE(vi) of the Rules; that it was not unreasonable for the child to leave the United Kingdom with regard to EX.1(a) of Appendix FM but allowed the appeal outside the Rules, finding

that the public interest was outweighed by the interests of the appellant and her child.

The grounds of appeal

8. The grounds argue that the judge materially misdirected himself and failed to give any adequate reasons for his findings on a material matter. Essentially, the judge had found that it would be reasonable to expect the child to leave the United Kingdom when considering the Rules and had failed to set out any reasons why the opposite conclusion was reached in relation to section 117B(6). Furthermore, there was said to be no consideration to the respondent's overstaying and her use of public services, such as health and education.

9. Permission to appeal was granted as it was considered that it was arguable that there was an inconsistency in the decisions reached on the same or very similar tests, without any clear reasons why such should be the case.

The hearing

10. The respondent did not attend the hearing and nor was she represented. Daniel Aramide Solicitors wrote to the Upper Tribunal on 11 July 2016 in order to state that the respondent had made a further application for leave to remain on the basis that her child was now a British citizen. Indeed, a photocopy of the certificate of registration was enclosed with that letter. The letter explained that because of the said application, the respondent would not, therefore, be attending the hearing. The Home Office were said to be aware of this development. I therefore proceeded with the hearing by way of submissions from Mr Melvin.

11. Mr Melvin relied on the Secretary of State's grounds of appeal. He submitted that the "unreasonableness test" was looked at by the Court of Appeal in *MA (Pakistan & others) [2016]* EWCA Civ 705 where the Court adopted the findings in *MM Uganda v Secretary of State for the Home Department* [2016] EWCA Civ 450 in relation to taking into account the whole case including public interest reasons. He argued that Judge Bartlett should have looked at that matter through the lens of the Rules. He invited me to find a material error of law and on the basis of the findings and evidence of the judge, proceed to remake that decision and conclude that the appeal fell to be dismissed

12. At the end of the hearing, I reserved my decision on the error of law.

Decision on error of law

13. The decision and reasons of the judge was detailed however, it contained a material error of law and is set aside, with no findings preserved, for the following reasons.

14. In *MA (Pakistan)*, it was established that the reasonableness of expecting a child to leave the United Kingdom, as referred to in EX.1(a) of Appendix FM to the Immigration Rules, paragraph 276ADE(iv) of the Rules and section 117B(6) of the 2002 Act should be approached in the same way.

15. Elias LJ was persuaded to follow the approach taken in *MM (Uganda)* as follows;

"But the critical point is that section 117C(5) is in substance a free-standing provision in the same way as section 117B(6) and even so the court in MM (Uganda) held that wider public interest considerations must be taken into account when applying the "unduly harsh" criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in section 117B(6)."

16. The difficulty with the decision in issue is that the judge reached conflicting decisions on the same matter, in that the appeal was dismissed under EX.1.(a) because the judge did not accept that it was unreasonable to expect the child to leave the United Kingdom but allowed with regard to section 117B(6), with the judge finding the reverse to be true. Furthermore, the latter decision did not engage with the wider public interest considerations or even explain why it would not be reasonable for the child to leave the United Kingdom.

17. The decision of the First-tier Tribunal is therefore set aside, with no findings preserved.

18. Given that the respondent did not attend the hearing before either the First-tier Tribunal or the Upper Tribunal, I could see no reason why I could not proceed to remake the decision on the basis of the information before me.

Remaking

19. I will now revert to the parties' original designation before the First-tier Tribunal. The appellant claimed to have entered the United Kingdom on 9 June 1997, however it would appear that the respondent was unaware of her presence until she sought a residence card as evidence of her right to reside in the United Kingdom as the spouse of an EEA national in 2003. That application was granted and a card was issued, valid until 7 January 2009. Thereafter, the appellant has been pursuing a number of applications and appeals for permanent residence and on human rights grounds. At the same time, the appellant has previously sought to register her child, born on 9 February 2006, as a British citizen. Ultimately, on 16 May 2016, the child was duly registered. Otherwise, the appellant says in her statement that she worked in the United Kingdom, which she was entitled to do at least during the five-year period when she was issued with a valid residence card. In addition, her child has resided in the United Kingdom since birth and attends school in this country. Indeed, the

appellant says that she, and presumably her child as well, has not left the United Kingdom since her arrival here.

20. The sole reason for the refusal of the appellant's application under the Rules, was that it was not accepted that it was unreasonable to expect her child to leave the United Kingdom.

21. Reference was made in the refusal letter to the ability of the appellant to assist her daughter with her own knowledge and experience of Nigeria. That is no doubt the case and I have taken that issue into account, however, that is not the only issue to be considered. The child in question is now a British citizen and has resided in the United Kingdom continuously since birth for a period of ten years. It is not in dispute that her best interests are to continue residing in the United Kingdom with her mother and in order to continue her education.

22. Returning to *MA (Pakistan)*, I note that a period of seven years' residence would need to be given "*significant weight*". I consider a period of ten years coupled with British citizenship is equally, if not more, deserving of weight.

23. As stated in *MA (Pakistan)*, the starting point is that leave should be granted unless there are "*powerful*" reasons to the contrary. The Secretary of State has identified no such reasons here either in the decision itself or during Mr Melvin's submissions. I have taken into consideration the fact that the appellant has resided in the United Kingdom for long periods of time without leave, however it is fair to say that she has spent the best part of the last thirteen years either with a right to reside or actively pursuing applications and appeals.

24. I have placed into the balance the fact that the maintenance of immigration control is in the public interest. I also accept that it is likely to be the case that the appellant has used public services, if only in relation to her child's education and healthcare, nonetheless, I find that these matters, in combination, do not amount to powerful reasons, sufficient to outweigh the best interests of the child. In conclusion, I find that it would be unreasonable to expect the appellant's child to leave the United Kingdom. The terms of EX.1(a) of the Rules are met and leave ought to be granted to the appellant. There are no powerful reasons to the contrary. I allow the appeal on that basis.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

I remake the decision by allowing the appeal under the Immigration Rules.

Signed Date: 19 July 2016
T Kamara
Judge of the Upper Tribunal