Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09523/2016**

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Determination Promulgated**
On 10th November 2017	**On 21st November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

R U A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Thelma Ihebuzor (Solicitor)
For the Respondent: Mr C Bates (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Butler, promulgated on 16th May 2017, following a hearing at Sheldon Court on 24th May 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Nigeria, and was born on 15th September 1980. She arrived in the UK having been granted entry clearance as a dependant on her husband's student visa, valid from 20th September 2007 until 31st October 2008. On 14th December 2007, she gave birth to her daughter in Coventry. Following this, on 17th October 2008 she made an application for leave to remain in the UK as a dependent spouse, which was granted on 17th November 2008. This was valid until 31st January 2010. Thereafter, further extensions of leave to remain were granted. On 25th December 2011, she gave birth to her first son and on 11th November 2013, she gave birth to another son. A final decision with respect to her leave to remain on the basis of family and private life grounds was refused on 5th March 2015. There was no further right of appeal.

3. On 5th February 2016, however, the Appellant made an asylum and protection claim, alleging that she belongs to the Igbo tribe, and that she was circumcised when she was a child, and that she feared the same fate awaited her daughter if she were to return to Nigeria.

The Refusal Letter

4. The refusal letter explained why the Appellant's protection claim stood to be rejected. It was not accepted that the Appellant's relatives and those of her husband insisted that their daughter undergo FGM. She had returned to Nigeria following the death of her father in 2009, after all, and had stayed there for three weeks, and her daughter and husband remained in Nigeria for a month. Second, it was noted that the police were not informed about any proposal to circumcise her daughter. Third, under federal law, Nigeria had outlawed the practice of FGM so that adequate remedies lay at hand for the Appellant's use were there to be such a threat. Fourth, the Appellant failed to demonstrate that there was a sustained and systemic failure of state protection. Fifth, the Appellant could relocate internally to another part of Nigeria.

The Judge's Findings

5. The judge, having heard the evidence noted that the Appellant had a degree in computer science from Nigeria and her husband had an MC in engineering (paragraph 25). The judge heard submissions that the Appellant's failure to claim asylum early should not count against it (paragraph 30). Thereafter, the judge considered the question of credibility (paragraph 34). The judge did not find the Appellant to be credible (paragraph 36). This was not least because the Appellant had visited Nigeria (paragraph 37). The Appellant had also failed to claim asylum at the earliest opportunity (paragraph 39). Moreover, there was objective evidence that the practice of FGM had declined substantially among the Igbo tribe (paragraph 40). The judge concluded that this was a fabrication to bolster the Appellant's weak asylum claim (paragraph 41).

6. Thereafter, consideration was given to Article 8. The judge gave the benefit of the doubt to the Appellant and held, contrary to the conclusion of the Secretary of State, that the Appellant's daughter had indeed lived continuously in the UK for seven years immediately preceding the application (paragraph 44). However, the Appellant could not succeed under the Rules. This is because, "her husband and children, being dependants in her claim, are not British citizens or settled in the UK" (paragraph 45). Consideration was thereafter given to the position outside the Immigration Rules, and regard was specifically had to Section 55 of the BCIA 2009. The judge observed that, as far as the children were concerned, "their best interests are a primary consideration which may be outweighed by other countervailing factors" and that the best interests of the children must first be established (paragraph 45).

7. In looking at the position of the Appellant's daughter, the judge observed that she was now 9 years old, and had lived in the UK all her life, the sons were aged 5 and 3 years, and regard was had to the leading case of **Azimi-Moayed [2013] UKUT 197**, where it was noted that, "if both parents were being removed from the UK, the starting point was that the children should be removed with them" (paragraph 46).

8. The judge took a nuanced approach observing that **Azimi-Moayed** suggested that it would be in the best interests of the Appellant's daughter to remain and be educated in the UK, but that would not necessarily be the case for her sons (paragraph 48). It remained the case, however, that all three of the Appellant's children required the support of their parents. The balancing exercise, however, required account to be taken of public interest considerations as set out in Section 117B of the NIAA 2002 (see paragraph 49). Regard was had to the leading cases in the jurisdiction, namely those of **ZH (Tanzania) [2011] UKSC 44** and **EM (Lebanon) [2008] UKHL 64**, so that the child's best interests cannot be compromised by the misdemeanours of its parents (see paragraph 50). The Secretary of State's IDI was also referred which contained the statement that the longer a child has resided in the UK, the more it will be the case that it will be unreasonable to expect the child to leave the UK and strong reasons will be required in order to refuse a case with continuous UK residence of more than seven years (paragraph 50).

9. As against all of the above, the judge observed that the family's immigration status as overstayers counted against the Appellant. The parents were well educated to degree level. Their qualifications would secure them employment in Nigeria. They had returned to Nigeria. The Appellant's husband had returned on three occasions since the birth of their daughter. There was an education system in Nigeria. They have many siblings between them in Nigeria (paragraph 51).

10. Evaluating the circumstances as a whole, the judge observed that, "the question of reasonableness in this appeal is not an easy one", but that it would be reasonable to expect the Appellant's daughter to leave the UK with the rest of the family (paragraph 54). A balancing exercise had to be undertaken to ensure that the decision was a proportionate one. Regard was had to Lord Bingham's five step approach in **Razgar**, so that it would be necessary to effect the decision of the

Secretary of State in the interests of the economic wellbeing of the UK (paragraph 55). The interference was legitimate and proportionate (paragraph 56).

11. The appeal was dismissed.

Grounds of Application

12. The grounds of application state that the Tribunal erred in coming to the decision that it did given Section 55 of the BCIA 2009. The judge did not take proper regard of paragraph EX.1 of Appendix FM. Article 8 had also not been properly evaluated.

13. On 7th September 2017, permission to appeal was granted by the Tribunal on the basis that the judge, having found (at paragraphs 44 and 46), that the Appellant's eldest child had resided in the UK for more than seven years, it was arguable that, in the light of the Court of Appeal decision in **MA (Pakistan) [2016] EWCA Civ 705**, that the judge had erred in law.

14. A Rule 24 response was entered on 18th September 2017. First, it was stated that the judge had applied Section 117B correctly, in that it would be reasonable for the Appellant's eldest child to return to Nigeria. Furthermore, paragraph 59 of the determination refers to Section 117B(6) in a manner that the reasonableness assessment is properly conducted. Second, the judge had directed himself appropriately.

Submissions

15. At the hearing before me, Ms Thelma Ihebuzor, appearing on behalf of the Appellant, began by making an adjournment application on the basis of an e-mail from the Appellant's husband, that this morning, as they were preparing to get the children ready for school, the Appellant "developed a stabbing pain on the left side of the breast" and that an ambulance had to be called, and that she was driven to accident and emergency services at the hospital. Mr Bates, appearing on behalf of the Respondent submitted that he was aware as early as 9 o'clock this morning that an adjournment application was to be made today. I asked Ms Ihebuzor, what the relevance of the Appellant's attendance at today's hearing would be. She submitted that she could proceed with the submissions on the error of law, given that no evidence was to be called, without having the Appellant present at the hearing today. I concluded, bearing in mind the overriding interests, that reference to a "stabbing pain on the left side of the breast" did not suggest that the Appellant could not attend this hearing today had she wanted to, or that she was incapacitated medically, in a manner which prevented her from doing so. There was, in any event, no medical evidence, and not least, from the hospital. Ms Ihebuzor submitted that she had to make the application quite simply because she had been instructed by her client to do so. She was content to proceed.

16. In her submissions, Ms Ihebuzor submitted that there was only one issue before this Tribunal. This was that the Appellant's eldest daughter had been in the UK for seven years. It was unreasonable now to expect her to leave the UK and return with her parents back to Nigeria. Second, however, there was the ancillary issue of the risk of

FGM, although permission had not been granted on this, and she would have to accept this.

17. For his part, Mr Bates submitted that the FGM issue could not be raised now because permission had not been granted on this, with the judge holding that there was no risk of ill-treatment in Nigeria, and no exceptional circumstances being shown. As for the Appellant's child having been in the UK for seven years, the judge had given this aspect of the case very careful and proper consideration. First, he addressed this question head on at paragraph 45 of the determination, observing that the best interests of the child is a primary consideration, but which may be outweighed by other countervailing factors. He would have to accept that the Appellant's daughter was a "qualifying child", but there was an additional requirement of it being necessary to show that it was not reasonable for the Appellant to leave this country. At paragraph 46 the judge had regard to **Azimi-Moayed**, and the benefits of children growing up in the cultural norms of the society to which they belong.

18. Second, as against this, regard had to be had to Section 117B and the maintenance of immigration control. The judge had explicit regard to the two prongs of Section 117B(6). Reference was made to there being both a "genuine and subsisting parental relationship", as well as, ("it would not be reasonable to expect the child to leave the UK").

19. Third, the leading cases, in the form of **ZH (Tanzania)** and **EM (Lebanon)** were considered, and the Secretary of State's IDI which observes that the longer that the child has been in the UK the more the balance will shift in terms of favouring the child remaining in this country unless there are "strong reasons" to the contrary (paragraph 50). However, the parents were well educated middleclass parents with university degrees and prospects of a real job in Nigeria and the judge made express reference to this at paragraph 51, observing also that the Appellant's husband had returned back on three separate occasions, so that there was clearly the possibility of adaptation to life there, for a diaspora community of people who had only come to the UK on a temporary basis.

20. Fourth, it is not the case that the only possible outcome for a child who has been in the UK for seven years is to sanction their right to remain in this country. Section 117B was not to this effect.

No Error of Law

21. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. I come to this view, fully recognising that another judge may well have taken a different view of the circumstances, but that this judge, on the evidence before the Tribunal, was entitled to come to the decision that the Tribunal did eventually come to. It cannot be said that the judge has overlooked any factual aspect of the claim. It cannot be said that the judge has applied the legal authorities in this case wrongly. Indeed, there are two reasons why the approach of the judge falls to be upheld.

22. First, Section 117B expressly states that, bearing in mind the public interest in favour of immigration control, there is a two pronged approach to be satisfied, so that it is necessary to show both a genuine and subsisting parental relationship with a qualifying child, as well as being able to show that it would not be reasonable to expect the child to leave the UK.

23. Second, the Court of Appeal's latest decision in **MA (Pakistan) [2016] EWCA Civ 705** and makes it quite clear that had parliament wished to direct the decision maker to the effect that any child who had been in the UK for seven years should be allowed to remain in this country, the legislative intent would have plainly been so expressed. It is not so expressed. It is expressed in the terms that it is.

24. The question is whether the judge interpreted the legislative provisions in the correct way. I can see no reason to conclude that the judge made a material error in this respect. The findings of fact are ultimately for the judge and this supervising Tribunal can only intervene if there has been an error of law.

Notice of Decision

25. There is no material error of law in the original judge's decision. The determination shall stand.

26. An anonymity direction is made.

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 him or any member of their 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 Dated

Deputy Upper Tribunal Judge Juss 17th November 2017