Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09865/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th November 2018	**On 28th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

BEAUTY [O]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Lee, Counsel instructed by Irvine Thanvi Natas Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria whose appeal was dismissed by First-tier Tribunal Judge Rodger in a decision promulgated on 9th July 2018.

2. The judge noted that the Appellant relied upon her family life with her children who are British citizens (paragraph 29). The judge noted and the Respondent accepted that there was a genuine and subsisting parental relationship between the Appellant and the children and that the best interests of the children was a primary consideration as they would be affected by the refusal decision (paragraph 30). The judge went on to note that all the children had been born here and they were presently aged 4 years, 1 year and 1 month. The eldest attended nursery school. The judge accepted that they had been brought up in a close and loving family with both parents and that is nearly always in the best interests of a child to remain within the family unit (paragraph 31). The judge went on to find that the Immigration Rules were not satisfied giving reasons for that (paragraph 36 et seq).

3. Having considered all the circumstances, the judge did not consider there were any exceptional or compelling factors such as to render the refusal decision disproportionate (paragraph 44). The judge took into account that there was genuine family life that would be adversely affected and also that her partner and children were British. However, this was not a trump card. The judge was satisfied that it was reasonable to expect the Appellant to leave the UK and her family to make a choice to whether to join her or whether to remain here. Reference was made to **Chikwamba v SSHD [2008] UKHL 40** whereby the Appellant could make an application for entry clearance.

4. The judge went on to dismiss the appeal.

5. Grounds of application were lodged. The first ground was that the judge had materially misdirected himself in his consideration of whether it would reasonable to expect the Appellant's British children to leave the UK. Reference was made to **ZH (Tanzania) v SSHD [2011] UKSC 4** highlighted at paragraphs 30 to 32 noting the intrinsic importance of nationality in the assessment of the best interests of the child that they would not be able to exercise that if they had to move to another country. Reference was also made to **Zambrano [2011] EUECJ C-34/09**. Paragraph 11.2.3 of the SSHD Immigration Directorate Instructions Family Migration Appendix FM Section 1.0b; Family Life (as a Partner or Parent) and Private Life: Ten Year Routes, (August 2015) stated that save in cases involving criminality the decision maker must not make a decision in relation to her parent or primary carer of a British citizen who by the effect of that decision would be to force that British child to leave the EU.

6. Similar observations were made in the February 2018 edition. It was said that the children's' best interest to live with the Appellant and both their parents could continue to be met by remaining within the family unit. The Appellant also placed reliance on the case **of SF and Others (guidance – post 2014) Albania [2017] UKUT 120** which gives guidance on the approach to be taken where one is considering removal of a person that is a parent or primary carer of a British child. In paragraph 8 various factors were set out which could be said to justify removal even where there was

a British citizen child and that included whether or not there was any issue with regard to criminality. The case of **SF** involved the mother and several children of whom only one was a British citizen. The result of the immigration decision would have been the separation of the youngest child from not only his mother but his siblings. The family save the father had entered illegally in 2012 and had remained in the UK. The father appears to have had settled status. There was no criminality or other factor justifying separation.

7. In the present case there was clearly a father in the United Kingdom and arguably the child could stay with the father. However, the problem would be that the father working would have limited time either to work or look after the child.

8. The conclusion in **SF** was that expecting the mother and some of the children to leave the youngest child in the United Kingdom and effectively separating them was not in the circumstances reasonable in terms the SSHD's own policy. The result of failing to grant the mother leave would have been to force the British child to leave the UK. There were no other factors in this case which justified separation.

9. Central to the policies is the fact that it is not reasonable to force a British child to leave the United Kingdom.

10. It was said the judge had failed to consider the IDIs and the case law of **SF** which amounted to a material error in law. Other grounds (which are not material to the outcome) are put forward.

11. Permission to appeal was granted by First-tier Tribunal Judge Holmes noting that it was arguable as set out in the grounds that the judge had erred in his approach taken to the Appellant's relationship with her British citizen children whether by reference to Section 117B(6) of the 2002 Act, the IDIs, the guidance to be found in **MA (Pakistan)** or **SF (guidance – post 2014 Act) [2017] UKUT 120**.

12. Before me Mr Lee relied on his grounds. It was not reasonable to expect a British child to leave the United Kingdom and the European Union. The judge had ignored the relevant case law and the IDIs. Section 117B (6) said that there was public interest in removing the appellant. So clear was the position that there was only one possible outcome namely that there was a material error of law by the judge and as a result the decision should be set aside and the appeal allowed.

13. For the Home Office Ms Everett said that the judge had fully considered all the circumstances of the Appellant and the children. There was nothing perverse in the reasons given. While there was some force in the grounds the judge had considered the reasonableness of her removal and there was no material error in law.

14. I reserved my decision.

Conclusions

15. In my view there is considerable force in the grounds of application all as set out in some detail above and I do not require to repeat them here. While it can be said that the judge gave a careful and thorough decision looking at the best interests of the children and while it was unclear whether the judge was referred to **SF** it does seem to me to be a clear error in law for the judge not to have considered the IDIs and what the Tribunal did say in **SF** (a decision of the Vice President) about removal of someone such as the Appellant. In terms of the reasonableness of the Appellant's removal it was incumbent upon the judge in terms of the balancing act under Article 8 to consider what was said in the IDIs highlighted in the case of **SF**.

16. In essence the Home Office do not require removal of a parent of British children except in circumstances of criminality (there is none here) and/or having a very poor immigration record (again that is not suggested here). Had the judge been referred to **SF** then no doubt the judge would have taken the policy into account but not to consider its contents in any way results in the judge failing to apply the law as it presently stands. There is a clear material error in law with the consequence that the decision has to be set aside.

17. Given the Home Office's own policy on these issues there is only one possible outcome to this case namely that the appeal should have been allowed by the judge on human rights grounds because there is no good reason to force the removal of the Appellant and to separate her from her children who are British citizens. In terms of the Home office policy I am satisfied that the proposed interference with family life is disproportionate and it follows that the appeal is allowed on Article 8 grounds.

18. The decision of the First-tier Tribunal is therefore set aside in its entirety and a fresh decision is made allowing the appeal on human rights grounds.

Notice of Decision

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

I set aside the decision.

I allow the appeal on human rights grounds.

No anonymity order is required or made.

Signed *JG Macdonald* Date 21st November 2018

Deputy Upper Tribunal Judge J G Macdonald

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and because the Appellant came here as a visitor have decided to make no fee award.

Signed *JG Macdonald* Date 21st November 2018

Deputy Upper Tribunal Judge J G Macdonald