Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/34614/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision and Reason Promulgated**
On 20th December 2017 **On 4th January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MA
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs K Degirmenci, Counsel, instructed by DF Solicitors
For the Respondent: Mr.D.Clarke, Home Office Presenting Officer.

DETERMINATION AND REASONS

Introduction

1. The appellant is a national of Nigeria born in the United Kingdom in June 2008.

2. His mother, T, came here as a student in December 2006. She obtained various leaves until September 2009. She then was granted

leave until August 2013 as the spouse of a settled person, D. They married in July 2010.She gave birth to her daughter, A, in December 2009.

3. The father of both children is O, a Nigerian national. He married a United Kingdom citizen. She died shortly after their marriage and his application for leave to remain was refused in January 2014. His appeal was dismissed. He remains here having made a further unsuccessful leave application.

4. T applied for indefinite leave to remain on the basis of her marriage to D. This was refused in August 2014. Her appeal was heard on 1 May 2015 and the decision was remitted back to the respondent for reconsideration. This was because the decision did not adequately consider the two children affected. This resulted in the decision of 18 November 2015 which is the subject matter of the present proceedings. Meantime, she had leave under section 3C of the 1971 Act

5. The decision of 18 November 2015 dismissed her application for indefinite leave to remain as a spouse. This was because her marriage had broken down two years earlier and a decree absolute issued, dated 3 August 2015. Consequently, she was not in a genuine and subsisting relationship with D.

6. Consideration was given to the ten-year route to settlement as a parent. By the time of reconsideration A had lived in the United Kingdom for seven years. The decision maker had regarded to paragraph EX1 of the immigration rules. There was no dispute that a genuine and subsisting parental relationship existed. However, the respondent took the view that the family could reasonably return to Nigeria and that the section 55 duty was complied with.

The First tier Tribunal.

7. The appeal against this decision was heard by Designated Judge of the First-tier Tribunal Woodcraft and Judge of the First-tier Tribunal Norris. The appellant and his mother were the appellants, with his sister as a dependent. The focus in the appeal was upon the children, particularly MA because he had been here seven years.

8. The tribunal heard from T. She was employed by a Health Board managing 8 employees. She said her parents lived in a village in Nigeria and all of her siblings were in the United Kingdom. She said their biological father, O, saw them most weekends and he had family settled here who they saw.

9. At paragraph 28 onwards the tribunal dealt with the reasonableness of expecting the children to relocate to Nigeria. When considering the matter outside the rules reference was made to section 117 B of the 2002 Act. The relevant date there was the date of hearing. On this basis, MA sister, A, was also a qualifying child.

10. The tribunal found that the best interest of the children were to remain with their mother and to have contact with their natural father and to continue to be educated in their school. The tribunal then went on to consider the weight to attach to those interests in assessing the reasonableness of requiring them to leave.

11. Paragraph 36 dealt with the core argument: the fact the children had crossed the 7-year threshold. Reference was made to the respondent's instructions and of very strong reasons being required to show it would be reasonable to expect the children to leave. The tribunal referred to the decisions of MA Pakistan and also AM Pakistan and Ors –v-SSHD [2017] EWCA Civ 180.

12. The tribunal concluded by finding that T had no basis for remaining in her own right following the breakdown of her marriage. They also took the view that it was not unreasonable to expect either child to leave. Therefore, the claim that MA had under the rules failed. The tribunal then went on to consider the position of the children outside the rules, following the Razgar sequential approach and the effect of section 117B. It referred to T having had a precarious immigration status and little weight being attached to the private life she had established. The fact she would lose her employment was not a significant obstacle to relocation, as discussed in the decision of A. She was considered to be self-sufficient. The tribunal did not see very significant obstacles to either child integrating into Nigeria and did not find any compelling factors which outweighed the legitimate aim of immigration control. Consequently, the appeals were dismissed under the immigration rules and under article 8.

The Upper Tribunal

13. Permission to appeal was granted on the basis it was arguable the tribunal did not identify the very strong reasons to render the return of the children proportionate.

14. Mrs Degirmenci referred to the case law and the IDI. She contended the starting point was to grant leave unless there were strong contrary reasons. The first appellant always had leave and queried what was weighing against the appellants. They spoke English; they had sufficient income; they were here lawfully.

15. She contended there were inaccuracies and assumptions by the tribunal in relation to the children's father. For instance, there was no specific finding as to whether he had any outstanding application or appeal. Mrs Degirmenci said that in fact he had. Furthermore, there was a suggestion that the level of contact he had with the children had been exaggerated. No evidence had been led as to the distance between where he and the children lived.

16. In response, Mr. Clarke contended that no material errors existed. The judges correctly directed themselves and made relevant findings, based upon evidence. The balancing of the individual interests and the public interest was not fixed but which was fact sensitive. The weight to be attached to the various ingredients was a matter for the judges. They had reached the conclusion that the children's best interest lay in remaining in the United Kingdom. However, this was not determinative. They then turned to consider what weight to attach to those interests. They considered their father's situation. He has no leave. He may well have an ongoing appeal but given his past difficulties the future was uncertain. The judges reached a conclusion that the children's best interest was to maintain contact with their father and there was no good reason apparent why he could not return to Nigeria. The United Kingdom had no obligation to continue to educate third country nationals. The tribunal had considered the risks to the children in Nigeria. There was no evidence produced as to kidnappings.

17. Mr Clarke made the point that T time here was always precarious and she had no legitimate expectation things would be different. She had 3C leave pending the decision on her application in relation to her marriage. There was however no underlying factual basis to support the application: they were estranged.

18. In response, Mrs Degirmenci repeated that the children's mother had always been here lawfully. She had been on student visas up until her marriage. She was then granted leave based on that. The delay in a decision in relation to her subsequent application was attributable to the respondent not considering the position of the children. She accepted the position of the children was not a trump card but it was necessary to look at all of the factors cumulatively.

Consideration

19. The tribunal were looking at matters through the prism of the rules. The position of the children's mother was considered first. The conclusions are recorded at paragraph 26 to 27. This aspect has been uncontentious.

20. The tribunal clearly appreciated the nuances of the statutory provisions. For instance, it was pointed out that MA had a claim under paragraph 276 ADE (vi) in that he had lived continuously for seven years prior to the reconsideration (as distinct from the date of application). The distinction between the provisions in the rules and section 117 B of the 2002 Act was noted, where the relevant date is the latter was the date of hearing. This therefore applied also to the younger child.

21. The tribunal noted the claim that the children's father visited most weekends. Their mother had provided a second statement in which she gave an account of the situation in Nigeria and referred to the educational system in place; the limited amenities and the risk from

kidnappers. Her financial circumstances were set out. The tribunal heard evidence from the children's natural father. He said he had an appeal pending and the tribunal commented on the lack of documentation provided. The competing submissions are recorded.

22. The tribunal made comprehensive findings. The appeal was directed towards the children. However, at Paragraph 29 the tribunal made the point that they were considering the appeal not only from the interests of the individuals concerned but also in relation to the family as a whole.

23. At paragraph 30 the tribunal noted the best interests of the children were a primary consideration. Their interest had to be considered before considering the reasonableness of their removal. The tribunal went on to consider the weight to be attached to their best interests, balancing this with the reasonableness of requiring them to leave. Consequently, the tribunal that adopted the correct approach and made clear finding that their best interests were to remain and to be with their mother; to continue to have contact with the father and to continue to be educated in their school.

24. The tribunal at paragraph 32 considered the possibility of them losing contact with their father if they moved to Nigeria. The tribunal acknowledged this was a factor which could potentially render the decision unreasonable. The tribunal referred to what was known of his immigration history, with the conclusion being there was no good reason why he could not return to Nigeria with them.

25. Paragraph 33 considered the existing level of contact between him and the children. The tribunal did express concern that this had been bolstered to support the appeal. There was a reference to him travelling each day to collect them from school. His statement referred only to seeing them at weekends or collecting them when their mother was not available. He was living in Erith and they were in East London. The tribunal referred them living a considerable distance apart, with the journey involving crossing the Thames. Whilst there is nothing to indicate evidence was led as to the distance and time involved the judges also had the benefit of oral evidence which is not recorded. It was open to the tribunal to assess the level of claim contact. The reference as to distance reads as an observation rather than a specific finding and I find no material error established either of fact or law.

26. The tribunal evaluated the factors advanced about why it would be unreasonable to expect the children to leave. It was accepted they have been immersed in the British educational system but it did not follow they could not adapt to the Nigerian system. Reference was made to the absence of evidence provided on their behalf about the system in place in Nigeria beyond their mother's own account of her experiences. Similar comments were made about the claim in relation to the security situation.

27. At paragraph 36 the tribunal clearly identified the core issue in the appeal. The tribunal appreciated that the jurisprudence and highlighted the seriousness of expecting children who had been here 7 years to go to their country of nationality. There had been quire in the higher courts as to whether the focus should be on the children only or whether other factors could come into play. The tribunal referred to the decisions of MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705 MA and AM (Pakistan) & Ors v Secretary of State for the Home Department [2017] EWCA Civ 180. Lord Justice Elias gave both judgements and at para 20 of the latter said `The court, admittedly reluctantly, concluded that it was inherent in the reasonableness test in section 117B(6) that the court should have regard to wider public interest considerations and in particular the need for effective immigration control'

28. In line with this the tribunal considered the family immigration history. Comments were made about their mother having leave under section 3C.This interim leave was based upon an application which had been extended because of the respondent's original error and with little underlying merit. The tribunal recognised the difference between someone here without leave or who had overstayed and the situation of the children's mother who had leave throughout. The tribunal recognised this as a favourable consideration in line with AM (Pakistan). However, the strengths of the point was diluted by the fact that her marriage had broken down and therefore the basis upon which he sought to remain no longer existed.

29. The tribunal went on to address other arguments advanced, such as the potential for MA to apply for British citizenship in the future. However they were dealing with the situation as at the present. The suggestion they would be at risk of kidnapping was assessed. Factors relevant to section 117 B were considered including their mothers financial situation. Section 117 B (6) was considered and the reasonableness of the children going to Nigeria. This overlapped with the earlier consideration.

Conclusions

30. Having considered the decision in its entirety I am satisfied that the tribunal asked itself the right questions and made appropriate findings based upon evidence. I find this to be a carefully prepared decision in which the tribunal clearly understood the legislative provisions and the jurisprudence. It was a matter for the tribunal to decide the balancing of the various factors. They did state at paragraph 38 that the issue was finely balanced and potentially arguable either way. I find the tribunal did carefully balance the relevant factors. It had regard to the length of time the children had been here and their progress. At the outset it evaluated their best interests. Having done so, other factors were then considered. This included the immigration history and position of their mother and father. The arguments about the situation in Nigeria were addressed.

Another tribunal may well have reached a different conclusion. However, this does not mean the tribunal materially erred in law.

Decisions

The decision of Designated Judge of the First-tier Tribunal Woodcraft and Judge of the First-tier Tribunal Norris dismissing the appeals shall stand. No material error of law has been established.

Francis J Farrelly
Deputy Upper Tribunal Judge Dated 28 December 2017