Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06518/2017

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 5 November 2018	**On 22 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR M A A A
(ANONYMITY DIRECTION MADE)

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Alam of Counsel, instructed on a public access basis
For the Respondent: Mr Tan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Tanzania born on 25 May 1973. He arrived in the United Kingdom and subsequently made an asylum claim. This application was refused in a decision dated 28 June 2017. The Appellant appealed and his appeal came before Judge of the First-tier Tribunal Burns for hearing on 9 October 2017. In a decision and reasons promulgated on 11 October 2017, the judge dismissed the appeal.

2. Permission to appeal to the Upper Tribunal was sought on a number of grounds challenging both the judge's decision in relation to the asylum appeal and also in relation to the fact the Appellant had at the time of the

decision and hearing two qualifying children and it was submitted that their best interests had not been properly taken into consideration, nor all the relevant factors in relation to the reasonableness of expecting them to leave the United Kingdom.

3. Permission to appeal was granted by Upper Tribunal Judge Lindsley on limited grounds in relation to Article 8 only in a decision dated 22 January 2018 in the following terms:

> *"However I am satisfied that there are arguable errors in the decision under Article 8 ECHR as it is arguable that insufficient weight was given to the fact that the Appellant's children had lived in the UK for more than seven years in accordance with MA (Pakistan) [2016] EWCA Civ 705. It is arguable that significant weight was given to this factor when assessing the best interests of the children and to the assessment of whether it was reasonable for them to be required to leave and that the decision is insufficiently reasoned on this point."*

Hearing

4. At the hearing before the Upper Tribunal I heard submissions from Mr Alam, Counsel instructed on a direct access basis and for Mr Tan on behalf of the Secretary of State. In his submissions, Mr Alam observed that the grounds of appeal had been handwritten by the Appellant himself. He acknowledged that the application for permission to appeal in respect of the asylum aspect of the appeal had not been successful and as essentially the grounds could be summarised as firstly the judge had inadequately reasoned his assessment of the reasonableness of the return of the two qualifying children to Tanzania, and secondly, in failing to apply the judgment of the Court of Appeal in MA (Pakistan) [2016] EWCA Civ 705.

5. He submitted that the fact that the children had resided in the UK for over seven years was a fundamental part of the appeal. This was dealt with very briefly at [18] where the judge summarised the basis of the claim. At [64] the judge dealt with the issue of reasonableness very briefly, finding that the best interests of the children were to remain in the family unit. He noted that the two oldest children attend primary school and speak English but he expected that they would speak Swahili despite the fact that there was no evidence to that effect before the judge and his finding was thus entirely speculative.

6. He further noted at [68] when considering the public interest considerations, that the Appellant speaks English, therefore it is likely that the Appellant would communicate with his children in English rather than in Swahili. The submission recorded at [18] was that the children would have linguistic difficulties if returned to Tanzania because they do not speak Swahili.

7. Moreover he submitted there was no consideration by the judge at [64] as to the length of residence of the children or the difficulties or disruption they would face on return to Tanzania, which clearly plays into the question of whether it is reasonable to expect them to leave the UK.

8. In respect of the judgment of the Court of Appeal in MA (Pakistan) Mr Alam sought to rely on the judgment of Lord Justice Elias at [46] and [49] where His Lordship made the point that if a child had been in the United Kingdom for seven years or more this would need to be given significant weight, both because of its relevance to determining the nature and strength of best interests of the children and that leave should be granted unless there are powerful reasons to the contrary. At no stage in the judge's decision did he make any reference to the fact the children were qualifying children having resided continuously in the UK for more than seven years or to the judgment in *MA (Pakistan).* He submitted that this amounted to a material error of law.

9. In his submissions Mr Tan drew my attention to [42] of the decision and reasons where the judge made reference to the school reports submitted on behalf of the two oldest children and found

> *"neither have reached secondary school age and accordingly I find that neither are at an age where their educational progress will be undermined by a change of school if they were to move to Tanzania. They are more than likely to change school at the end of year 6 in any event".*

10. He submitted that the judge had considered the children's best interests at [64] finding that they were to remain with their parents as a family unit and at [69] and [70] in relation to the assessment of proportionality, the judge had considered both the Supreme Court judgment in Zoumbas [2013] UKSC 74 and Kaur (children's best interests public interest interface) 2017 UKUT 00014 (IAC). Following on from that the judge went on to find it was reasonable for the children to relocate with their parents to Tanzania.

11. Mr Tan also sought to rely on the recently handed down decision of the Supreme Court in KO (Nigeria) and Others [2018] UKSC 53 at [18] where the Court found that it was inevitably relevant to consider where the parents are expected to be since it will normally be reasonable for the child to be with them. He submitted that this was essentially a narrowing of the focus of the Article 8 considerations but what the court were doing were setting out the prism through which reasonableness should be viewed and that was residence of the family as a whole in Tanzania.

12. Mr Tan submitted that the judge had considered all the points in the Appellant's favour and there was no material error of law.

13. In his response, Mr Alam acknowledged that he had not read the Supreme Court judgment in *KO (Nigeria)* however it did not appear that it had

engaged with the aspects of the judgment of Lord Justice Elias in *MA (Pakistan)* upon which he sought to rely *viz* [46] and [49]. He submitted there was an absence of any proper consideration of the material facts of the children. The oldest child was born on 28 December 2007, thus at the time his appeal came before the First-tier Tribunal he was two months short of having resided continuously in the United Kingdom for ten years having been born here. He submitted the judge had failed to address his mind to this point and his length of residence was clearly a material factor. He submitted there was no reference to the children's dates of birth or indeed to the youngest child at all, despite the fact that that child's best interests required consideration. He submitted the judge's reasons are clearly inadequate in that no significant weight had been given to the facts and there was no reflection of the length of residence of the first Appellant.

14. I found a material error of law at the hearing and heard submissions in order to re-make the appeal.

15. Mr Tan acknowledged that since the hearing of the appeal by the First tier Tribunal the elder child had been granted British nationality. He accepted that in light of the Home Office guidance in respect of private life: "Family Migration: Appendix FM Section 1.0b Family Life as a Partner or Parent and Private Life: Ten Year Route" Version 1 22/2/18 at page 76 it was not open to him to submit it was reasonable for him or the family to now leave the United Kingdom.

16. In light of Mr Tan's helpful concession Mr Alam did not seek to make any further submissions.

Findings

17. In respect of the error of law in the decision of the First tier Tribunal Judge, it is apparent, as Mr Alam submitted, that there is an absence of detailed consideration of the individual facts of each child. The oldest child was born on 28 December 2007, thus he was almost 10 at the date of the hearing. His slightly younger sister was born on 25 January 2010 and was thus 8 years at the date of the hearing. There is no reference within the decision and reasons of the First tier Tribunal Judge to their length of residence, which is clearly material to any proper or satisfactory assessment of the reasonableness of expecting them to return.

18. Whilst at [42] the judge acknowledged that he had read their school reports and that they were hardworking and able, he found simply because they were still at primary school age and would change schools in any event, that their educational progress would not be undermined by a change of school if they were to move to Tanzania. At [64] the judge found it was in the children's best interests to remain with their parents as a family unit.

19. Whilst the Judge acknowledged at [64] that the two oldest children were qualifying children, he went on to find only that he was not told that there were any specific health concerns. He reiterated his finding that they were still at primary school and then went on to find that they speak English, but expected that they would speak Swahili or have a very good understanding of the language, given that both of their parents gave evidence via an interpreter.

20. Whilst that last finding is speculative, I find it was a finding open to the judge on the basis of the evidence before him. However, I do not find that the Judge's findings form a sufficient foundation to then go on to find it would be reasonable to expect the children to leave the United Kingdom, in light of the fact that the children were all born in the UK; had never visited Tanzania and the qualifying children were almost 10 and 8 years of age at the hearing [66].

21. It is clear that the judgment in *MA (Pakistan)* was based on the Home Office guidance, the version in force at that time being the August 2015 version which makes clear at 11.2.4 that once seven years' residence requirement is satisfied there need to be strong reasons for refusing leave. This is because:

> *"after such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families but the disruption becomes more serious as they get older. Moreover in these cases there must be a very strong expectation that the child's best interest will be to remain in the UK with his parents as part of a family unit and that must rank as a primary consideration in the proportionality assessment."*

22. At [49] Lord Justice Elias went on to hold

> *"However the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: First because of its relevance to determining the nature and strength of the child's best interests; and second because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."*

23. Thus it is clear that not only is the judge's assessment of reasonableness flawed by the failure to engage with either the Home Office guidance or the judgment in *MA (Pakistan)* but also that his findings in respect of the proportionality of removal are also flawed for the same reasons. That is the basis of one which I found an error of law in the decision of First-tier Tribunal Judge Burns.

24. I then proceeded to remake the appeal in light of the further evidence submitted on behalf of the Appellants. The oldest child, AMAA had been registered as a British citizen on 29 May 2018. A copy of the certificate of registration was provided and also a copy of the child's British passport issued on 25 June 2018.

25. In light of that evidence Mr Tan helpfully and correctly accepted in light of the Home Office guidance at pages 76 to 77 that it would not be reasonable to expect a British child to leave the United Kingdom, which provides as follows:

> *"Where the Child is a British citizen*
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> *Where the child is a British citizen it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly where this means that the child would have to leave the UK because in practice the child will not or is not likely to continue to live in the UK with another parent or primary carer EX.1(a) is likely to apply."*

26. Reference is then made to the fact that in some circumstances it may be appropriate to refuse leave if there has been persistent criminality or a very poor immigration history. Mr Tan did not seek to argue that that was the case in respect of this particular family and indeed there is no evidence to that effect.

27. Therefore, in light of the acceptance by the Secretary of State that the oldest child meets the requirements of EX.1(a) of Appendix FM of the Immigration Rules that the requirements of the Immigration Rules are met. It follows that it will be disproportionate to expect the family to leave.

28. The appeal is consequently allowed on human rights grounds (Article 8).

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 Rebecca Chapman Date 14 November 2018

Deputy Upper Tribunal Judge Chapman