Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07005/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th October 2017	**On 9th November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS APINKE GANIYAT SOLAJA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Adeolu (LR)
For the Respondent: Mr C Avery (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Henderson, promulgated on 26th January 2017, following a hearing at Taylor House on 13th January 2017. 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, born on 12th September 1976. She first entered the UK in 2004 as a visitor and remained unlawfully thereafter. She has a daughter, [S], born on [ ] 2007. It is a feature of this appeal that [S]'s father is not on her birth certificate but at the hearing before Judge Henderson, the name of Adeole Qadri was give by the Appellant as father of the child. Before Judge Henderson, the Appellant's evidence was that Adeole Qadri had left them in 2006 before [S]'s birth and she did not know his exact whereabouts, but knew that he was not in the UK, and has had no contact with [S].

3. An another aspect of this appeal is that the Appellant had married a Portuguese national by the name of Nelson Esteves on 19th October 2006 and obtained an EEA residence card as his spouse from 9th July 2010 until 9th July 2015. She has a son from this marriage who was known as "[H]", and he was born on [ ] 2010. At the date of the hearing before Judge Henderson the children were over aged 10 years and 6 years respectively and both are Nigerian nationals. Mr Nelson Esteves has deserted the Appellant.

The Judge's Determination

4. The judge did not find the Appellant to be a credible witness (paragraph 24). He did accept that the children, and in particular [S], were doing well at school and have many friends and connections in the UK. The judge heard evidence that the Appellant's children had a relationship with a Mrs Balogun's children, and the Appellant's evidence was that the Appellant's children would be devastated if they were separated from their friends, because the children spoke every evening by WhatsApp or video calls, and saw each other during school holidays. The judge observed that Mrs Balogun lived in Thornton Heath, in Surrey, whereas the Appellant lived in Manchester (paragraph 21). The judge made a finding that this relationship could be maintained even if [S] and [H] were in Nigeria (paragraph 26).

5. Consideration was given to the application of Article 8, and the judge observed that this was the main thrust of the Appellant's case, and in particular [S], because she has lived in the UK for just over ten years, and was in the course of applying for British citizenship (paragraph 28). The judge properly addressed the key question as whether it will be reasonable to expect her to leave the UK, and observed that the test appears in paragraph EX.1 of Appendix FM and also in Section 117B(6) of the 2002 Act (paragraph 28).

6. The finding reached was, "it would be in [S]'s best interest to remain in the UK, bearing in mind that she is now aged 10 and has spent most of the

seven years from age 4 in the UK and is at an important stage of educational development", taking into account the decision in **Azimi-Moayed [2013] UKUT 197** (see paragraph 30). More recent judgments of the Court of Appeal, such as **NA (Pakistan) [2016] EWCA Civ 705** were also noted in the decision and the holding of Elias LJ, which required a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed that a child should return (see paragraph 31).

7. The judge did not accept that the Appellant would be destitute in Nigeria. He accepted that it will be difficult as a single mother who has not lived in Nigeria for over twelve years to return back there. However, this was not the test that had to be applied. That the judge found that there were no very significant obstacles to her returning back to Nigeria. The children will be well catered for under the state funded education system there (paragraph 32). The misconduct of the parents was taken into account in the light of the judgment in **Kaur [2017] UKUT 00014**, and the judge expressly stated that the Appellant's immigration history was not taken into account when assessing the best interests of the children. Nevertheless, it was held that, "I find that although [S]'s best interests would be to remain in the UK and continue her education here, it is not necessarily the case that it would be unreasonable for her to leave to the UK ..." (paragraph 36).

8. The appeal was dismissed.

Grounds of Application

9. The grounds of application state that the judge did not adequately assess the grave consequences that would follow the Appellant's removal from the UK given the interests of [S] which had weighed heavily in the consideration of the judge in any event.

10. Permission to appeal was granted by the Tribunal on 16th August 2017 on the basis that it was unclear whether the judge had proceeded to consider whether there was a breach of Article 8 outside the Rules or not, given the finding that there were no sufficiently compelling reasons to affect the balancing exercise as stated at paragraph 37, and given the heading "Article 8 and the Children", under which the judge considered the application of EX.1. The judge had also arguably set out an insufficient analysis of the principles of **Razgar** and an insufficient analysis of the proportionality exercise. A full analysis on proportionality is necessary in the context of wider factors that had a bearing upon the situation. This was a case where the Appellant's child had spent an unbroken ten year period in the UK and the judge had noted at paragraph 4 of the decision that it was accepted that [S] had lived continuously in the UK for at least seven years immediately preceding the date of the application.

11. On 13th September 2017 a Rule 24 response was entered by the Respondent Secretary of State to the effect that the decision was not unreasonable and that the judge had not directed himself appropriately.

Submissions

12. At the hearing before me on 19th October 2017, Mr Adeolu, appearing on behalf of the Appellant submitted that there were two reasons why the judge had erred in law. First, there was the risk of terrorism in Nigeria which the judge had not referred to. I pointed out that this was not an issue that featured in the judge's determination. Nor, assuming that it had been overlooked by the judge, did it form any part of the grounds of application. Permission to appeal also had not been given on this basis.

13. Second, Mr Adeolu submitted that the judge had not considered the position of "[H]" but had only considered the position of [S], and that being so this appeal should be allowed. I pointed out once again that this too was incorrect because the judge expressly deals with the position of [H] at paragraph 26 of the determination.

14. Mr Adeolu then submitted that the Appellant's EEA partner had not been properly considered, but the judge had referred to this at paragraph 2 of the determination, and it also did not feature in the grounds of application, because it was not relevant to the particular issues at hand in this appeal.

15. For his part, Mr Avery submitted that there was no error of law at all. At paragraph 24, the judge had taken into account the position in Nigeria. Furthermore, at paragraph 30, the judge had referred to the position of both [H] and of [S] in terms of their best interests. At paragraph 32, the judge had observed that state funded education was available in Nigeria. As for the EEA point, there was none at all, and it did not make sense to raise it now.

16. In reply, Mr Adeola submitted that at paragraph 28 the judge had referred to how [S] had applied for British citizenship, and it was now the case that [S] had indeed been granted British citizenship. Mr Adeola did not produce any proof of the grant of such citizenship.

Error of Law

17. I am satisfied that the making of the decision by the judge involved 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 and remake the decision. My reasons are as follows. This is a case where the judge made a finding that,

> "On balance I accept that it would be in [S]'s best interest to remain in the UK, bearing in mind that she is now aged 10 and has spent most of the 'seven years from age 4' in the UK and is at an important stage of her educational development" (see paragraph 30).

18. The judge then went on to refer to the recent Court of Appeal judgment of Elias LJ in **MA** (**Pakistan) [2016] EWCA Civ 705** (at paragraph 31). However, what the judge did not do then was to refer to paragraph 49 of the judgment of Elias LJ, where his Lordship states that, "the fact that the child has been in the UK for seven years would need to be given significant

weight in the proportionality exercise", such that it would need to be recognised, "as a starting point that leave should be granted unless there are powerful reasons to the contrary".

19. In this case, the judge recognised that the best interests of [S] lay in remaining in the UK (see paragraph 30). There were no "strong" or "powerful" reasons shown by the Secretary of State such that would displace the starting point (such as criminality on the part of the parents), and on that basis the Appellant should have been granted leave to remain.

20. This was also consistent with the Respondent Secretary of State's own policy set out in Section 11.2.4 of the Immigration Directorate Instructions Family Migration: Appendix FM, Section 1.0B, which states that,

> "The longer the child has resided in the UK, the more of the balance would begin to strengthen in terms of it being unreasonable to expect on 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".

Re-Making the Decision

21. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 8th November 2017