Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/08533/2016**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 11th September 2017	**On 4th December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

AM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Howarth; Counsel instructed by Rotherham & Co Solicitors
For the Respondent: Ms Peterson; Home Office Presenting Officer

DECISION AND REASONS

1. The First-tier Tribunal ("FIT") has made an anonymity order and for the avoidance of any doubt, that order continues. AM is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

2. This is an appeal against a decision and reasons by F*t*T Judge Malik promulgated on 13th April 2017 in which the Judge dismissed an appeal against a decision made by the respondent on 26th July 2016 to refuse to grant asylum and

Humanitarian Protection. The Judge also dismissed the appeal on Article 2, 3 and 8 grounds.

3. The appellant is a national of Malawi. Her husband and their two children *(FM, born 14th April 2004 and VM, born 13th July 2012)* are dependants on her application. They are all nationals of Malawi.

4. The background to the claim for asylum is that the appellant fears return to Malawi because her eldest daughter is at risk of FGM and initiation. The Judge of the F*t*T heard evidence from the appellant and her husband. The appellant's case is set out at paragraphs [10] to [28] of the decision of the F*t*T Judge and I do not repeat it here. The Judge's findings as to the protection claim are to be found at paragraphs [31] to [35] of the decision. The Judge found, at [33], that the appellant and her husband held no fear for their daughters and that they have fabricated their claim, having exhausted all other avenues to remain in the UK. At paragraph [34], the Judge states:

> *"Consequently, I find the appellant has failed to discharge the burden upon her, I find the appellant (and her husband) to be incredible witnesses and that the appellant has fabricated her evidence to form what I find to be the basis of a false asylum claim and I find the appellant's daughters would not be at risk for the reasons claimed."*

The findings and conclusions of the F*t*T Judge as to the asylum and humanitarian protection claims are not challenged.

5. The Judge then turned her attention to the appellant's claim under paragraph 276ADE and Article 8. The Judge found, at [36], that the requirements of paragraph 276ADE of the immigration rules are not met. Adopting the five-stage approach set out in **Razgar**, the Judge found that the appellant and her family have established a family and private life in the UK. She was satisfied that the respondent's decision may have consequences of such gravity as potentially to engage the operation of Article 8, that any such interference is in accordance with

the law and has a legitimate aim. The real issue in this appeal was whether such interference is proportionate to the legitimate public end sought to be achieved.

6. In reaching her decision, the Judge refers at paragraph [42] of her decision to the need to consider the best interests of the children and the decision of the Supreme Court in **ZH (Tanzania) –v- SSHD [2011] UKSC 4**. The Judge also refers, at paragraph [43] of her decision, to s117B of the 2002 Act, noting that the appellant's eldest child is a qualifying child *(she having been in the UK for a continuous period of 7 years)* and that the issue is therefore whether it is reasonable for the eldest child to return to Malawi. At paragraph [45], the Judge refers to the decision of the Court of Appeal in **MA (Pakistan) –v- Upper Tribunal & Anor [2016] EWCA Civ 705**, in which the Court considered how the test of reasonableness should be applied when determining whether or not it is reasonable to remove a child from the UK once he or she has been resident here for seven years. At paragraph [46] of her decision, the Judge states:

> *"I accept the elder child having come to the UK at 4 years/10 months has now been in the UK in excess of 7 years and that she will have enjoyed the benefit of an education and inevitably made friends – but there is no reasonable evidence before me to suggest she (nor her sibling) could not continue with their education in Malawi, commensurate with their abilities, just as their parents did, surrounded by their family there – and make new friends and take up new interests. Whilst the appellant said her children do not speak Chichewa, there is nothing to assume with the support of their parents that they will be unable to acquire it and English is also spoken in Malawi…Whilst I accept there will be some initial upheaval for the elder child, having lived the majority of her life in the UK, having considered her family and private life, of which there is only evidence of her schooling, her best interests (and that of her younger sibling), which in the absence of evidence to the contrary will be to remain with their parents and to grow up in her home country, I find there are powerful reasons to satisfy me to the required standard that it would not be unreasonable to expect her to leave the UK and return to Malawi now. This equally applies to her sibling. For the same reasons, I further find the appellant (nor her husband) can meet the requirements of the parent route, having found it would not be unreasonable to expect the elder child to leave the UK."*

7. At paragraph [47] of her decision, the Judge refers to the matters that she is required to consider as part of the proportionality assessment under s117B of the 2002 Act. The Judge noted that the appellant does not meet the requirements of the immigration rules and that the appellant, her husband, and their children would be returned to Malawi together. The Judge was satisfied that it would be reasonable for the appellant and her husband to return to Malawi having made the prior finding that it is reasonable to expect the appellant's eldest daughter to return.

8. At paragraph [48], the Judge concludes that the appellant and her husband have established a private life in the UK whilst their immigration status has been precarious. She also noted that the appellant did not seek to regularise her presence in the UK until some 6 years after she became *(sic)* appeals rights exhausted. At paragraph [49], the Judge states:

> *"Thus in determining whether the respondent's decision is proportionate, I find the facts underpinning the appellant's, her husband's and their children's family and private lives, taken either singularly or cumulatively, do not outweigh the legitimate purpose of immigration control.*

9. In the grounds of appeal advanced by the appellant it is contended that appellant's eldest child arrived in the UK aged 4 years and 10 months, and she has now lived in the UK for 8 years and 2 months. The appellant contends that more weight should have been have been to the private life established by the eldest child, especially as the F*t*T Judge had accepted that the eldest child is a qualifying child. The appellant contends paragraph 276ADE was included in the rules for good reason and when a child has lived in the UK for over seven years, just to over-ride the rule and simply say it is 'reasonable' for the child to relocate with the parents, is not good enough.

10. Permission to appeal was granted by Upper Tribunal Judge Bruce on 4th July 2017. The matter comes before me to consider whether or not the decision of the F*t*T

Judge involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

11. Before me, Mr Howarth submits that the fact of 7 years residence in the UK accumulated by the appellant's eldest daughter must be given "significant weight", and that there would need to be strong reasons for leave not to be granted in such circumstances. He submits that at paragraph [46] of her decision, the Judge did not attach, as she was required to, significant weight to the fact that the appellant's eldest daughter had been in the UK for over seven years. He submits that the eldest child has put down roots and developed social, cultural and educational links in the UK, such that it will be highly disruptive if she is required to leave the UK. He submits that it is in the child's best interests to remain in the UK and the findings made by the Judge do not support the conclusion that it is reasonable to expect the appellant's children to return to Malawi.

12. In reply, Ms Peterson submits that the Judge considered all the evidence before her, and the findings and conclusions reached by the Judge were open to her. She submits that the Judge correctly directed herself to the relevant statutory framework, and the material authorities. Ms Peterson submits that at paragraphs [43] to [46] of her decision the Judge adequately addressed the real issue in the appeal. Having accepted at paragraph [43] of her decision, that the eldest child is a 'qualifying child', the question for the Judge was whether it is unreasonable to expect the eldest child to leave the United Kingdom. The Judge found, for the reasons set out at paragraphs [45] to [46] in particular, that it would not be unreasonable, to expect her to leave the UK and return to Malawi. That was a finding, on the evidence, that the Judge was entitled to reach.

DISCUSSION

13. I remind myself that in **R & ors (Iran) v SSHD [2005] EWCA Civ 982**, the Court of Appeal held that a finding might only be set aside for error of law on the grounds

of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.

14. It is common ground that in the assessment of the appeal under Article 8, the best interests of the children must be a primary consideration. That meant that they must be considered first. At paragraph [42] of her decision, the Judge noted that she is required to consider the best interest of the children and that she has taken into account the decision of the Supreme Court in **ZH (Tanzania)**. The Judge noted that the best interests of a child are "a primary consideration" but that is not the same as "the primary consideration" and still less "the paramount consideration. At paragraph [45] of her decision, the F*t*T Judge refers to the decision of the Court of Appeal in **MA (Pakistan)**. She noted that the Court of Appeal held that the fact that a child had been in the UK for seven years should be given significant weight in the proportionality assessment.

15. The Tribunal must "have regard" to the considerations set out in section 117B of the Nationality, immigration and Asylum Act 2002 (section 117A). The Judge properly identified that in this appeal, by operation of s117B(6) of the 2002 Act the public interest does not require a person's removal where, (a) the person has a genuine and subsisting parental relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the United Kingdom.

16. At paragraph [46], the Judge notes from the outset that the eldest child came to the UK aged 4 years and 10 months, and that she has now been in the UK for a period in excess of 7 years. The Judge addressed the question of whether it is reasonable to expect the children, and in particular, the eldest child, to return to Malawi before turning to the wider proportionality assessment. In reaching her decision the Judge noted that there was no evidence before her to suggest that the children could not continue with their education in Malawi. The Judge noted that the children do not speak Chichewa. The Judge refers to the health of the children and having rejected the account given by the appellant and her husband that the husband's family wish to subject the children to FGM, the Judge found that the children would also be able to benefit from growing up surrounded by their

extended family in their home country. The Judge accepted that there will be some initial upheaval for the eldest child, who has lived the majority of her life in the UK. However, the Judge found that having considered her family and private life, of which there is only evidence of her schooling, her best interests, and that of her younger sibling in the absence of evidence to contrary, will be to remain with their parents and to grow up in their home country.

17. Having considered the best interests of the children, in my judgement, it was open to the Judge, on the evidence, to find that it would not be unreasonable to expect the eldest child in particular, to return to Malawi. The judge took into account the best interests of the children, and found that it was in their best interests to continue to live with those who cared for them namely, their parents. When considering the childrens' circumstances, she considered the length of time that they had spent in the UK, their education, and the Judge noted that they could access education and healthcare in Malawi. The Judge noted the initial upheaval that would be caused to the eldest child in particular. The judge applied the public interest considerations under section 117 and in particular S117B(6) on the basis that the eldest child had been in the UK for a period in excess of 7 years and she addressed the crucial question of whether it would be unreasonable to expect the eldest child in particular to return to Malawi.

18. In light of her findings at paragraph [46], the Judge applied the decision in **MA (Pakistan)** and had regard to the wider public interest in reaching a decision on the question of reasonableness of return. **MA (Pakistan)** concludes that the reasonableness test in this context is wide ranging, effectively bringing back into play all potentially relevant public interest considerations, including the matters identified in section 117B. The Judge placed in the balance, the fact that the appellant did not meet the requirements of the immigration rules either for asylum or for leave on the basis of family and private life. She found that the private life had been established at a time when the appellant's, and her husband's status in the UK was precarious.

19. Having considered all relevant matters, the Judge found that the facts underpinning the appellant's, her husband's, and their children's family and private lives, taken either singularly or cumulatively, do not outweigh the legitimate purpose of immigration control.

20. The decision of the F*t*T Judge must be read as a whole. I have carefully read the paragraphs that the appellant seeks to criticise and the decision as a whole. I am satisfied that it was open to the Judge on the evidence before her, to have reached the conclusion that it would be reasonable to expect the children to leave the UK. It was open to the Judge to reach the conclusion that the appellants' removal was proportionate having regard to all the circumstances. The Judge took into account the best interests of the children which are a primary consideration and the public interest in effective immigration control. The Judge did not find that the circumstances were such that they were outweighed by the public interest considerations that she had identified. In my judgement, it was open to the Judge to dismiss the appeal on the material that was before her, for the reasons that she has given.

21. Here, it cannot be said that the Judge's analysis of the evidence is irrational or perverse. The Judge did not consider irrelevant factors, and the weight that she attached to the evidence either individually or cumulatively, was a matter for her. I am satisfied that the Judge's decision is a sufficiently reasoned decision that was open to her on the evidence.

Notice of Decision

22. The appeal is dismissed.

Signed Date 20th November 2017

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

The appeal is dismissed and there can be no fee award.

Signed Date 20th November 2017

Deputy Upper Tribunal Judge Mandalia