



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/06248/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 11 February 2018**

**Decision & Reasons
Promulgated
On 27 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**F A A
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**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.

Representation:

For the Appellant: Mr Albert Isaiah Corban, Solicitor from Corban Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the Appellant against the decision of the First-tier Tribunal Judge Moore (the judge), promulgated on 26 October 2018, by which he dismissed the Appellant's appeal against the Respondent's refusal, dated 26 February 2018, of his human rights claim.
2. In essence, that claim had been based upon the Appellant's claimed relationship with his two children, L and R. The Appellant had also asserted that he was no longer in a relationship with the children's mother. The Respondent appeared to accept the Appellant's relationship with the children but concluded that they could all return to Ghana, as could the children's mother.

The judge's decision

3. Despite concerns with aspects of the Appellant's evidence, the judge found that he did indeed have a genuine and subsisting relationship with the two children [14].
4. The judge was not impressed with the evidence relating to the Appellant's relationship with the children's mother. At [18] he found that the Appellant remained in a relationship with the mother and had not, as had been claimed, separated from her. The judge was of the view that in any event, the children's mother had no leave to remain in the United Kingdom and could return to Ghana if she wished.
5. The judge assessed the older child's (L) best interests in view of the fact that she was, by the time of the hearing, a "qualifying child" under section 117B(6) of the Nationality, Immigration and Asylum Act 2002, having been born in this country in 2010. It was concluded that the best interests lay in L remaining with both of her parents and staying in the United Kingdom as well.
6. With reference to section 117B(6), the judge goes on to consider the issue of reasonableness. In doing so, he applied the guidance set out in MA (Pakistan) [2016] EWCA Civ 705 and that contained in EV (Philippines) [2014] EWCA Civ874.
7. With reference to the various factors in the case and wider public interest considerations the judge concluded that it would be reasonable for L to leave the United Kingdom. There was nothing else in the case which justified the Appellant being able to succeed and the appeal was duly dismissed.

The grounds of appeal and grant of permission

8. The grounds assert that the judge failed to assess the best interests and reasonableness issues adequately. In particular, it is said the judge failed

to have reference to the qualifying child's education and other ties established in the United Kingdom.

9. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 20 November 2018. The grant suggests that there may not have been adequate consideration and reasoning given to the position of the older child, L.

The hearing before me

10. Mr Corban relied on the grounds of appeal.
11. I indicated that in light of KO (Nigeria) [2018] UKSC 53, which had been handed down some two weeks after the date of the hearing before the judge, there was an error in the decision under appeal. It was now clear that when assessing the issue of reasonableness under section 117B(6) (or indeed paragraph 276ADE(1)(iv) of the Rules), the wider public interest considerations should not be taken into account, thus overturning what was said by the Court of Appeal in MA (Pakistan).
12. I was interested to hear from Mr Corban as to whether, in light of my indication, the judge's decision was *materially* flawed. Perhaps unsurprisingly, he submitted that it was. He suggested that the judge would have been swayed by the wider public interest considerations and it was difficult to separate the error from the rest of the assessment. It could not be said that the error made no difference to the outcome.
13. Mr Tufan submitted that the older child's best interest had clearly been considered by the judge. He pointed me to the consideration of appellant NS within the judgment of KO (paragraphs 46 onwards). The judge was entitled to have taken account of the fact that neither of the children's parents had leave to remain in this country, and there was nothing else by way of the evidence to show that the judge's decision would have been any different if he had applied the approach set out in KO.

Decision on error of law

14. I conclude that the judge has erred in law in his assessment of the reasonableness issue, but that this error is not material to the outcome of the Appellant's appeal.
15. As stated previously, the judge was not to know that a short time after he made his decision the Supreme Court was to change the legal landscape by way of KO (see in particular, paragraphs 16-17). It is clearly the case that the judge's reliance on the guidance in MA (Pakistan) was erroneous.

16. The question is whether, looking at the judge's decision holistically and sensibly and stripping out the reliance on the wider public interest considerations (specifically the Appellant's overstaying), his overall decision would likely have remained the same?
17. The judge clearly gave adequate consideration to the oldest child's best interests [17] and [20]. He had in mind the fact that she had been born in the United Kingdom and had lived here for the entirety of her life. He took account of social and educational ties here and the disruption and distress that relocation to Ghana would entail. Indeed, he in fact concluded that the best interests lay not only in remaining with her parents but also in remaining in the United Kingdom.
18. The judge quite properly goes on to consider the reasonableness issue bearing in mind that the best interests consideration was a primary factor but not a decisive one. He emphasises, rightly, the fact that her residence in the United Kingdom represented a "powerful factor" in favour of it being unreasonable for her to leave the United Kingdom.
19. At this stage the judge factors in the wider public interest considerations, something that he should not have done in light of KO. However, he was entitled to, indeed he was bound to, consider the "real-world" situation of the parents: neither of them had any leave to remain in this country. This fact had to be seen in light of the judge's finding that the Appellant and the children's mother remained in a relationship, despite their claim to the contrary. When this "real-world" scenario is combined with the judge's consideration of the older child's best interests, it is in my view very likely that he would have reached the same ultimate conclusion on the reasonableness issue even if he had hypothetically directed himself to the authoritative guidance in KO.
20. A further point should be made here. The grounds do not allege that the judge had failed to take any relevant evidence relating to L into account. There was no expert evidence on the impact of L having to leave the United Kingdom, or any other evidence of any health or developmental problems experienced by her.
21. Therefore, in my view the error unwittingly committed by the judge in respect of MA (Pakistan) and KO did not make a material difference in this case.
22. I would add that if I were to have concluded that there was a material error on the basis that I was not sure enough as to the effect of excising the error from the judge's decision as a whole, and if I were to remake the decision in this case, I would have come to the conclusion that it would be reasonable for L to leave the United Kingdom in any event. I say this based upon the findings of the judge and the evidence submitted to the First-tier Tribunal as a whole.

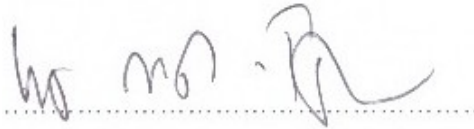
23. Finally, there is nothing in respect of the younger child, the Appellant's own particular circumstances, or those of his partner, which had been identified as constituting any error by the judge.

24. In light of the above, the judge's decision shall stand.

Notice of Decision

The decision of the First-tier Tribunal does not contain material errors of law. That decision shall stand.

The Appellant's appeal to the Upper Tribunal is dismissed.



Signed

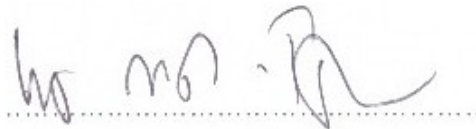
Date: 24 February 2019

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.



Signed

Date: 24 February 2019

Deputy Upper Tribunal Judge Norton-Taylor