Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11996/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th March 2019	**On 05th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

D C I
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: No attendance

DECISION AND REASONS

1. The Appellant is a minor child aged 9 having been born on 26th November 2009. She is a citizen of Nigeria. The Appellant was born in the United Kingdom and has consequently lived in the United Kingdom for all her life. On 3rd August 2017 a human rights claim was made on her behalf on the basis of her family life with her parents NCI and NOI. The Appellant's application was refused by Notice of Refusal dated 25th September 2017.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Sullivan sitting at Harmondsworth on 13th July 2018. In a decision

and reasons promulgated on 20th August 2018 the Appellant's appeal was allowed on human rights grounds.

3. On 11th October 2018 Judge of the First-tier Tribunal Boyes granted permission to appeal. Judge Boyes considered the decision to be very short and brief and that he was satisfied that the grounds were arguable and that the acceptance by the judge of the matters deleterious to the success of the application but nonetheless allowing the appeal may be indicative of the judge erring in law in respect of the public interest. He submitted that it was difficult to see how the case was allowed outside the Rules absent anything compelling or exceptional to justify even stepping out of the Rules in the first place.

4. It was on that basis that the appeal came before me to determine whether or not there was an error of law in the decision of the First-tier Tribunal Judge. I had noted at that stage that this was an appeal by the Secretary of State and for the purpose of continuity throughout the appeal process referred to the Secretary of State as the Respondent.

5. I noted that the challenges on the error of law were two-fold:

   (a) Firstly, that the judge has failed to have regard to the public interest factors outlined in Section 117B of the Nationality, Immigration and Asylum Act 2002. To be fair to the judge he has referred to Section 117B(6) in one line in paragraph 20. The decision was very short but that did not of itself mean that a decision cannot be adequate. However, I was in agreement with the submissions made by the Secretary of State. Section 117B sets out the public interest considerations applicable in all Article 8 cases. The judge failed to balance all relevant factors in reaching his conclusion. That is not to say that his conclusion is ultimately wrong but it is appropriate for a proper and due analysis to be carried out and I was satisfied that the brevity of the decision reflects the fact that the First-tier Tribunal Judge's consideration of the statutory considerations under Section 117B of the 2002 Act are inadequate. Further, the judge failed to give full and proper analysis as to how this case engages "compelling reasons", albeit again that ultimately his conclusion was not one at this stage that was challenged, rather than the adequacy of his reasoning in reaching such conclusions. To such extents there were material errors of law.

   (b) Secondly, there was in addition an adequacy of reasoning challenge and I agreed with the submissions made by Mr Whitwell that the First-tier Tribunal Judge has failed to articulate why in all the circumstances it would not be reasonable for the family to relocate to Nigeria, particularly bearing in mind as he pointed out that it is a mainly English speaking country where the Appellant would be with her family. This again constituted a material error of law.

6. I found that there was an error of law solely on whether it was reasonable to expect the Appellant to leave the UK and to return to Nigeria and I

directed that the restored hearing be by way of submission only. I granted leave to both parties to file and serve skeleton arguments such further evidence upon which they seek to rely and authoritative case law.

7. The Appellants have not chosen not to appear. What they have done is send in an email from their instructing solicitors stating as follows:

> "The Appellant was born in the UK on 26th April 2009 and has lived in the UK since then. On 26th April 2019 she will be turning 10 years old and therefore will be eligible to make an application for British citizenship. We therefore wrote to the appeal's reconsideration team asking them to reconsider the Appellant's case as we have seen in our file all applications made on the basis of seven year continuous stay to be granted by the Home Office. However, despite the Respondent's granting leave to remain to seven year applications they have refused to reconsider the Appellant's case.
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> Further the Appellant's father has informed us that due to financial reasons he will not be attending the resumed hearing on Tuesday 26th March 2019 and will also not be instructing Counsel for the hearing. In the light of this the Appellant's father wishes for the Tribunal to make a decision in his daughter's case in his absence with all the documents already with the Tribunal."

8. Attached to that email is an additional bundle including a witness statement of the Appellant's father dated 21st March 2019 which I have read and considered and the emails sent with supporting documents seeking reconsideration to the Secretary of State.

9. It is on that basis that the restored hearing comes back before me. The Secretary of State appears by her Home Office Presenting Officer Mr Whitwell. Mr Whitwell is very familiar with this matter. He appeared before me on the error of law hearing.

Submissions/Discussion

10. Mr Whitwell makes brief submissions to me. He submits that it is for the claimant to make out their case and that all cases are not the same and consequently whilst neither he nor other Home Office representatives can comment on other cases presented by the Appellant's instructed solicitors each case turns on its own facts and it is the decision of the Secretary of State in this matter that the appeal should be opposed. He refers me to the authoritative guidance of *KO* and to the guidance given by the Secretary of State in their January 2019 Family Migration Appendix FM Section 10b. He asked me to dismiss the appeal.

Findings

11. The factual scenario in which the Appellant finds herself is not disputed. She was born in Romford on 26th April 2009 and it is acknowledged that in April 2019 she will have been in the UK for ten years. It is further

acknowledged that she will be able to qualify for British citizenship at the end of that period. That is not a matter that is before me. There is no further evidence or information provided. I do of course have the preserved findings of fact so far as they relate to this appeal from the First-tier Tribunal and the factual matrix generally of this case that has been put to me. I am not satisfied having considered that this is a case that should succeed. I find guidance in paragraph 18 of *KO (Nigeria) and Others v Secretary of State for the Home Department [2018] UKSC 53* which states when considering the current IDI guidance and making reference to the findings of Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department [2017] SLT 1245*:

> "In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question why would the child be expected to leave the United Kingdom? In a case such as this there can only be one answer "because the parents have no right to remain in the UK". To approach the question in any other way "strips away the context in which the assessment of reasonableness is being made".

12. This is a case where the parents have substantially overstayed in the UK. The Appellant's father's lack of immigration status in the UK has been known since November 2009. The Appellant's father has taken no steps to abide by the terms of his previous immigration status and to leave the UK. It is clear that the Appellant should in her best interests remain with her parents. The question consequently arises as is set out in *KO* is it whether it is reasonable in the facts of this case for her to leave with them. I conclude that it is.

13. I have given detailed consideration to the Home Office published guidance. They reflect that the Supreme Court in *KO* found that reasonableness has to be considered in a real world context in which the child finds him or herself and that a parent's immigration status is relevant in establishing that context. That is an applicable factor in this matter and bearing in mind that the child's parents would be expected to leave the UK it is reasonable to expect the Appellant to leave with them unless there is evidence that it would not be reasonable.

14. I have considered the substantial number of factors set out in the Secretary of State's guidance as to when it would be reasonable for a qualifying child to leave the UK with a parent or primary carer. Many of those factors apply in this case for instance the parents are citizens of the country and able to enjoy full rights of being a citizen and there is nothing in the country's specific information which would suggest that relocation would be unreasonable. These are parents of a child having family, social and cultural ties with the country and there is absolutely no reason why they should not return to it.

15. Consequently I am of the view that the assessment of reasonableness in this case leans in favour of finding that it is reasonable for the Appellant to

leave the UK with her parents and to return as a family unit to Nigeria. For all the above reasons the Appellant's appeal dismissed.

Decision

16. Having found initially that there was a material error of law and set aside the decision of the First-tier Tribunal Judge and having gone on to reconsider and rehear as to whether it is reasonable for the Appellant's appeal against the refusal of the Secretary of State be allowed I find, and decide, that the Appellant's appeal is for all the above reasons dismissed and the decision of the Secretary of State as made in the Notice of Refusal is maintained.

17. The Judge of the First-tier Tribunal granted the Appellant anonymity. No application is made to vary that order and none is made.

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 Date 1 April 2019

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT

FEE AWARD

No application is made for a fee award and none is made.

Signed Date 1 April 2019

Deputy Upper Tribunal Judge D N Harris