Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/05777/2018**

THE IMMIGRATION ACTS

Heard at Manchester **Decision & Reasons Promulgated**
On 17th May 2019 **On 4th July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

NLK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms NLK, in person
For the Respondent: Mr Tan, Home Office Presenting Officer

DECISION AND REASONS

1. The First-tier Tribunal ("F*t*T) has made an anonymity order and for the avoidance of any doubt, that order continues. NLK is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify her or any member of her family. 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.

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2. This is an appeal against the decision of First-tier Tribunal ("F*t*T") Judge O'Brien promulgated on 22nd June 2018. The F*t*T Judge dismissed the appellant's appeal against the decision of the respondent dated 9th April 2018, to refuse her claim for international protection and leave to remain on human rights grounds.

3. The appellant is a national of Burundi. Her immigration history is set out at paragraph [2] of the decision on F*t*T Judge O'Brien. It appears that she arrived in the United Kingdom on or about 22nd March 2000 and made a claim for asylum. The claim was refused and an appeal against that decision was dismissed by the Tribunal. She had exhausted her rights of appeal in 2005. On 4th December 2003, the appellant gave birth to her son ("NK") in the UK. His father is a national of Sierra Leone.

4. The appellant left the UK for Belgium in 2008/9 and claims to have returned to the UK in December 2012. On 7th December 2012, the appellant made further submissions to the respondent. The respondent again refused the claim for international protection for reasons set out in a decision dated 10th October 2014. On 27th February 2018, the appellant made yet further submissions to the respondent. The respondent again refused the claim international protection and decided that the appellant does not meet the requirements under the immigration rules for leave to remain in the UK, on the basis of her family and private life. That decision gave rise to a right of appeal. The appeal was heard by F*t*T Judge O'Brien on 1st June 2018 and it is his decision promulgated on 22nd June 2018, that is the subject of the appeal before me.

The decision of F*t*T Judge O'Brien

5. At paragraphs [5] and [6] of his decision, F*t*T Judge O'Brien summarises the reasons provided by the respondent for refusing the claim for international protection. At paragraphs [12] to [16] of the decision, the Judge sets out the evidence received, and submissions made by the parties. The Judge's findings and conclusions are set out at paragraphs [36] to [45] of the decision. In reaching his decision, the F*t*T Judge noted that the appellant is a citizen of Burundi and has a son, NK, who was born

in the UK. It was common ground that NK is a national of Burundi. The Judge noted that NK's father is not a British citizen, and he does not have any relationship with NK. The Judge noted, at [37], that the appellant and NK left the UK sometime at or around the beginning of 2009, and returned on 7th December 2012. The Judge notes, at [38], as follows:

> "… her claim to have been raped by Tutsis was rejected by Adjudicator Hanes, as was her claim that her father was wanted by the Tutsis, that she had no contact with her family, that she had no family or relatives to return to in her home village, or that she would be persecuted on return, either because of her ethnicity or because she was a single woman with a child. The appellant has provided no evidence to suggest that the situation would be any different now, or that I should depart from the unappealed findings of Adjudicator Hayes. Therefore, I reject the suggestion that the appellant would be at risk of persecution or serious harm on the grounds of ethnicity, because of her family circumstances, or at all."

6. The appellant had maintained that she has no contact with her family. F*t*T Judge O'Brien was unconvinced that the appellant has become estranged from her family. He considered her claims to the contrary, to be self-serving and motivated by a clear desire to avoid removal to Burundi at all costs. He noted that in any event, the appellant admits that she still has friends in Burundi. F*t*T Judge O'Brien considered the appellant's claim that she will be destitute if she is returned to Burundi. He found there to be no evidence of the likelihood of destitution, and noted that contrary to her claim, she would have family (and at least friends) to return to. He noted that in any event, the appellant could make use of the respondent's assisted voluntary return program to secure some financial resources for her return. As to the best interests of NK, the Judge states at paragraph [41] as follows:

> "The appellant frankly states that one of the reasons that she does not want to return is because her son would have better opportunities in this country. However, he is not, and has not been entitled to the free education he has received; The United Kingdom is not obliged to educate the world. The appellant has not demonstrated that he would not have access to education in Burundi; on the contrary some free education appears to be available in Burundi. It is clear from the documents before me that [NK] speaks Swahili. He clearly adapted to the move from the United Kingdom to Belgium in 2008/2009 and back again four years later. He is likely to have extended family in Burundi. He would have no less a relationship with this father there, than he

does in the United Kingdom. All in all, I do not consider that [NK's] removal to Burundi would be contrary to his best interests."

7. The Judge accepted that the removal of the family would interfere sufficiently with their private life, to engage Article 8. The Judge noted that the appellant and NK would be removed together, and that NK does not have a relationship with his father. The Judge concluded that the removal of the appellant and NK would not be disproportionate, and the appeal on Article 8 grounds was dismissed.

The appeal before me

8. In the written grounds of appeal, the appellant claims that F*t*T Judge O'Brien erred in law at paragraph [44] of his decision, in stating that the family's private life attracts little weight. The appellant accepts that in the assessment of proportionality, the private life that she has established, attracts little weight, but, she claims, NK was born in the UK, and "has spent a total of over 10 years in this country". The appellant claims that the Judge erred in attaching little weight to NK's private life, as the UK is the only country that he has lived in, aside from a three-year spell in Belgium. The appellant also claims that in his assessment as to the best interests of NK, the F*t*T Judge refers to NK having adapted to a new life in Belgium in 2008/9, and then returning back to life in the UK. She claims it is impossible to extrapolate from that, that NK would be able to adapt to a move to Burundi, and that in his consideration of the best interests of NK, the Judge fails to state what would be in NK's best interests.

9. Permission to appeal was granted by F*t*T Judge Shimmin on 23rd July 2018. In granting permission, the Judge noted "*It is arguable that the judge eerily erred in law in stating that the family's private lives attracted little weight when the appellant's son has spent over 10 years in the UK.*" The matter comes before me to consider whether the decision of the F*t*T involved the making of a material error of law, and if so, to remake the decision.

10. The appellant was not represented at the hearing of her appeal before me, but she was accompanied by a children's practitioner, namely Susan Watson, employed by Derby City Council. I permitted Ms Watson to act as a '*McKenzie friend',* and assist the appellant. As the appellant was unrepresented, notwithstanding the fact that the appeal before me is an appeal by the appellant, I invited Mr Tan to make submissions first, so that the appellant can understand why the respondent maintains that the decision of F*t*T Judge O'Brien does not contain any material error of law capable of affecting the outcome of the appeal.

11. The respondent has filed a rule 24 response dated 24th September 2018 in which the respondent confirms that the appeal is opposed. The respondent adopted that response. It is said that the fact that NK may have lived in the UK for a total period in excess of 10 years, is not relevant. That would be to ignore the fact that the appellant and NK lived outside the UK, in Belgium, between 2009 and 2012. The respondent submits that the F*t*T Judge correctly proceeds upon the premise that NK is not a qualifying child. The respondent submits that the F*t*T Judge carefully considered the best interests of NK, and it was open to the Judge to conclude that NK's removal to Burundi would not be contrary to his best interests. In reaching that conclusion, the F*t*T Judge did not limit his consideration simply to the fact that NK had adapted to life in Belgium before returning, and adapting to life in the UK again. The F*t*T Judge also considered other relevant matters including the provision of education in Burundi, his ability to speak Swahili, and the fact that the appellant would, on the findings made by the Judge, have family, or least friends, to return to in Burundi.

12. Mr Tan submits that the there was no substantial evidence before the F*t*T regarding the private life that NK has established in the UK. He submits that the F*t*T Judge considered all relevant matters in his assessment of the best interests of the child, and that the grounds of appeal amount to nothing more than a disagreement with findings and conclusions that were properly open to the Judge.

13. The appellant adopted her grounds of appeal. She accepts that she took NK to Belgium in or about 2009, but she submits, that is a European country, and it was easier for NK to adapt to life there. She maintains that she has no links to Burundi, and she submits that NK would be unable to adapt to life there.

Discussion

14. S117B(vi) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), confirms that in the case of a person who is not liable to deportation, the public interest does not require the 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. The term "qualifying child" is defined in s117D. A "qualifying child" means a person who is under the age of 18 and who—(a) is a British citizen, or (b)has lived in the United Kingdom for a continuous period of seven years or more. NK was born in the UK in December 2003 and lived in the UK with the appellant until sometime in 2008/2009, when they left to live in Belgium. They returned to the UK in December 2012. On any view of the facts, as at the time of the respondent's decision, and the hearing before the F*t*T, NK had not lived in the United Kingdom for a continuous period of seven years or more. I accept, as the respondent submits, that the fact that NK may have lived in the UK for a total period in excess of 10 years is not relevant. To benefit from s117B(vi) of the 2002 Act, the requirement is that NK must have lived in the United Kingdom for a continuous period of seven years or more. In my judgment, the F*t*T Judge properly proceeded upon the premise that NK is not a qualifying child. In any event, s117B(vi) not only requires there to be a genuine and subsisting parental relationship with a qualifying child, but additionally, some evidence that it would not be reasonable to expect the child to leave the United Kingdom.

15. S55 of the Borders, Citizenship and Immigration Act 2009 requires the respondent to make arrangements for ensuring that her functions in

relation to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK.

16. I reject the claim that the Judge erred in making his decision without considering the best interests of NK, or by failing to apply the principles set out by the Supreme Court in ZH (Tanzania) and considering the best interests of the child as a primary consideration. It is plain from a careful reading of paragraphs [41] to [44] of the decision, that the Judge had regard to the duty under s55 and the best interests of the child. The best interests of NK, whilst a primary consideration, is not the only consideration.

17. In my judgment, from a careful reading of the findings and conclusions of F*t*T Judge O'Brien, it is clear that the Judge addressed matters relevant to an assessment of whether the removal of the appellant and NK is proportionate. I accept that NK is in no way to be held responsible for the appellant's misconduct, but as has been said repeatedly, children are not a "trump card". In the real world, families move countries and continents all the time, frequently so that their parents can find, or continue with work. It is clear from a careful reading of the decision of the F*t*T Judge, that he considered the particular circumstances of this family, in the real world.

18. The obligation on a Tribunal is to give reasons in sufficient detail to show the principles on which the Tribunal has acted and the reasons that have led to the decision. Such reasons need not be elaborate, and do not need to address every argument or every factor which weighed in the decision. In my judgement, the findings reached by the Judge were neither irrational nor unreasonable in the *Wednesbury* sense, or findings that were wholly unsupported by the evidence. The assessment of such matters is always a highly fact sensitive task. The F*t*T Judge was required to consider the evidence as a whole. He clearly did so.

19. I accept the submission made by Mr. Tam on behalf of the respondent. The written grounds of appeal amount to nothing more than a

disagreement with the findings of the Judge that were properly open to him

Notice of Decision

20. The appellant's appeal is dismissed and the decision of F*t*T Judge O'Brien promulgated on 22nd June 2018 is to stand.

Signed Date 20th June 2019

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal but in any event, as no fee is payable, there can be no fee award.

Signed 20th June 2019

Deputy Upper Tribunal Judge Mandalia