**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/24450/2014**

**THE IMMIGRATION ACTS**

| **Heard at: Manchester** | **Determination Promulgated** |
|---|---|
| **On: 13th March 2015** | **On: 19th May 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Secretary of State for the Home Department**

Appellant

**And**

**Mr Napwahwa Pithon Power**
**(no anonymity direction made)**

Respondent

Representation:
For the Appellant: Ms Johnstone, Senior Home Office Presenting Officer
For the Respondent: Mr Adejumobi, Immigration Advice Service, Liverpool

**DECISION AND REASON**

1. The Respondent is a national of Nigeria, date of birth 10th April 1983. On the 19th September 2014 the First-tier Tribunal (Judge Crawford) allowed his appeal against the refusal to grant him leave to remain in the UK on human rights grounds, and to remove him pursuant to s47 of the Immigration Asylum and Nationality Act 2006. The Secretary of State now has permission[1] to appeal against that decision.

[1] Permission granted by First-tier Tribunal Easterman on the 10th November 2014

2. The matter in issue before the First-tier Tribunal was whether Mr Power should be given leave to remain in the UK on the strength of his family ties to his British partner, their child and his step-daughter. Mr Power relied on Appendix FM and Article 8. The Secretary of State had refused to grant him leave to remain on either basis. The decision-maker had apparently made a request for further information from Mr Power's solicitors who had not responded in time; he was therefore refused under the "suitability" criterion in S-LTR.1.7, "failure to comply with a requirement to provide information". Nor was the Secretary of State satisfied that Mr Power met the definition of "Partner", or "Parent" under Appendix FM. In respect of Article 8 the Secretary of State did not consider the case to reveal any exceptional or compelling circumstances.

3. On appeal the First-tier Tribunal found that that Mr Power could not meet the requirements of Appendix FM. Turning to Article 8, Judge Crawford noted his findings that this was a genuine, subsisting and durable relationship and that Mr Power and his partner did intend to marry. He found that Mr Power had a genuine parental relationship with his daughter and step-daughter. Both children were British and it would not be reasonable to expect them to go and live in Nigeria. The girls had all their extended family and friends in the Wallasey area – it would be contrary to their best interests to expect them to go and live in Nigeria. Finally the determination addresses the question of whether it would be reasonable to expect Mr Power to return to Nigeria and make an application for entry clearance as a fiancé. Having regard to the length of time that this would take, and the authority of Chikwamba, the Tribunal did not find this to be a reasonable option. The appeal was allowed on Article 8 grounds.

4. The Secretary of State contends that the decision must be set aside for the following reasons:

   i) The Tribunal failed to identify whether there were arguably good grounds for granting leave to remain outside of the Rules before embarking on the Article 8 assessment: R (on the application of) Nagre v SSHD [2013] EWHC 720 (Admin);

   ii) The Judge has misdirected himself in finding there to be compelling circumstances not sufficiently recognised by the Rules. Mr Power could go to Pakistan (sic – this should of course read Nigeria) and apply for entry clearance, or the family could go and live with him there;

   iii) He could never have had any legitimate expectation that he would be permitted to stay.

5. In her oral submissions Ms Johnstone supplemented the grounds, with permission, by adding that the Tribunal had given insufficient attention to the mandatory considerations in s117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) .

6. Mr Adejumobi defended the decision. The fact that Mr Power had a genuine parental relationship with two British children whom he was helping to bring up

was in itself a compelling circumstance. The Judge had found that it would not be reasonable for either child to leave and for that reason s117B(6) applied.

**My Findings**

7. This determination is not as clear as it could be. It is not for instance obvious on the face of it why the appeal was dismissed under the Rules – as a fiancé Mr Power did qualify as a "partner" by virtue of GEN.1.2 (iii). The fact that he had not lived with his partner for more than two years was therefore irrelevant. It would appear from the Judge's own findings that EX.1(a)(i)(cc) applied, these being British children with whom Mr Power had a genuine parental relationship, and (ii) it not being reasonable that they leave the UK. Neither of those findings are challenged in the grounds of appeal or by Ms Johnstone in her submissions, in which she expressly relied on the Secretary of State's concession in Sanade. That being the case, the only ground for refusal under the Rules was the 'suitability' requirement raised in the refusal letter. That is not clearly articulated in the determination.

8. It is the Article 8 assessment which is however the subject of this challenge.

9. The grounds refer to Nagre and complain that the Judge failed to identify an "arguably good case" before addressing Article 8. Even before Aikins J made the comments he did in MM [2014] EWCA Civ 985, fortified by the decision in Singh and Khalid [2015] EWCA Civ 74, this was a fallacious argument. If the Tribunal, having made a complete assessment of proportionality, found there to be sufficiently compelling reasons to allow the appeal, it follows that it considered there to be an "arguably good case" to do so.

10. The second ground of appeal – in truth an elaboration of the first - is that the facts of this case are not sufficiently different from situations covered by the Rules to warrant Article 8 protection outside of that scheme. Ms Johnstone submitted that the Rules are there to cover the situation where an individual has a partner and children in the UK. She is quite right about that but since the Secretary of State has not challenged the finding that a) Mr Power is the father/step-father of British children and b) it would not be reasonable for them to leave the UK it is difficult to see where this argument can lead. The fact is that as in-country applicant Mr Power *met* the substantive requirements because he is a 'Partner' and EX.1 applies. The failure to meet the Rules was not his, it was that of his representatives. The question was therefore whether it would, in those circumstances, be "unjustifiably harsh" to:

    a) Split this family up and deprive these British children of their father;

    b) Expect the family to all relocate to Nigeria; or

    c) Expect Mr Power to go alone to Nigeria where he could make an application for entry clearance as a fiancé.

11. Ms Johnstone did not pursue (a). Notwithstanding that the author of the grounds cited (b) as a possibility she sensibly declined to make that submission, referring me to the decision in Sanade. The Secretary of State's case before me concentrated on

(c): having failed to meet the in-country requirements under S-LTR.1.7, Mr Power should go back to Nigeria and make an application for entry clearance in the proper way. It is submitted that the Tribunal failed to properly address this submission. Whilst the reasoning in paragraph 25 is scant I find that the Judge was entitled to reach the decision that he did. The peculiar situation that Mr Power finds himself in is that he fails in-country because his solicitor did not respond to an email in time. If he leaves the country he will lose the benefit of the very provision that parliament approved in order to protect children like his from an unjustifiable interference with their right to family life: EX.1. As Judge Crawford observed, the interference in the family life between father and children would be of "some length" even if he eventually managed to get entry clearance. That is because if Mr Power goes back to Nigeria he will lose his job. As the mother of two young children his partner is unable to work. She will not be able to satisfy the financial requirements necessary to support an application for entry clearance as a fiancé. The successful reunification of this family would depend on the children growing up, getting a place in full time education and Mr Power's partner getting a job earning the requisite amount. On these facts there is some justification for Judge Crawford's conclusion [at 23]: "in effect, to remove him to Nigeria would be to break up a family".

12. As for 'legitimate expectation' I cannot see that this formed any part of the reasoning of the Tribunal. It is correct to say that as a migrant with precarious status Mr Power took his (family) life in his own hands when he entered into the the relationship that he did. His daughter cannot be blamed for that, and his "precarious" status cannot rationally diminish the weight to be attached to her family life. It is no doubt in recognition of this that parliament drew, in s117B (4) and (5), a distinction between private and family lives:

> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

13. That leads me to Ms Johnstone's additional ground, that the First-tier Tribunal failed to consider each of the mandatory considerations set out in s117B. She relies on the Upper Tribunal decision in Dube [2015] UKUT 90 (IAC). It is true that the determination does not in terms refer to Mr Power's ability to speak English (as a Tier 4 (General) Student Migrant he has recently completed his MSc) but this is not the focus of the Secretary of State's complaint. That is that there was no regard had to the fact that the family are, at least in part, reliant on his partner's benefits. They cannot therefore be said to be "self-sufficient". In fact that is not the test. The Act mandates that the public interest requires the *migrant* to be self-sufficient. Mr Power has paid foreign student fees for his BSc at Liverpool John Moore's University and

his recent MSc. He has been financially self-sufficient for the entire time that he has lived in the UK, and should the restrictions on the amount of hours he is entitled to work be lifted, no doubt that service to the public interest would extend to supporting his partner and children, thus removing them from their current dependence on the tax-payer. The determination does expressly address the public interest in maintaining immigration control [at 23] and in doing so notes that this was an appellant who has never breached immigration law. As for sub-section (5) the focus of the determination is the relationship with the children, not with the partner. It cannot therefore be said that this determination has failed to address the factors set out in s117B (1)-(5). The fact is that this determination contains unchallenged findings that it would not be reasonable to expect these British children to leave the United Kingdom. In those circumstances s117B(6) expressly states that there is no public interest in removing their father. If there is no public interest in removing him, the Secretary of State cannot show the decision to be proportionate. The decision of the First-tier Tribunal was therefore rational, lawful and open to it on the evidence before it.

**Decisions**

14. The determination of the First-tier Tribunal does not contain an error of law and it is upheld.

Deputy Upper Tribunal Judge Bruce
12th May 2015