Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25111/2014

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 25 September 2015	**On: 19 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

MR ROO
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Jesurum, counsel instructed by DF Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Callow (FTTJ) dismissing the appellant's appeal against the refusal of his claim for leave to remain under Appendix FM of the Immigration Rules.

2. Permission was granted, and an error of law subsequently found on the basis that the FTTJ had failed to consider the effect of the appellant's removal on a qualifying child, that is the appellant's British stepchild. The reasons are annexed to this decision.

3. The matter came before me for a rehearing to re-make the decision, taking into account all the evidence and submissions before me as well as that before the FTTJ.

The Hearing

4. Shortly before the hearing commenced, a skeleton argument was served on behalf of the respondent in which, contrary to the respondent's previous position, it was accepted that the appellant could argue his case with reference to the parent route in Appendix FM (R-LTRP) provided that he can show that he has a genuine and subsisting relationship with the child and the child's biological father plays no role in the child's life. However, it was also argued that the appellant could not benefit from Appendix FM because he fell foul of the suitability provisions, with specific reference to S-LTR 1.6.

5. Mr Jesurum was taken by surprise by these submissions and sought a not insubstantial quantity of additional time in order to take instructions, consider the respondent's arguments and the accompanying case law.

6. The issues before me were whether the appellant's continued presence in the United Kingdom was not conducive to the public good and whether it was reasonable to expect the child of the appellant's partner, L, to leave the United Kingdom. The nature of the appellant's relationship with his partner and of his meaningful role in the life of her child is not in issue and forms part of the preserved findings of FTTJ Callow.

7. I heard oral evidence from the appellant and his partner, Ms OK, as well as submissions from both representatives. I also had regard to Mr Jarvis' skeleton argument, the appellant's bundles of documentary evidence submitted previously and currently and case law provided on behalf of the respondent.

8. In examination-in-chief, the appellant explained that his mother had died in Nigeria in April 2005. The appellant had continued living, alone, in the rented home he shared with his mother for a further three months until the rent was due. At this point his maternal uncle collected him and applied for a visit visa for the appellant. The appellant recalls signing a visa application form for this purpose. He left Nigeria in October 2005. Upon arriving in the United Kingdom the same month, the appellant was taken to the home of his maternal aunt, a British citizen, who fairly swiftly enrolled him at Newham College. This aunt provided the college with evidence of the appellant's relationship to her and informed them she was his guardian.

9. The appellant was able to progress to study for a science degree at the University of East London and graduated in 2011. He was able to commence that course because he had resided in the United Kingdom for three years prior to the commencement of the degree course. His aunt had paid the fees on his behalf, at the home student rate.

10. The appellant told me that he has had no further contact with his maternal uncle, but heard from extended family in America, that his uncle had been seen there. The appellant does not have the passport he used to enter the United Kingdom, which he maintains was in his true identity, because his uncle retained it. The appellant last saw his father in Nigeria a few days after the funeral of the appellant's mother. He did not hear from him thereafter. The appellant's half-brother lives in America and he does not believe he currently has any relatives in Nigeria.

11. The appellant also gave evidence regarding his involvement in L's life, which included routine tasks such as making breakfast, collecting the child after school and supervising her homework. The appellant did not know when L had last seen her father, but believed that this was before he was on the scene, as he put it.

12. Ms OK gave evidence regarding her domestic life with the appellant and L in similar terms to that of the appellant. She also gave an indication of their social life which mainly involved going out as a family unit and occasionally going out as a couple. She told me that L, who is aged 7, last saw her father when she was aged around 3 and approximately 2 years ago, the child's father had telephoned Ms OK. L's father had never financially supported her. Ms OK's mother and siblings reside in the United Kingdom. Her mother is a higher education teacher. She does not have a relationship with her father. She has a number of uncles and aunts in Nigeria but does not have a personal relationship with them, in that she sees only some of them if they visit her mother in the United Kingdom. L has just started junior school, in that she is in year 3.

13. Mr Jarvis, relied on his skeleton argument and submitted that the appellant could not get to EX.1 of Appendix FM owing to the prohibition in R-LTRP.1.1(d)(i). He relied on the cases of ZS (Jamaica) & Anor v SSHD [2012] EWCA Civ 1639 and R v Bennabas [2005] EWCA Crim 2113, with regard to unlawful residence and use of false documents for procuring entry into the United Kingdom. However, if I was not with him on that, he accepted that it would not be reasonable to expect L to leave the United Kingdom. With regard to the appellant's case outside, the Rules he referred to the test in SS (Congo) and argued that this had not been met. Furthermore, he submitted that the Article 8 assessment outside the Rules is broader than the restricted questions posed in EX.1 and therefore even if it was unreasonable to expect the child to leave the United Kingdom this was not determinative of the question of proportionality in the appellant's case.

14. Mr Jesurum argued that the appellant met the requirements of the Rules. He accepted that he would be in difficulty arguing that the appellant's removal was disproportionate were I to find against him as to the case under the Rules.

15. At the end of the hearing I reserved my determination.

Consideration and findings

16. There was little disagreement over the vast majority of facts of this case. The appellant's genuine and subsisting relationship with L is not in dispute, as is the fact that L has no contact with her biological father, whom she has not seen for 4 years and who last telephoned 2 years ago. I am satisfied that L's father plays no role in her life.

17. The appellant admits his unlawful residence in the United Kingdom from some point in 2006 onwards. He believes that he had a valid visa in his own genuine passport. Mr Jarvis disputes that, but conceded that the respondent's records of entry to the United Kingdom are not infallible. I found the appellant's description of how the visa application form was completed, signed and submitted to be plausible. I am therefore prepared to accept that he entered as a visitor in 2005. Given that the appellant's understanding was that he was sent to the United Kingdom for a fresh start, it could be said that he entered illegally in this regard. However, in view of the fact that the appellant had only just reached the age of majority and was being guided by his close relatives at a time when he was grieving, I am not prepared to find that he is wholly responsible for the manner of his entry to the United Kingdom and the regularisation of his status in the early period of his arrival. The appellant is, however, responsible for his protracted failure to attempt to regularise his immigration thereafter.

18. Under Section 117B Article 8 public interest considerations applicable in all cases, under Part 5A of the Immigration Act 2014 it states:

> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (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.

(6) 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.

19. 117B considerations were recently considered by the Upper Tribunal in AM (Section 117B) Malawi [2015] UKUT 0260 where the Upper Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either Sections 117B(2) or (3), whatever the degree of his fluency in English to the strength of his financial resources. So far as Section 117B(6) is concerned, the question must be posed and answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin (EV (Philippines)).

20. In this case, therefore, although it is said that the appellant can speak English and has not been a burden on the state, he derives no credit for that in relation to Section 117B.

21. It is equally clear that the appellant has spent a substantial amount of time in the UK unlawfully and accordingly little weight should be given to a relationship formed with a qualifying partner.

22. The crux of this case therefore is the position of the appellant's British stepchild.

23. Mr Jarvis relied upon S-LTR.1.6 of Appendix FM on the basis of the appellant's unlawful entry and unlawful residence in the United Kingdom. That provision, if proved would result in the mandatory refusal of the appellant's claim. It states as follows;

> "The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall with paragraph S-LTR.1.3-1.5), character, associations, or other reason, make it undesirable to allow them to remain in the United Kingdom."

24. I have carefully considered what was said at [41] in the judgment in Benabbas relied on by Mr Jarvis, however there is no evidence before me which satisfies me that the appellant fraudulently used a passport in order to gain entry or support his residence in the United Kingdom, like the claimant in that case.

25. Mr Jarvis argues, with reference to [27] of ZS (Jamaica) that the appellant's overstaying and unlawful residence in the United Kingdom renders his presence not conducive to the public good. While I accept that these are serious matters, they are mitigated to some extent by his age, his state of mind following losing his mother and the fact that the appellant was not responsible for his arrival in the United Kingdom. The appellant's aunt was acting in loco parentis and I consider that she must share the responsibility for the appellant's unlawful status at the outset.

26. While the appellant's failure to regularise his presence earlier than 2013 is a serious countervailing matter as far as the balancing exercise under Article 8 outside the Rules in concerned, I do not find that this alone renders his presence in the United Kingdom not conducive to the public good in terms of suitability under the Rules.

27. I now turn to the issue as to the reasonableness of expecting L to leave the United Kingdom in order that family life between her and the appellant can continue in Nigeria.

28. In EV (Philippines) and Others v SSHD [2014] EWCA Civ 875 the Court of Appeal considered Section 55 of the Borders, Citizenship and Immigration Act 2009 and adopted the formulation of Lady Hale in ZH (Tanzania) v SSHD [2010] UKSC 4.

29. At paragraph 30 she said:

> "30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8). In Wan, the Federal Court of Australia, pointed out at para 30 that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the Court clearly regarded as important:
>
> > (a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle'
> >
> > (b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;
> >
> > (c) the loss of educational opportunities available to the children in Australia; and
> >
> > (d) their resultant isolation from the normal contacts of children with their mother and their mother's family."

30. In EV (Philippines), at paragraph 35 Christopher Clarke LJ said:

> "A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age, (b) the length of time they have been here, (c) how long they have been in education, (d) what

> stage their education has reached (e) to what extent they have become distanced from the country to which it is proposed that they return (f) how renewable their connection with it may be, (g) to what extent they will have linguistic medical or other difficulties in adapting to that country, and (h) the extent to which the course proposed will interfere with their family life or other rights (if they have any) as British citizens."

Lewison LJ said at paragraph 51:

> "To attempt to answer this question is it necessary to revisit the well-known case of ZH (Tanzania) v SSHD [2011] UKSC 4. It is necessary to put that decision into its factual context. The Appellant was the mother who is a national of Tanzania. She had two children who were aged 12 and 9 respectively. They were British citizens. Importantly so was their father. Accordingly there was no question of removing the father. Nor did the Secretary of State have any power to remove the children. The only power the Secretary of State had was that of removing the mother alone. If therefore the children were to stay in the UK they would be separated from their mother. On the other hand if they followed her to Tanzania they would be separated from their father, and deprived of the opportunity to grow up in the country of which they were citizens. That was the context in which the issues were discussed."

And at paragraph 58:

> "In my judgement therefore the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

31. In EV (Philippines) none of the family was a British citizen and none had the right to remain in the UK and the court concluded that it was entirely reasonable to expect the children to go with their parents.

32. In this case the child in question is British as well as aged over 7, having resided in the United Kingdom since birth. In addition to her relationship with her mother and the appellant, she has relationships with her maternal grandmother, uncles and aunts in the United Kingdom. She is beginning to develop a private life of her own in terms of her schooling and interests, which include ballet.

33. The appellant has a poor immigration history in that he has clearly overstayed his visa and shown scant regard for the requirements of immigration control, shown by his failure to seek to regularise his status until 2013. These factors are mitigated by his fairly young age when he arrived in the United Kingdom and the fact that he was being guided by close family members whom I consider share the responsibility for his unlawful status in this country.

34. However if L, as in ZH (Tanzania), followed the appellant to Nigeria she would be deprived of the right to grow up in the country of which she is a citizen. She would also be deprived of the benefits of living in the United Kingdom and this is particularly relevant in relation to her education. There was no evidence before me of a family home in Nigeria on either the appellant or Ms OK's side of the family. Ms OK is currently between jobs and the appellant also lacks financial means. I do not consider that it is reasonable, in these circumstances, to expect L to leave her country, her family home, maternal grandmother, aunts and uncles, school, friends and activities for a potentially indefinite period of time, possibly until she is old enough to return to the United Kingdom independently.

35. In these circumstances the appellant meets the requirement of paragraph EX1(a) in that he has a genuine and subsisting relationship with a qualifying child and it would not be reasonable to expect her to leave the UK.

Notice of Decision

36. The appellant's appeal is allowed.

Signed Date: 26 September 2015

Deputy Upper Judge Tribunal Kamara

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make an award of the full fee which has been paid.

Signed Date: 26 September 2015

Deputy Upper Tribunal Judge Kamara

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25111/2014

THE IMMIGRATION ACTS

Heard at Field House **Date Sent**
On 14 August 2015

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Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

MR ROO
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Jesurum, counsel instructed by DF Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. This is an appeal against a decision of FTTJ Callow, promulgated on 31 March 2015, in which he dismissed the appellant's appeal against a decision to refuse to grant him leave to remain on human rights grounds and to remove him from the United Kingdom.

Background

2. The appellant claimed to have arrived in the United Kingdom on 9 October 2005, at the age of 18, accompanied by an uncle. His application for leave to remain was based on a relationship with a partner and her child, now

aged 7, from a previous relationship. That application was refused on 25 April 2014. The Secretary of State commented that the appellant was not married to his sponsor; there was no evidence at all of cohabitation; it was not accepted that the appellant had a genuine and subsisting relationship with the sponsor's child and the appellant could not meet any of the requirements of paragraph 276ADE of the Rules. In particular, the respondent noted that the appellant had spent his first 18 years in his home country and it was not accepted that he had "lost ties" to Nigeria. Reference was made to section 55 of the Borders, Citizenship and Immigration Act 2009, however no objective evidence had been presented of the child in question or of the appellant's relationship with her. The respondent noted that the appellant had submitted a letter from a doctor, which identified him as the son of a named person whose medical issues were described. Reference was also made to the appellant's claim that he supported a named aunt who was his former guardian, both physically and emotionally. The respondent had regard to records showing that this aunt was married; that the appellant only visited at weekends and that the aunt's needs were adequately supplied by her husband and other support workers. There were said to be no compelling or exceptional circumstances to merit the exercise of discretion outside the Rules.

3. In his grounds of appeal, the appellant argued that the respondent's decision failed to take into account his right to a family life with his partner and "*children"* and the best interests of those children.

The hearing before the FTTJ

4. The appellant and his partner gave evidence before FTTJ Callow, who heard the appeal on 17 March 2015. The FTTJ accepted that the parties lived together in a genuine and subsisting relationship. He also accepted that the appellant played a "*meaningful*" role in the upbringing of his partner's daughter. Nonetheless, the FTTJ found there to be no insurmountable obstacles to family life continuing outside the United Kingdom. With regard to Article 8, outside the Rules, the FTTJ found that the sponsor's child was not a qualifying child under section 117D(1) of the Nationality, Immigration and Asylum Act 2002, as amended and that the appellant's family life was outweighed by public interest considerations.

Error of law

5. The grounds of appeal argue that the FTTJ erred in finding that the British child in question was not a qualifying child and his decision might have been different if this error had not been made; it followed that the FTTJ failed to consider section 117B(6) of the 2002 Act; that the FTTJ failed to consider the effect of the appellant's removal on the child and failed to consider the best interests of the child.

6. FTTJ Frankish granted permission, finding there to be an arguable error of law for the FTTJ to find that the British child was not a qualifying child.

7. The Secretary of State's response of 9 June 2015 stated that the respondent did not oppose the appellant's application and invited the Tribunal to determine the appeal following a fresh oral hearing.

The hearing

8. It was common ground between the parties that the FTTJ had materially erred in finding that the sponsor's British daughter was not a qualifying child as defined in section 117D(1) of the 2002 Act and thereby failing to have regard to section 117B(6). I accordingly decided that the FTTJ had made a material error of law.

9. There was some discussion as to the parameters and venue of the rehearing of this appeal. Ultimately I decided that the findings of the FTTJ as to the relationship between the appellant and sponsor and the sponsor's child ought to be preserved given that the error of law did not undermine those findings in view of the judgment in DK (Serbia) & Ors [2006] EWCA Civ 1747, at [25];

> "Accordingly, as far as the scope of reconsideration is concerned, the Tribunal is entitled to approach it, and to give directions accordingly, on the basis that the reconsideration will first determine whether or not there are any identifiable errors of law and will then consider the effect of any such error or errors on the original decision. That assessment should prima facie take place on the basis of the findings of fact and the conclusions of the original Tribunal, save and in so far as they have been infected by the identified error or errors of law. If they have not been infected by any error or errors of law, the Tribunal should only revisit them if there is new evidence or material which should be received in the interest of justice and which could affect those findings and conclusions or if there are other exceptional circumstances, which justify reopening them."

10. In terms of the venue of any future hearing, I bore in mind paragraphs 3.1 and 3.4 of the Tribunal's Practice Directions. Given that findings of fact were required only in relation to the issue as to the reasonableness of requiring the child in question to leave the United Kingdom, I was of the view that the most appropriate venue for the remainder of the hearing would be the Upper Tribunal. However I was unable to proceed to hear the appeal and remake the decision immediately because I was informed by Mr Jesurum, of the non-attendance of the sponsor's partner as a result of suspected food poisoning following a restaurant meal the evening before. Mr Jesurum advised me that his instructing solicitors would be providing supporting medical evidence once that was available. I accepted that the sponsor was the person best placed to give evidence regarding the child in question and I accordingly adjourned the matter until 25 September 2015 when I would be sitting again. Neither representative had any objection to my retaining conduct of the appeal.

11. In these circumstances I am satisfied that there are errors of law such that the decision be set aside to be re-made. The FTTJ's findings of fact with re-

gard to the relationship between the appellant and sponsor and that between the appellant and her child are to stand.

12. Further directions are to follow.

Conclusion

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision to be re-made.

Directions

This appeal is remitted to be heard afresh at a hearing at Field House on 25 September 2015 with a time estimate of 2 hours.

No anonymity direction was made by the FTTJ, however one has now been sought in order to protect the best interest of the child and I therefore make the following direction:

> "Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant, his partner or the child of the family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. "

Signed Date: 16 August 2015

Deputy Upper Tribunal Judge Kamara.