IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00334/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st February 2020	**On 12 March 2020**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

CHINWENDO [E]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Ojo, Law Eagles
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal M R Oliver, promulgated on 30th August 2019, dismissing the appellant's appeal against a decision by the respondent dated 4th December 2018 to refuse his human rights claim.

2. The appellant is a national of Nigeria born on 18th April 1989. He entered the United Kingdom together with his son, who was born in October 2015, in order to join his wife, who is also the mother of his son. She is also a

Nigerian national. She was residing in the United Kingdom as a Tier 4 Student. Shortly after entering the United Kingdom the appellant discovered that his wife was pregnant with the child of another man, the other man being a British citizen. As a result of this discovery the couple separated and the appellant's wife retained custody of their son. The appellant sought further leave to remain in order to enable him to have access to his son.

3. The respondent refused the application on 4th September 2018. At that date the appellant had no contact with his son. The appellant's wife had been granted further leave to remain on 30th November 2018 and the son had been granted further leave to remain in accordance with the grant of leave to his mother. The judge incorrectly stated that the mother was granted Discretionary Leave to Remain. It is clear from documentation in the appellant's bundle of documents prepared for the First-tier Tribunal hearing that the wife was granted leave to remain under Appendix FM of the Immigration Rules pursuant to the ten year parent route to settlement. She would have been granted leave to remain under this provision if she either had sole responsibility for a qualified child or if the qualified child was residing with her. In the particular circumstances of this case the qualified child was the British citizen child born to the wife on 21st November 2018.

4. The respondent noted that the appellant had no contact with his Nigerian son, who was living with his mother at that time. The appellant did not have sole responsibility for the child either and the respondent was not satisfied there were very significant obstacles with respect to the appellant's private life preventing him returning to Nigeria. The respondent rejected any claim that there would be a risk to the appellant's life from members of his family who were angry with him for leaving his business in Nigeria, which subsequently collapsed, and financially supporting his wife in this country. No asylum claim was made, and the judge properly rejected any suggestion that the appellant would be harmed if returned to Nigeria.

The judge's decision

5. When the appeal came to be heard on 23rd July 2019 there had been a material change in circumstances. There had been a reconciliation between the appellant and his wife in October 2018 and the wife attended the hearing and gave evidence on behalf of the appellant. At the date of the hearing the appellant and his wife were living together with their oldest child and the wife's biological child by the British citizen. The judge recorded evidence that since November 2018, when the British citizen child was born, the child's father had not been in contact with the appellant's wife or the British citizen child.

6. In her evidence the wife stated that after the baby was born the biological father played no role in the baby's life and did not provide any support.

The wife also gave evidence that the biological father of her British citizen child had not had contact since November 2018, the month of the child's birth, and that the only contact had been to arrange for a passport for the British citizenship child.

7. The judge accepted that the appellant and his wife had reconciled. The judge noted some warmth in the wife's demeanour when giving evidence about her relationship with the appellant and was satisfied that family life between them existed. The judge accepted that the appellant now treated his wife's second child, that is the British citizen child, as part of the family unit. In summary, the judge found that the appellant had a genuine and subsisting parental relationship with the British citizen child of his wife.

8. The judge then went on to consider the impact of Section 117B(6)(b) of the Nationality, Immigration and Asylum Act 2002, relating to the reasonableness of a qualified child leaving the UK, and noted that the fact that the child was British was not a trump card. The judge indicated that he had to look at all of the circumstances.

9. The judge then found, on the balance of probabilities, that the leave to remain granted to the appellant's wife was based upon maintaining contact with the British citizen child's biological father. Although the judge mistakenly referred to that leave as Discretionary Leave and stated that no evidence had been provided of the basis of her leave, as I have already indicated, there was in fact a copy of the grant of leave to remain made to the appellant's wife under Appendix FM.

10. Mr Ojo, representing the appellant, confirmed that the mother had been granted leave to remain under Appendix FM because it was not reasonable for the child to leave the UK, and this was based, firstly, on the fact that the child was a British citizen, and secondly, and for present purposes more importantly, because the Secretary of State believed the British child had a relationship with his British citizen biological father.

11. The judge found, however, that at the date of the decision, and indeed since very shortly after the birth of the child, the British citizen father had shown no interest in maintaining any contact with the child. The judge found that the leave to remain granted to the appellant's wife, and indeed, his son, had no foundation. The judge was therefore satisfied that the requirements of Appendix FM were not met.

12. The judge then went on, at paragraph 20, to consider whether there were compelling circumstances outside the Immigration Rules which, in accordance with Article 8 principles, would render the appellant's removal a disproportionate breach of Article 8 of the European Convention of Human Rights. The judge cited the well-known cases of **Razgar** and **Agyarko** and **MM (Lebanon)**. The judge found that there were no strong or compelling circumstances outside of the Rules that would warrant a grant of leave to remain on Article 8 principles, and that there would, in

any event, be no interference with the family life rights of the appellant. The appeal was dismissed.

The challenge to the judge's decision

13. The grounds of appeal to the Upper Tribunal were premised on three different heads; proportionality, human rights and rationality. As was pointed out by the judge granting permission, the grounds were somewhat imprecisely drafted. In essence however, the grounds contend that the judge erred in law in his proportionality assessment because there had been an unlawful assessment of whether it was reasonable for the British citizen child to leave the United Kingdom.

14. it was argued that the judge failed to appreciate or give adequate consideration to the British nationality of the child, and that if the child was compelled to leave the UK he would miss the opportunities offered by being a British citizen. In granting permission, the First-tier Tribunal found it arguable that the judge had not properly considered whether it would not be reasonable to expect the British citizen child to leave the UK and that this might have affected the outcome of the proportionality exercise.

The error of law hearing

15. At the hearing Mr Ojo sought to rely on further evidence. There had been no formal application under Rule 15(2A) of the Upper Tribunal Procedure Rules 2008 for the admission of new evidence. I have nevertheless considered that new evidence. It consists of a letter from Mr [EE], who is the biological father the wife's British citizen child. In this letter, which is dated 15th February 2020, Mr [EE] confirmed that, although he does not live with his son, he has unhindered access to him, that he sees his son as frequently as he can and spends quality time with him. Mr [EE] stated that "this connection and love developed stronger after my first visit on his 1st birthday". Mr [EE] claims that he saw his son on five dates between 21st November 2019 and February 2020. Also included are a copy of Mr [EE]'s passport, the birth certificate in relation to the British citizen child and the child's passport.

16. This new evidence was not in existence at the date of the judge's decision, which was in August 2019. Clearly, it was not provided to the judge. It relates to events that significantly postdate the judge's decision. No explanation has been provided as to why there was a sudden change of heart by Mr [EE] in terms of his relationship with his child. No explanation was provided as to why, if he did want involvement in his son's life, evidence to this effect had not been put before the judge. The evidence before the judge was clear and unambiguous. The biological father expressed no interest in seeking a relationship with his son and there was no evidential basis, at the time of the judge's decision, to support a finding that this situation was likely to change. The new evidence provided on

behalf of the appellant is insufficiently relevant in determining whether the judge made an error of law.

17. In his submissions before me Mr Ojo submitted that the issue that the Upper Tribunal needed to grapple with concerned the judge's balancing exercise and his assessment of the qualified child's rights. He confirmed that the appellant's wife was granted leave to remain under the ten year route of Appendix FM based on her British citizen child having a relationship with the biological British citizen father.

18. In his submissions Mr Ojo submitted that the judge failed to consider the effect on the child of relocating to Nigeria. He submitted that a British citizen child cannot be asked to relocate from the country of his birth, although he was unable to provide any authority in support of this particular proposition. Mr Ojo relied repeatedly on the new evidence in submitting that things have since improved since the date of the judge's decision and I was asked to exercise my discretion. Mr Ojo submitted that it would be disproportionate to expect the appellant to leave the UK and the public interest did not justify the removal of the child on account of the mother's behaviour. He submitted that the child would lose the benefits of being raised in the UK as a British citizen.

Discussion

19. The judge's factual findings, which mirror the appellant's own evidence at the First-tier Tribunal and that of his wife, have not been challenged. The judge found that since November 2018 the British citizen child's father had not been in contact other than to arrange a passport in the same month as the child's birth. After the baby was born the biological father had played no role in the child's life and did not provide any support. The judge found that the biological father showed no interest in maintaining contact with the child. This is the relevant factual matrix in which the judge's assessment has to be considered. It is necessarily implicit in reading the decision as a whole that the judge found that the British citizen child's best interests were to be with those who actually had a parental relationship, who cared for the child, and who provided for the child's welfare and ensured his safety. This is particularly so, given that the child was less than 1 year old at the dates of the hearing and the judge's decision.

20. Reading the decision holistically, the judge was unarguably aware that the child was a British citizen. The judge properly directed himself in accordance with Section 117B(6) of the 2002 Act, and the judge properly reminded himself that being a British citizen was not a trump card. If any authority is needed for this proposition, see **Agyarko**. The judge properly directed himself as to the needs for compelling circumstances outside of the Immigration Rules and properly referred to the **Razgar** test.

21. The basis upon which leave to remain was granted to the appellant's wife ceased to exist soon after the child's birth. There was no relationship between the biological father and his son. This underscored the question of whether it was reasonable for the child to leave the UK. The child, who was less than 1 year old at the date of the judge's decision, clearly had no private life of his own, and his family life interests, based on the factual matrix determined at the date of the decision, were best served by remaining with his biological mother and the appellant, who was in a parental relationship with him. There was no requirement for the appellant's wife and son to leave the UK as they had been granted further leave to remain, but the grants of leave did not require them to stay. It was a question of choice whether they decided to return to Nigeria, their country of nationality, in order to maintain the family relationships.

22. Whilst it is clear that the child has a right to the benefits that flow from being a British citizen, given his very young age and the absence at the date of decision of any relationship with the biological father, and the fact that those with a genuine parental relationship in respect of the child had no permanent right to reside in this country, the judge was rationally entitled to conclude that it was reasonable for the British citizen child to leave the UK. I consequently find that the judge did not materially err on a point of law in dismissing the appeal.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

D.Blum

Signed

Upper Tribunal Judge Blum

3 March 2020

Date