Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41096/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 September 2014	**On 17 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OO (NIGERIA)
(ANONYMITY DIRECTION MADE)

Respondent/Claimant

Representation:

For the Appellant: Ms A Holmes, Specialist Appeals Team
For the Respondent: Ms V Akiatola, Legal Representative, Harrison Morgan Solicitors

DETERMINATION AND REASONS

1. The Secretary of State has successfully appealed from the decision of the First-tier Tribunal allowing the claimant's appeal on Article 8 grounds against the decision by the Secretary of State on 18 September 2013 to refuse his application for leave to remain as the parent of a British citizen

child. In her determination promulgated on 31 July 2014 Deputy Upper Tribunal Frances gave her reasons for finding that the decision of the First-tier Tribunal contained an error of law, such that it should be set aside and remade.

2. The First-tier Tribunal made an anonymity order, and I consider that it is appropriate that such an order should continue for these proceedings in the Upper Tribunal, as the central issue in the appeal is the best interests of a minor child. Accordingly, I direct that in any report of these proceedings the identity of the child D and her parents shall not be revealed.

3. I set out below Judge Frances's Decision and Reasons following the error of law hearing at Field House on 16 July 2014.

> 1. I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Nigeria and is 54 years old. His appeal against the Respondent's decision of 18th September 2013 refusing to vary leave to remain as the parent of a British citizen child under Appendix FM was allowed by the First-tier Tribunal on human rights grounds. The Secretary of State appealed.
>
> 2. Permission to appeal was granted by First-tier Tribunal Judge Heynes on 20th May 2014 on the grounds that First-tier Tribunal Judge Troup erred in law in failing to make a finding on whether the Appellant had instituted family court proceedings for the purpose of delaying or frustrating removal given his finding that the Appellant's explanation for the delay was not credible.
>
> 3. Mr Bramble relied on the grounds of appeal and submitted that the Appellant had been granted further leave to remain, for six months, outside the Immigration Rules on 14th February 2013, on the basis that he was to show that family court proceedings were in progress. The Appellant failed to supply such evidence and his application on 10th August 2013, for further leave to remain on a discretionary basis, was refused on 18th September 2013. Between the decision and the hearing before the First-tier Tribunal on 2nd April 2014, the Appellant made an application for a contact order.
>
> 4. On 13th March 2014, Brentford County Court made an order for 6 to 8 contact sessions for the purpose of re-introduction and re-establishment of the relationship between the Appellant and his child. The Appellant was cross-examined on why contact proceedings had not been instituted before January 2014 and submissions were made on RS (immigration and family court proceedings) India [2012] UKUT 00218 (IAC). The Judge failed to properly apply RS because his findings at paragraph 23 could only lead to the conclusion that the delay was intended to frustrate removal. Further, the parties were amicable to contact and this undermined the Judge's finding that if the Appellant was removed, contact would be severed. The Appellant had not shown that the contact proceedings would lead to a relationship with his child or that his commitment to those proceedings necessitated discretionary leave.

5. There was currently no relationship between the Appellant and his child and the Judge found that the Appellant's explanation for the delay in instituting contact proceedings to be "unsatisfactory, lame and less than credible." The Appellant had been given an opportunity to pursue contact proceedings and had not done so. The Judge failed to explain why the Appellant should be given further leave given his past conduct.

6. Ms Akiatola submitted that the child's best interests were a primary consideration and would be affected by the outcome of the Appellant's appeal. The Judge found that family proceedings had been initiated and it was in the best interests of the child that the Appellant be granted limited leave in UK to continue those proceedings. The only way to assess the genuineness of the Appellant's intentions was to see through the outcome of the family court proceedings. The Judge could not conclude if the Appellant was frustrating his removal without allowing him to progress with his contact application. The Appellant would not be able to attend the contact sessions if he was removed to Nigeria. Limited leave was a proportionate response in the circumstances.

Discussion and conclusions

7. The Appellant married a British citizen and they have a daughter who was born on 29th April 2008. She is also a British citizen. The Appellant separated from his wife in 2009 and he last had contact with his daughter in about April or May 2011. The Appellant could not meet the requirements of the Immigration Rules.

8. The First-tier Tribunal Judge found that the Appellant was granted discretionary leave to remain for six months, in February 2012, in order to resolve contact arrangements, but he failed to issue contact proceedings during that period let alone resolve them. The Appellant's application form was misleading because he claimed that contact proceedings were 'in progress' when evidently they were not. The Appellant asserted in his witness statement that 'the reason for the delay was due to court administrative proceedings' when that was clearly not the case because he did not issue proceedings until January 2014.

9. The Judge found the Appellant to be a "thoroughly unsatisfactory witness" and his explanation for the delay in instituting family court proceedings was "unsatisfactory, lame and less than credible." Despite this view, the Judge found that if the Appellant was removed to Nigeria it would be highly probable that any possibility of future contact between him and the child would be ended. He allowed the appeal to the limited extend under Article 8 and invited the Respondent to grant discretionary leave following the decision of MS (Ivory Coast) [2007] EWCA Civ 133.

10. I find that there was an error of law in the Judge's conclusion that the Appellant was not a credible witness. The Judge rejected the Appellant's explanation for the delay in instituting proceedings. This

finding was open to the Judge on the evidence before him and he gave cogent reasons for his conclusion.

11. However, the Judge failed to make a finding on whether the family proceedings were instituted to frustrate the Appellant's removal and not to promote the child's welfare. The Judge failed to properly direct himself following RS and address the questions at paragraph 43(iv). The Appellant had not had contact with his daughter for three years; he had been granted discretionary leave to institute family court proceedings, but failed to do so; he had not issued proceedings until after his application was refused and the proceedings were at a very early stage: the court ordered six to eight contact sessions for the purpose of re-establishing a relationship. Had the Judge considered these issues he may well have come to a different decision.

12. I find that the decision of the First-tier Tribunal disclosed an error on a point of law such that it is set aside and will be remade. The Judge's findings at paragraph 23 are preserved. His findings at paragraph 24 are set aside.

DIRECTIONS

1. Adjourned to the first open date before me. The Appellant to notify the Upper Tribunal if an interpreter is required.

2. The Appellant to file and serve evidence relating to the progress of the family court proceedings including the outcome of the order made on 13th March 2014 and any further court orders or reports to enable the Upper Tribunal to determine where the best interests of the child lie.

3. Not later than 14 days before the hearing the parties must serve on the Upper Tribunal and each other any further documentary evidence upon which they intend to rely at the hearing.

4. Time estimate 2 hours.

The Continuation Hearing

4. At the hearing before me, I asked whether there had been compliance with Judge Frances's second direction. Ms Akiatola produced a copy of a notice of a directions hearing on 9 September 2014 in the contact proceedings. This referred back to an order made on 15 July 2014. I asked about this order. Ms Akiatola said that she did not have permission to provide it. I pointed out that Judge Frances had directed the production of such material, and queried whether it was open to the appellant not to disclose it. Ms Akiatola took instructions from the appellant, and he agreed to disclose the order.

5. It was a child arrangements order under Section 8 of The Children Act 1989. The father OO was a litigant in person. The child D was living with her mother, VM. The safeguarding checks by CAFCASS were complete. They showed that there were safety issues in that the father was alleged

to have used domestic abuse and was alleged to have been convicted in the United States of drug related offences.

6. The key issues which had been agreed and or which were to be determined were: (a) whether the father is engaged in domestic violence; (b) whether the father has convictions for/used drugs.

7. The planned steps to resolve the issues were: (a) the father shall attend a domestic violence perpetrator's programme; (b) the father will provide such information as to enable CAFCASS to make enquiries about his activities in the United States.

8. There is a reference to a report of the family court adviser, which has not been disclosed in these proceedings.

9. The court made the following order with regard to child arrangements:

> Until further order the children shall have contact with their father as follows: he may send letters, photographs, cards and gifts once per month and the respondent mother shall encourage D to reply as required and send photographs.

10. The court made an activity direction, whereby the father was directed to take part in a domestic violence perpetrator's programme on dates and times as specified by the activity provider.

11. I invited the claimant to be tendered as a witness in order to address the matters referred to in the court order. He said that he had sent letters and photographs to his daughter in accordance with the court order. He produced a letter and a postal receipt evidencing the sending of the letter dated 4 August 2014 to the mother's address. He claimed that he had sent two other letters, and produced a postal receipt of 16 August 2014 but not a copy of what was sent. He said he had also sent photographs, but he did not have copies of such photographs. D had not replied to any of the letters, and he had raised this at the directions hearing on 9 September, which his ex-wife had attended.

12. He had not seen D since she was 2 years old. After he had split up with the mother, she used to bring D to meet him at a shopping mall in Harrow. He was asked to state the year and the month in which contact between him and D ceased. He said he thought she was five or six years old now. It was maybe in 2011 that contact ceased. Her mother had stopped bringing D to the shopping mall, saying that she was too busy. But he called the Child Support Agency and they said he should take her to court. He had tried to speak to D on the telephone, but her mother refused to put D onto the telephone. He had not attempted to send any letters or cards to D until now.

13. He confirmed that D's mother was resisting his application for a contact order. He had never lived in the USA, and she had fabricated the claim

that he had a US drugs conviction. It was also a fabrication on her part to accuse him of engaging in domestic violence.

14. In cross-examination, Ms Holmes asked the claimant to explain why, when she had contacted his solicitor yesterday to find out whether there were any documents which came within the scope of paragraph 2 of the directions, she had been informed that there were none. He said he did not know why, as he had given him copies. It was put to him that the family proceedings had been initiated by him to delay or frustrate his removal. He answered that he had been trying his best to establish contact with his daughter. It was put to him that he did not seem to know very much about his daughter, including how old she was. He answered he knew that she was born in 2008, and that they were together for two years.

15. In answer to questions for clarification purposes from me, the claimant said his wife worked as a nurse, and he thought this was at an NHS hospital.

16. In her closing submissions on behalf of the Secretary of State, Ms Holmes relied on the Reasons for Refusal Letter, and invited me to find that the contact proceedings had been instituted to delay the claimant's removal, not to promote D's welfare.

17. In reply, Ms Akiatola submitted that, irrespective of the claimant's conduct, the decision appealed against involved a child, and her best interests were a primary consideration. The contact proceedings were ongoing, and removing the claimant at this stage would bring them to an end or at least lead to a severe delay in them coming to a conclusion. So, having regard to the best interests of the child, the proposed removal of the claimant was disproportionate.

Discussion and Findings

18. The claimant entered the United Kingdom on 12 April 2008 with a spousal visa which was valid until 26 February 2010. D was born in the UK on 29 April 2008. The claimant is not recorded as having applied for an extension of his spousal visa in 2010. Moreover, he began paying child maintenance in respect of D from October 2009. So I infer that he split up with D's mother and moved out of the family home some time before then. The photographs in the claimant's bundle of the claimant with D are likely to have been taken when D was between the ages of 1 and 2, and they are consistent with the claim that for a period of time after the split the mother brought D to a shopping mall in Harrow for contact with the claimant. In so far as it is material, there is one photograph in which D appears to be older.

19. On 14 February 2012 the claimant was granted limited leave to remain in the United Kingdom until 14 August 2012 so as to provide the Secretary of State with a court order granting him access rights to D. It is not clear

when the claimant made the application which led to this limited leave to remain.

20. On 14 August 2012 the claimant applied through his former legal representatives for leave to remain on a discretionary basis. This was so he could establish and further develop contact with his daughter, thus enjoying family life with her; and to maintain and further develop contact with the de facto children of his former relationship. His solicitors provided a number of documents in support of the application, but they did not include any documents evidencing any contact with D, or evidencing any attempt to obtain a court order granting him access rights to D. In his application form, the claimant represented that court proceedings were "in progress".

21. On 18 September 2013 the Secretary of State gave her reasons for refusing to grant the claimant's application for leave to remain as the parent of a British citizen child. On 22 August 2013 he had been requested to provide evidence of the court order granting him access to his rights of the child, or a letter from the mother of the child confirming his role in the child's life. This was because his previous grant of leave outside the Rules had been granted on the basis he was in the process of obtaining this order. But as he had failed to provide the specified information, and given it was now eighteen months since his leave outside the Rules was granted, he failed to meet the suitability requirement of S-LTR.1.7 and there was no evidence to hand to suggest that he had played a parental role in the life of his child.

22. The claimant finally initiated contact proceedings on 28 January 2014. On 3 March 2014 solicitors on behalf of VM wrote to the claimant to say that their client would very much like to come to an amicable arrangement concerning contact, and would therefore like to propose that they both attended mediation. At the same time their client could confirm she would not object to contact between him and D, providing it took place at a contact centre to begin with.

23. The court order made on 13 March 2014 was before the First-tier Tribunal. The mother and father attended in person, and the court also heard from Mr Harmon of CAFCASS. Upon the parties in principle agreeing contact, but it being agreed that it had to proceed gradually and with care during the time since D had last seen her father, and upon CAFCASS agreeing to fund six to eight sessions at Stephen's Place, CAFCASS was directed to make a referral to Stephen's Place and to fund six to eight contact sessions at that venue for the purpose of re-introduction and re-establishment of the relationship between the applicant father and the child. CAFCASS was also directed to provide a Section 7 report, which would consider how contact could progress after Stephen's Place.

24. It is clear from the order which I have seen today that matters have not unfolded as was envisaged in the order of March 2014. Without sight of the Section 7 report, it is not clear to what extent the concerns raised

about contact emanate from the mother as opposed to from CAFCASS. But it is clear that the resumption of direct contact between father and child is no longer on the cards for the time being.

25. The Court of Appeal in **MS (Ivory Coast) [2007] EWCA Civ 133** considered that where family proceedings are under consideration, a period of discretionary leave should be granted to enable the person facing removal to remain lawfully in the UK to participate in those proceedings. But in **DH (Jamaica) [2010] EWCA Civ 2007** the Court of Appeal clarified there was no universal obligation that a period of discretionary leave must be granted where family proceedings remain unresolved. Sedley LJ said as follows:

> What **MS (Ivory Coast)** concerns is the unacceptability of keeping an individual in limbo rather than giving legal effect, by the grant of limited leave to enter outside the Rules, to her accepted entitlement to remain here for a specified purpose. What the present case concerns is whether the appellant has any such entitlement.

26. In her error of law ruling, Judge Frances directed that the findings of fact in paragraph 23 of the decision of the First-tier Tribunal should be preserved. Paragraph 23 reads as follows:

> Having heard the submissions and reviewed the evidence I found the appellant to be a thoroughly unsatisfactory witness. He entered the UK in April 2008 just days before his daughter was born and the marriage broke down soon afterwards in 2009. He claims that there was contact with the child until April/May 2011 which is now over three years ago. Ten months later in February 2012 the respondent granted the claimant leave to remain for a discretionary period of six months in order to resolve contact arrangements, but he failed to issue proceedings for contact during that period let alone resolving them. Throughout his evidence the claimant excused himself by blaming either his solicitors or his ex-wife for the delay but I find that responsibility falls largely at the claimant's own door. [The Presenting Officer] is right to point out that the FLR(O) application was entirely misleading when the claimant claimed at 6.31 that contact proceedings were in progress when evidently they were not. Equally, I find that the claimant's character is demonstrated by his assertion at paragraph 7 of his witness statement "the reason for the delay was due to court administrative proceedings". Self evidently this was not the case. He did not issue proceedings of January 2014, and his explanation for not doing so between April/May 2011 and the beginning of 2014 are unsatisfactory, lame and less than credible.

27. In **RS**, the Tribunal said at paragraph [43] that when a judge sitting in an immigration appeal has to consider whether a person with a criminal record or adverse immigration history should be removed or deported when there are family proceedings contemplated the judge should consider the following questions:

> (i) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?

(ii) Are there compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interests of the child?

(iii) In the case of contact proceedings initiated by an appellant in an immigration appeal, is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare?

28. In the light of the preserved finding, and also having formed my own independent judgment on the totality of the evidence that is before me, I answer the third question in the affirmative. I find that the claimant did not initiate the contact proceedings in January 2014 to promote D's welfare, but to delay or frustrate his removal. It is clear from the chronology that the claimant did not grasp the opportunity of initiating family proceedings when specifically granted six months' leave to do so, but only initiated them in response to the threat of removal. Since ceasing to have contact with his daughter in 2010 or 2011, he has not done his best to re-establish contact. On the contrary, there was a remarkable lack of activity on that front until January 2014.

29. **RS** was decided before the introduction of the new Rules, and therefore the case does not address their potential impact to a case such as this. In my judgment, the necessary starting point in the Article 8 assessment is to recognise that Appendix FM caters for applications for limited leave to remain in order to pursue contact proceedings. However, the claimant does not meet the mandatory requirements for leave to remain on this basis under Appendix FM. Not only does he fail to meet the suitability requirement identified in the refusal letter, but also he does not play a parental role in the life of his child. He is D's biological father, but he has had no contact with her whatsoever from, at the latest, April/May 2011.

30. Because of the **MS (Ivory Coast)** line of authority, I am prepared to accept the claimant has an arguable Article 8 right claim outside the Rules to remain until the conclusion of the family proceedings such as to require the application of the five point **Razgar** test.

31. I find that the claimant does not enjoy family life with D at the date of the hearing, and therefore Article 8(1) is not engaged with respect to the claimant's right to respect for family life. On the one hand, I accept that Article 8(1) is engaged in respect of the claimant's private life. This will be seriously interfered with if he is not allowed to remain until the conclusion of the family proceedings. Questions 3 and 4 of the **Razgar** test fall to be answered in favour of the Secretary of State, and so the crucial question is whether requiring the claimant to leave now, before the family proceedings are concluded, is proportionate.

32. The best interests of D are a primary consideration in the proportionality assessment. I accept that in general terms it is in the best interests of a child to have contact with his or her biological father. But on the evidence as it stands, the claimant's removal will not impact at all on D's welfare

and it will also have no adverse impact on her emotional wellbeing and development in the foreseeable future. As previously noted, she has had no contact or relationship with her father for some years, and so, to put it bluntly, she is not going to miss him if he is outside the jurisdiction. The only contact which the claimant is allowed to have with D is indirect contact once a month. There is no reason why the claimant could not maintain this level of contact from Nigeria.

33. The removal of the claimant is likely to delay the conclusion of the family proceedings, but it will not prevent them from continuing. The claimant can continue to participate in the family proceedings from Nigeria by modern forms of communication, "with visits on the part of the claimant where he is required to attend court": see the Secretary of State's grounds of appeal, paragraph (c).

34. In conclusion, I am not persuaded that it is contrary to D's best interests for the claimant to be removed at this stage. But even if I am wrong about that, it is only contrary to D's interests to a small degree, and there are strong countervailing considerations which render the decision appealed against a proportionate one.

35. I repeat my earlier finding that the purpose of the contact proceedings initiated by the claimant has been to delay or frustrate removal, not to promote D's welfare. In all the circumstances, this is not a case where the appeal should be allowed to a limited extent and a further period of discretionary leave be granted to the claimant. I also do not consider there should be an adjournment to enable a decision to be made in the family proceedings. This is because the period of adjournment is unlikely to be short. Also, it is not clear that the decision in the family proceedings will ultimately assist the claimant with regard to his immigration status. If the decision is indirect contact only, such indirect contact can be continued from Nigeria.

Decision

The decision of the First-tier Tribunal contained an error of law, and so the decision is set aside and the following decision is substituted: this appeal is dismissed on all grounds raised.

Signed Date

Deputy Upper Tribunal Judge Monson