Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37407/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 5 August 2015 **On 14 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

OLUWASEGUN UJI
(ANONYMITY ORDER NOT MADE)
Respondent

Representation:

For the Appellant: Mr T Wilding of the Specialist Appeals Team
For the Respondent: Dr A Corban of Corban Solicitors

DECISION AND REASONS

The Respondent

1. The Respondent to whom I shall refer as “the Applicant” is a citizen of Nigeria born on 27 September 1969. He states he arrived on 15 May 2005 using a fraudulently obtained Nigerian passport in a false name. He has a child born in late 2010 by his ex-partner who is said to be a Nigerian

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national with indefinite leave to remain in the United Kingdom. There was no evidence before the Tribunal that their child is a British citizen.

2. The Appellant's sister is a British citizen and she and her husband and other family members live together in Peckham Rye.

3. On 17 May 2011 the Applicant sought to formalise his immigration status and made an application for his case to be considered under Article 8 of the European Convention on the basis of his private and family life with his partner, their child and his extended family.

The Original Decision

4. On 17 September 2014 the Appellant (the SSHD) refused the Applicant's claim and proposed to make directions for his removal under Section 10 of the Immigration and Asylum Act 1999 to Nigeria.

5. The SSHD considered the Applicant's claim under paragraph 276ADE of the Immigration Rules and Appendix FM. She noted there was no record the Applicant's child was a British citizen or that he had sole responsibility for the child who resided with the mother. The SSHD concluded the Applicant did not have any family life in the United Kingdom which would engage the State's obligations under Article 8. She went on to consider the claim under Article 8 outside the Immigration Rules, taking account of the Applicant's relationship not only with his child's mother but also his extended family and concluded that such family life did not warrant the grant of leave outside the Immigration Rules.

6. The Respondent considered the Applicant's private life and noted he did not meet the relevant length of residence and other requirements under paragraphs 276ADE(iii)-(vi). Further, he had substantial ties with Nigeria including three children identified at an interview on 13 May 2011. She referred to the lack of evidence that the Appellant had a material role in his child's life and that the Applicant was no longer in a relationship with the child's mother.

7. On 22 September 2014 the Applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). He continued to assert his child was a British citizen; he maintained contact with the child and he relied on Article 8 of the European Convention, asserting further that the SSHD had not adequately considered her duties to his child under Section 55 of the UK Borders Act 2007.

The First-tier Tribunal's Decision

8. By a decision promulgated on 15 April 2015 Judge of the First-tier Tribunal Quinn allowed the Applicant's appeal under Article 8 of the European Convention outside the Immigration Rules.

9. The SSHD sought permission to appeal on the basis that the Judge had not adequately dealt with the best interests of the child and had expressed

doubts about the reason why the Applicant no longer had contact with his child. The SSHD asserted the Judge had failed to give any reasons why the best interests of the child, in the light that the Applicant had no current contact, would outweigh the public interest factors outlined in Section 117(B) of the 2002 Act. The SSHD further challenged the factors in respect of which the Judge had referred to in his consideration of the proportionality of the decision and that he had placed undue weight on the Applicant's claim that he had not committed any criminal offence or been reliant on public funds.

The Upper Tribunal Hearing

10. At the start of the hearing Dr Corban produced a copy of an order in the Croydon Family Court providing for the Applicant to have contact with his child. The order is dated 21 April 2015 and provides for a further hearing four months thereafter to discuss progress unless the Applicant and his partner had resolved matters between themselves. I remind myself that the order was made subsequent to the hearing and promulgation of the Judge's decision and therefore could not have any relevance to whether the Judge's decision contained a material error of law.

11. Following a discussion between the representatives and myself, I indicated that I found that there were material errors of law in the decision and that in the circumstances I considered it would be necessary to set it aside. During the course of the discussion Dr Corban had given reasons why the decision should stand but he had not persuaded me and in all the circumstances did not wish to make any further submissions in open court.

Material Errors of Law in the Judge's Decision and Reasons

12. The Judge failed to address the SSHD's claim that the Applicant said he had three children in Nigeria. He made no findings about the nature and quality of the Applicant's life with his extended family.

13. At para.40 of his decision the Judge made no reference to the evidence or reasons for finding that the Applicant had a close bond with his child. The Judge did not assess all the relevant evidence before he reached his conclusion. Crucially, the Judge made a finding that it was in the child's best interests to remain with the mother. There was no decision before the Judge that the SSHD proposed to or had refused any application made for the child or the child's mother for leave to remain or that there were any proposals for the child's removal. There was no finding on the desirability and importance of contact between the Applicant and his child.

14. At para.41 the Judge failed to take any account of the public interest referred to in Sections 117(A)-117(D) of the 2002 Act. Having made a finding at para.40 that the Applicant had no means of supporting his child and accommodation of his own, the Judge failed to incorporate these findings into his assessment of the factors referred to in Sections 117(A)-117(D) which he considered at paras.41-45.

15. In *Zoumbas v SSHD [2013] UKSC 74* Lord Hodge stated that the best interests of a child are an integral part of the proportionality assessment under Article 8 of the European Convention. The Judge concluded his assessment under Article 8 at para.46 of his decision found the interference to the Applicant's private and family life which would be caused by his removal would be proportionate. Then at para.48 he commenced his consideration of the SSHD's duties under Section 55 of the Borders, Citizenship and Immigration Act 2009.

16. The Judge's finding at para.46 was that the interference to the Applicant's private and family life was proportionate, presumably (but not stated) to the legitimate objective of the economic well-being of the State which includes the maintenance of proper immigration control. However, at para.59 he concluded that the decision to refuse the Applicant leave and to remove him to Nigeria was disproportionate. These two findings are contradictory and the Judge gave no explanation for or attempt to reconcile this contradiction before he reached his conclusion at para.61.

17. For these reasons, I find the decision to contain material errors of law and must be set aside in its entirety.

<u>The Next Steps</u>

18. The Applicant's position has now altered by reason of the making of a Child Arrangement Programme (CAP) in the Croydon Family Court. Any re-hearing would now have to be taken in this was evidence which would be available for the Tribunal to consider. The Applicant would wish to provide evidence to show how the CAP was working out and Dr Corban did not have that evidence and was not in a position to proceed to a substantive re-hearing.

19. The decision has been set aside. Section 12(2) of the Tribunals, Courts and Enforcement Act 2007 allows for the case to be remitted to the First-tier Tribunal with directions or for the Upper Tribunal to re-make it. Having regard to Practice Statement 7.2(b) and the nature and extent of the fact finding required, I conclude the decision should be remitted to the First-tier Tribunal to decide afresh.

<u>Anonymity</u>

20. There was no request for an anonymity order and having heard the appeal, I find that none is warranted.

<u>NOTICE OF DECISION</u>

The First-tier Tribunal's decision contained errors of law such that it should be set aside in its entirety and the appeal should be heard afresh in the First-tier Tribunal.

Signed/Official Crest Date 11. viii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal