IAC-HX-MC/12-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17564/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 October 2015	**On 21 January 2016**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MS JENNIFER ANDRURU
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Lanlehin
For the Respondent: Ms Sreeraman

DECISION AND REASONS

1. The Appellant is a citizen of Uganda born in 1984. She appealed against a decision of the Secretary of State made on 3 April 2014 to curtail her leave to remain under paragraph 323(ii) of the Immigration Rules.

2. The history is that she was granted leave to remain from 7 October 2013 to 7 October 2015 as the spouse of Mr Alex Andabati Agotre, a person present and settled in the UK. He has ILR.

3. On 7 January 2014 solicitors instructed by Mr Agotre wrote to the Home Office to request the annulment of the Appellant's immigration status. It

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was stated that she had obtained her entry by deception and that they had only stayed together peacefully for two months. The couple have a son, AD who was born on 17 May 2012 in Uganda. Mr Agotre represented to the Home Office that he wanted the Appellant and their child to return to Uganda as the child could continue to live with the Appellant's parents. He stated that he considered the Appellant should be removed from the UK as the reason for which leave was granted to her no longer existed as they were no longer living together and he did not want to continue to be a Sponsor.

4. As indicated the Respondent on 3 April 2014 curtailed the Appellant's leave from that date.

5. She appealed.

6. Following a hearing at Hatton Cross on 12 May 2015 Judge of the First-tier Watt dismissed the appeal under the Immigration Rules and on human rights grounds.

7. The judge heard evidence from the Appellant. His conclusions are at paragraph 13 ff of his decision.

8. It was accepted that the Appellant and Mr Agotre had stopped living together from, at the latest, January 2014.

9. Further, the Appellant was convicted at South London Magistrates' Court on 23 December 2014 of battery of her husband and having been remanded in custody until 21 January 2015 received a restraining order. She had subsequently been charged with a breach of that order and was awaiting trial.

10. The judge (at [17]) found that the "*split up of the marriage had been unpleasant and spiteful on both sides. Both parties did not speak to each other. The child is with the Appellant, but Mr Agotre has a court order granting contact with the child.*"

11. The judge went on to note a claim by the Appellant that she had been a victim of domestic violence at the hands of Mr Agotre but found that he was not satisfied on the evidence that such was so. In fact "*it appears the reverse is true*", namely, the assault by the Appellant on Mr Agotre.

12. The judge concluded that the appeal failed under the Rules.

13. As for Article 8 the judge considered the matter "*under Appendix FM and under paragraph 276ADE. The child was not 3 years of age at the date of hearing. He is very young and lives with his mother. If his mother was to return to Uganda then it would obviously be in the best interests of the child to return with her*." [24]

14. Finally, the judge considered s117B noting that the Appellant is not working and is only in receipt of benefits. Further, her status has been precarious. He concluded that the public interest in removal outweighed the Appellant's Article 8 rights.

15. Permission to appeal was sought. The grounds, in essence, were that the judge failed to give adequate consideration to the child's best interests. He had been mistaken as to the child's age. Also the father had obtained a Contact Order. Further, the judge was wrong to find that Mr Agotre had been the aggressor in the relationship. Post hearing she had been acquitted of breaching the restraining order.

16. In granting permission on 18 August 2015 a judge stated:

> "…
>
> 2. It is not arguable that the judge's findings as to the age of the child (which was correct at the date of hearing) and the fact that the outcome of criminal proceedings against the Appellant was not known until after the date of the hearing can be arguable errors of law.
>
> 3. However, I am satisfied that it is an arguable error of law that the judge did not consider, when considering the best interests of the child, the Order granting the child's father contact with the child and the effect that the child's removal from the United Kingdom would have on the child as, of necessity, the contact would have to come to an end."

17. At the error of law hearing Ms Lanlehin sought to rely on the grounds. The child's best interests under Article 8 had not been adequately assessed.

18. In response Ms Sreeraman's position was that although succinct the judge's reasoning was adequate and open to him. The judge had noted that the Appellant has made an application for leave to remain on the basis of domestic violence. A decision is pending.

19. In considering this matter there was no dispute that the judge's decision under the Rules was unassailable. It was accepted that the marriage was no longer subsisting. Accordingly the Appellant no longer met the requirements of the Rules under which her leave was granted.

20. However, I considered that the decision under Article 8 was flawed. As the judge granting permission stated, the First-tier Judge in his brief assessment of the child's best interests had failed to consider the existence of the Contact Order and the effect that removal might have on the child and his father.

21. I set aside the decision and proceeded to remake it. Parties were content to make submissions. Ms Sreeraman's position was that the Contact Order allowed for visitation and access rights for the father to his child who is living with his mother, the Appellant. However, the father's evidence in a statement is that he is content for the child to live in Uganda with the Appellant. He will support his child financially. Such indicated that it would be in the child's best interests to go with his mother to Uganda.

22. Ms Lanlehin submitted that it is in the best interests of the child to have a relationship with his mother and his father. At present with the Order the father has the child alternate weekends and alternate holidays.

23. The child, Ms Lanlehin continued, has had instability. The father took him away at about 20 months. He kept him for about 4 months. She got him

back. But on return he had a speech impediment. He is now at nursery. He has regular contact with his father. There is no restraining order now in force. She was found not guilty of breaching the order. The child has been through a lot. He gets on well with both his parents. The father has ILR. He is a teacher and it is not reasonable for him to relocate.

24. Ms Lanlehin submitted that the father's actions had been contradictory. He had been concerned to keep contact with his child in the UK but had also become more concerned with the removal of the Appellant.

25. In considering this matter under Article 8 I find that there is clearly family life between the Appellant and her child. Also between the child and his father, Mr Agotre. It seems that there is no longer family life between the Appellant and Mr Agotre.

26. It is clear also that removal of the Appellant who is the primary carer of the child and would take the child with her would amount to interference with the right to family life in respect of the father who has a Contact Order and visitation rights in respect of his child.

27. Such interference in respect of the father (and indeed of his son) is sufficiently serious to engage Article 8.

28. The decision to remove is in accordance with the law and is necessary in a democratic society in the interests of the economic wellbeing of society.

29. The issue is proportionality. I consider first the best interests of the child.

30. In **EV (Philippines) & Others v SSHD [2014] EWCA Civ 874** it was held that the best interests of the child were to be determined by reference to the child alone without reference to the immigration history or status of either parent. In then determining whether or not the need for immigration control outweighed the best interests of the child, it was necessary to determine the relative strengths of the factors which made it their best interests to remain in the UK; and also to take account of any factors that pointed the other way.

31. At [35] of **EV (Philippines)** it was stated that the best interests of children will depend on a number of factors including their age, the length of time they have been in the UK, how long they have been in education, the stage that their education has reached, to what extent they have been distanced from the country to which they are to be returned, how renewable their connection with it may be, the extent that they will have linguistic, medical or other difficulties in adapting to life there and the extent to which the course proposed will interfere with their family life or other rights in this country.

32. The longer the child had been in the UK, the more advanced or critical the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that fell into one side of the scales.

33. If it was overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the

balance. By contrast if it was in the child's best interests to remain, but only on balance with some factors pointing the other way, the result may be the opposite. In the balance on the other side there fell to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic wellbeing of the country and the fact that *ex hypothesi* the claimant had no entitlement to remain.

34. In considering this case the starting point must be that it is in the best interests of the child to be with both his parents. Here, however, the parents have irrevocably separated. By court order the primary carer is the mother, the Appellant. The father's involvement is more limited. He has contact alternate weekends from Friday evening to Sunday evening. The father also has the child, essentially alternately, during holidays.

35. I look at other factors. The child is not a British citizen. Indeed he was born in Uganda and is a Ugandan citizen. He is also very young having been born in May 2012. He is thus not in education and has spent a relatively brief time in the UK thusfar. Whilst he has no knowledge of Uganda by dint of his young age, it can scarcely be said that he has any significant knowledge of this country. I do not see there to be linguistic, medical or other difficulties in adapting to life in Uganda. English is an official language of Uganda; it was not suggested that the child has any health issues.

36. I note the Tribunal's comment in **Azimi-Moayed and Others (decisions affecting children; onward appeals) [2013] UKUT 197** that the seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable. As indicated in this case the primary carer is the Appellant.

37. I note and find significant the letter from the father stating that he has no difficulty with his son going to live with the Appellant in Uganda where there is a "*great extended family support where the child will experience love and nurture in our culture and cultural values".*

38. Also, that he will support his child and "*give him the best possible education while I work here to help him and my family back home."* Indeed, it will be "*better for him to be taken back to Uganda so that his development is not affected."*

39. Ms Lanlehin submitted that the father's position had changed from seeking by court order to prevent the removal of the child from the UK to this later position. She questioned his motives. However I see no reason to doubt the genuineness of what is stated in his letter. I note that the father is a secondary school teacher. It is reasonable to conclude that he has the funds to continue to support his son and would do so. Nor is there any indication that he would not be able and willing to visit his child and otherwise to keep in touch by the usual modern methods. There is no suggestion that he is anything other than devoted to his child.

40. On the evidence before me I do not see there to be any significant detriment to the child returning to Uganda. I conclude that the best interests of the child do not require him to remain in the UK, but rather to live in Uganda with his primary carer. It is clear from the evidence that the Appellant will herself be able to rely on the support of the extended family. Also, according to her statement she is educated to degree level and was in work before she came to the UK. I bear in mind further that she only arrived in the UK in 2013 and has spent almost all her life in Uganda a country with which she is thus clearly familiar.

41. The Appellant alleges that she was the victim of domestic violence at the hands of her husband. I find this matter to be of no assistance to the Appellant. It is merely an allegation, there is simply no evidence to support the allegation. Indeed, albeit it appears that she was subsequently acquitted of breaching a restraining order, it was she who was convicted of battery against him.

42. As for the s117B factors the Appellant speaks English. However she is not financially independent. Her income is from public benefits. The child, being neither a British citizen or a person who has lived in the UK for a continuous period of seven years or more is not a "*qualifying child*".

43. In the circumstances of this case noting the strong weight to be given to immigration control in pursuit of the economic wellbeing of the country and seeking to balance the factors, I conclude for the reasons given that the decision to remove is not disproportionate. The appeal fails.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law. It is set aside and remade as follows.

The appeal is dismissed under the Immigration Rules.

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Conway