Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23461/2015

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 13th June 2016	**On 8th July 2016**

Before

UPPER TRIBUNAL DEPUTY JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EO
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mrs Pettersen, Senior Home Office Presenting Officer
For the Respondent: Mr Hussain (Counsel)

Anonymity

I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously and it is correct that none was sought before me. However since much of this decision concerns a child 4 years of age, I consider it appropriate to grant anonymity in this appeal, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

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DECISION AND REASONS

1. The Secretary of State for the Home Department brings this appeal, but for the sake of clarity, the parties are referred to as they were in the First-tier Tribunal.

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal (Judge Henderson) promulgated on 27th November 2015 in which it allowed EO's appeal against the Secretary of State's decision of 10th June 2015 refusing him leave to remain in the UK and making removal directions.

Background

3. The Appellant EO is a citizen of Nigeria (born 16th April 1986). He entered the UK on 10th April 2009 with leave, as a student, valid until 16th August 2012. He has remained unlawfully in the UK since the expiry of that leave. In November 2009 the Appellant met KC, after chatting online. Although it is said they started a relationship, the Appellant remained resident in London whilst KC was in Rotherham where she lives.

4. On 9th March 2011 KC gave birth to a daughter K. K's birth was registered at the time of her birth without any father being named on the birth certificate. Although the Appellant and KC were said to be in some relationship at the time of K's birth they were not getting along and the Appellant did not see K for the first nine months of her babyhood. It also appears that KC was in another relationship with a man whom it subsequently transpired is the biological father of K.

5. When K was around 9 months of age, the Appellant relocated to the South Yorkshire/North Derbyshire area. When he specifically did so is unclear and it is unclear as to where he was living at that time. However K's birth certificate was changed on 17th October 2012, to record the Appellant as her father.

6. In November 2013 the Appellant formed a new relationship with AL after meeting her online. He moved in with AL in March 2014 and they have been cohabiting since that time.

7. On 17th March 2015 the Appellant made a twofold application for leave to remain on the basis of his family/private life.

   - as the partner of AL, a British citizen; and

   - as the father of K, the child of his relationship with KC.

8. The Respondent did not accept the Appellant's claimed relationship with K. DNA testing obtained on 2nd June 2015 revealed the Appellant was not the biological father of K.

9. The Respondent refused the Appellant's application for leave to remain, with reference to Appendix FM of paragraph 276ADE of the Immigration Rules. It was not accepted that the Appellant had been living with AL in a relationship akin to marriage for at least two years. So far as the second limb of his application was concerned, DNA testing had revealed that the Appellant was not the biological father of K, therefore he could not fulfil the Immigration Rules with regard to the "parent" route.

10. The Appellant appealed the refusal and his appeal came before the First-tier Tribunal.

The First-tier Tribunal Hearing

11. The First-tier Tribunal heard evidence from the Appellant, from KC (K's mother) and AL, his current partner. The findings made by the FtT are not seriously challenged in so far they go. In summary it has been accepted that the Appellant was aware that after August 2012 his immigration status was precarious because he was an overstayer. It was accepted that the Appellant is currently in a relationship with AL, that relationship having started around about November 2013 and that the Appellant and AL had been cohabiting since March 2014.

12. It is also accepted that the Appellant believed that K was his natural child, albeit that he did not see the child for the first nine months of her life. It is accepted that K visits the Appellant and AL on a regular basis. They assist K's mother by looking after K at weekends. K according to the parties believes that the Appellant is her father. The Appellant is currently financially dependent upon AL. Any financial support which the Appellant gives to K's mother, effectively comes from AL. There is of course no legal obligation to provide this assistance.

13. When considering the matter, the FtT correctly identified that the Appellant cannot meet the Immigration Rules. The judge therefore directed herself to a consideration of Article 8 ECHR. She set out that the Appellant argued that his case admitted of compelling circumstances. The compelling circumstances relied upon his relationship with K, who it is said regards him as a parent; and his relationship with AL, whom he regards as his partner.

14. At [48] the judge noted:

> "I am asked to consider that it would be disproportionate for the Appellant to have to return and seek entry clearance primarily because of the child with whom he has a relationship although the application itself would be for entry clearance to rejoin the British citizen with whom he has been living."

15. At [49] the judge said this:

> "The Appellant cannot seek entry clearance under the Immigration Rules to have contact with K. He does not fit into the qualifying

provisions as a parent. Any entry clearance application would be made as the partner of (AL). This is an unusual case in that the Appellant has formed a close relationship with a child he regarded as his own. Like many children in this country she has a settled but complicated family life which involves a parental relationship in two family units – that of her biological mother and that of the man she regards as her father and his partner."

16. The judge then followed this at [50]:

> "The Appellant's relationship with a British citizen is not solely a factor which weighs heavily in his favour since there is an alternative to the couple living in this country and there is an alternative in the form of entry clearance. It is an additional factor however in the consideration of the stability of the child's life. (AL) as I have stated has now established her position as another carer and provided a home environment for (K) as well as providing financial support to the Appellant and therefore indirectly to (K)."

17. Finally the judge concluded by saying at [51]:

> "There are insurmountable obstacles in this unusual family situation which mean that it would not be possible for the family units to relocate to Nigeria. I conclude that the decision to remove the Appellant is disproportionate".

She then allowed the appeal.

Permission to Appeal

18. The Respondent sought and was granted permission to appeal. The grounds seeking permission cited one reason namely "failing to give adequate reasons for findings on a material matter". In particular, for the purposes of this decision I am drawn to paragraph 3 of the grounds, which is reproduced here.

> *"In the alternative, it is submitted that the Tribunal's readiness to accept the Appellant's relationship with a child who is not his daughter, was subject to inadequate investigation. The Tribunal quite properly considered the best interests of the child. However, it did not make any assessment of whether this relationship had been subject to any welfare scrutiny or whether it had been subject to any assessment by a social worker. Given that the issue is the welfare of the child, it is respectfully submitted that this should have been a key factor in any consideration. It is therefore submitted that this key finding was not adequately reasoned."*

The UT Hearing

19. Before me, the Appellant was in attendance but not required to give evidence. Mrs Pettersen appeared for the Secretary of State and Mr Hussain for the Appellant.

20. Mrs Pettersen expanded upon the grounds seeking permission. She submitted that this was a pure Article 8 ECHR case. The main plank of the Appellant’s argument, centred around his claimed relationship with K. K was a child with whom he had no legal standing. So far as the best interests of K are concerned, the Appellant can only benefit from Article 8 if he can show that there are compelling/exceptional circumstances surrounding the relationship and that those circumstances would amount to insurmountable obstacles to family life continuing in Nigeria. The first point of reference is that there is no family life as such within the confines of Article 8 ECHR.

21. She submitted further that the judge had failed to carry out a proper analysis because she had conflated the issue of the Appellant’s relationship with his current partner AL, with that of his relationship with K.

22. The judge appeared to be saying that because the Appellant could not meet the requirements of the Immigration Rules with regard to K (because there is none available to an Appellant who is not the parent of a child) that in itself amounted to compelling and exceptional circumstances such as to allow a consideration under Article 8. She submitted in any event that even a consideration of Article 8 was admitted because of the relationship with K, the issue of the " best interest of the child" would require greater consideration than that given by the First-tier Tribunal Judge. There was no family life within Article 8, because the Appellant is not K’s parent. There was no evidence to show for example that he could be regarded as a de facto parent. His relationship with K amounted to no more than him being allowed to look after her at the behest of KC. This was a choice made entirely by K’s mother.

23. Mr Hussain on behalf of the Appellant said that the decision should stand. The judge had properly found that the Appellant could not bring himself within the Immigration Rules as a parent, but on the facts of this case, the Appellant was in a relationship with K, which was akin to him having parental responsibility for K.

24. He submitted that the facts in this appeal were unusual enough to constitute exceptional circumstances. The rights of the child must be respected and the Appellant had formed a close relationship with a child he regarded as his own. He further submitted that the Appellant has not got the option of seeking entry clearance on the basis of his relationship with K.

25. Finally in response to a question by me, Mr Hussain confirmed that in the event I should find an error of law in the First-tier Tribunal’s decision, there was no further evidence to put before me.

Consideration and Findings

26. As Mr Hussain correctly pointed out, the Appellant's case hinges upon his claim that his relationship with K is such, that it would not be in K's best interest for the Appellant to be removed and those best interests amount to an insurmountable obstacle to maintaining his family life with K. Mr Hussain submitted that the rights of the child must be respected. With that last sentence, at least, I agree.

27. However what I find difficult to accept is that the evidence before the FtT was sufficient to enable it to conclude that K's best interests were served by the Appellant being allowed to remain in the UK and that it would be disproportionate to remove him.

28. What is of particular significance in considering the judge's assessment of the impact on the question of "insurmountable obstacles" of K's best interests, is the evidence that had actually been produced before her in order for her to conduct such an assessment. That evidence was conspicuously limited; a matter impressed upon me by the grounds seeking permission.

29. Obviously there was no direct evidence from K – she is of tender years and it is hardly to be expected. K's side of the story was given by the oral evidence of the witnesses.

30. K's mother gave evidence as did the Appellant. The judge reported she was cautious about accepting their credibility.

31. She did accept the evidence of AL whom she found to be credible, but AL's evidence in reality is limited. AL has only figured in K's life since 2014 when the Appellant moved in with her. Whilst AL was at pains to say that she and the Appellant will continue their relationship with K her evidence does not amount to an independent assessment of K's best interests. I need hardly remind the parties that when dealing with the best interests of a 4 year old child, a full and careful analysis of evidence from the child's perspective is required.

32. From the evidence before the FtT what was in place was an informal arrangement whereby K's mother allowed K to see the Appellant and his partner at weekends. K's mother may well depend upon the Appellant and his partner for weekend childminding and for some financial help, but the reality is that this is no more than an informal arrangement at best, as the Appellant has no legal standing concerning K.

33. In addition there was no evidence to show why the Appellant's relationship with K could not continue by other means should he be removed. I note that it was said that he and K Skype one another during the week.

34. Finally so far as the Appellant's relationship with AL is concerned there was no evidence to show why a return to Nigeria to make an entry clearance application as a partner would result in an unduly harsh

outcome. Given the FtT's findings on the relationship with AL, this would be a viable option.

35. For the forgoing reasons therefore I find that the FtT erred in law by giving inadequate reasons for concluding as it did that the Respondent's decision to remove the Appellant amounts to a disproportionate one under Article 8 ECHR and the decision is therefore set aside.

36. No further evidence was placed before me. As I indicated so far as the evidence goes it was not seriously challenged. I find I am in a position to remake the decision. The circumstances of this case as outlined above, fall far below that required to show that exceptional or compelling circumstances exist sufficient to amount to a disproportionate interference with the Appellant's Article 8 family/private life.

Notice of Decision

The Secretary of State's appeal is allowed. The decision of the First-tier Tribunal is set aside. I substitute a fresh decision. EO's appeal against the Secretary of State's decision of 10th June 2015 refusing him leave to remain and to remove him, is dismissed.

Signed C E Roberts Date 07 July 2016

Upper Tribunal Deputy Judge Roberts