Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22690/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 April 2017	**On 4 May 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SOO
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: No Representative

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Nigeria born on [ ] 1975, as the appellant herein. He appeals the decision of the Secretary of State on 28 May 2015 to refuse his application for leave to remain on human rights grounds.

2. The Secretary of State records that the appellant claims to have arrived in this country on 18 March 1999 as a visitor. Applications made in October 2008 and 2012 were refused. However, an application made on 29 November 2013 on human rights grounds was allowed to the extent it was remitted to the Secretary of State on 11 December 2014 by First-tier Tribunal Judge Lindsley. The reason for this was that in the view of the judge the Secretary of State had not made findings in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009 in relation to the appellant's two sons, whom I shall refer to as D and H.

3. D was born in Nigeria on 15 June 2003. He had stayed with his mother in Nigeria until he was 6 or 7. While the appellant had played no part in D's care, D had spent holidays with the appellant's brother. The appellant had sent money for schooling and clothes to his brother.

4. Judge Lindsley records that D had arrived in the UK on 9 January 2014 following a call from D's mother to the appellant about his impending arrival. The appellant had collected D, who had then lived with him. However, in May 2014 following an allegation of assault by the appellant against D, D was taken into care. H was born on 29 June 2009 and has lived in the UK all his life although it appears that neither child has status in the UK. The appellant himself has never had leave to remain here.

5. At the hearing before the First-tier Judge the appellant gave evidence. He stated he was still in a relationship with H's mother but they did not live together.

6. The judge found that the appellant could not succeed under Appendix FM and concluded his determination as follows:

> "15. In respect of EX.1, EX.2 and 276 ADE of the Immigration Rules I make the following findings. The appellant has lived in the UK for in excess of 17 years. He has two minor children in the UK. For reasons, I will set out below, I accept the appellant has a strong family life with his children including D who is currently in care. Social Services in Courage [sic] the reinforcement of the relationship between the appellant and D and have considered the increase in contact between them and allowed the appellant unsupervised contact with D for his birthday. The appellant was not prosecuted for assault. The appellant has an ongoing relationship with his younger son's mother. The appellant's removal would therefore cause interference with his rights to a family life and those of his children and partner. The appellant has lived, worked and socialised with friends and family members in the UK. I accept that the appellant has a private life in the UK. The appellant's removal would cause interference to his rights to a private life. I must consider whether the appellant's removal from the UK would cause disproportionate interference to the appellant's rights to a private life.

16. The appellant has lived in the UK for 16 years. He has not left. He has formed a strong family life in the UK. I find that the appellant has extremely limited connections with Nigeria where he has not returned for 41 years. The appellant has lived in the UK for 17 years during which he has had numerous relationships, fathered children and formed long-lasting relationships. He has worked in the UK and has integrated into UK life.

17. The appellant has two children born in the UK, to different mothers. The appellant's children are qualifying children. I have evidence from H's mother concerning the appellant's contact and emotional and financial support with him. I have received detailed, entirely consistent and compelling evidence from the appellant concerning the extent of his contact. Furthermore, there is official documentation from Hackney Social Services and the court in respect of the appellant's level of contact with D. The appellant's evidence in relation to his sons indicated that he was not seeking to bolster his evidence of all. He added compelling evidence before me indicating that he would take H on contact visits with D. Hackney Social Services support the appellant having greater contact with D and the court is considering long-term strategies, which include returning him to the appellant. Having regard to my findings herein, I found the evidence before me to be compelling and credible and accept that the appellant has strong contact with his children in the UK. The appellant's removal would cause significant interference both to the appellant's rights to a family life with his children I was particularly impressed that the appellant indicated that the main reason that he wanted to stay in the UK was the love of his children and the children's own rights. In respect of S55 of the Borders, Citizenship and Immigration Act 2009 I find that it is in the appellant's children's best interests for the appellant to remain in the UK where he can continue frequent contact with them and provide them with the necessary emotional and financial support that they require throughout their childhood.

18. The appellant has no criminal convictions. I have regard to the public interest noting section 117B (6) of the Immigration Rules in particular. I note the case law of **MA (Pakistan)**. The judgment indicates that the appropriate test tribunals should ask are the following:

    1. Is the applicant liable for deportation…
    2. Does the applicant have a genuine and subsisting parental relationship with the child?
    3. Is the child a qualifying child as defined in section 117D?
    4. Is it unreasonable to expect the child to leave the United Kingdom?

It is stated that if the answer to the first question is no and to the other three questions is yes, the conclusion must be that Article 8 is infringed. The focus of the paragraph is purely on the interests of the child. No justification could be seen from reading the concept of reasonableness so as to include the consideration of the conduct immigration history of the parents as part of an overall analysis of the public interest.

19. I find that in this case the appellant clearly has a genuine and subsisting relationship with his sons and find that it is unreasonable for the children to leave the UK where they have lived all of their lives and in excess of seven years and have relationships with other family members. In the light of the totality of my findings above, I find that the appellant's relationship with his sons fulfils the requirements of section 117B (6). I find that the appellant's children's interests outweigh the public interest in this case.

20. I further note that the appellant has a partner in the UK who supports his appeal. Finally, I note that there has been a delay in the present case over the past 3 years without explanation and find that the appellant has developed a strong family life over the course of that delay at no fault of his own (**EB (Kosovo**).

21. In conclusion, in the light of the appellant's significant family life in the UK and the best interests of his children and his exceptional circumstances, I find that the appellant's deportation is disproportionate in all the circumstances."

7. Accordingly the judge allowed the appellant's appeal on human rights grounds.

8. The respondent applied for permission to appeal pointing out that the appellant's children had no status in the United Kingdom. In ground 1 it was submitted that the appellant's supervised visits appeared to entail little more than "face to face contact" and the judge's decision that there existed a strong family life with D was inadequately reasoned. The appellant had not lived with D for over two and a half years and the visits to D were largely supervised and limited to once a month. It was unclear how a genuine and subsisting parental relationship for the purposes of Section 117B(6) could be made out. D's welfare was looked after by Social Services and fundamental decisions regarding control and direction were not the responsibility of the appellant.

9. In ground 2 it was submitted that the judge had not clearly identified where the best interests of the children lay. The judge had erred at paragraph 19 of the decision in considering the question of reasonableness. It did not appear that the appellant's partner (who had

an outstanding appeal) gave evidence and there was not much documentation relating to the welfare of the children and ability to integrate in Nigeria. The judge had failed to consider why a private life "to the standards of the returning country could not be established." The judge had treated the reasonableness assessment "as one relating solely to the private life of the children with no reference to a wider family assessment." The educational ties were not placed in a "real world setting" – neither of the parents of the children had any basis to remain in the UK and had no future right to education. It would not be unreasonable for H or D (should the appellant assume parental responsibility) to return to Nigeria with the support of their parents.

10. It was submitted in paragraph 7 of the grounds that the judge had failed to undertake the relevant balancing exercise and only considered those factors which fell in the appellant's favour without having any regard to the wider public interests and immigration history of the parents contrary to the decision in **MA (Pakistan) [2016] EWCA Civ 705**.

11. In paragraph 8 of the grounds it was submitted that the judge had erred in adopting a freestanding Article 8 assessment when considering the appellant's private life and had not considered whether there would be very significant obstacles to the appellant's integration into Nigeria. Compelling circumstances were not identified and the judge had not referred to the public interest provisions in Section 117B apart from Section 117B(6). Little weight should be given to the private life of the appellant built up when he had been in the United Kingdom unlawfully. It was not apparent from the decision that the public interest considerations had been afforded the correct weight in the proportionality exercise. Any delay in the decision-making process was not inordinate and the appellant had not been in any way prejudiced. Any delay should be seen in the context of the public interest provisions set out in Section 117B.

12. Permission to appeal was granted on 28 February 2017 by a First-tier Judge who found it arguable that the judge had erred in not considering the entirety of Section 117B and whether there would be very significant obstacles to the appellant's integration and to Section 117B(4) – the appellant's status being precarious. It was further arguable that the judge had erred in considering the children's best interests as none of the children had any right to reside in the UK and that supervision was required for the appellant to meet D, who was in care. H and his mother had no status in the UK and had been refused leave to remain although an appeal was pending.

13. At the hearing before me the appellant was unrepresented and the procedures and the grounds of appeal were explained and Mr Nath went through the points slowly and clearly. It was submitted there was no genuine and subsisting parental relationship and Social Services had made the fundamental decisions. Reference had been made in the grounds to

MA (Pakistan) and it was submitted that the judge had not properly directed himself in paragraph 18 of his decision.

14. The appellant submitted that he had a relationship with the children, whom he saw regularly. There was a plan to introduce him to the children and give him unsupervised access but this depended on him getting immigration status in the UK. D had special educational needs and H had been in the UK for eight years. D would not be welcome on return to Nigeria and the family there did not want him back. The appellant said he would not wish to leave D in the UK with no father or mother. He accepted that as had been found by First-tier Judge Lindsley that he did admit that he had assaulted D.

15. As regards what should happen if a material error of law was identified Mr Nath submitted that in the light of the fact-finding required there would need to be a fresh hearing. The appellant pointed out that there had already been considerable delay.

16. At the conclusion of the hearing I reserved my decision. I remind myself that I can only interfere with the determination of the First-tier Judge if it was materially flawed in law.

17. There do appear to be considerable difficulties in this decision. The judge does not appear to have weighed in the balance the fact that the appellant has never had leave to remain in the United Kingdom and his status was nothing if not precarious.

18. The judge does not appear to have directed himself properly in paragraph 16 in considering the appellant's "extremely limited connections" with Nigeria as the respondent submits in the grounds (there are plainly typographical problems in this paragraph as the appellant has certainly not been away been away from Nigeria for 41 years as the judge wrote).

19. The judge's approach to what is said in **MA (Pakistan)** in paragraph 18 of his decision does appear to be flawed.

20. It appears to be based on what is said in paragraphs 19 and 20 of **MA (Pakistan)** and while it is a correct reflection of that decision until the words "Article 8 is infringed" from what follows it appears that the judge has taken what is said in **MA (Pakistan)** out of context. It is clear that while the Court of Appeal had reservations about the arguments advanced on behalf of the Secretary of State in the light of **MM (Uganda) v Secretary of State [2016] EWCA Civ 450** it concluded that it should not depart from what was held in that decision. While the case of **MM (Uganda)** was concerned with foreign criminals

> "… the critical point is that Section 117C(5) is in substance a free-standing provision in the same way as Section 117B(6), and even so the court in **MM (Uganda)** held that wider public interest

> considerations must be taken into account when applying the 'unduly harsh' criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in Section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of Section 117B(6) is that where the seven year Rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted." (at paragraph 45 per Elias LJ).

21. It is worthwhile observing in paragraph 47 that even applying a "narrow reasonableness test" the court rejected the submission that the best interests assessment automatically resolved the reasonableness question.

> "Even where the child's best interests are to stay, it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed he should return. What could not be considered, however, would be the conduct and immigration history of the parents."

The judge may have misread the decision by taking paragraphs 19 and 20 out of context or in misinterpreting paragraph 47. For whatever reason, the judge appears to have misunderstood the decision.

22. This is an unusual case in that the appellant has limited access to D and does not live with either child. As stated above, neither child has any right to reside in the UK. The complaint made in the grounds that there had not been a proper balancing exercise in the light of the decision in **MA (Pakistan)** is made out. The grounds identify various failings in the decision. Although the judge refers to delay in this case – and I appreciate the appellant's position that he is reluctant to encounter further delay – the circumstances of this case are unusual and complex. I note that on 23 December 2014 the Secretary of State provided the appellant with forms in which to give any additional grounds for consideration and the appellant responded on 29 December 2014 and 20 March 2014 with such grounds. The Secretary of State states in paragraph 7 of her decision that she had considered all the evidence and information including the evidence from Hackney Children and Young People Services and the appellant's Statement of Additional Grounds. Her decision was arrived at on 28 May 2015. The decision itself is some fourteen pages long. I do not find that the delay could be characterised as inordinate or that prejudice has been caused.

23. The determination is clearly materially flawed in law for the various reasons advanced by Mr Nath. He submitted that given the difficulties a fresh hearing was likely to be required and I agree. I appreciate the appellant wants this matter resolved but the judge appears to have cut

short the fact-finding required because of the misinterpretation of **MA (Pakistan)** and in the light of that and the other difficulties with the decision I agree with Mr Nath that a fresh hearing is required. As the respondent points out in the grounds, it does not appear there was much documentation relating to the ties of the children, their welfare and ability to integrate in Nigeria. In the circumstances a fresh hearing de novo is required.

Notice of Decision

For the reasons I have given the determination of the First-tier Judge is materially flawed in law. The appeal of the Secretary of State is allowed.

I direct a fresh hearing before the First-tier Tribunal to be heard by a different First-tier Judge.

Anonymity Direction

It is appropriate to continue the anonymity direction made by the First-tier Tribunal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 26 April 2017

G. Warr, Judge of the Upper Tribunal