Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/27404/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th October 2017	**On 30th October 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

O A T
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss A Basharat, Counsel instructed by Farani-Javid Taylor Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. Mr OAT is a citizen of Nigeria born on 22nd October 1980 and he appealed against a decision of First-tier Tribunal, dated 19th May 2016, dismissing his appeal against the respondent's decision of 13th June refusing his application for further leave to remain.

2. The appellant entered the United Kingdom with a visit visa valid from 14th June 2005 but overstayed the six months leave conferred on him next coming to light when he made an application for leave to remain outside the Rules on 7th September 2009. That application was refused on 5th July 2010 and he was notified of his liability to removal as an overstayer on 26th July 2013. A Pre-Action Protocol letter challenged

the Home Office decision and ultimately his application for judicial review resulted in a reconsideration of his case which led to the refusal from which this appeal stands. That is a refusal dated is 13th July 2014.

3. The appellant had a son born on 24th November 2007 and referred to as AOOUT and aged 6½ at the date of the application. AOOUT was born from a former relationship with A B O a Nigerian citizen without leave in this country (although different representations were made before the Upper Tribunal).

4. It was asserted by his representatives that not only did the appellant have a son but he also had strong ties with his mother, brother, close friends and extended family and was at ease with the British culture and norms. He was integrated here and had no subsisting ties in Nigeria. They had no family assets, property or a job to which to return. On 29th May 2014 a letter clarified that the appellant had in fact had no contact with his son for over a year and at that time did not know his whereabouts the mother having refused to keep in touch with him.

5. On 9th May 2017 Deputy Upper Tribunal Judge Symes found an error of law in the decision of the First-tier Tribunal on the basis that no reference had been made to Section 117(6) of the Nationality, Immigration and Asylum Act. It was noted that the First-tier Tribunal accepted the concession made by Counsel before it that there was no viable case under the Immigration Rules given that the appellant lacked sole responsibility for AOOUT and given that they did not live together and he was not the primary carer. Nonetheless, the decision of the First-tier Tribunal was set aside and the matter subject to a transfer order and came before me on 7th October 2017 to re-determine the matter.

6. At the hearing Mr Nath cross examined the appellant about his recent contact with his son and the appellant confirmed that he had seen his son four times recently on 19th July, 20th July, 1st September and 29th September 2017. He explained the gap during August because his ex-partner had gone to Nigeria. He had had contact with his son over the phone through WhatsApp. He was asked whether he could maintain that contact when he was in Nigeria and he said that he felt that he could not. The appellant lived with his mother and the appellant maintained that he had never worked in Nigeria and had never worked in the United Kingdom. It was his mother and family who had supported him.

7. At first he stated that he had no family in Nigeria but then accepted that he had a grandmother in Lagos. His grandmother would travel to and from America because she had a "*green card*" there. The appellant had a desktop publishing course of three months when he left school at the age of 19 to 20 and had been offered a job in a hotel but had not taken it up. He had not been employed.

8. He had obtained a contact order to visit his son in 2016 but that contact was stopped in July 2016 because the ex-partner had moved. The appellant had made efforts to track down the ex-partner and his son by using a tracing agency in July 2016 and had restored contact with the mother.

9. Mr Nath's submissions were that the relationship with the appellant's son could be maintained from Nigeria. He could maintain contact through WhatsApp conversations. The status of the appellant had been precarious since 2005. It was important to take into account the head note of **AM (S 117B) Malawi** [2015] UKUT 0260 (IAC) with reference to children. The appellant could use his skills to support himself in Lagos. It was important to consider the public interest and the reliance placed on the child which was being used as a trump card. The appellant had not mentioned emotional support or schooling or education.

10. I asked the appellant why he could not go to Lagos and his son visit him there as it was clear that the ex-partner and mother would visit Nigeria and he stated that that would not be possible as his grandmother was old and it would be expensive.

11. Miss Basharat submitted that there was a witness statement in the previous court bundle referring to the contact that the appellant had with his child. Contact had only recently been reinstated and the contact had previously been interrupted because the appellant and the ex-partner had fallen out but their relationship was more civil now. He had produced photographs to show his contact with his son and he was fully and entirely dedicated to him. He had no prospect of employment in Nigeria and it was unreasonable to expect him to leave.

Conclusions

12. This appeal is considered outside the Rules. When considering Article 8 however I must consider all relevant factors **Singh v SSHD [2015] EWCA Civ 74** and the Supreme Court in **Agyarko & Ors v SSHD** [2017] UKSC 11 has emphasised that the approach to Article 8 should consider whether the decision would result in unjustifiably harsh consequences**.** From the five stage test in **Razgar v SSHD** [2004] UKHL 27 the appellant does have an engaged family life in the UK and the threshold for interference is low. The decision by the Secretary of State (the refusal) was taken in accordance with the law and for a legitimate purpose (the maintenance of rights and freedoms of citizens in the UK).

13. I note that the appellant cannot meet the Immigration Rules and those rules set out the Secretary of State's position in relation to Article 8. At the date of his initial application which was in fact on 7th September 2009 the child had not lived in the UK for 7 years at the date of the application. The application was the subject of judicial review proceedings which resulted in the reconsideration of his human rights. At the date of decision which was on 13th June 2014 it was confirmed that the child had not lived in the UK for seven years prior to the date of the application. It was also asserted that he had not seen the child for over a year. There has been considerable delay in the resolution of this case although this is not only the responsibility of the Secretary of State.

14. The initial refusal in 2014 noted the child had not been in the UK for 7 years at the date of application but would appear that this applicant still could not qualify for leave under the Immigration Rules (Appendix FM) as a parent. The appellant has had a brief relationship with the child's mother, he does not have sole custody and

although he has a contact order he entered the UK as a visitor. He does have contact with his child.

15. Under the 'Appendix FM Section 1.0b - Family Life (as a Partner or Parent) and Private Life: 10-Year Routes' (updated)

'Direct access in person
An applicant can qualify for leave as a parent if they have direct access in person to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK. The applicant must prove they have direct access in person to the child by submitting evidence such as:

- *a residence order or contact order granted by a court in the UK;*
- *a letter or sworn affidavit from the UK-resident parent or carer of the child; or*
- *evidence from a contact centre detailing contact arrangements.*

The above evidence, or a reasonable equivalent, should seek to confirm that the applicant parent has direct access in person to the child, and describe in detail the arrangements which allow for this. If a sworn affidavit is submitted, it should be certified by a legal officer.

It is not enough for an applicant to provide evidence only that they have been granted direct access to a child. The Rules require an applicant to show they have direct access in person with the child, are currently taking an active role in the child's upbringing and will continue to do so'.

16. From the witness statements and the previous evidence given before the First-tier Tribunal it was clear that the appellant had regular contact with his son in the early years of his life before 2012 and for example up to his age of 5 or 6. Once the mother moved away to Leicester this became infrequent and had apparently resumed pursuant to a court order on 26th February 2016 obtained by the appellant. It would appear from the witness statement of the appellant dated 18th March 2016 that he did have a much greater part in the care of his son when his ex-partner was living with his mother. The appellant would visit his mother's house on a daily basis to see his son and for example was present at his first birthday. His son was registered at a nursery when he was 2 years old in Camberwell and the appellant would drop him and collect him from nursery three times a week and when the ex-partner had some immigration issues and was detained and was unable to take care of him he reached an agreement with Social Services in 2010 whereby he and his mother would have care of the son and that they would take him to school, hospital appointments and other care involved. I note from the Southwark Children' Services Report dated 27th July 2010 that the child was living with the appellant's mother, his upbringing rather unsettled but that when taken from the mother and put into foster care, the child 'kept asking for his father'. This report emphasised then the need for stable care arrangements for AOOUT. When the son was enrolled in primary school the appellant maintains he was also involved in taking him and collecting him. There are primary school letters on file. When the son was 3 to 4 years old the child went to live with the mother in Loughborough whilst the appellant was living in Camberwell.

17. After December 2012 the ex-partner prevented contact between the appellant and his son without informing him and she moved out of the last known address. She did not attend court hearings but the appellant did see his son on 24th January 2016 after three years.

18. I had sight of a court order dated 26th February 2016 from the Family Court at Coventry which made a contact order under the Children Act 1989 in respect of AOOUT and which detailed visiting and overnight and holiday contact on at least a monthly basis if not more frequently. Indeed half of all school holidays were to be spent with the father and arrangements were to be agreed in writing between the parties.

19. Once again the arrangement broke down but subsequently the appellant had tracked down the ex-partner and re-established contact.

20. I do accept that the appellant has a genuine and subsisting relationship with the child (albeit he does not live with him) and the appellant is an important figure in his son's life. From the solicitor's letter dated 5th July 2017 to the ex-partner there would appear to have been difficulties with the contact through the moving of the ex-partner and her blocking of WhatsApp.

21. I accept from the documentary and oral evidence that this contact is at a delicate and fragile stage and this is quite clear from the letter sent by the solicitors of 5th July 2017 which spells out in no uncertain terms the action that will be taken if the ex-partner did not comply. I accept this is a genuine attempt to reinstate and secure the contact arrangements. The relationship with the mother is said to be more civil now. I do accept that it would be far more difficult for the appellant to have contact with his son should he be removed to Nigeria.

22. I also accept that it would be indeed in the child's best interests to have access to both parents even though he lives with his mother. Bearing in mind the photographs and the earlier contact that the appellant has had with his son it would be in the best interests of the child to have continued and continual access to his father and not just on the basis of visits. Indeed that has been determined by the Family Court. There is a court order dated 26th February 2016 and this must have been made with the best interests of the child in mind and I must have regard to that order.

23. I do take into account the fact that the appellant and his son live at some distance from each other but the train tickets and the access established by the appellant recently with his son leads me to believe that this will be facilitated by his remaining in the UK.

24. At the hearing before Deputy Upper Tribunal Judge Symes it was conceded by the Secretary of State that the appellant's ex-partner and AOOUT's mother had been granted leave under Appendix FM but it was not clear whether AOOUT had been granted leave in line with her. What is clear is that by the date of decision that the child has been residing in the United Kingdom for a period of nearly ten years having been born in the UK. Although the child is not a British citizen it appears that

the mother has been granted some form of limited leave it is likely that for the foreseeable future the child will stay in the UK.

25. I take into account **Azimi-Moayed (decisions affecting children onward appeals) [2013] UKUT 197 (IAC)** when assessing the child's interests. The child is at school here, will have friends here and has only known life in the United Kingdom and will shortly be transferring into secondary education.

26. I am obliged to take into account Section 117 of the Nationality Immigration and Asylum Act 2002 and

> *Section 117B of the 2002 Act provides:*
>
> *"(1) The maintenance of effective immigration controls is in the public interest.*
>
> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-*
>
> *(a) are less of a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-*
>
> *(a) are not a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(4) Little weight should be given to-*
>
> *(a) a private life, or*
>
> *(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.*
>
> *(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*
>
> *(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-*
>
> *(a) the person has a genuine and subsisting parental relationship with a qualifying child, and*
>
> *(b) it would not be reasonable to expect the child to leave the United Kingdom.*"

27. This is not a deportation decision. I note the appellant has a poor immigration history - he entered and overstayed his visit visa in 2005 and did not attempt to

regularise his status until 2009. He can speak English but does not appear to be financially independent and that is a factor I should consider under Section 117(3)(a) and (b) of the Nationality Immigration and Asylum Act 2002.

28. From the evidence put before me, however, not least the statement, the court order, solicitor's letters and photographs and the appellant's oral evidence, it is clear, that he does have a genuine and subsisting parental relationship with a qualifying child that is a child who has been in the UK for over seven years (Section 117 (6)).

29. In line with the dictum in **MA Pakistan v SSHD [2016] EWCA Civ 705** from Elias LJ the fact that a child has been in the UK for seven years must be given significant weight in the proportionality exercise for two related reasons; first because of its relevance in determining the nature and strength of the best child's best interests and second because it establishes the starting point that leave should be granted *unless* there are powerful reasons to there contrary. The fact is, however, that this child will not be departing from the UK. He was born in the United Kingdom on 24th November 2007 has now been here for weeks short of 10 years. At no point did the Home Office challenge the fact that the child would remain in the UK.

30. The appellant has had an active participation, where he could, in his son's welfare and upbringing and has indicated that he wishes to continue to do so. The appellant has been active previously in the child's upbringing when the child was young. I therefore accept that there have been no powerful reasons presented to me *contradicting* the fact that leave should be granted to the appellant.

31. **AM (Pakistan) Oths v SSHD** [2017] EWCA Civ 180 confirmed at [20] that the wider public interests considerations can only come into play via the concept of reasonableness in Section 117B (6) itself.

32. It is not a question that it may be reasonable to require the child to leave and I do not find that **AM (S 117B) Malawi** [2015] UKUT 0260 (IAC) assists here. The child is settled at school, has always lived in the UK, has had a somewhat disrupted upbringing and to disrupt him further by the removal of his father would undermine his best interests. He lives with his mother and the Home Office Presenting Officer, in the hearing before Deputy Tribunal Judge Symes confirmed that the mother had been granted leave to remain in the UK. In the error of law decision it was recorded thus at [9]

'Mr Jarvis… enquired into the information held by the Home Office as to the mother's situations, and had established that she had been granted leave under Appendix FM, although it was not so far apparent whether AOOUT had been granted leave in line with her. Before the appeal was finally determined , the Respondent would wish to have the opportunity to look into the application leading to that grant of leave, as it could be expected to cast light on the extent of the Applicant's relationship with his son'.

33. The Secretary of State was directed to produce evidence to that effect but after the representations before Judge Symes produced nothing and subsequently did not provide evidence to the contrary. It would appear that the child has now been in the United Kingdom for a fraction short of 10 years.

34. I take into account the position of the Secretary of State as set out in the Immigration Rules but conclude that the best interests of this child are an important factor in the determination of this appeal, although not a trump card. The Family Court has determined that the child's best interests are to have a continuing relationship with his father. The appellant's human rights are to be interpreted in the light of statute. If, in line with the reading of Section 117B (6) in **MA Pakistan v SSHD** and **AM (Pakistan)**, wider public interest consideration are *confined* to this provision and the child will not be departing I am governed by Section 117B(6) and the public interest does not require the appellant's removal.

35. Separately, I am mindful of the dicta in **Huang v SSHD** [2007] UKHL 11 and consider the proportionality of the decision, and find that although no great weight should be attached to the private life of the appellant, certainly his family life has been enhanced by his relationship with his son and the presence of his mother and siblings in the UK and I take this into account further to **Beoku-Betts v SSHD [2008] UKHL** 39. In relation to proportionality, any assessment would require an analysis of the strength of the relationship between the father and child and balance that against the public interest. The difficulty for the appellant is that his relationship, as can be seen from the court orders, has been frustrated by the moving of the child. Clearly in the proportionality assessment Statute through Section 117(6) tilts the scales in the favour of the appellant.

36. For the reasons I have given above, however, I find that the appellant's appeal is allowed.

Notice of Decision

I remake the decision and allow the appeal of Mr OAT.

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. This is because this appeal involves a minor.

Signed *Helen Rimington* Date 25th October 2017

Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because of the complexities of the case.

Signed *Helen Rimington* Date 25th October 2017

Upper Tribunal Judge Rimington