Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15816/2017

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 1st October 2018	**On 25th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

CHUKWUNYERE [O]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No representation
For the Respondent: Ms H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge V A Cox, promulgated on 12th June 2018, following a hearing at Birmingham Priory Courts on 24th May 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, and was born on 21st June 1971. He appealed against the decision of the Respondent dated 11th November 2017, refusing his application for leave to remain in the UK as the partner of a person present and settled in the UK, on the grounds that he could not meet the requirements of Appendix FM paragraph 276ADE. The Respondent was not satisfied that the Appellant met the eligibility relationship requirement as a partner as he had not lived with his partner for two years and was not married.

The Judge's Findings

3. At the hearing on 24th May 2018 in Birmingham, Judge Cox heard the Appellant give evidence. The Appellant explained that he had visited his partner in the UK a number of times, to visit her as well as his children. In August 2016 he entered for the last time. He arrived as a visitor. He intended to return. His children did not want him to go back. His previous visits had been in 2014 and 2015. However, at the time his children were young and they were unable to persuade him to remain in this country.

4. The Appellant also said that he three cousins in the UK. In Nigeria, however, he had his mother, his brother, and his sister. He did not live with them in 2016.

5. The Appellant went on to explain that since coming to the UK in 2016 he had always lived with his partner. He referred to school documents and to church contacts in the bundle to demonstrate the strength of his claim. He confirmed that his partner, [PC], was a British citizen, and worked in the UK as a teaching assistant and also claimed some benefits. She had come to the UK in 2008, and the Appellant and his partner had then lived apart for some seven years. The Appellant explained that the last time he came his son was having problems in school, he needed support, and he had in fact been excluded from school, and had to move to another school. He offered support to his son. He was supporting his son's homework. The judge recorded that, "he felt his presence was helping the child and said if he could get a job then the family would not be on benefits" (paragraph 20).

6. With respect to his own work in Nigeria, the Appellant explained that he was a pharmacist. He said that since coming to the UK he had not owned it anymore. The Appellant gave evidence about his business partner, (paragraph 27) and explained that he was not returning back to Nigeria. He had sold his share of the business. The deaths had been paid. He did not have any money due from the business (paragraph 29).

7. When asked why he could not return back to Nigeria, the Appellant had explained that

> "The children are more stable and happier. If he were to go back to Nigeria he said it would cause disruption. He said that he could not return to Nigeria and visit as before as that was a visit a twice a year

> and that was not now the same. There would be long break whilst he applied to return" (paragraph 31).

8. The judge then went on to hear evidence from the Appellant's partner, [PC], and she explained that she had relatives in the UK, such as her father and her brother, and also more distant family cousins. She explained that she had not really lived alone, before the Appellant came to the UK, because she had a baby and then other children in the UK. She explained "when separated from her partner she did not talk about his coming to live in the UK and he visited three or four times a year" (paragraph 34). She also went on to say that

> "Her oldest son is now a teenager and he needed his father to help out. She said that the oldest son had bad friends in school so the father needed to help her out with him. She added that her daughter cries when he, her father, the Appellant is not here…." (paragraph 35).

9. She went on to agree that only the youngest child was a British citizen but the other two children had applied to become citizens in March 2018.

The Judge's Findings

10. The judge started on the basis that the best interests of the children were a primary consideration (paragraph 55). He recognised that one child is a British citizen, as is the mother and, "I find it is in the best interest of the children to live with both of their parents in a stable home" (paragraph 56). He accepted that the children were indeed those of the Appellant and his partner, "they have three children and in the past their family life was conducted in two countries. The partner visited the Appellant in Nigeria and took the daughter with her and the Appellant has now more frequently visited the UK" (paragraph 57). The daughter has lived in the UK all her life the sons were brought here by the father. The judge observed that "none of these children have consistently lived with both of their parents since the mother left Nigeria" (paragraph 58).

11. In terms of the quality of the evidence before him, the judge found both witnesses to be "vague and inconsistent in the details of the claims about their history" (paragraph 59). He went on to say that, "I find it is not credible that the couple claimed to be in a relationship and to have three children and yet claim to never have discussed living together in the UK or indeed it seems in Nigeria" (paragraph 61). He went on to also say that "the Appellant is the father of the British child and whilst he has not lived with the mother for two years since entering the United Kingdom, he has a family life and indeed a private life in the UK" (paragraph 64).

12. Crucially, in terms of the family set up between the Appellant and his partner, the judge then observed that,

> "The Appellant has, I find, decided to change the nature of his family life from that established by visiting the UK over a period of many years and indeed the majority of the children's lives. He and the mother established that pattern when she left the older children in

Nigeria. They lived there with their father for many years and she had a child here alone whilst they remained overseas" (paragraph 65).

13. It was against this background, that the judge concluded that "the fact that the mother is a British citizen is not exceptional and the decision to remain was made when the Appellant was well aware he should leave the UK within the terms of his visit visa…" (paragraph 66). The judge's view was clear that "the facts are plain in that any application for leave would not succeed at this time as the financial grounds are not met and therefore there is no case to argue the **Chikwamba** principle" (paragraph 67). It was further concluded that there were no insurmountable obstacles for the Appellant and the partner continuing their family life "as they did in the past by visits, of the partner choosing to move to Nigeria if she and the children wishes to do so. They do not have to do so and that is a matter for them. There is no right to enjoy family life in the UK…" (paragraph 68). Towards the end of the determination the judge emphasised the fact that "visits can continue as before" (paragraph 85).

14. The appeal was dismissed.

Grounds of Application

15. The grounds of application state that there were more documents to prove that the Appellant has been living with his partner and the children since his arrival. There is then a detailed reference made to these documents (see paragraph 2). The grounds also go onto explain the problem that the Appellant's son had at school in October (paragraph 4). They go on to say that "we all live together as one family…" (paragraph 5). They further state that "our three children are now British as shown by the award of citizenship letters and certificates submitted with this appeal" (paragraph 9). They further state that the Appellant has been employed and that he "made financial contributions for the family upkeep, shopped for the family, paid for out of school club activities, dental care and others" (paragraph 10).

16. On 13th July 2018 permission to appeal was granted. The basis of this grant was that, in recognising that the Appellant was unrepresented and had drafted his grounds of application himself, there was, nevertheless, a possible defect in the proportionality assessment. This arose for two reasons. First, the judge had accepted that the Appellant played a "fatherly role" to his children (see paragraph 74). Second, the judge accepted that family life with the children in the UK existed (see paragraph 64). Against this background, there had been no reference by the judge to the Court of Appeal judgment in **MA (Pakistan) [2016] EWCA Civ 705**, or to the test in Section 117B(6). The judge did not consider whether it is reasonable for the children to leave the UK as is required when considering the test under Section 117B(6), given that the judge had found that the Appellant had a genuine and subsisting parental relationship with the children at least one of whom was a qualifying child.

Submissions

17. At the hearing before me on 1st October 2018, the Appellant appeared, once again, unrepresented. The Respondent was represented by Ms H Aboni. At the start of the morning, I called in the Appellant, knowing that he was unrepresented. I explained to him that the grant of permission in this case had been on the basis that the proportionality exercise had not been undertaken from the view point of the children, and their best interests, together with the maintenance of immigration control which is a public interest consideration under statutory provisions. I asked him whether he understood that this was the basis upon which permission had been granted because the judge granting permission was quite clear that the Appellant and the Sponsor "were not credible witnesses". The Appellant said that he understood the position. I asked him if he wished to have time this morning to consider how to put the claim. He said he would appreciate that. That being so, I stood him out to the end of the morning's list. I then progressed with the other cases for the time being.

18. When the hearing reconvened, the Appellant began, surprisingly, by saying that he had further documentations to hand up, because the nature of his claim had now changed. He went on to say that, although he had lived with his partner for two years in this country, he no longer now did so. He said that he had in fact separated from his partner. The relationship had broken down. His partner had thrown him out. This happened in June 2018. The reason for this appears to have been that the partner wished to move to Ireland, where she wished to avail herself of the opportunity of her son going to university, but without paying university fees, which was a requirement in the United Kingdom, but not in the Republic of Ireland. He said that if he was now returned back to Nigeria, he would lose all contact with his wife and children, as they wished now to move to Ireland. He said that since 26th July 2018 he had not seen his children. He said that he had a CAFCASS letter to prove this. I said I was not in a position to look at any new documentation. And asked if he would have any further submissions to make. He said that he had none.

19. For her part, Ms Aboni submitted that this was a complete change of circumstances, in a manner that was not envisaged. She had had no notification until the Appellant made his oral submissions about such a drastic change of circumstances. Given that this was the case it was open to the Appellant to make a fresh application on the changed facts as alleged. It was not open for this Tribunal to entertain these new arguments. Secondly, insofar as permission had been granted by the Tribunal, there really had been no material error of law at all. This was because Judge Fox did consider the children's interests quite independently from those of the adults. This is clear from paragraph 79 of the determination. The judge explains that, "the mother does not have to leave the UK and the children can remain here with her. The children have lived the majority of their lives with one or other of their parents and only with both at times of visits and since the Appellant remained. That has been their pattern of life. The parents did not discuss any change of plans for it but simply decided suddenly to change" (paragraph 79). This was simply a disagreement with the decision.

20. In reply, Mr [O] now stated that if he was sent back he would lose his children. This would have an impact on his family life.

No Error of Law

21. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

22. First and foremost, it is not the case, on a comprehensive reading of the determination, that the Rule in **MA (Pakistan) [2016] EWCA Civ 705** has not been taken into account. The judge has in terms addressed the position, by referring to the fact that this was a case where the *modus operandi* of the family was for the Appellant's partner to come to the UK with one child and then the Sponsor to visit, bringing the others. This pattern was established. The judge makes express reference to how the Appellant's partner had left the older children in Nigeria where they lived there with their father for many years and she had a child in the UK alone (paragraph 65). The judge explained further that the way in which the family life had been kept intact was that they had made visits in the past (paragraph 68).

23. In his conclusion the judge further explained that the stark reality is that the mother does not have to leave the UK. The children can remain in this country. In fact, if the Appellant is now correct in stating what he has said, namely, that his partner is prepared to take the children to the Republic of Ireland, then this simply reinforces the very point that the judge himself made, namely, that the children do not have to be separated from the mother at all. As the judge explained "that has been their pattern of family life". (Paragraph 79). The plain reality is that the judge did not accept the evidence of the Sponsor and the Appellant about their immigration history (paragraph 79).

24. In short, there is a world of difference between a situation, although rarely met, where the family life is maintained, over very many years, with regular visits being made by one spouse to the other in the UK; and the situation where the family life in question crystalizes in its essential aspects, by one spouse being with the other spouse in this country. The Appellant's situation falls in the former. It does not fall in the latter.

25. In fact, the Appellant has only been with his partner in this country for two years from 2016, and he now maintains that as of June she has separated from him again, a matter on which I cannot hear evidence, and which must remain for determination on another day. Suffice it to say, that since the test for a successful appeal is "perversity" or "irrationality" the Appellant fails to demonstrate that the decision by Judge Cox was one that fell in that class of cases.

Decision

There is no material error of law in the judge's decision. The determination shall stand.

No anonymity direction is made.

Signed Dated 1st October 2018

Deputy Upper Tribunal Judge Juss