Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09578/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 August 2021	**On 7 September 2021**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR ADEYINKA OLASUPO SHOYEMI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Malik, Counsel, instructed on Direct Access
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

This is an appeal against the decision of First-tier Tribunal Judge Hone issued on 17 February 2021 which refused the appellant's appeal brought on Article 8 ECHR grounds.

The appellant is a citizen of Nigeria. He was born on 12 April 1976.

The appellant came to the UK on a visitor's visa on 6 May 2007. The appellant returned to Nigeria on 19 June 2007, returning to the UK on 1 September 2007. His wife was also in the UK at that time on a visitor's visa. The couple then

overstayed when their visit visas expired on 16 October 2007. Applications for further leave were made out of time and were refused.

The couple had two children in the UK. The appellant's son was born on 16 July 2008 and his daughter on 6 October 2010. The appellant and his wife went through a difficult separation. On 24 August 2017 the appellant was granted leave on Article 8 ECHR grounds until 24 August 2018. The appellant applied for further leave but this was refused on 20 May 2019 in the decision that forms the basis of these proceedings. The application was refused, in part, as by that time the appellant was permitted only indirect contact with his children.

The appellant appealed against the refusal of leave to the First-tier Tribunal. The appeal was heard by First-tier Tribunal Judge Hone on 5 January 2021. At the hearing the appellant raised a further ground of appeal, setting out details of a relationship with a new partner, Sibongile Masiya and her son, Adlai, who was a British national. The respondent consented to this new matter being considered by the Tribunal.

The First-tier Tribunal did not find that the appellant could show very significant obstacles to re-integration in Nigeria and found that paragraph 276ADE of the Immigration Rules was not met. First-tier Tribunal Judge Hone also found that the appellant's relationship with Ms Masiya did not amount to a genuine relationship akin to marriage for the purposes of Appendix FM of the Immigration Rules. Those aspects of the decision are not challenged.

The First-tier Tribunal did not find that the appellant had a genuine and subsisting parental relationship with Adlai and therefore concluded that paragraph 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) was not met. The First-tier Tribunal's reasons for this were as follows (verbatim):

> "25. As set out above there are three issues in this case. I will consider these in turn.
>
> 26. First whether the Appellant had a genuine and subsisting parental relationship with Adlai Masiya, if he does then the Appellant submitted then he should be granted leave to remain as the child is a British citizen, his mother a right to reside in the UK and it would be in his best interest to remain in the UK with the Appellant under Section 117B(6) of the 2002 Act. I find that he does not have a parental relationship with his partner's son.
>
> 27. I find that he does have a relationship with the child's mother. I find that this relationship is not the equivalence of marriage. They have separate houses, though stay with each other regularly. I find that this amounts to a relationship but does not amount to a relationship akin to marriage. It is clear that they share some costs on a casual basis but the majority of this is for visits to the cinema or meals out, not showing household costs. I find that they do not share day to day household costs, and the sharing of costs they do does not suggest they share a closer relationship. I also find that there is not family life. There is a

private life, but this does not extend to a family life. I accept that they have been in a relationship since 2018.

28. I also find that the Appellant does not have parental responsibility for his partner's child. He does take her to school and carry out his partner's instructions, but I do not find that this shows any reasonability on his part. Though I accept they have a friendship and there is clear affection between them, on the evidence I have before me I do not find that it extends to a parental relationship. As an example, I find that the fact that the Appellant drops the child at school or helps with some classes, is at the direction of the child's mother and under her control and does not amount to parental control. I also find that the son relies on his mother for parental support and not the Appellant. On that basis I find that Section 117(6) is not met."

The judge went on in paragraphs 31 to 34 to consider Article 8 ECHR outside the Immigration Rules. He found as follows (verbatim):

"31. Finally, I need to consider this matter outside the Rules, using the TZ approach. In R (on the application of Agyarko) v SSHD [2017] UKSC 11, the Supreme Court explained that the ultimate question in Article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved, applying a proportionality test while considering all of the relevant factors. In addition to the findings I have set out above, I find that the Appellant does not have a family life in the UK, either with his new partner and her son or his biological children but he does enjoy a private life with his new partner. I do not question they are in a relationship but it does not amount to a Family Life, and at most it is part of the Appellant's private life. This is highlighted by the fact that they live in two distinct households and do not share the majority of costs. Furthermore, it is important for me to consider that this relationship was begun while the Appellant had a precarious immigration status in the UK, and the Appellant was keenly aware of this fact.

33. I find that he has significant periods of being an overstayer in this country and his private life has been developed with this in mind. I find that he only has indirect contact with his biological children and this was ordered by the Family Court due to his conduct. I have considered the psychology report and find it of limited use in relation to the Appellant's actions at the time. Though he might be trying to change, it is clear that his actions have led him to where he is now, and that has resulted in limited links with his biological children that can be continued in Nigeria. I find that his removal to Nigeria would be proportional to all the best interests of the children in his life, as well as proportional to his other human rights.

34. Weighing up the two sides of the balance sheet I find that the factors in favour of dismissing the appeal outweigh the factors put forward by Appellant. In particularly I consider the need to continue Appellant's current private life is outweighed by the need to maintain proportional Immigration Rules. I also find that the Appellant can continue to enjoy his private life with his partner and her child via electronic communication methods, which they are clearly adapt with, and

> though this is different from their current situation it is proportionate when considering all the factors."

Permission to appeal the decision of the First-tier Tribunal was granted by the Upper Tribunal on 28 April 2021. The respondent provided a Rule 24 response on 12 May 2021.

The appellant raised two grounds of appeal. Firstly, the First-tier Tribunal materially misdirected itself in relation to the correct test for a genuine and subsisting parental relationship under Section 117B(6) of the 2002 Act. Secondly, the judge materially misdirected himself in relation to the appellant's claim to have a family life with Ms Masiya.

In support of the first ground, the appellant relied on paragraph 43 of R (on the application of RK) v SSHD (Section 117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC):

> "43. I agree with Mr Mandalia's formulation that, in effect, an individual must 'step into the shoes of a parent' in order to establish a 'parental relationship'. If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a 'parental relationship with the child. It is perhaps obvious to state that 'carers' are not *per se* 'parents.' A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example whilst the parents are at work) or even longer term (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a 'parental relationship.'"

The appellant maintained that the judge erred in three ways in paragraph 28 of the decision. Firstly, the judge referred in this paragraph to the appellant not having "reasonability" in line 3 and this was not part of the proper test for a genuine and subsisting parental relationship. Secondly, the judge was in error in placing weight on the question of "direction" and "control" of the child. These factors were not "necessary ingredients" of a parental relationship. The grounds at paragraph 11 maintained that the reliance on these factors showed that judge may have incorrectly applied the "sole responsibility" requirement from paragraph 297 of the Immigration Rules. Thirdly, the combination of these two matters showed that the First-tier Tribunal had applied a test that was too stringent.

I did not find that the First-tier Tribunal erred in the assessment of whether the appellant had a genuine and subsisting parental relationship with Adlai.

The reference in line 3 of paragraph 28 to an absence of "reasonability" was, in my view, clearly a typographic error and the term "responsibility" was intended. This is the only way to make sense of that sentence which should read:

> "He does take her to school and carry out his partner's instructions, but I do not find that this shows any [responsibility] on his part."

Where that is so, nothing in the decision suggests that the judge was looking for sole responsibility. The grounds concede that the question of parental responsibility is legitimate factor in assessing whether there is a parental relationship. It was open to the First-tier Tribunal to consider, based on the material provided, who had direction and control of the child. The First-tier Tribunal was entitled to conclude that the appellant had not "stepped into the shoes of a parent" and was a carer or caring friend to Adlai as explained in paragraph 43 of RK.

The second ground argued that the judge took an incorrect approach in paragraph 32 when finding that the limited relationship between the appellant and Ms Masiya was part of the appellant's private life. Having found in paragraph 27 that the appellant had a relationship with Ms Masiya, the judge should have found that family life was engaged.

I did not find that this ground had merit. The First-tier Tribunal judge found that the appellant and Ms Masiya had a limited relationship, not living together, not sharing living expenses and so on. There is nothing objectionable in that relationship being considered as part of the appellant's private life, as a strong friendship would, for example, rather than as amounting to family life for the purposes of Article 8 ECHR. Further, the relationship was weighed on the appellant's side of the balance, in any event and nothing turns on whether it was a factor forming part of family life or private life.

For all of these reasons, the decision of the First-tier Tribunal does not disclose an error on a point of law.

Decision

The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

No anonymity direction is made.

Signed: S Pitt Date: 4 August 2021
Upper Tribunal Judge Pitt