Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18977/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th February 2015	**On 5th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR OKEREMUTE SADUWA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C. Jacobs of Counsel
For the Respondent: Mr I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 19th January 1976. He appeals against the decision of Judge of the First-tier Tribunal Stott sitting at Birmingham on 1st October 2014 who dismissed the Appellant's appeal against a decision of the Respondent dated 26th March 2014. That decision

was to refuse the Appellant's application for further leave to remain and to remove the Appellant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The Appellant landed in the United Kingdom on 29th April 2012 accompanied by his wife and three children as his dependants with leave to enter as a Tier 4 Student valid from 31st January 2012 to 31st July 2013. He was subsequently granted an extension of stay in the United Kingdom until 6th March 2014 in the same category.

2. The Appellant and his wife separated in May 2013 and she has since made her own application for leave to remain outside the Immigration Rules. That was refused and she appealed. As at the date of the hearing before Judge Stott the outcome of that appeal was not known. In February 2014 the Bedfordshire Family Proceedings Court made an order that there be no direct contact between the Appellant and his children. He was only allowed indirect contact, sending them cards or photographs once a month through his wife's solicitors. On 6th March 2014 the Appellant applied for leave to remain under Appendix FM of the Immigration Rules and the refusal of that application led to the present proceedings.

3. A non-molestation order was granted in favour of the Appellant's wife against the Appellant on 19th June 2014 by Luton Family Court which Judge Stott noted had not been lifted despite the limited contact now granted to the Appellant. The police had been called to the former matrimonial home and allegations of assault had been made by the Appellant's wife against the Appellant and she had petitioned for divorce. The Appellant applied to the Luton Family Court for a contact order which was made in September 2014 increasing the Appellant's contact to supervised contact for one day a month for the period of six months with each session lasting one hour. A further hearing date was fixed for 2nd March 2015.

The Explanation for Refusal

4. The Respondent refused the application as the Appellant could not satisfy Appendix FM. In particular he could not satisfy the provisions set out in E-LTRPT.2.2,
2.3 and 2.4 for leave to remain as a parent. The Appellant and his wife had three children but they had not been in the United Kingdom for at least seven years nor were they British citizens nor were they settled in this country. The Appellant did not have sole parental responsibility for them and the Appellant's wife, the children's mother, was also not a British citizen or settled in this country. The Appellant could not succeed under paragraph 276ADE of the Immigration Rules because he had not lived in the United Kingdom for at least twenty years and given that he was 38 and had only come to the United Kingdom two years before it was considered he still must have ties and connections with Nigeria which would enable him to reintegrate there.

5. The Appellant had stated that he was bisexual and was afraid of ill-treatment if returned to Nigeria on that account. The Respondent rejected

that claim as the Appellant had lived in Nigeria for 36 years without experiencing problems and had fathered three children. He had remained married to his wife and they only separated in 2013. The Appellant had business interests in Nigeria and there were no significant obstacles which would prevent his reintegration.

6. The Appellant appealed against the Respondent's decision arguing that his removal would have a deleterious affect on his three young children whose best interests had to be considered. All three children were anxious to see him as was evidenced by a report from Social Services. He wished to play a full and productive part in their lives which would not be possible if he had to return to Nigeria.

The Decision at First Instance

7. The Appellant argued that if his current application for leave to remain was dismissed and he had to return to Nigeria the Family Court would have to make a final order on his contact application in March 2015 without knowing how the six monthly trial developed. The Judge characterised the contact arrangements at paragraph 7 of his determination as "An assessment of how the Appellant and his children relate to each other".

8. The Judge did not accept the Appellant's claim to be at risk upon return to Nigeria by reason of sexual orientation. He rejected letters of support produced by the Appellant noting that the disclosure of bisexuality was made at a very late stage namely in the grounds of appeal. The Appellant's evidence on this point lacked credibility. Further the Judge did not consider it a strong factor that the Appellant needed to be in this country to attend any divorce proceedings. The Appellant could be kept informed of the date of any hearing and could apply to return to the United Kingdom when necessary to make his representations. The Appellant could not satisfy the Immigration Rules because of the lack of status of his wife and children thus he could not rely upon the provisions of Appendix FM.

9. At paragraph 14 of the determination the Judge accepted that the Appellant had a family life with his children as he had contact and that their best interests were a primary feature in this appeal. At paragraphs 15 and 16 the Judge said as follows:

> "15. I take into account however the history of the relationship, when from the Appellant's own written information, the police have been called to the matrimonial home and allegations of assault have been made. It is also the position, judging by the information contained within the Social Services Report prepared for the Luton case that a non-molestation order is in place. That order will only have been granted after the hearing of evidence and a finding that the Appellant's wife and children needed protection.

> 16. From reading the Social Worker's Report there is information that physical and emotional abuse has been practised by the Appellant against his family. Presumably that is why any contact between him and his children was banned in February 2014. It is also of note however that the children are agreeable to seeing their father and I accept that it is in their best interests that they develop having frequent contact with their natural father if that is considered to be appropriate."

10. At paragraph 22 the Judge accepted that the Appellant had an arguable case under Article 8, having been granted contact with the children "albeit on a limited basis". Following the case of **Gulshan [2013] UKUT 00640** the Judge directed himself that he had to consider whether or not there were compelling and exceptional circumstances which would lead to the conclusion that it would be unduly harsh for the Appellant to have to go back to Nigeria. The children's interests were a primary consideration but could be outweighed by other factors. The maintenance of effective immigration control was in the public interest and must be taken into account.

11. The Judge was aware of the matrimonial history and the initial banning of any contact. At paragraph 24 he concluded:

> "Although I accept that there may well be initial distress and upset caused to his children I find that the Appellant's removal would not be disproportionate bearing in mind what has been happening to them and their mother in the recent past. From the Social Worker's Report it is apparent that they have started to thrive and develop more fully once apart from the Appellant and consider that in all the circumstances compelling reasons do not exist to enable the Appellant to succeed in this appeal."

The Judge dismissed the appeal declining to make an anonymity order.

The Onward Appeal

12. The Appellant who had represented himself at first instance appealed against the Judge's decision arguing that the order made by the Bedfordshire Family Court prohibiting him from having contact was made by that court of its own volition as a precautionary measure pending the outcome of the hearing. The order was amended on 9th September 2014 in the Appellant's favour as there was nothing which suggested that the children required protection from the Appellant. The Appellant denied all allegations of assault against his wife and the grounds made counter allegations against the Appellant's wife while noting that the Bedfordshire Family Court had upheld her allegations against the Appellant. The court had made an order barring the children's removal pending the outcome of the contact proceedings. The Appellant's grounds stated that he did not have any family in Nigeria that he could reintegrate with upon return. Removing him now would no doubt cause emotional and financial damage

to the children as he would not be able to cater for their needs. Much of the remainder of the grounds of appeal was taken up with the Appellant's arguments as to the findings against him on the grounds of sexual orientation and/or repeating parts of previous paragraphs in the grounds.

13. The application for permission to appeal came on the papers before First-tier Tribunal Judge Dineen on 25th November 2014. In granting permission to appeal he wrote that:

> "For the most part the application merely seeks to reargue matters already argued before the Judge and matters in issue in Family Court Proceedings without identifying any arguable error of law. However on 9th September 2014 the Family Court at Luton made an order relating to the Appellant's three children that subject to the children's wishes and feelings their mother should make them available for six one hour sessions of supervised contact in the months of September 2014 to February 2015 inclusive prior to a final hearing on 3rd March 2015 of the Appellant's application for a child arrangements order. In carrying out the proportionality exercise under Article 8 it is arguable that in particular in paragraphs 15, 16, 23 and 24 the Judge erred in law by making findings on matters properly within the jurisdiction of the Family Court. It is arguable in any event that the Judge erred in law by precluding the development of contact between the Appellant and his children and pre-empting the hearing of the Family Court listed for 3rd March 2015."

14. The Respondent replied to the grant of permission on 3rd December 2014 stating that the Judge had directed himself appropriately. It was open to the Judge to consider all relevant evidence and reach reasoned findings on the Appellant's and his family's circumstances and their impact on the Article 8 rights of the parties.

15. Following the grant of permission the Appellant instructed Messrs Duncan Lewis Solicitors to act for him in relation to this appeal. They applied for an adjournment of the hearing which had been fixed for 5th January 2015 by letter dated 31st December 2014. The solicitors' letter noted that the Appellant, whilst acting in person, had disclosed a number of documents relating to the family proceedings without permission from the Family Court. They had now made such an application for permission but due to the length of time it would take the Family Court to consider the application they sought an adjournment of the hearing. The solicitors raised a second point which was that they were not aware of the children's immigration status in this country as the Appellant had no contact with his wife and therefore did not know what if any applications she might have made in relation to them. The application was granted and the hearing was adjourned until 5th February 2015.

16. On 3rd February the solicitors made a further request for an adjournment as the Family Court had still not listed the Appellant's application for permission to disclose documents. As it was possible that the Family

Proceedings Court might not deal with the application for permission to disclose as a separate matter but wait until the hearing for 3rd March 2015 the solicitors requested an adjournment of the Appellant's appeal to the Upper Tribunal until after that date. This second application was refused by an Upper Tribunal Judge who wrote:

> "The relevance of the documents relating to the Appellant's ongoing family proceedings is a matter best determined by the Judge hearing the appeal and in any event would not appear to be a matter preventing the determination of the error of law issue. Should it be the case that an error of law is found and the documents are considered necessary for the decision to be remade it will then be open to the Judge to adjourn the case to another date for a resumed hearing".

The Hearing Before Me

17. The matter came before me to determine whether there was an error of law. The Appellant submitted a bundle of documents for the error of law hearing before me, the most relevant of which was Counsel's skeleton argument. This argued that the findings of the First-tier Tribunal were erroneous in that they usurped the function of the Family Court which was seized of the issue of whether the best interests of the children were being met by contact with the Appellant. The Judge's decision pre-empted the outcome of the final contact hearing listed for 3rd March 2015. The Judge had failed to take account of a settled line of authorities including the case of **MH [2010] UKUT 439** that a decision to remove an applicant in the process of seeking a contact order may violate Article 8 particularly on the basis that removal of a parent/applicant during contact order proceedings would be unlawful because it prejudged the outcome of the contact proceedings and more importantly denied the applicant all possibility of any further meaningful involvement in the proceedings which may breach Article 6.

18. A refusal to adjourn proceedings before the Tribunal may have similar consequences. It was usual for the appeal to be allowed pursuant to Article 8 rather than for the proceedings to remain within the Tribunal system to be adjourned perhaps more than once. The Respondent would then normally grant a short period of discretionary leave bearing in mind any relevant facts found by or observations of an Immigration Judge. If an application for a contact order is successful a parent may make application for further leave to remain in the United Kingdom.

19. In oral submissions Counsel argued that the hearing on 2nd March 2015 had been allotted half a day and the Immigration Judge had accepted that the Appellant had made a valid and genuine application for contact. This case was on all fours with the case of **MH**. The Judge had taken a partway stage, the making of an interim order in September, as the final stage. If the Appellant had to leave the United Kingdom with only interim supervised contact his contact application would be fundamentally

compromised. If the Appellant had no contact order he would not be able to make an application to visit the children in this country. The direction in **RS India [2012] UKUT 00218** that the Tribunal should consider whether an application was made to frustrate deportation did not apply in this case. Counsel accepted he was not previously aware of the case of **Mohammed [2014] UKUT 419** relied upon by the Respondent in this case but that case could be distinguished as it dealt with a situation where there was a mere possibility of an application being made.

20. In reply the Presenting Officer argued that the Appellant's analysis of the law was not correct. The starting point for an assessment of the relationship between the Family Court and the Immigration Tribunal was what was said in the case of **MS [2007] EWCA Civ 133**. In **MS** the Court of Appeal had said:

> "The question of whether the Appellant's removal would have violated Article 8 … should have been decided by the Tribunal on the facts as they were when it heard the appeal i.e. with her outstanding application for contact with her children. That question was capable of resolution one way or the other. It was not open to the Tribunal to rely on the Respondent's assurance or undertaking that the Appellant would not be removed until the contact application had been resolved. Nor was it appropriate to speculate upon whether there might be a violation of Article 8 on different facts at some point in the future. Had the Tribunal decided the Article 8 point in the Appellant's favour she should have been granted discretionary leave to remain. This could have been for quite a short period whatever was regarded as sufficient to cover the outstanding contact application. It would have been open to the Appellant later to apply for the period to be extended should the circumstances so warrant."

21. The Presenting Officer argued that **MH** did not say anything different to the Court of Appeal in **MS** what the cases were saying was that there was no formulaic approach. **MH** could not be read as saying that if the Family Court had not yet made a decision the Tribunal should adjourn or grant a short period of leave. At paragraph 42 of **RS** the Upper Tribunal had said "There is no universal obligation that a period of discretionary leave must be granted where family proceedings remain unresolved". The Judge had evidence from Social Workers which showed emotional and physical abuse of the Appellants' wife and children. The purpose of the hearing in March 2015 was to see how the contact had gone as it was for a trial period. This was not the same as where an Appellant was requesting contact for the first time. The Appellant had been granted very limited contact which was clearly based on a significant amount of evidence for example about police visits. The Judge had to take into account the Social Worker's evidence and was entitled to give that weight and find the Appellant's removal would not be disproportionate. The Judge had approached this matter by weighing up what the interference was. There were no compelling factors why leave should have been granted.

22. In closing for the Appellant it was argued that there was no authority to say that **MH** was wrong, **RS** was a case which related to automatic deportation as was **Mohammed**. The Appellant had made an application for contact and relied on the case of **MS**. He should be afforded procedural protection by Article 8. There must be an error of law in the determination because the Judge had not addressed **MH** or **RS**. There was no reference to either case in the determination. The Judge had sought to pre-empt the Family Court proceedings. It was speculation for the Judge to say at paragraph 15 of the determination that the non-molestation order would only have been granted after evidence. The Appellant denied that there was any allegation of violence against the children. It might be that the children were exposed to domestic abuse by the children witnessing their parents' violent arguments. All of this was within the domain of the Family Court and there had to be a separation between the two jurisdictions. The appeal should be allowed and discretionary leave granted to the Appellant whilst the contact proceedings were underway.

Findings

23. In the case of **Mohammed** the Upper Tribunal stated that the guidance given in the earlier authority such as **RS** was concerned with whether there was a realistic prospect of the Family Court making a decision that would have a material impact on the relationship between a child and the parent facing immigration measures such as deportation. In **Mohammed** the Appellant had indirect contact via letters etc. but the Tribunal found particularly pertinent certain observations in an Upper Tribunal decision of **Azimi-Moayed [2013] UKUT 197** that where evidence gives no hint of a suggestion that the welfare of the child is threatened by the immigration decision in question or that the child's best interests are undermined thereby there is no basis for any further judicial explanation or reasoned decision on the matter.

24. In the instant case before me the Judge was well aware that the Appellant had interim contact of one hour per month and that there was to be a further hearing in March. The Judge also had evidence from Social Services that the Appellant had been emotionally abusive against all of the family including the children (and physically against his wife). It was reasonable for the Judge to deduce that that was the reason why the Appellant had been banned from having contact in February 2014. The Judge also had evidence from the Social Worker's Report that the children had started to thrive and develop more fully once they were apart from the Appellant.

25. In granting permission to appeal the Judge of the First-tier Tribunal appears to make the criticism that Judge Stott was taking it upon himself matters more properly open to the Family Court. In **RS** the Upper Tribunal

made the point that although the First-tier Tribunal had a duty to treat the child's best interests as a primary consideration, the Tribunal had no means of assessing those matters for itself, in particular there was usually no local authority or children's guardian, no access to the service provided by CAFCASS and no independent means of ascertaining the wishes, concerns and interests of the child. In the instant case before me however the Judge had evidence from the Social Workers of the best interests of the child and accepted that evidence.

26. I take the point that the Appellant had not obtained permission from the Family Court for the disclosure of papers to the Tribunal but the alternative would have been that the Tribunal simply refused to accept any evidence from the Appellant affirming the contact proceedings which would have been deleterious to the Appellant. As Counsel observed in closing submissions to me, we are where we are. Unless it is said that it is an error of law per se for the Judge to have considered evidence put before him for which permission had not been obtained then it was open for the Judge to consider that evidence and make his findings accordingly.

27. Unlike cases therefore where the Tribunal has to adjourn a resolution of the immigration proceedings whilst contact proceedings are ongoing the rationale being that it simply has insufficient information to proceed, that was not the case here. The Judge had evidence which would enable him to proceed.

28. The argument in essence for the Appellant is that there is a line of authorities that say that where there are ongoing Family Court proceedings the case must be adjourned and/or the Appellant granted some form of discretionary leave whilst the outcome of those proceedings is awaited. As will be seen from the quotation from the case of **RS** (paragraph above) there is no such universal obligation that a period of discretionary leave must be granted where family proceedings remain unresolved.

29. As the Respondent pointed out in submissions to me this was not a case where there was a first application for contact which was to be decided. The Appellant had been barred from having contact earlier in the year and later had only been granted limited contact for six months. What the Judge did was to weigh that against other factors in the case. The Judge was aware of the need to treat the welfare of the children as a primary concern. He had evidence from the Social Services as to that welfare. His view was that given the limited contact available to the Appellant and in the light of all the circumstances including the history of emotional abuse of the children, that he could decide the Appellant's application for leave to remain there and then without adjourning it.

30. Ultimately it was a matter of assessing the proportionality of interference with such established rights as existed. In the case of **RS** at paragraph 43 the Upper Tribunal stated that a Judge should consider certain questions. The first was whether the outcome of the contemplative family

proceedings was likely to be material to the immigration decision. In the instant case before me the Judge was aware that as a result of the Appellant having been granted limited contact there was an Article 8 argument before him. To that extent the outcome was likely to be material.

31. The second question posed by the Upper Tribunal is whether there are compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of family proceedings or the best interests of the child. Here the Judge was influenced by the evidence he had from the Social Workers that the Appellant's removal would not be disproportionate bearing in mind what had happened to the children and their mother in the recent past and that the children had started to thrive and develop more fully once apart from the Appellant. The Judge made no specific finding on whether the contact proceedings had been instituted to delay or frustrate removal but he was clearly of the view that they were not designed to promote the children's welfare.

32. The fourth question posed by **RS** is that the Judge should normally consider the degree of the claimant's previous interest in and contact with the child, the timing of contact proceedings and the commitment with which they have been progressed and whether the decision is likely to be reached and what materials were already available to identify pointers to where the children's welfare lies. The Judge was took into account a previous ban on contact and the level of abuse (which the Appellant continues to deny indicating perhaps an inability to amend his behaviour).

33. In the light of that the Judge was not prepared to adjourn the proceedings for a short period to enable a core decision to be taken in the family proceedings. He felt he was able to make a decision there and then on the Appellant's removal taking into account the children's best interests and that they were thriving being apart from the Appellant. As the Upper Tribunal points out in **RS**:

> "There is a public interest that immigration proceedings be expeditiously decided and a right to remain on human rights grounds should not be created solely by reason of family links created or significantly developed during pending appeals."

In this case the Appellant's connections to this country were tenuous at best. His case turned entirely on his relationship with three children who themselves had no leave to remain.

34. It may be that at some point a Family Court gives the Appellant more contact to his children than he currently has over and above the level which was taken into account by the Judge at first instance. Whether at that point the matter should be reviewed is not a matter for me. My concern was whether the Judge had made an error of law in proceeding to deal with the hearing before him rather than adjourn it for the contact proceedings to be resolved. The Appellant had made a number of points

rejected by the Judge as to why he should remain in the United Kingdom. The Judge was entitled to find that the Appellant had been abusive towards his wife and children, physically violent towards his wife and emotionally abusive towards his children. He was entitled to find that there was evidence from Social Services as to the best interests of the children and in those circumstances to proceed to deal with the case. Ultimately it was a matter for the judgment of the First-tier whether the case should go ahead and a decision made or whether the appeal should be adjourned. The Judge gave his reasons for his decision and whilst another Judge might have decided the matter differently that makes no difference to the test of whether there is an error of law. In the circumstances I do not find that there is an error of law in the determination and I dismiss the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing. I note that the First-tier Tribunal refused the application by the Appellant for an anonymity order.

Signed this 3rd day of March 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed this 3rd day of March 2015

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Deputy Upper Tribunal Judge Woodcraft