Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19541/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1st April 2016	**On 27th May 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

J O
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Staunton, Home Office Presenting Officer
For the Respondent: Mr P Corben, Counsel, instructed by Samuel Ross Solicitors

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, I continue to refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Nigeria, born on [ ] 1982. On 1 November 2013 she made an application to vary her leave to remain on the basis of

having completed 10 years' continuous lawful residence. That application was refused in a decision dated 3 April 2014. A decision was also made to remove her under Section 10 of the Immigration and Asylum Act 1999.

3. The appellant appealed against that decision and her appeal came before First-tier Tribunal Judge Henderson ("the FtJ") on 24 August 2015 whereby the appeal was allowed, on a limited basis, such as to allow the respondent to consider the new basis upon which the appellant sought to be entitled to remain in the UK.

4. Although the appellant applied for leave to remain on the basis of 10 years' continuous lawful residence, it was concluded by the respondent that her lawful leave ended on 30 November 2011, when her leave expired. An appeal against the decision to refuse leave to remain had been dismissed on 2 May 2012 and her onward appeal was dismissed by the Upper Tribunal on 23 August 2012, with the result that her appeal rights were exhausted on 12 September 2012. Her continuous leave was deemed to have ended on 12 September 2012 at that point. That appeal was also dismissed with reference to paragraph 276ADE of the Immigration Rules.

5. The FtJ in the appeal which is before me recorded that the grounds of appeal against the respondent's decision were to the effect that the decision was not in accordance with the Immigration Rules and otherwise not in accordance with the law, that a discretion under the Rules should have been exercised differently, and that the decision was unlawful as being incompatible with the appellant's rights under the ECHR. Reference was made in the grounds to medical facilities in Nigeria in relation to a health condition (unspecified in the FtJ's decision). The FtJ also referred to the grounds stating that the appellant is an extended family member of an EEA national, in that the appellant's brother was married to an EEA national with indefinite leave to remain ("ILR").

6. At [11] in the FtJ's decision it is stated that the appellant's representative invited the FtJ to take into account "fresh information" regarding the appellant's adopted child, said to be a British citizen. It was argued that the appellant was able to succeed under Appendix FM, or alternatively under Regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

7. In her findings the FtJ found that the appellant did not have 10 years' continuous lawful residence because the "clock stopped" on 30 November 2011 and her continuous lawful residence was therefore only eight years, not 10.

8. She recorded at [17] that by the time the appeal came before her the focus of the appeal had "shifted completely". There was little or no reliance on the appellant's health issues and no reliance on her position as an extended family member of an EEA national. The FtJ stated that she was asked instead to consider that the appellant had "become" the

mother of a 10 year old boy, JO. She made a number of findings about that late change in position.

9. She stated that she had not been given a satisfactory explanation as to why the appellant or her representative neglected to provide any information about the existence of the child she regards as her son, at any point prior to the hearing. Although the appellant's statement refers to her becoming the adoptive mother of JO on 7 November 2005, the appellant had not at any time previously mentioned her status as the mother of a child who is a British citizen. Although she had provided evidence of a private adoption agreement, it was not clear as to why this was not provided until after the refusal of the present application. The FtJ noted that the agreement was undated and she said that she could see very little other evidence to show that the appellant had assumed a role of a responsible adult and mother of this child since 2005.

10. At [20] she questioned why the parents of the child would wish her to take on the role of the adoptive parent in 2005, when she was in the United Kingdom in a temporary capacity as a student and her intention was to return to Nigeria.

11. The contention that the appellant and JO had lived at the same address since 2005 was at odds with some of the evidence produced by the appellant, of which examples were given by the FtJ.

12. At [22] she stated that the real difficulty with the evidence was a lack of information showing that the appellant had indeed provided the role of adoptive mother to a 10 year old British citizen since 2005. No evidence was provided with the original application submitted to the respondent. Although there was a letter from a deputy head teacher, there was no indication as to whether the appellant had recently become the carer of that child, who was registered at the school on 29 September 2014. There was no evidence from his earlier school or any other educational institution which showed the length of her involvement. The FtJ also noted that there was no information, for example, to show that she was registered with a GP as the adult responsible for the child's care. There was no evidence to show who was receiving child benefit payable for the child's care. A recent letter from the Church did not state how long the child had been viewed as the appellant's adopted child.

13. With reference to evidence given by the appellant at the hearing, the FtJ stated that she found it implausible that the appellant would not know of the whereabouts of JO's siblings or their current school. Although there was reliance on a Child Arrangements Order in the Family Court, the FtJ expressed herself not satisfied that the appellant had been straightforward regarding the real reasons or motivation behind the production of a private adoption agreement or the Child Arrangements Order made in the Family Court. She stated that she was not provided with any of the reports submitted to the Family Court which led to the order. She found that the appellant had not given a plausible explanation regarding the

whereabouts of the siblings of JO, or their care, and she stated that she questioned what the real arrangements and motivations were for seeking a court order. She noted that the appellant and JO's mother are cousins. She noted that CAFCASS reports were not disclosed to her, the FtJ.

14. At [26] she stated that her initial conclusion, taking all the evidence in the round, is that this is not a genuine transfer of parental responsibility. She stated that she had been provided with insufficient evidence to show the living arrangements of this child in the past and she did not know what information was put before the Family Court. Crucially, she stated that in the absence of further evidence the motivation for the provision of the Child Arrangements Order was simply to enable the appellant to make an application for further leave to remain as the parent of a British citizen child, who has lived in the UK for a period in excess of ten years.

15. At [27] she said that the information she had been given, together with additional information regarding the history of the appellant's relationship with JO, should have been submitted to the respondent prior to the late stage it was disclosed. She said that although she had expressed real concerns about whether this is a genuine transfer of parental responsibility it was still a matter which should be fully considered by the respondent. Accordingly, she found that there was a still a decision to be made regarding the best interests of the child, stating that she was concerned that she had little information on the wishes and desires of the child, arrangements for him to see his parents and the level of contact he has with his siblings.

16. She stated that her findings conflict with the decision of the Family Court but this conflict arises from a lack of information regarding the background circumstances and a concern that the appellant has not been straightforward.

17. Ultimately therefore, she concluded that the respondent should be afforded a full opportunity to consider the completely different facts with supporting documents. As to disposal, she stated that she allowed the appeal "to the extent that the Appellant's current circumstances and those of her adopted child be considered by the Respondent", and that the appellant should provide all reports and supporting correspondence to the respondent within 21 days of her decision.

18. The respondent's grounds before me, albeit briefly, contend that there was nothing unlawful in the respondent's decision of 3 April 2014. In the light of the lack of reliable evidence, it is contended that the FtJ could only have dismissed the appeal and it was open to the appellant to make further representations to the Secretary of State.

19. Mr Staunton relied on the grounds, submitting that the FtJ should have made the decision herself rather than deciding that the respondent's decision was unlawful.

20. Mr Corben made reference to a 's.120' notice, which it was submitted allowed the appellant to raise the issue of the adopted child at any time up to the hearing before the FtT.

21. Although it was contended that the grounds of appeal to the FtT raised this issue, I am not satisfied from the information put before me that that is the case. The original grounds of appeal to the FtT appear to have been faxed with the notice of appeal on 23 April 2014. They contain no reference to any argument in relation to the appellant being a parent of an adopted child. It is true to say that the appellant's bundle at pages 7 – 10 contains a document headed "Grounds of Appeal", raising this argument, but I am not satisfied that that is in fact a copy of the original grounds. As I say, the notice of appeal is dated 23 April 2014, which is the date of the faxed grounds which do not include any reference to an adoptive child.

22. Nevertheless, for present purposes I am prepared to accept that there is no time limit on the provision of information pursuant to a s.120 notice, for the reasons advanced on behalf of the appellant before me. In that case, the matter was therefore properly before the FtT in any event.

23. Mr Corben submitted that whilst the FtJ had doubts about the quality of the evidence, she was aware of the Family Court order and was conscious that the information before her was not the same as that before the Family Court. The Secretary of State had not considered s.55 of the Borders, Citizenship and Immigration Act 2009, or the best interests of the child. The FtJ had the option, it was submitted, of finding that there was no genuine relationship and could have dismissed the appeal on that basis. Equally, she was entitled to conclude that although not unlawful at the date of the decision, the respondent's decision was nevertheless not in accordance with the law.

My assessment

24. The relevant paragraph of the Immigration Rules which appears to have been the basis of the appeal before the FtJ is that at Appendix FM, Section R-LTRPT, that is the requirements for leave to remain as a parent. Those requirements include those under E-LTRPT.2.3 which has as one of its features that the applicant must have sole parental responsibility for the child as one of the options, or that the child normally lives with the applicant and not with their other parent who is a British citizen or settled in the UK. Under E-LTRPT.2.4, an applicant must provide evidence that they have either sole parental responsibility for the child, or that the child normally lives with them, again as one of the options for meeting the requirements of the Rules. The applicant must also provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

25. Although the FtJ did not refer to those specific requirements of the Rules, and before me there was only limited reference to the Rules, it seems to me that those are the relevant requirements. In any event, it is plain from

the FtJ's reasons, which I have recited, that she was not satisfied with the evidence that she had been provided with such as would demonstrate that the appellant met the requirements of the Rules for leave to remain as a parent. Many and varied reasons are given by the FtJ for her views in that regard. She evidently rejected the appellant's claim that she is the adoptive parent of JO, at least in reality. At [26] she stated that her initial conclusion having regard to all the evidence was that this was not a not a genuine transfer of parental responsibility. She concluded that the motivation for the provision of the Child Arrangements Order was simply to enable the appellant to make an application for further leave to remain as the parent of a British citizen child.

26. In those circumstances, it is apparent that the FtJ was not satisfied that the appellant had sole responsibility for the child, or indeed that she is taking and intends to continue to take an active role in the child's upbringing. On that basis the appellant was not able to meet the requirements of the Rules.

27. This was not a case therefore, where information was before the respondent at the time of the decision in relation to a child which the respondent failed to have regard to, and to make a decision in respect of. Even if that were the case, it is clear from the decision in *AJ (India) v Secretary of State for the Home Department* [2011] EWCA Civ 1191 that in circumstances where the respondent has not given consideration to the best interests of a child, the Tribunal should nevertheless go on to deal with the matter itself in any event, rather than concluding that the decision is not in accordance with the law.

28. In the circumstances, I am satisfied that the FtJ erred in law in effectively remitting the matter to the respondent for consideration of the evidence which she herself did not find to be satisfactory. In fact, the FtJ did not express herself as concluding that the respondent's decision was not in accordance with the law, although she did allow the appeal to a limited extent and from which that conclusion could be interpreted.

29. In any event, for the reasons I have given, I am satisfied that the FtJ erred in law in allowing the appeal in the light of her findings. In the circumstances, I set aside the decision of the FtT

30. Mr Corben intimated that there was a further bundle of evidence that was not before the FtJ, but indicated that its contents are not materially different from the evidence that was before the FtJ. Although he said that "theoretically" the further evidence could affect the FtJ's findings, if a material error of law was found there was likely to be limited scope for an outcome other than that the appeal should be dismissed.

31. Having set aside the decision of the FtJ, I cannot see that there is any basis upon which to have a further hearing to make further findings of fact. There is no complaint by either side in relation to the FtJ's findings, and those findings are not infected by the error of law.

32. That being the case, having set aside the FtJ's decision, I re-make the decision in line with the findings of fact made by the FtJ, and accordingly dismiss the appeal.

Decision

33. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and I re-make the decision, dismissing the appeal on all grounds.

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. This is in order to protect the identity of the child referred to in these proceedings. No report of these proceedings shall directly or indirectly identify the appellant, the child, or any member of their families. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek 27/05/16