Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/25713/2014**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 28 January 2016	**On 4 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR CHIDIEBERE EZEIKE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Senior Presenting Officer
For the Respondent: Mr G Brown, Counsel

DECISION AND REASONS

1. This matter comes before me pursuant to permission having been granted by First-tier Tribunal Judge Wellesley-Cole dated 14 January 2015. The appeal relates to a decision by First-tier Tribunal Judge Tully promulgated on 28 October 2015. The Judge at the First-tier Tribunal had dismissed the appeal based on the Immigration Rules but had allowed the appeal on human rights grounds. The Secretary of State had sought permission to appeal. To ease following these grounds I shall continue to refer to the Secretary of State as the Respondent and to Mr Ezike as the Appellant.

2. The Secretary of State's grounds of appeal can be summarised as follows:

(1) The Judge had misdirected herself because the appeal was dismissed in respect of the Immigration Rules and should only have been allowed if the Judge had identified the Appellant's circumstances "to be exceptional i.e. that the refusal would amount to an unjustifiably harsh outcome";
(2) The Judge failed to engage with the decision of **Gulshan** [2013] UKUT 00640 (IAC) although it was cited;
(3) The circumstances advanced by the Appellant and adopted by the Judge failed to identify any consequences which were unjustifiably harsh;
(4) In undertaking a proportionality assessment outside of the Rules, the Judge failed to consider s117B Nationality Immigration Nationality and Asylum Act 2002
(5) Whilst the Appellant may have a parental relationship with his son, this can continue via modern forms of communication.

3. At the hearing before me Mr Richards said that he relied on the grounds of appeal and did not intend to add much more. The ground in respect of s117 was misplaced because that was dealt with at paragraph 33 of the Judge's decision. None of what the Judge said is contentious but it missed the point. The fact was that if the Appellant did not qualify for further leave to remain then he should be removed from the United Kingdom. There was no need for the Appellant do have done anything criminal. The Judge missed the point and she did not give appropriate weight to the balancing exercise and it was skewed in favour of the Appellant. This was amplified by the Judge giving undue weight to the relationship between the Appellant and the son. The son was not a qualifying child whether within the Rules or the Act. The Judge had fundamentally erred in her decision which therefore ought to be set aside.

4. Mr Brown in his submissions said that on a plain reading there was no sufficient reason to set aside the Judge's decision. Based on the decision of the Administrative Court in **R on the application of Sunasse v Upper Tribunal (IAC)** [2015] EWHC 1604 (Admin) if the facts do not fit in within Appendix FM then one goes on to consider the application outside of the Rules. I should not lose sight of the facts. The Appellant has a strong parental relationship. The son is almost 3. The mother and son had leave to remain. Paragraphs 33 and 34 of the Judge's decision show no material error of law. Paragraph 36 showed that it was up to the Respondent to consider further leave. It would be unjustifiably harsh to expect the Appellant to return to make an application. It would leave to severance of family life. The challenge to the decision is one of weight. Most important is the issue of the best interests of the child.

5. I heard from Mr Richards in reply. He said that it was not just that the Appellant's son and former partner's stay was precarious. In respect of s117B the Judge did not direct herself properly. None of what the Judge said at paragraph 33 was factually correct. The Judge missed

the point. Immigration control is from someone not meeting the Rules. There was no deference paid by the Judge and therefore the balancing exercise was skewed and the decision was wrong.

6. I took the unusual course of permitting Mr Brown to respond with the position that Mr Richards would get the final word. Mr Brown said he was still unsure as to what in respect of the public interest aspect remained. The Judge did balance things at paragraph 35.

7. Invited to reply, Mr Richards said he had nothing further to add.

8. The findings which the Judge made in this case (and which remain unchallenged) include that there was "overwhelming evidence" that the Appellant and his son enjoy a close bond. This evidence included from several sources that the Appellant is a loving father who is actively involved in his son's life. The Appellant sees his son regularly and is involved in all aspects of his life. The Appellant also provides financial support for his son.

9. The Judge also made findings that she had no doubt that both the Appellant and his son would be severely affected by a removal of the Appellant from the United Kingdom. It was unlikely that the Appellant and his son would be able to spend time together for the foreseeable future if the Appellant was removed from the United Kingdom. As for the son travelling to Nigeria, this was not possible on his own as he was only aged 3 and the child's mother has other young children and is in a new relationship and she would not be able or willing to take that child to Nigeria.

10. The Judge concluded that the son was of an age where it was unlikely that he would understand why his father was no longer present and that this would be confusing and distressing for him. The Judge had also considered the Supreme Court's decision in **ZH (Tanzania) v Secretary of State for the Home Department** [2011] UKSC 4.

11. Ultimately the Judge said that in her view and in this particular case it was in the best interests of the child that the son maintain the close bond that he has with the Appellant. There would be severe damage to the relationship to do otherwise.

12. It is against that background and in respect of those unchallenged findings that I consider this appeal. I note that the two stage assessment requirement as set out by the Court of Appeal in **SS (Congo) and others v Secretary of State for the Home Department** [2015] EWCA Civ 387 and the decision of the Administrative Court in **Sunassee** [2015] EWHC 1604. I shall apply the law as it stands and any later decision of the Supreme Court in **SS (Congo)** is not a matter for me.

13. In this case, in my judgment, the Judge did ask the right questions and did identify the compelling circumstances which needed to be

considered outside of the Immigration Rules. Namely the best interests of the child who had a very close bond with his father who he saw on a regular basis would be severely affected.

14. Further as has been clear, the Judge did consider section 117B although the original grounds of appeal by the Secretary of State indicated otherwise. In any event, as **Dube** [2015] UKUT 90 makes clear, the real issue is substance and not form. In this case the Judge noted the presence of the child. That was a very important factor even though the child was not British and the child had not been present in the United Kingdom for 7 years or longer.

15. Ultimately the Judge made the numerous extensive findings that she did about the serious impact on the child if there was to be a removal of the Appellant. Those findings are adequately reasoned and indeed are not themselves challenged. These are compelling circumstances in this particular case.

16. It may well be that the decision reached by the Judge was not one which all Judges would have reached, but that does not mean it is a decision infected by error of law.

17. Ultimately in my judgment the Judge carefully and fully explained that on the facts of this individual case there would be too severe an impact on the child by a removal of the Appellant. The Judge also explained at paragraph 36 of her decision that in the circumstances the Secretary of State would wish to grant the Appellant a corresponding period of leave as that of the son.

18. Therefore having reflected on the matter, I conclude that there is no material error of law in the Judge's decision. The Judge was entitled to come to the decision that she came to in view of the findings which she had made and which findings were unchallenged in any event. These were the unjustifiably harsh consequences of removal. The Judge did consider the case law. Indeed she referred to it and then applied it. Similarly she referred to and correctly applied statute, including s117 NIAA 2002.

19. Accordingly, I dismiss the Secretary of State's appeal.

Notice of Decision

The decision of the First tier Tribunal Judge contains no material error of law and therefore remains.

The Secretary of State's appeal is dismissed.

An anonymity direction is not made.

Signed Date: 1 February 2016

Deputy Upper Tribunal Judge Mahmood