Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00778/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 January 2018	**On 9 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

O. J.
(ANONYMITY DIRECTION MADE)
Respondent

Representation:
For the Appellant: Mr Goddard, Southwark CAB
For the Respondent: Mr Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria who entered the UK as a visitor and became an overstayer six months later in July 2005. He made no attempt to regularise his immigration status until October 2005 when he sought a grant of discretionary leave to remain outside the Immigration Rules. It is common ground that he did not qualify under the Immigration Rules for a grant of leave as a parent.

2. The appellant's application was refused on 22 December 2015. His appeal against that refusal on Article 8 grounds came before First tier Tribunal Judge Reid at Taylor

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House on 14 March 2017, and it was dismissed by decision promulgated on 21 March 2017. The appellant was refused permission to appeal by the First tier Tribunal, but renewed his application to the Upper Tribunal. Limited permission was granted by decision of Upper Tribunal Judge Blum on 31 October 2017 in the following terms;

> *"The Appellant does not arguably fall within the parameters of the Respondent's policy identified in SF and others (Guidance, post 2014 Act) Albania [2017] UKUT 120 as, although the FtJ appears to find that he has a parental relationship with D, he is not her parent or primary carer. Any reliance in the grounds on Sanade [2012] UKUT 48 is misguided in light of VM (Jamaica) [2017] EWCA Civ 255, and the evidence did not, on any view, support a finding that D would be forced to leave the EU. There was no evidence before the FtJ that the Appellant was certain to be granted entry clearance if he applied for entry clearance Agyarko [2017] UKSC 11 [51].*
>
> *Although not clearly articulated in the Grounds it is arguable that the FtJ was not entitled to conclude that Ms O and the children including D, could relocate to Nigeria with the Appellant given that Ms O and the Appellant say they are no longer in a relationship. It is arguably unreasonable to expect an estranged partner to relocate even if that partner is a national of the country of proposed relocation and has only limited leave to remain in the UK. This is relevant when determining whether it is reasonable, pursuant to s117B(6) to expect D to go to Nigeria."*

3. Thus the matter comes before me.

4. Before me it is accepted on behalf of the appellant that the following material findings of primary fact were made by Judge Reid, and, that they were all fully taken into account in the course of her decision;

   (i) The appellant fathered a child, Q, in Nigeria before he left that country in 2005. Q continues to live in Nigeria with her mother. She is a Nigerian citizen, and she has never met the appellant.

   (ii) The appellant undertook a telephone marriage ceremony with T, a Nigerian citizen, who was then living in Nigeria, on 8 November 2008. T is not Qs mother. The ceremony is not recognised as constituting a lawful marriage under English law, and the relationship between the appellant and T in any event failed in 2012/3.

   (iii) T entered the UK as a visitor on 6 May 2011, and became an overstayer in November 2011.

   (iv) The appellant is the father of K, a Nigerian citizen, born to T, in the UK, on 22 March 2012. K was conceived and born when the appellant and T were in a relationship together, having cohabited since Ts entry to the UK in May 2011. (Although the Judge did not spell this out, under EU jurisprudence, the result of Ks birth to a settled relationship between the appellant and T, would be that de facto "family life" existed between K and the appellant from the point of his birth. Again, although not spelt out, Ks age meant that he could not be a "qualifying child" as defined in s117D of the 2002 Act, at the date of the hearing .)

   (v) D was born to T on 8 June 2013. The appellant is not Ds father, he has not adopted her, and he has taken no other formal step to acquire a legal status in

the UK of parental responsibility for D. Although no DNA evidence was provided to corroborate this claim, the Judge was told that D was conceived in the course of a short lived affair between T and the Appellant's brother M. As a result of Ms paternity, D is a British citizen, and as a result of Ts maternity she is a Nigerian citizen; she has dual citizenship. D has no existing relationship with M, her father. (Again, although not spelt out, this meant that D is a "qualifying child" as defined in s117D of the 2002 Act, because of her British citizenship. She was not however born to a settled relationship, and so she would not under EU jurisprudence enjoy de facto "family life" from the point of birth with either her father M, or the appellant. "Family life" could however be created subsequently between D and either of them, if a suitable relationship was formed.)

(vi) C was born to T on 30 May 2015. A is Cs father, and C was conceived as the consequence of the briefest of encounters between T and the appellant at a wedding; she was not conceived, or born, to a settled relationship between them. (Although the Judge did not spell this out, again under EU jurisprudence, the result would be that de facto "family life" would not exist between C and the appellant from the point of her birth; although it could of course be created subsequently if a suitable relationship was formed between them. Again, although not spelt out, Ks age means that he was not a "qualifying child" as defined in s117D of the 2002 Act.) C is a Nigerian citizen.

(vii) K is on the autistic spectrum, although as a result of a failure by the appellant to provide any relevant and reliable evidence upon the issue, the Judge was unable to make any finding upon; (a) precisely where he fell upon that spectrum, (b) what his medical needs were, or, (c) how well those needs were being met [28]. K attends a mainstream primary school, and is provided with no additional support at school, and T has been provided with no extra help from the Early Years Autism Support Service.

(viii) The appellant's appeal was not advanced before the Judge on the basis that K's autism posed any risk of harm in Nigeria for either K himself, or, for any member of his extended family (such as the appellant) who sought to care for K in Nigeria, or to protect him from harm. The Judge noted that the evidence of T and the appellant failed to raise the possibility of such a risk of harm. Thus, although the possibility of the existence of such a risk had been raised in the papers submitted to the Respondent, and those filed in support of the appeal, the Judge concluded that there was no such risk of harm.

(ix) The appellant is of no fixed abode, and has not lived as a member of Ts household since 2012/3. The Judge was unable to make any finding as to how the appellant supported himself, but he has never been entitled to take lawful employment in the UK.

(x) The appellant does not differentiate between the three children K, D, and C on the basis of their paternity, but treats them all as his own. The appellant is involved in the life of the three children to a degree, albeit not to the extent that

was claimed in evidence either by himself, or, T; both having exaggerated his involvement.

(xi) T has suffered some intermittent mobility issues since 2012. Intermittently that means her mobility is impaired to the level that she is unable to take the children to school, to medical appointments, or, to sporting activities. That medical condition is not sufficiently severe that it prevents her from caring for the three children. The contemporary reliable documentary evidence showed the Judge that the appellant did help T out with the care of K, D and C sometimes, but equally that sometimes he did not. The result was that they did sometimes miss school, therapy sessions, and sports activities. The appellant did not do the school run every day, rather T would ordinarily do it. He had not attended with K all of his speech and language therapy appointments, or, ensured that K had done so.

(xii) Ts immigration status was not regularised until she was granted leave to remain on 24 October 2014. Grants of leave to remain were made on the same occasion to K and C. D, as a British citizen, needed no such grant. Neither party placed before the Judge any evidence concerning the Respondent's reasons for making that grant. (I note that no subject access request was made by the appellant, and the Respondent disclosed no reasons for the decision to make such a grant either in the course of making her decision upon the appellant's application, or, subsequently in the course of the appeal.)

5. The grounds make no complaint about the rejection of any risk of harm to any individual in Nigeria, and Mr Goddard accepted that in the circumstances no challenge to these findings are open to the appellant before me. Nor do the grounds raise any complaint about any of the other findings of primary fact made by the Judge.

6. Although the first ground argued that the appellant was entitled as of right to a grant of leave to remain in the light of Ds British citizenship in reliance upon Sanade [2012] UKUT 48, permission was refused on this argument as a result of the guidance provided by the Court of Appeal in VM (Jamaica) [2017] EWCA Civ 255. The concession by the Respondent which was central to the decision in Sanade was withdrawn in VM. No such concession was made in the course of this appeal. The Judge explicitly rejected the argument that the inevitable consequence of the appellant's removal would be that D would be forced to leave the UK. She was in my judgement plainly right to do so in the light of the evidence concerning Ts ability to care for D unaided by the appellant, and indeed no challenge is offered in the grounds to that finding.

7. It is in my judgement clear from the decision when it is read as a whole that although the Judge did not offer a detailed analysis of how this arose, she did conclude that the appellant's Article 8 rights were engaged by the decision under appeal. That conclusion could have arisen either because she was satisfied that the appellant had demonstrated a "private life" of the requisite nature and strength, or, a de facto "family life" with K created at the point of birth as a result of his paternity and Ks

birth into a settled family relationship between the appellant and T, or, "family life" as a result of the relationships the appellant had formed with D and C subsequent to their birth, or, indeed a combination of all three. It would have been much better if the Judge had clearly identified the Article 8 "gateway" through which she had found the appellant had passed, because of the different considerations arising in a "private life" and a "family life" appeal. To the extent that it is necessary to speculate I infer however that the Judge concluded that "family life" existed at least between the appellant and K, sufficient to engage Article 8.

8. It is clear from the decision that the Judge sought to address the issue of the best interests of the four children affected by the decision under appeal, Q, K, D, and C. Mr Goddard argued before me that the Judge's efforts in this regard were deficient because there was not one final conclusion that the best interests of the children required the appellant to remain in the UK. However, as I think he ultimately conceded, no such conclusion could have been reached by the Judge because each of the different children had different circumstances, and indeed arguably inconsistent interests. Thus the Judge concluded that it was in Qs interests for the appellant to return to Nigeria so that during her childhood she could have the chance of forming a relationship with him, and indeed that it was in her interests for K, D, and C to also live in Nigeria so that she could have the chance of forming a sibling relationship with them. On the other hand it was in the interests of K, D and C to remain in the UK where they could access free education and healthcare. It was also in the interests of K, D and C to remain together, and to remain with their mother T, and to continue to have regular contact with the appellant. Accordingly, in my judgement, the Judge did undertake in my judgement a proper analysis of the competing interests which then fed into the balance sheet exercise, or assessment of the balance of proportionality that she undertook.

9. Equally there can be no proper criticism of the Judge for considering whether the appellant would be able to gain entry clearance to the UK in the future in the event of a return to Nigeria. Such a consideration is not usually decisive, but it will often be argued to be relevant to the assessment of the balance of proportionality. Moreover, as pointed out by Upper Tribunal Judge Blum when refusing permission to appeal on ground two, there was in this appeal no evidence that would have established that the appellant would be bound to gain entry clearance if he were to apply for it; Agyarko [2017] UKSC 11. I agree. I note that the appellant denied the existence of any ongoing relationship with T, and he identified no other individual with whom he had been in a relationship whilst living in the UK. Thus entry for settlement as a partner, fiancée or spouse was not open to him. Since the Judge had concluded that T did care on a day to day basis for the children adequately, and could continue to do so following the appellant's removal then unless there was some future change in circumstances the route of entry for settlement as a parent/carer was also not open to him. In the light of his immigration history he would be highly unlikely to persuade an ECO that he genuinely intended a short visit, and would not overstay.

10. Although permission upon this limb to ground one was also refused by Upper Tribunal Judge Blum, Mr Goddard argued that in the light of the decision in SF and

others (Guidance, post 214 Act) Albania [2017] UKUT 120, which considered the application of the Respondent's policy upon British citizen children, the appellant was entitled to a grant of leave to remain as a result of Ds citizenship. This argument fails, as Upper Tribunal Judge Blum pointed out, because the evidence before the Judge did not establish either that the appellant was her parent, or her primary carer. Self evidently he was neither. (If, contrary to the appellant's case, he was in truth Ds father, then she would not of course enjoy the British citizenship upon which this argument relied.)

11. Mr Goddard also argued that the Judge had failed to have regard to the Respondent's decision to grant leave to remain to T, K and C. That argument fails for two reasons. First it is not a complaint that is included in the grounds, and, second there is no merit in it. The Judge is entitled to have her decision read as a whole, and it is perfectly clear that the Judge had this grant of leave to remain well in mind. It is referred to directly on a number of occasions in the course of the decision [2, 7, 41].

12. Upper Tribunal Judge Blum considered it arguable that the Judge would have erred if she had assessed the proportionality of the decision under appeal on the basis of a finding that T, K, C and D could be removed from the UK. D as a British citizen could not of course be removed from the UK, and the others have been granted discretionary leave to remain in the UK. That was not however in my judgement the approach taken by the Judge. When the decision is properly read as a whole, I am satisfied that the Judge went no further than to remind herself that it was a matter of choice for T, as to whether she relocated to Nigeria with her children, to follow the appellant there. The Judge was correct to conclude that the decision to relocate to Nigeria was open to T since they are all Nigerian citizens, and since the Judge had concluded that no individual faced any risk of harm in Nigeria.

13. Properly analysed, central to this Article 8 appeal is the choice that is open to T. The appellant is not in a position to dictate that choice, and he is not in a position to deny that it exists. If T wished the appellant to continue to have direct contact with the children and to continue to have a similar role in their lives to the one that the Judge had found existed, then, notwithstanding the grant of immigration status in the UK, it was open to T to decide to follow the appellant to Nigeria with her children. That was no more than a conclusion of commonsense, once the Judge had concluded that no individual faced any risk of harm in Nigeria. In my judgement the Judge was perfectly entitled to conclude that such a choice was open to T in real terms. Indeed, although she had not had the benefit of it, the Judge's approach was in my judgement entirely consistent with the guidance to be found in Patel [2017] EWCA Civ 2028. There was no question of compulsion that arose; simply a choice to be made by T. T was perfectly capable of looking after K, C, and D alone in the UK satisfactorily, as the Judge had found she was doing. Indeed the Judge had concluded that T and the appellant had exaggerated the extent of his involvement in the lives of those children.

14. What then is left of the appellant's challenge to the Judge's approach to the Article 8 appeal? In my judgement it is reduced to the proposition that no Tribunal properly

directing itself could have concluded in the light of the primary facts as the Judge had found them to be, the legitimate public interest in the appellant's removal, and Ds British citizenship, and the grant of leave to K and C, and the existence of the genuine parental/quasi-parental relationships between the appellant and K, D and C (as described and detailed within the Judge's findings of primary fact), that his removal was a proportionate response. Phrased differently it is the proposition that simply because D is a British citizen, and K and C have been granted leave to remain, that the appellant's removal from the UK must be a disproportionate response, and any conclusion to the contrary must be perverse or irrational. In my judgement the appellant's case has to be pitched so high, because otherwise his complaint would be reduced to a mere disagreement with the Judge's proportionality assessment. This was not of course the way in which the application for permission to appeal was framed. Arguments of perversity and irrationality carry a high threshold; Miftari [2005] EWCA Civ 481. In my judgement the relevant threshold is simply not met. Were such a finding perverse, then s117B(6) of the 2002 Act would not be framed in the way that it is – all Parliament would have needed to do would have been to stipulate that there was no public interest in the removal of an individual with a genuine parental relationship with a child who is a British citizen.

15. In my judgement the Judge properly considered the competing interests and balanced them, giving adequate reasons for her conclusions. I therefore dismiss the appeal and confirm the decision to dismiss this appeal on Article 8 grounds.

16. An anonymity direction is made in the interests of the children.

Notice of decision

The decision promulgated on 21 March 2017 did not involve the making of an error of law sufficient to require the decision to be set aside. The decision of the First tier Tribunal to dismiss the appeal is confirmed.

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. No report of these proceedings shall directly or indirectly identify him or any of the individuals referred to in this decision. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 8 March 2018

Deputy Upper Tribunal Judge J M Holmes