Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10232/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 18th of December 2017	**On 10th January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR EDOSA [A]
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Rahman of Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 21st of March 1984. He appeals against a decision of Judge of the First-tier Tribunal Herlihy sitting at Hendon Magistrates Court on 8th of March 2017 who dismissed the Appellant's appeal against a decision of the Respondent dated 14th of August 2015. That decision was to refuse to grant leave to remain in the United Kingdom under Article 8 on the basis of his private and family life.

2. The Appellant first entered the United Kingdom on 14th of October 2004 with entry clearance as a student valid until 31st of October 2005. He applied for and was granted extensions in this capacity until 31st of December 2011. On 3rd of May 2008 the Appellant applied for and was granted a certificate of approval of marriage. It appears that this marriage was subsequently dissolved by a decree absolute issued in August 2013. A further application for leave to remain in the United Kingdom as a Tier 4 general student made on 30th of December 2011 was refused as were applications made in September 2012, February 2013 and April 2014 for leave to remain under family and private life rules. On 1st of June 2015 the Appellant made an application for leave to remain in the United Kingdom under family and private life rules the refusal of which has given rise to these proceedings.

The Appellant's Case

3. The Appellant and his wife married in 2014 at a time when the Appellant had no leave. He had met his present wife in 2011 when still married to his first wife although that marriage had broken down before that time. The Appellant had obtained some qualifications in the United Kingdom during his 8 years of study here. The Appellant's wife is a British citizen and the couple's daughter was born in or about March 2016. The child is also a British citizen. The Appellant told the Judge that his principal child care role was to help feed the couple's daughter as his wife had fibroids and was unable to wake at night to feed the child.

4. The Appellant's studies had been supported in the United Kingdom by an uncle who had since stopped supporting him and had asked him to leave his house. The Appellant had seven siblings who were all married and living in Nigeria but he had not seen them since his arrival in the United Kingdom. His wife was also originally from Nigeria. She came to the United Kingdom at the age of 12 years (in 2002). She worked for HSBC bank and was currently on maternity leave. She expected her salary to rise to £23,000 per annum and the plan was that the Appellant would care for their daughter while she returned to work. All her family were in this country and it would be impossible for her to remain in the United Kingdom without her husband. Her parents' families were still in Nigeria but she had no relationship with them. Both her paternal grandparents were there as was her maternal grandmother. The language in which she was taught at school was English.

The Decision at First Instance

5. It was accepted that the Appellant and his wife were in a genuine and subsisting relationship but the Judge did not find the Appellant and his wife would face any significant obstacles upon return to Nigeria as this was where they both had family and where the Appellant had spent his formative life and was educated. The couple's daughter was born since the decision was made although the Respondent had been aware that the Appellant's wife was pregnant at the date of decision. At the date of hearing at first instance the daughter was aged less than one year old.

The family could live together in Nigeria where they could rely on the support of their respective families. The Appellant's father and his 7 siblings were still living in Nigeria the Appellant had no family supporting him in the United Kingdom as the entirety of his family were based in Nigeria.

6. At [27] the Judge dealt with the issue of the British nationality of the Appellant's wife and daughter. The Judge found it reasonable to expect the wife and daughter to continue their family life with the Appellant in Nigeria if they wished to do so. There was no evidence that the daughter would be unable to adapt to the culture of Nigeria. English was the language which was most widely spoken and the Appellant's wife had confirmed that when she attended school she was taught in English as was the Appellant. There were no medical issues in relation to either the Appellant's wife or the daughter. The Judge was not satisfied that the Appellant or his wife had lost cultural, family or social ties to Nigeria. The Appellant and his wife had met at her father's church and as a pastor he would no doubt have strong connections to other ministers in Nigeria who might be able to provide support.

7. The Appellant had produced little evidence of his financial situation or his income and resources or how he supported himself. His presence in the United Kingdom had always been precarious as his continued presence was reliant upon further grant of leave. Since 2011 he had had no lawful leave and was in the United Kingdom unlawfully. The Appellant and his wife could have had no reasonable expectation that the Appellant could remain so that they could develop their family life together.

8. At [32] the Judge dealt with section 117B (6) of the Nationality Immigration and Asylum Act 2002. The daughter was a qualifying child (by reason of her British citizenship) but it was reasonable for family life to continue in Nigeria where the Appellant and his wife had strong links. The decision to remove the Appellant in Nigeria was proportionate given that family life could be continued by the family in Nigeria if the wife and daughter chose to accompany the Appellant. There would be some disruption to the private lives of the Appellant and his wife but private life could continue in Nigeria. Any such disruption would be limited and proportionate. The Judge dismissed the appeal.

The Onward Appeal

9. The Appellant appealed against this decision arguing that the Respondent's decision had contravened case law. It was unlikely that the Appellant's friends would follow him to Nigeria and therefore the Appellant's removal would interfere with their human rights. There was evidence of the earnings of the Appellant's wife which showed how the Appellant was supported.

10. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Hollingworth on 27th of October 2017. In granting permission to

appeal he found it arguable that the Judge when carrying out the proportionality exercise had attached insufficient weight to the fact that the Appellant's daughter was a British citizen. Consideration of section 55 of the Borders Citizenship and Immigration Act 2009 had not been set out fully. There was a need to consider whether the Appellant's daughter should remain with both her parents and a need to take into account the conclusions from a section 55 analysis in the proportionality exercise.

11. The Respondent replied to the grant of permission indicating that whilst the grounds of application were extremely hard to follow and some of the points appeared to be misplaced the Respondent did not oppose the Appellant's application for permission to appeal so far as it related to the relevance of the British citizenship of the Appellant's daughter. The Respondent invited the Tribunal to determine the appeal with a fresh oral hearing to consider whether the Appellant should succeed under section 117B (6) of the 2002 Act.

12. The Appellant submitted a lengthy nine-page response to the Respondent's rule 24 reply settled by counsel who appeared before me but who did not appear at first instance. This complained that the Judge had not considered Section EX.1 (a) or paragraph 276A of the Immigration Rules. The birth of the Appellant's daughter after the date of decision was a matter relevant to the substance of the decision and was a circumstance giving rise to the Appellant's claim under section EX.1.

13. The Judge had found no insurmountable obstacles or exceptional circumstances in the return of the family to Nigeria but had not considered the difficulties they would face upon return given the length of time they had resided in the United Kingdom and the strong ties to this country. There had been no consideration of the Appellant's wife and daughter's rights as British citizens under EU law. Where a non-EU national applicant enjoys a family life with the British spouse and their British child it would breach the European Union rights of the spouse and their child if as a result of the refusal of their application for leave to remain they were forced to leave the United Kingdom. It was possible to find that the Appellant's case was exceptional and had features of a special and compelling character. The Appellant had persistently sought to regularise his stay and did not regard himself as an overstayer. There was no clear finding on whether the Appellant had a genuine and subsisting relationship with his daughter nor had there been a full consideration of the section 55 issues.

The Hearing Before Me

14. At the hearing before me the Presenting Officer raised a preliminary issue in relation to the Appellant's response to the Respondent's rule 24 submissions. The grounds of appeal for which permission had been granted had not made submissions relating to the Immigration Rules. The Appellant's response sought to raise the Immigration Rules which was a new matter and was not permitted at this stage

reliance being placed on the Upper Tribunal authority of **Mahmud [2017] UKUT 488**. The Respondent had not been represented at first instance.

15. **Mahmud** defined a new matter as one which constituted a ground of appeal of a kind listed in section 84 of the 2002 Act. It must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. The ground of appeal is the legal basis on which the fact in any given matter could form the basis of a challenge to the decision under appeal. In practice, the new matter is a factual matrix which has not previously been considered by the Respondent in the context of the decision in section 82(1) or in a statement made by the Appellant under section 120. This requires a matter to be factually distinct from that previously raised by the Appellant as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive.

16. In response, counsel argued that her reply to the Rule 24 response was her skeleton argument for this appeal. This had been an application under the partner rules and Article 8. The birth of a child after the date of decision was not a new matter nor was it a new ground of appeal. The Appellant had challenged the Respondent's decision under paragraph 276 ADE on appeal to the First-tier. At [26] the Judge's finding that there were no significant obstacles to relocation was relevant to the substance of the decision giving rise to a claim under EX.1. The Judge had not made a clear finding whether the Appellant was in a genuine and subsisting relationship or whether it was unreasonable to expect the child to leave. There was not a full assessment of the child's best interests.

17. There was no examination of the present links to the United Kingdom. There was a material misdirection at [28] where the Judge appeared to require independent corroboration of the ties to Nigeria and the potential support from ministers in Nigeria. By finding at [25] that the Appellant's wife had strong connections to Nigeria the Judge was excluding consideration of all the other factors raised by the Appellant in his statement as to why he could not relocate. Just because they were past ties did not mean he could relocate now. The Judge should have taken a forward-looking view of the case. She should have taken such factors into account as the protracted delay by the Respondent. The Appellant had been in the United Kingdom since 2004 but there had been a delay by the Respondent in enforcement. The Appellant's wife had no ties to Nigeria. The Appellant was an integral member of the church community. His family would not take care of him if returned.

18. It was not a question of whether the Appellant's wife and child would choose to accompany the Appellant it was whether they should be compelled to accompany him. There was no criminality in this case the issue was whether the child would be forced to leave the United Kingdom in breach of the child's rights under EU law. The reasonableness of expecting the child to leave the United Kingdom had not been assessed by the First-tier Tribunal Judge. There had been no consideration of the application of section 55 of the 2009 Act. There needed to be a very careful examination of all the relevant factors and circumstances of the child.

19. In response, the Presenting Officer argued there was no material error of law in the decision. The child had not been born at the date of decision but the wife's pregnancy had been referred to in the refusal letter. The Judge had dealt with all relevant matters. Whilst the Respondent had not enforced removal the Appellant could have chosen to leave the United Kingdom as he was an overstayer. The Respondent was not forcing the child to leave the United Kingdom. The Appellant might have to leave but the child could remain in the United Kingdom being looked after by her mother. The Judge was aware that the sponsor had come to the United Kingdom at the age of 12. The finding that the Appellant and his wife had strong connections to Nigeria was open to the Judge on the evidence. The challenge in this case was a mere disagreement with the result.

20. In conclusion counsel argued there were no new matters. The Respondent in her rule 24 reply had not challenged the basis of the appeal if the issue was in relation to the Judge's failure to consider sufficient weight to the child being British. There was other evidence which was pertinent to the issue of obstacles to relocation.

Findings

21. In this case the Appellant who had no leave to be in this country sought to remain here because he was married to a British citizen and they had a British citizen child. The Judge's view was that the Appellant could return to Nigeria as there were no insurmountable obstacles to this and his wife and child could choose to accompany him. The Appellant submitted a somewhat chaotic application for permission to appeal introducing irrelevant matters such as whether the Appellant's friends would miss him and making uncalled for comments about the Judge. It was rightly criticised by the Respondent in her rule 24 response.

22. Permission to appeal was granted on the basis that arguably the Judge had not adequately considered the weight to be given in the proportionality exercise to the fact that the child was a British citizen. The Appellant's reply to the Respondent's rule 24 response was criticised for raising matters which were not in the Appellant's onward grounds of appeal against the decision at first instance. I do not find that that is a valid objection. The Respondent gave the indication in her rule 24 response that she did not oppose the setting aside of the determination for the case to be considered under section 117B (6) of the 2002 Act. At the hearing before me the Respondent no longer pursued that argument but instead contended that there was no material error of law in the Judge's decision and it should be upheld. In those circumstances, I consider it reasonable that the Appellant should have the opportunity to make all the points open to him in relation to the decision of the First-tier Tribunal.

23. The Appellant's arguments break down as follows: (i) although the Appellant's daughter had not been born at the date of decision she had been born by the date of the hearing and therefore the Judge had a duty to consider her best interests under

section 55. This it is argued the Judge failed to do in the matter should be set aside on that basis; (ii) the Judge did not consider whether the child would be forced to leave the United Kingdom in the event of the Appellant being removed. As the child was a European Union citizen this would be a breach of European Union law pursuant to the CJEU authority of Zambrano; (iii) the Judge had erred in finding there were no insurmountable obstacles to the Appellant and his wife continuing their married life in Nigeria and failed to look at all of the factors which the Appellant and his wife had put forward to show that they could not be expected to relocate in this way; (iv) there had been an inadequate assessment of the Appellant's private life claim.

24. In relation to the first point, the Judge was aware that the Appellant had a British citizen child and did factor that into her determination. At [33] she stated that she had first considered the best interests of the Appellant's daughter who was British as was the child's mother. The argument in this case therefore is not that the Judge failed to consider she had a duty under section 55 of the 2009 Act or failed to consider that she was dealing with a British citizen wife and child. The argument is that the Judge's treatment of these issues was inadequate. This is a reasons based challenge. It is difficult to resist the conclusion however that for all its length, the challenge is no more than a disagreement with the result.

25. The Judge began her findings at [22] onwards. The Appellant had had no leave to be in this country for six years. I do not place any weight on the argument that there has been undue delay by the Respondent in this case. During that time, the Appellant had made a series of applications which were apparently without merit as they were either rejected or refused by the Respondent. That necessarily involved the Respondent in a considerable amount of time in assessing those applications but the Appellant continued to reside in the United Kingdom without leave when he could have returned to Nigeria to regularise his status. That he has been able to stay is because of his actions in making applications without merit. It is not because of any default on the part of the Respondent. The Appellant may well not have regard himself as an over stayer but the plain fact of the matter is that he was an over stayer and was not entitled to be here.

26. As the Judge correctly pointed out at [25] there could have been no expectation when the Appellant and his wife began their relationship that the Appellant could remain in the United Kingdom to pursue it. A married couple does not have the right to choose where to exercise their married life. Both the Appellant and his wife had extensive connections to Nigeria. The Judge set those out in some detail. The Appellant's wife in her statement referred vaguely to being unable to return to Nigeria where her life was threatened. Although much was made by counsel for the Appellant of the Judge's apparent failure to take into account the factors whereby the Appellant could not return to Nigeria, little by way of substance was produced to show what these factors were over and beyond what was already before the Judge. The Judge took those factors into account but dismissed them a course of action which was open to her. It was not a case of past ties to Nigeria; the

Appellant's family were still there and these were present ties. The argument that the Judge failed to give adequate reasons why the Appellant and his wife could relocate to Nigeria is I find an argument that carries no weight but is a mere disagreement with the result.

27. The core issue in this case is the treatment by the Judge of the best interests of the Appellant's daughter, the issues (i) and (ii) I refer to at paragraph 23 above. The Judge noted that the daughter was not yet one at the date of the hearing. As the authorities indicate, at that age the focus of a child's interests will be on its parents. By definition there would be no evidence of a child's ties to this country whether friendships, health or education because of the very young age of the child. It is difficult to see therefore how given such a young child, it could be said that it would be unreasonable to expect the child to leave the United Kingdom with the Appellant. The Judge found that it was reasonable to expect the child to leave. This is the test under Section EX.1 and whether the Judge referred to the section in terms is irrelevant, what is important is whether the Judge was aware that that was the test. A fair reading of the determination shows that she was so aware.

28. The skeleton argued that the Judge had not made clear at [32] that the Appellant had a genuine and subsisting relationship with his daughter. This is not a good point. The Judge makes clear in the following paragraph at [33] that she is treating the three individuals as a family. There is no adverse issue raised as to the Appellant's relationship with his daughter. The Judge records for example the child care the Appellant carries out, see [13] although it should be pointed out that no medical evidence to justify the Appellant's presence was submitted see [27].

29. The issue in relation to **Zambrano** is a different one. The issue there is whether a European Union citizen, in this case the child would be forced to leave the European Union because of the removal of a parent. The issue of compulsion has been recently considered by the Court of Appeal in the case of **Patel [2017] EWCA Civ 2028**. It would be an error to start with the desirability of maintaining family life and jumping from that to the conclusion that there was requisite compulsion on a child to leave the United Kingdom. The correct approach, as the Court of Appeal made clear at paragraph 77, is to ask is the situation of the child such that if the non-EU citizen parent leaves the British citizen will be unable to care for the child so that the child will be compelled to leave.

30. The Court of Appeal made clear that by posing the question in this way they were following a line of authority from the CJEU which did not seek to develop new principles but rather was giving guidance as to the application of **Zambrano**. Consideration of the respect for family life although a relevant factor could not be a trump card enabling a Tribunal to conclude that a child would be compelled to leave because Article 8 was engaged and family life would be diminished by the departure of one parent. Family life would be diminished by the departure of one parent in the great majority of cases. The question was whether all things considered the departure of the parent would mean that the child would be

compelled to follow. In **Patel,** the Court of Appeal pointed out that if one parent left the British parent in that case would have been perfectly capable of looking after the child. There was no real evidence to the contrary.

31. In the case before Judge Herlihy there was some evidence from the Appellant that he had to get up at night to look after his daughter but his wife was currently on maternity leave and expecting upon return to be paid a good salary at HSBC bank. There had to be a full enquiry into the facts and full consideration of the details but that did not mean that the Judge had to write a very large number of pages before it could be said that she had satisfied those requirements. What was important was that the Judge should set out the salient facts of the case and analyse them accordingly. This the Judge did. There would be no compulsion in this case upon the British citizen child to leave the United Kingdom if the Appellant were to leave since there was a British citizen parent who could adequately care for the child in the Appellant's absence. The point made by the Appellant in his onward appeal relating to Zambrano is not one that I uphold.

32. There is one further outcome which to a certain extent flows from the **Zambrano** point. That is whether the Appellant could return to Nigeria to make application for entry clearance from there. That was not dealt with in terms in the determination but was relied upon by the Respondent in submissions to me, see paragraph 19 above. There is no particular reason to suppose that the Appellant's absence would be unduly long were he to return to Nigeria and apply from there. Since he has no leave at the present time it is not a mere bureaucratic requirement that he should return to apply, at present it might be argued that the Appellant is "queue jumping" by making his application in country.

33. The important issue was whether it would be contrary to the best interests of the child if the Appellant were removed from the United Kingdom and she and the Appellant's wife chose to join the Appellant in Nigeria. The Judge found for the cogent reasons she gave that there would be some disruption to the daughter's life but it would be limited and family life could continue in Nigeria where the Appellant's wife and daughter had strong links. Although the Appellant takes issue with the argument that he has strong links in Nigeria, given the large number of family members he has it is difficult to see how it could be said he has not got strong links. He claimed that he was not in contact with them but that was clearly not accepted by the Judge and the Appellant's disagreement with the Judge's conclusion on that point does not indicate any error of law. The Judge indeed was concerned to point out the contrast between the lack of family members the Appellant had in the United Kingdom and the large number of family members he had in Nigeria, see [26].

34. The skeleton argued that the Upper Tribunal decision in **SF Albania [2017] UKUT 120** was applicable in this case. In **SF** the Tribunal made clear that weight had to be given to the Respondent's own immigration directorate instructions (IDIs) because there was no longer a ground of appeal that a decision was not in accordance with

the law. It may well be that the reason why the Respondent's initial reply under rule 24 to the grant of permission (that there could be a fresh oral hearing to consider whether the Appellant should succeed under section 117B (6)) was because of the uncertainty surrounding the content of the IDIs. However, as I have indicated the Respondent did not pursue that line of argument before me.

35. It is fair to say, whether pursuant to **MA Pakistan** or the IDIs, that very strong reasons are required to show why it would be reasonable to expect a British citizen child to leave the United Kingdom. The very strong reasons found by the Judge in this case were in part the very young age of the child, the fact that family life could be continued elsewhere and that the Appellant and his wife both had strong connections to Nigeria. Ultimately the assessment of whether a factor is or is not a strong one is a matter for the trial Judge who has heard the evidence. It is not the function of an appellate Tribunal to second-guess a matter decided upon by the First-tier. The function on an error of law hearing carried out by the Upper Tribunal is to decide whether the Judge has given adequate reasons for her decision such that the losing party knows why they have lost. For the reasons which I set out at some length above, I consider that the Judge did give adequate reasons for her decision and that the grounds of onward appeal and submissions made to me amount to no more than a disagreement with the result. I dismiss the Appellant's onward appeal and make no anonymity order.

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

Signed this 4th of January 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 4th of January 2018

…….
Judge Woodcraft
Deputy Upper Tribunal Judge