Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12789/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 January 2018	**On 12 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

G O E
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms D Revill, counsel
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on [ ] 1991. He appealed against a decision of the respondent on 17 November 2015 to refuse his application for leave to remain on human rights grounds. That appeal was dismissed by First Tier Tribunal Judge M A Khan ("the FTTJ") in a decision promulgated on 27 February 2017.

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2. Given my references to the appellant's daughter and the court order for contact with her, an anonymity direction is appropriate. I make a direction accordingly.

3. The appellant sought permission to appeal and this was granted by Upper Tribunal Judge Kebede on 15 November 2017 in the following terms:

   "2. Whilst I find no arguable merit in the grounds asserting that the respondent was not entitled to request a DNA test and ought simply to have accepted the birth certificate as evidence of paternity, there is some arguable merit in the assertion that the judge arguably failed to take account of all the evidence when assessing the relationship between the appellant and the child [...] and the relationship between the appellant and his claimed current partner and her daughter. Although not raised in the grounds it seems to me that such arguable concerns about the judge's consideration of relevant matters are compounded by the apparent inclusion at [41] and [43] of facts not related to this appellant.

   3. To the extent stated, the grounds are arguable."

4. Thus the appeal came before me.

5. I indicated at the outset of the hearing that I had noted there was no reference at all, in the FTTJ's assessment of the evidence, to the existence of the court order under the Children Act 1989 dated 3 November 2016; this order referred to the appellant as being the father of his claimed daughter with his former partner.

6. Mr Tufan, for the respondent, acknowledged this omission. He submitted he would leave it to me to decide whether this had given rise to a material error of law. He made no substantive submissions on the issue. The appellant's counsel considered it also relevant that there was no reference in the Article 8 assessment to s117B(6) of the Nationality, Immigration and Asylum Act 2002.

7. The court order was in the appellant's bundle and his counsel referred to it in her skeleton argument which was before the FTTJ. This is highly material evidence and supports the appellant's claim to be the father of his daughter and to have a genuine and subsisting relationship with her, pursuant to Appendix FM and s117B(6). It attests to the nature of the relationship between the appellant and his daughter. It ordered that there be contact between the appellant and his daughter three times a week and on other dates to be agreed between the child's parents. It is an important document yet the FTTJ makes no reference to it in his assessment of the evidence. This suggests he did not take it into account. Irrespective of the FTTJ's findings with regard to the suitability of the appellant pursuant to Appendix FM, the FTTJ, in making his assessment pursuant to Article 8 outside the Rules, should have taken that document into account in considering the nature of the appellant's relationship with

his daughter and the public interest factors at s117B(6). His failure to do so amounts to an error of law.

8. The FTTJ found "the appellant's family … life can continue in Nigeria". In making that finding the FTTJ makes no reference to the appellant's daughter or the impact on her of the appellant's removal from the UK. Her best interests and welfare are not addressed.

9. The FTTJ refers at paragraph 41 to "appellants" and facts which are unrelated to the appeal before the FTTJ. Furthermore, at [43] the FTTJ refers to the appellant having entered the UK as a visitor when he did not.

10. I am satisfied that the FTTJ's assessment of the evidence is tainted by error: the FTTJ has failed to take into account a document, the court order, which attests to the nature of the appellant's relationship with his child. This, together with the manner in which the last three paragraphs of the decision have been drafted, suggests a lack of appropriate scrutiny and consideration of the evidence. Had the relevant evidence and provisions of s117B(6) been taken into account, the outcome of the appeal might have been different.

11. I find that the FTTJ has erred in his consideration of the evidence, having failed to take into account evidence material to the issues to be decided, namely whether Article 8 was engaged outside the Rules as regards the appellant's family life. The FTTJ's assessment of the evidence as a whole is tainted by error of law and cannot stand.

12. All parties were agreed that, in the circumstances, it was appropriate for all issues in the appeal to be decided afresh by the First-tier Tribunal, without any findings of fact being preserved, not least because the appellant now claims that he and his current partner have a child born in May 2017 (after the hearing before the FTTJ). The interests of that child need to be addressed, as well as those of the appellant's elder daughter, who is the subject of the court order.

Decision

13. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside in its entirety. No findings of fact are preserved. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from Judge M A Khan.

A M Black

Deputy Upper Tribunal Judge Dated: 9 January 2018

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 member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

A M Black
Deputy Upper Tribunal Judge Dated: 9 January 2018