Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03066/2018
HU/13010/2018
HU/13015/2018

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 9 December 2019	**On 19 December 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ABASS [A]
ADEOLA [A]
[A A]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Pipi, Counsel, instructed by Devine Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal against the decision of Judge of the First-tier Tribunal Hussain (the judge), promulgated on 3 July 2019, dismissing their joint appeals against the respondent's decisions dated 4 January 2018 (in respect of the 1st

appellant) and 31 May 2018 (in respect of the 2nd and 3rd appellants) refusing their human rights claims.

Background

2. The 1st appellant is a national of Nigeria born on 21 March 1983. The 2nd appellant is a national of Nigeria, born on 26 October 1985. The third appellant is also a national of Nigeria. She was born on 16 December 2012. The 3rd appellant is the daughter of the 1st and 2nd appellants. According to documents issued by the High Court of Lagos State the 1st and 2nd appellants were married on 29 April 2012 and were divorced on 4 April 2017. The covering letter accompanying the 1st appellant's human rights claim made on 6 May 2016 stated that the 1st and 2nd appellants had been in a relationship but that the relationship had ended.

3. The 1st appellant entered the UK on 18 July 2013 pursuant to a visitor entry clearance. He overstayed. The 2nd and 3rd appellants entered the UK on 19 April 2014 as visitors. They both overstayed. The 2nd appellant was 1 year and 4 months old at the time. She had lived in the UK for just over 5 years at the date of the First-tier Tribunal's decision and was 6 ½ years old.

4. Following her entry into the UK the 2nd appellant commenced a relationship with a British citizen and she bore his child, [M], on 18 January 2015. At the time of [M]'s birth the 2nd appellant was still married to the 1st appellant. The relationship between the 2nd appellant and the British citizen father of [M] broke down. Based on their relationships with [M], who had been issued with a passport as a British citizen, the 2nd and 3rd appellants were granted leave to remain following a human rights application. Their period of leave was granted on 6 April 2016 and was due to expire on 6 October 2018.

5. On 10 May 2017 HM Passport Office, a division of the Home Office, revoked [M]'s passport on the grounds that she was not a British citizen. This was based on the Secretary of State's reading of section 50(9A) of the British Nationality Act 1981. It is not necessary for me to set this provision out. It deals with the interpretation of the 1981 Act stating, at section 50(9A)(a) that, for the purposes of the Act, a child's father is, inter alia, "the husband, at the time of the child's birth, of the woman who gives birth to the child". Section 50(9A)(c) indicates that where the preceding sub-paragraphs apply, a person who satisfies the prescribed requirements as to proof of paternity will be regarded, for the purposes of the Act, as a child's father. As the 2nd appellant was married to the 1st appellant at the time of [M]'s birth HM Passport Office considered that, by operation of law, the 1st appellant was [M]'s father and not her biological British citizen father.

6. Following the revocation of [M]'s passport the leave granted to the 2nd and 3rd appellants was curtailed in a decision dated 7 November 2017 so as to expire on

13 January 2018. On 5 January 2018 both the 2nd and 3rd appellants made human rights claims.

7. The 1st appellant's human rights claim was primarily based on his claimed relationship with the 3rd appellant. The respondent refused the human rights claim under Appendix FM as the 3rd appellant was not a British citizen, was not settled in the UK and had not resided in the UK for a continuous period of 7 years. Whilst the respondent accepted that the 1st appellant had demonstrated a genuine and subsisting relationship with the 3rd appellant, EX.1 of Appendix FM did not apply because the 3rd appellant did not meet the relevant eligibility requirements. Having concluded that the requirements of paragraph 276ADE of the immigration rules were not met the respondent considered whether there were any exceptional circumstances outside of the immigration which, in accordance with Article 8 principles, would warrant a grant of leave to remain. The respondent noted that the 2nd and 3rd appellants had only limited leave to remain and that they would all be returning to Nigeria and that the 1st appellant would therefore be able to maintain his relationship with the 3rd appellant in their country of nationality.

8. The human rights applications of the 2nd and 3rd appellants were principally based on their relationship with [M]. However, as [M] was no longer considered to be a British citizen child, the eligibility requirements of Appendix FM could not be met. Neither did the 2nd or 3rd appellants meet the requirements of paragraph 276ADE of the immigration rules. Nor was the respondent satisfied that there were any exceptional circumstances that would result in unjustifiably harsh consequences for either appellant. The respondent considered it reasonable for the 3rd appellant and [M] to return to Nigeria.

9. The appellants each appealed the respondent's decisions pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

10. In the meantime, the 2nd appellant entered into a relationship with another British citizen and a child, Albert, was born to them on 23 May 2018. The 2nd appellant and the father of Albert are no longer in a relationship.

The decision of the First-tier Tribunal

11. The appeals first came before Judge of the First-tier Tribunal Oxlade on 7 January 2019. The 2nd appellant sought to rely on her relationship with Albert in her human rights appeal. Judge Oxlade considered this to be a 'new matter' within the terms of section 85 of the Nationality, Immigration and Asylum Act 2002 and that, in order for the 2nd and 3rd appellants to rely on their relationship with Albert, the respondent had to give her consent. The appeal was therefore adjourned and directions issued to the 2nd appellant to serve notice of the new matter on the respondent before 4 PM on 21 January 2019, and for the respondent to reply by 15 April 2019.

12. Instead of serving notice of the new matter on the respondent the 2nd and 3rd appellant served amended grounds of appeal on the First-tier Tribunal.

13. The joint appeals came before Judge Hussain on 30 May 2019. The respondent failed to field a Presenting Officer. An application to adjourn the hearing was made by counsel representing the appellants. The judge set out the basis of the adjournment application at [18] to [23] of his decision. The first basis for the adjournment application related to a judicial review challenge brought by [M] against the decision by HM Passport Officer to revoke [M]'s passport. The judge was informed that the lawfulness of the Passport Offices decision was the subject of litigation in the "Administrative/Court of Appeal" and since the success of the 2nd appellant's appeal depended on whether or not [M] was a British citizen, it was only fair to stay the proceedings until the outcome of the litigation was known. The second basis for the adjournment related to the 2nd appellants relationship with Albert. It was accepted by Counsel that this relationship constituted a 'new matter'. As the respondent had not however replied to the 'application' to admit the new matter, it was in the interests of justice to delay the hearing to enable the respondent to consider whether to give her consent.

14. The judge refused the adjournment request. His reasoning is contained at paragraph 23.

> "I considered the application for adjournment but decided not to grant it. Insofar as awaiting the outcome of the proceedings in relation to [M] was concerned, I took the view that the present appeals could not be stayed indefinitely. There was no date in sight as to when the challenge brought by [M] was going to be settled in the superior courts. With regard to the new matter, I was aware that the Tribunal could not force the Secretary of State to determine the application to admit the new matter, nor force the Secretary of State to admit it. In any event it was open to the second appellant to make a fresh application, on the basis that she was, otherwise the mother of a British citizen child, called Albert. That application would have to be decided by the Secretary of State, afresh, and if refused, is very likely to attract a right of appeal."

15. Having refused to grant the adjournment the judge then heard oral evidence from both the 1st and 2nd appellants and submissions from Counsel.

16. In his 'Findings' the judge noted that the 1st appellant's appeal revolved around his relationship with the 3rd appellant, but that the 3rd appellant had no immigration status nor an independent claim under the immigration rules. Her only claim to remain was based on her family life relationship with the 1st and 2nd appellants. The judge noted that the 2nd appellants claim could only succeed if [M] was a British citizen. [M] was not however a qualifying child within the terms of Appendix FM (or indeed within the definitions contained in s.117D of the Nationality, Immigration and Asylum Act 2002). Nor could the 2nd appellant establish a claim to remain in the UK on the basis of her relationship

with Albert because the respondent had not given her consent to this relationship being considered. At paragraph 32 the judge stated,

> "It seems to me, that since neither the first or second appellants are able to assert a claim under the Immigration Rules and since then [*sic*] appears to be no impediment to the appellants enjoying family life elsewhere than the United Kingdom, the proportionality assessment has to weigh in favour of their exclusion from this country. That outcome seems to me to be inevitable having regard to the public interest considerations in Section 117B of the 2002 Act."

17. The appeals were consequently dismissed.

The challenge to the First-tier Tribunal's decision

18. The grounds of appeal contend that, as [M] was undertaking a judicial review challenge against the revocation of her passport she could not be removed from the UK and that even if the appeals of the 2nd and 3rd appellants were unsuccessful they would remain in the UK because they could not leave [M], who was aged 4, alone. It would be unreasonable to remove them and, as none of them could be removed until the conclusion of [M]'s challenge, the judge erred in using the absence of a clear timeframe for refusing the adjournment application. The grounds referred to **K (A Child) v SSHD** [2018] EWHC 1834 (Admin) ('**K**'), the lead case behind which [M]'s judicial review challenge had been stayed following a signed consent order sealed on 25 September 2018. Although the grounds state that neither Counsel nor the judge appeared to be aware of the consent order, I note that the consent order was indeed included in the appellants' bundle of documents prepared for the First-tier Tribunal appeal. The grounds noted that the Secretary of State had appealed the decision in **K** to the Court of Appeal. The grounds noted a 'declaration of incompatibility' under section 4 (2) of the Human Rights Act 1998 had been issued by the Administrative Court in respect of the relevant provisions of the British Nationality Act 1981. According to the grounds this meant that [M]'s biological father was, "for purposes of nationality", her British citizen biological father.

19. The grounds additionally or alternatively content that the judge erred in refusing the adjournment because the absence of any decision in respect of the 'new matter' would render "the section" unworkable unless there was a legal mechanism compelling the respondent to make a decision. Reliance was placed on **Quaidoo (new matter: procedure/process)** [2018] UKUT 00087 (IAC) in support of the contention that if the respondent fails to make a decision in respect of a 'new matter' then the appellants cannot mount a judicial review challenge and this will leave them with no judicial remedy.

20. At the 'error of law' hearing Mr Pipi provided a helpful bundle of documents including a copy of **K** (a copy of which was already contained in the appellant's First-tier Tribunal bundle), a chronology, a family tree, a copy of the consent order in relation to [M]'s judicial review challenge dated 25 September 2018

(which was also contained in the First-tier Tribunal bundle), and a letter issued by the GLD to [M]'s solicitors dated 19 November 2019. The letter noted that [M]'s JR challenge had been stayed behind the case of **K**, and indicated that the Secretary of State had requested that her appeal in **K** be dismissed. In an order sealed on 31 October 2019 Lord Justice Singh granted the Secretary of State's request and her appeal in **K** was dismissed. Under the terms of the consent order [M]'s legal representatives had to notify the Administrative Court and the Secretary of State within 21 days if she intended to pursue her judicial review claim and, if so advised, to file and serve amended grounds of claim. If [M] failed to notify the Administrative Court or the Secretary of State within that period and file amended grounds of claim, her judicial review challenge would be struck out without further order. Although there was no documentation to this effect Mr Pipi had been told by [M]'s legal representatives that they were going to notify the Administrative Court that [M] would not be pursuing her Judicial Review challenge.

21. In his submissions Mr Pipi submitted that, as the Secretary of State's appeal against the decision in **K** had been dismissed, and as the relevant section of the British Nationality Act 1981 had been held to be incompatible with the European Convention of Human Rights, the relevant section would be amended and [M] would be recognised as a British citizen.

22. In his oral submissions Mr Pipi submitted that [M]'s judicial review challenge was pivotal to the appeals and that, as she could not be removed pending the outcome of her judicial review, the judge's reliance on the absence of any definitive timeframe for determining her judicial review challenge fell away. Mr Pipi confirmed that, to his knowledge, no injunction preventing [M]'s removal had been issued by the Administrative Court, but that this was not surprising given the absence of any decision to remove [M]. According to Mr Pipi the 'bottom line' was that the appellants had no right to remain in the UK and could be removed if their appeals were dismissed. As there was a 'declaration of incompatibility' the Secretary State would either seek to amend the British Nationality Act 1981 or generate a policy to ensure that the offending legislative provision was no longer incompatible with the ECHR. When this occurs [M] would be recognised as a British citizen and this would have been relevant to the appeals before the First-tier Tribunal.

23. In respect of the 'new matter' ground Mr Pipi submitted that, although the appellants failed to comply with Judge Oxlade's directions, it would have been obvious to the respondent that a request was being made for her consent to enable the First-tier Tribunal to consider the 2nd appellant's relationship with Albert and that it was now too late for the respondent to make a decision on the issue of consent.

24. In his submissions Mr Lindsay indicated that a decision had now been made in respect of the 'new matter' and that the respondent did not consent to the new

matter being considered. This was because the respondent considered that she should be the primary decision maker in respect of events that occurred after the decisions to refuse the human rights claims of the 2nd and 3rd appellants were made. Mr Lindsay said that this decision would have been the same if made prior to or at the date of the First-tier Tribunal hearing before Judge Hussain. Mr Lindsay submitted that this was relevant to the materiality of the judge's decision to refuse the adjournment. The appellant's representatives failed to comply with Judge Oxlade's direction to serve notice of the new matter on the respondent and this was necessary as a first step to enable the respondent to comply with Judge Oxlade's other direction. With reference to the decision in **K**, this demonstrated that [M] was not a British citizen and that the judge did not act unlawfully in refusing to adjourn.

Discussion

25. No issue has been raised with the judge's decision other than his refusal to adjourn. I will first consider the refusal to adjourn to await the outcome of [M]'s judicial review challenge to the decision to revoke her British passport.

26. Although the grounds suggest the judge was not aware of either the decision of decision of Helen Mountfield QC, sitting as a Deputy High Court judge, in **K**, or the consent order issued in respect of [M]'s judicial review staying her challenge behind the decision in **K**, the decision in **K** was handed down on 18 July 2018 and that decision and the consent order were contained in the appellants' bundle of documents. Although no explicit reference was made to either of these by the judge in his decision, it would be surprising if his attention was not drawn to them by Counsel making the adjournment application.

27. In her decision Helen Mountfield QC rejected an argument that s.50(9A) of the British Nationality Act 1981 could be read in a way that was compatible with Article 8 and Article 14 ECHR and that the decision that **K** should not have a British passport because she was not, as defined by that Act, entitled to be treated as a British citizen by birth, did not breach section 6(1) of the Human Rights Act 1998 [100]. The reading of s.50(9A) advanced by the Passport Office was not only the natural reading, but the only possible one [96]. As such, **K** was not a British citizen by birth because her mother was married to a man who was not a British citizen at the time of her birth even if the child's biological father was a British citizen.

28. [M] is in a similar position. The 2nd appellant was married to the 1st appellant at the date of [M]'s birth, even though [M]'s biological father was a British citizen. [M] was not therefore a British citizen by birth.

29. Helen Mountfield QC issued a declaration of incompatibility holding that the provisions preventing a child, other than a child born under a licensed IVF arrangement mentioned in sections 50(9A)(b) or (ba) of the British Nationality

Act 1981, as being recognised as the child of his or her actual biological father for the purposes of acquiring his or her nationality, if the child's mother was married to someone other than the biological father at the time of the child's birth, was incompatible with Article 14 ECHR read with Article 8 [101]. The issuance of the declaration of incompatibility did not however mean that **K** was a British citizen, or had to be treated as a British citizen. **K**, and by logical necessity, [M], are not British citizens. The appeal by the Secretary of State to the Court of Appeal was, it appears, against the decision to issue the declaration. Although I accept Mr Pipi's observation that the British government is, eventually, likely to act in accordance with the Administrative Court's decision and remedy the incompatibility, there was, at the date of the judge's decision refusing the adjournment, and indeed at the date of the Upper Tribunal hearing, no evidence of the manner in which the incompatibility will be remedied or the time frame for such a remedy, or indeed whether it will be retroactive. There was, and remains, significant uncertainty as to whether [M] would become a British citizen, and if so, when and how.

30. The judge properly observed that the appeals should not be stayed indefinitely and, in the absence of any indication as to when or how the incompatibility with the ECHR would be remedied, an adjournment of the hearing would not have advanced the appellants' appeals given that the declaration did not result in [M] becoming a British citizen. The judge was entitled to rely on the absence of any definitive timeframe in respect of [M]'s judicial review challenge in refusing to grant the adjournment because, in light of the decision in **K**, she would still not be a British citizen and there was nothing to indicate when the Secretary of State would actually seek to remedy the incompatibility with the ECHR.

31. Mr Pipi argued that [M] cannot be removed while her judicial review was active and that the adjournment should be granted on this basis. It is not apparent from the face of the judge's decision that this particular argument was advanced by Counsel in support of the adjournment application. In any event, whilst there were no removal directions in place to remove [M], and while it may be unlikely that the Secretary of State would seek to remove her whilst she has an extant judicial review, there was nothing in theory preventing removal directions being issued against her. Moreover, [M]'s judicial review was stayed behind that of **K**, and it was the Secretary of State who sought to appeal the Administrative Court's decision. If the Secretary of State had, in theory, been successful in her appeal, the declaration of incompatibility would have been withdrawn, which could not have assisted the appellants in any way. Nor does the dismissal of the Secretary of State's appeal assist the appellants because [M] remains someone who is not a British citizen. the fact that the appellants are unlikely to face actual removal is not, on the particular facts of this case, a factor that would entitle a judge to adjourn the appeals for what would be an indeterminate period of time.

32. If, as a result of the extant declaration of incompatibility, the offending provision within the British Nationality Act 1981 is amended or the Secretary of State issues a new policy addressing the incompatibility, then [M] may become a British citizen. This, in turn, could lead to further human rights applications being made by the appellants. If [M] is eventually considered to be a British citizen, it is unlikely that the Secretary of State would be able to rely on paragraph 353 of the immigration rules (relating to fresh applications) as there would have been a material change in circumstances (the same is likely to apply in respect of any new applications that rely directly (in the case of the 2nd appellant) or indirectly (in the case of the 1st and 3rd appellants) on the 2nd appellant's relationship with Albert). The appellants are therefore unlikely to be materially disadvantaged if there is a change in the law relating to children born in [M]'s situation.

33. I now consider whether the appeal hearing should have been adjourned because the respondent had not decided whether to treat Albert's birth as a 'new matter'. The appeals had already been adjourned to enable the 2nd and 3rd appellants to serve notice of the new matter on the respondent. Instead, the appellants' solicitors applied to the First-tier Tribunal to amend the grounds of appeal. Mr Pipi submitted that the respondent would have been aware that that the 2nd and 3rd appellants (and, because his claim rested on his relationship with the 3rd appellant, the 1st appellant) wanted the First-tier Tribunal to consider a new matter because the hearing before Judge Oxlade was adjourned to enable this to be done and because of the nature of the amended grounds. This may be so, but the fact remains that there was no application made by the appellants to the respondent for her to consent to the new matter. Judge Oxlade clearly envisaged that the respondent would be served with a notice of the new matter and would then decide in respect of that notice. I accept Mr Lindsay's submission that the provision of a notice of the new matter was a first step before a response from the respondent was required.

34. Mr Pipi relied on **Quaidoo** in support of his submission that the judge should have adjourned the hearing. **Quaidoo** explained that it will generally be appropriate to grant an adjournment to enable the Secretary of State to decide whether to consent to the new matter being considered or not, rather than proceed without consideration of the new matter. But there had been an adjournment in the proceedings to enable this to be done. The hearing on 7 January 2019 was adjourned but the appellants' representative filed amended grounds with the First-tier Tribunal instead of serving the notice of the new matter on the respondent. Given that the appellants had already been given the opportunity to request the respondent to consent to the new matter, the judge was entitled to refuse a further adjournment in light of the failure to comply with the previous direction.

35. To the extent that the written grounds of appeal contend that the appellants cannot mount a judicial review challenge if the respondent fails to make a

decision, this is simply wrong. There is nothing preventing the appellants from challenging a refusal to make a decision in judicial review proceedings. I note the absence of any application by the appellants' Counsel at the First-tier Tribunal hearing to seek an adjournment in order to challenge the failure to make a decision in the 'new matter' issue by way of judicial review proceedings. Nor is there any merit in the written grounds contending that the failure to make a decision renders the appeals scheme unworkable. S.85(5) of the Nationality, Immigration and Asylum Act 2002 makes clear that, in the absence of consent from the Secretary of State to a 'new matter', the new matter cannot be considered. The existence of consent is required for a new matter' to be considered, but the absence of any consent results in the appeal being heard without consideration of the 'new matter'. This does not render the provisions unworkable.

36. I find, in the alternative and in any event, that the respondent would have withheld her consent had the matter been considered prior to or at the date of the First-tier Tribunal hearing. I have no reason to doubt the information provided by Mr Lindsay at the 'error of law' hearing that the respondent would not have considered giving her consent as she considers that she should be the principle decision maker in respect of the 2nd appellant's relationship with Albert. The refusal to grant the adjournment would not therefore have made any material difference to the outcome of the appeal as the First-tier Tribunal would not have been entitled to consider the birth of Albert. As pointed out by the judge, this could form the basis of a further application for leave to remain.

Notice of Decision

The appeals are dismissed.

D. Blum

Signed Date 13 December 2019
Upper Tribunal Judge Blum