Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03554/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 January 2019	**On 03 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

I.M.E.
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Plowright of Counsel instructed by Adam Bernard Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Judge Moore promulgated on 25 September 2018 dismissing the appeal against a decision of the Respondent dated 23 January 2018 refusing a human rights claim.

2. The Appellant is a national of Nigeria born on 18 September 1964. His claim to remain in the United Kingdom on Article 8 grounds was focused upon his relationship with Ms G.I. (d.o.b. 25 February 1975), and her two British citizen sons E (d.o.b. 4 May 2005), and J (d.o.b. 30 April 2008). (GI

was born in Ghana but moved with her family to Nigeria at the age of 3 months; she grew up in Nigeria and is a dual national of Nigeria and the UK.)

3. The First-tier Tribunal Judge concluded that she was "*not satisfied that the oral and documentary evidence establishes that Appellant has a genuine and subsisting parental relationship with the children*" (paragraph 21).

4. In reaching this conclusion the Judge appropriately directed herself that the notion of a genuine and subsisting parental relationship was not confined to biological parental relationships, but extended to circumstances where "*the individual is playing a genuinely parental role in the child's life*" (paragraph 17). The Judge accepted GI's evidence that the children's biological father had not been in contact for several years (paragraph 18). The Judge also accepted that the Appellant had lived with GI and her children since approximately December 2015 (paragraph 19). It was also accepted that he took the children to and from school, cooked in the evening, had on occasions taken them to the doctor when GI was unavailable to do so, and had attended some events at school (paragraph 19).

5. The Judge also noted supporting letters from the children, but considered "*the content and tone of the longer letters a little problematic in the sense that they don't read like letters a child would write if left to their own devices*" (paragraph 20). The Judge explained her observation in this regard by way of citing passages from the letters. In my judgement it is entirely clear why the Judge detected the hand of someone other than the children in the composition of these letters.

6. The Judge also noted the absence of evidence from any "*third person or outside institution*" addressing the relationship between the Appellant and the children (paragraph 20).

7. It was against this background that the Judge reached the conclusion indicated above. In its entirety paragraph 21 is in these terms:

> "*Overall, on balance, I am not satisfied that the oral and documentary evidence establishes that Appellant has a genuine and subsisting parental relationship with the children. I note that the children are not small (there are 13 years and 10 years old), and until they were respectively 10 years and 7 years old they continued to have contact with their biological father. For the Appellant to form a parental relationship with the children, rather than simply a caring and affectionate relationship with them, would therefore require him to replace the children's biological father rather than step into empty shoes. While I accept that the Appellant has an involvement in their life, and that he provides practical care and that there is a degree of mutual affection, I consider the evidence falls short of establishing a de facto parental relationship, which must encompass, as well as practical care, deeper bonds of commitment, as well as shared*

responsibility and decision-making as regards the children's upbringing."

8. This finding as to the absence of a parental relationship was a significant part of the rest of the Judge's consideration of the issues in the appeal. Although this was a human rights appeal, the Judge appropriately had regard to the requirements of the Immigration Rules in respect of Article 8 family life: although the Appellant could not in any event meet the rules because his relationship did not satisfy the requirements under GEN 1.2 (the couple had not been cohabiting for a period of 2 years prior to the application), the Judge nonetheless had regard to paragraph EX.1 of Appendix FM, but concluded that its terms were not satisfied in circumstances where there was no parental relationship (paragraph 22).

9. Other findings/conclusions of the Judge included:

(i) That there would be no obstacle to GI relocating to Nigeria with the Appellant, she had family living there, there were no language or cultural barriers to relocation, and both the Appellant and GI had skills which would make it possible for one or both of them to find employment. In this context the Judge acknowledged that this would involve displacement of British citizen children, but this did not in itself constitute insurmountable obstacles to continuing the relationship between the Appellant and his partner outside the UK (cf. EX.1.(b)) (paragraphs 27 and 28).

(ii) The Appellant did not rely upon paragraph 276ADE(vi) of the Immigration Rules (paragraph 29) – which in any event the Judge concluded he could not satisfy (paragraph 31).

(iii) The children's best interests were served by staying with their mother whether in the UK or in Nigeria (paragraph 40). In this context, in the event that GI chose to remain in the UK with the children, the Judge acknowledged that there would be a negative impact in consequence of the Appellant's departure, but considered this from the perspective that the Appellant was not a *de facto* parent, that the affectionate relationship could be maintained through modern means of communication, and although GI would find it difficult to manage without the Appellant she had previously done so for 7 years after the departure of the children's biological father and there was no evidence to think that she could not avail herself again of the assistance of her cousin (paragraph 40).

(iv) The public interest considerations pursuant to section 117B(1)–(4) of the Nationality, Immigration and Asylum Act 2002 "*weight the scales heavily against the Appellant*" in respect of proportionality (paragraph 41)

(v) "*In this case I do not consider that the provisions of section 117B… are outweighed by the interest the children have in the Appellant remaining part of the family unit in the UK. … [T]he primary*

interest of the children is remaining with their mother, and this interest is not under threat." (paragraph 42)

10. The first basis of challenge pleaded in the grounds in support of the application for permission to appeal seeks to impugn the Judge's conclusion that there was not a genuine and subsisting parental relationship between the Appellant and the children (Grounds of Appeal at paragraphs 4.1-4.4).

11. During the course of submissions Mr Plowright acknowledged that to make good such a challenge he was driven to argue that the Judge's decision in this regard was perverse – that is to say a decision that no reasonable judge could have reached. Mr Plowright had to put the case in such a way because it was manifest that the Judge had correctly identified the scope and meaning of 'genuine parental relationship', had not overlooked any relevant evidence, and had offered reasons for her conclusion. A mere disagreement with the Judge's conclusion does not establish an error of law; accordingly, where it cannot be sustainably argued that the Judge misdirected herself or disregarded relevant evidence, or failed to give adequate reasons, the only remaining basis of challenge is that her conclusion was perverse.

12. I do not agree with that submission. In my judgement the conclusion of 'genuine parental relationship' was a finding open to the judge on the evidence and bears no hallmarks of perversity or irrationality.

13. As regards the other grounds of challenge, Mr Plowright acknowledged that although there was potentially scope in general terms for argument as to the inter-relationship between EX.1.(a) and EX.1.(b), any freestanding assessment of Article 8 outside the scope of the Rules in the circumstances of this particular case would come back to the question of 'genuine parental relationship'. He acknowledged that if he was in difficulties on this ground – and as indicated above I have concluded that he is – he would be in difficulty in prosecuting the appeal more generally.

14. For the avoidance of any doubt, I note that the third ground of appeal (paragraphs 6.1-6.3) - that the Judge was in error in concluding that section 117B(6) of the 2002 Act did not apply - was pleaded as contingent upon the Judge being in error in respect of 'genuine parental relationship'.

15. The only remaining pleaded ground of challenge is ground 2 (paragraphs 5.1–5.4) which seeks to raise criticism in respect of paragraphs 23-27 of the First-tier Tribunal's decision, with particular reference to the Judge's consideration of the case of **Jeunesse v Netherlands (2015) 60 EHRR 17**. This is in the context of insurmountable obstacles under paragraph EX.1.(b).

16. I note that paragraphs 23-26 serve to set out the framework of consideration of the issue of insurmountable obstacles. It is only really at paragraph 27 that the Judge's reasoning and finding on the facts of the

particular case are set out. It seems to me irrespective of what might or might not be derived from the case of **Jeunesse**, the Judge's actual findings and reasoning in the following passage is not to be impugned:

> "*Although … it is true that the children are British citizens … this is not enough to amount to an insurmountable obstacle to family relocation outside the UK. Further, both the Appellant and [GI] have family living in Nigeria, there are no language or cultural barriers to relocation, and both the Appellant and [GI] have skills which would make it possible for one or both of them to find employment*".

17. In such circumstances I find no substance to this line of challenge either

18. Yet further, and generally, it seems to me that approaching this appeal in a 'real world' context the reality is that if the Appellant leaves the UK, or is removed from the UK, in consequence of the Respondent's decision the reality of the situation is that GI and the children will not accompany him. The Judge fully considered the consequent disruption to the respective lives of the Appellant, his partner, and her children, and concluded that the public interest considerations did not outweigh the Article 8 rights involved. Again, I am unable to identify that the Judge misdirected herself as to the law in this regard, or otherwise failed to consider the evidence that was before her.

Notice of Decision

19. The decision of the First-tier Tribunal contained no error of law and accordingly stands.

20. The Appellant's appeal remains dismissed.

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 his 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.

Signed: Date: 1 April 2019

Deputy Upper Tribunal Judge I A Lewis