Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/09716/2017
HU/16539/2016
HU/16541/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 May 2019

Decision & Reasons Promulgated
On 06 June 2019

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

OLAWALE [B] (FIRST APPELLANT)
SHERIFAT [B] (SECOND APPELLANT)
[T B] (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms R Moffatt, instructed by Sutovic & Hartigan
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal to a Judge of the First-tier Tribunal against the Secretary of State's refusal to grant them leave to remain on the basis of private and family life in the United Kingdom. The first appellant is the partner of the second appellant and the third appellant is their daughter. The first appellant has also two sons by his previous partner. They are

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British citizens and were born respectively on 18 December 2004 and 12 May 2009. The third appellant was born on 18 July 2010.

2. After a hearing on 13 November 2017 the judge dismissed their appeals. Permission to appeal to the Upper Tribunal was subsequently granted, and following a hearing on 28 August 2018 I found errors of law in the judge's findings and directed that the matter fell to be reheard in the Upper Tribunal.

3. The first appellant has been in the United Kingdom since 2001. He had an unsuccessful claim for asylum, and a subsequent appeal was dismissed in 2002. Further asylum submissions were made in 2011 and were refused in 2013, but he was granted leave to remain on the basis of private and family life until 8 June 2016.

4. As noted above, his sons are British citizens born respectively in 2004 and 2009. His relationship with their mother ended in 2009. The second appellant has been in the United Kingdom since 2010, being an overstayer after the end of her leave as a visitor on 4 May 2011.

5. One of the issues before the judge in relation to which there is now some clarification concerns the degree of involvement of the first appellant in his sons' lives. His evidence was that his former partner caused difficulties in his access to his sons and at that time he had not attempted to seek access to them through the family court. He had tried to seek the help of his ex-partner's father with whom he had always had a good relationship, but to no avail. There was an issue before the judge as to the most recent contact between the father and the sons and the difficulties being experienced.

6. There is however now a family court order dated 7 May 2019 intending to provide certainty to the parties in terms of the arrangements and ordering that the children be made available to spend time with the appellant every Saturday between 12 noon and 4pm and telephone contact on a Monday, Wednesday and Friday on a time agreed between 4pm and 8pm.

7. I note in passing, though as Ms Moffatt said it is of no materiality to this appeal, that the first and second appellants have a further child who was born on 29 March 2018.

8. Ms Moffatt provided a helpful and detailed skeleton argument which she developed in points made in oral submissions. I should note at this point that Mr Tarlow was content to limit his submissions to reliance on the refusal letter.

9. Ms Moffatt's first point was that the first appellant meets the requirements of the Immigration Rules in respect of his parental relationship with his two British sons and as a consequence his removal is disproportionate. This is argued on the basis that the evidence shows that he is taking and intends to continue to take an active role in his sons' upbringing as required in

Appendix FM paragraph E-LTRPT.2.4. Reliance was placed on the fact that he lived with them from their births until his relationship with their mother broke down in 2009, that he shares parental responsibility with their mother for them, that in 2013 the respondent had accepted that he had access rights to them and had provided evidence that he was taking and continuing to take an active part in their upbringing, since moving out of their home he has maintained regular contact with them over the past ten years including trips out and time spent at his home, and their securing of the court order formalising the requirement for him to have contact.

10. In this regard it can be seen from the first appellant's most recent statement, which he adopted today, that this was a last resort and that he had tried to resolve matters through family channels before having recourse to the courts. It is also the case that he has consistently provided financial contributions for his sons' upbringing as documented in the evidence including the witness statements, child maintenance letter and bank statements and that he is involved with their school as can be seen from his second statement.

11. The point is made that in light of the difficulties between the first appellant and the children's mother, and in particular periodic obstructive behaviour on her part, the relationship between the appellant and his sons is not without its difficulties. It is asserted however that such difficulties are a frequent and normal part of any human relationship and particularly one with teenage children.

12. I am satisfied that the argument in this regard is made out. The volume of evidence culminating most recently in the family court order but also the evidence of ongoing involvement to the necessary level in the children's lives from their birth on the part of the appellant is such in my view as to amount to him taking an active role in their upbringing.

13. In the alternative I accept the argument that the first appellant satisfies EX.1 since he has on the basis of the above findings a genuine and subsisting relationship with the two boys and has a subsisting role in providing elements of direct parental care which is longstanding. In addition it would not be reasonable to expect them to leave the United Kingdom. They live separately from the appellant with their British mother and requiring them to go to Nigeria would therefore have the effect of separating them from their mother or alternatively requiring their mother who is a British national to leave the United Kingdom to accompany them. This cannot be said to be reasonable, and it is clear in my view that their best interests favour them remaining in the United Kingdom as British citizens with their British national mother and with regular contact that has now been set out in a family court order with their father the first appellant.

14. The next point made by Ms Moffatt concerned the third appellant and paragraph 276ADE(1)(iv).

15. She will be 9 in July, and it is argued that it is not reasonable for her to leave the United Kingdom, bearing in mind that she is at an age at which ties and roots put down outside the immediate family take on greater significance, she regularly sees her two British half-brothers and the effect of her being required to leave the United Kingdom would separate her from them which would in practice I accept lead to a significant breakdown in her relationship with them. She has never visited Nigeria and knows little of it beyond the fact of it being the country in which her parents were born and brought up. It is, I accept, in her best interests to remain in the United Kingdom. As a consequence I consider that the requirements of paragraph 276ADE(1)(iv) are made out. The guidance in KO (Nigeria) [2018] UKSC 53 is of clear relevance here, bearing in mind the conclusion there that it is a question in assessing whether it is reasonable to expect a child to leave the United Kingdom with a parent the position of the child only and not the immigration history and conduct of the parents. I find that the argument in respect of paragraph 276ADE(1)(iv) is made out in that it would not be reasonable for the third appellant to leave the United Kingdom.

16. In the alternative I agree with the further submission that even if it were not the case that the first appellant had been shown to be taking an active role in his sons' upbringing, as was noted in SR [2018] UKUT 00334 (IAC), an appellant may still be able to demonstrate a genuine and subsisting parental relationship with a qualifying child for the purposes of section 117B(6) even if the requirement of active role is not satisfied. As noted above, I am satisfied that the active role requirement is satisfied but in the alternative if I am wrong in that regard I consider that the appellant has shown a genuine, subsisting parental relationship with his two sons who are qualifying children. As a consequence the public interest does not require his removal from the United Kingdom. It is clear from what was said in the Court of Appeal in Rhuppiah [2016] EWCA Civ 803 that the proper application of section 117B(6) when resolved in a person's favour is determinative of proportionality.

17. Further in the alternative, the argument is made that if I were to find that Article 8 would be breached in a requirement that the first appellant leave the United Kingdom but not with regard to the second and third appellants, on the independent basis of the third appellant's private life in the United Kingdom, it would not, I agree, be proportionate to require the second and third appellants to leave in the circumstances since this would have the effect of separating the first appellant from his partner and daughter and the infant child, and the third appellant from her British half-brothers. The public interest falls firmly in favour of the second and third appellants.

18. For all the above reasons therefore I am satisfied that this appeal falls to be allowed on the basis set out above.

19. No anonymity direction is made.

Signed
Upper Tribunal Judge Allen

Date 22 May 2019