Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15955/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 July 2019	**On 19 July 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SLYVANUS [E]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Iengar, instructed by SABZ Solicitors LLP
For the Respondent: Ms Fijiwala, Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Davison ('the Judge') promulgated on 1 March 2019 in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a citizen of Nigeria born on 25 July 1983 who arrived in the UK on 27 December 2017 as a visitor. On 9 March 2018 he made an

FLR(FP) application which was refused on 16 July 2018. The appeal against that decision was considered by the Judge.

3. The Judge records at [11] that the background facts to the appeal were not in dispute and records following salient facts:

   - The appellant was previously in a relationship with Ms [C]. They met each other in Nigeria in 2011 when Ms [C] was on holiday.
   - The couple had twins on 9 August 2016 '[Zy]' and '[Ze]'. Ms [C] is British and the children are British citizens.
   - Ms [C] and the children went to Nigeria to live with the appellant.
   - Unfortunately, in July 2017 the couple separated and Ms [C] returned to the UK with the children.
   - The appellant came to visit in December 2017.
   - The appellant is currently residing with an aunt in London but has unrestricted access to his children in Manchester. He sees them at least once a fortnight and spends 2 – 3 days with them during his visits. Ms [C] also brings the children to London to visit the appellant on occasion.
   - The appellants aunt is supporting the appellant in the UK and has assisted him in being able to fund various expenses related to the twins.

4. The Judge finds the appellant is highly involved in the life of his children. The appellant is currently unable to work in the UK due to his status and is financially reliant upon his aunt. The appellant is training to be a pilot and, if successful, hopes to move to Manchester and work from the airport there so he can be closer to his children. It is found the appellant has a parental relationship with the children. At [15] the Judge finds the appellant is the father of the twins and is seeking to play an active role in their lives, the limiting factor currently being his status in the UK and need to reside with his aunt which is some distance from where the twins reside.
5. At [17] the Judge finds the best interests of the children are to grow up knowing their father and it is accepted the appellant has a genuine parental relationship with them. At [18] the Judge states the real issue to be determined is whether it is proportionate to expect the appellant to return to Nigeria and seek entry clearance to maintain contact with his children.
6. The Judge sets out finding between [20 – 28].
7. The appellant sought permission to appeal asserting the Judge erred in law by failing to make any findings on whether the appellant met the requirements of Appendix FM paragraph EX.1. The grounds assert the Judge was bound to consider the requirements as the whole basis of the appeal had been that he satisfied Appendix FM paragraph EX.1.
8. The grounds assert the Judge erred for although making findings on the parental relationship there was no reference to whether it will not be reasonable to expect the appellant's children to leave the United

Kingdom. The grounds assert the Judge erred in failing to consider the evidence that supported the claim it would not be reasonable to expect the children to do so; such as the speech therapy the appellant's daughter is likely to require in the long term. The grounds assert the Judge failed to consider the impact on the children should the appellant be required to leave the United Kingdom, albeit for a temporary period. The grounds assert the Judge's assertion any separation will be for a short period of time fails to consider that the appellant is financially dependent upon his aunt and would not be able to meet the financial requirements of the Immigration Rules for entry clearance; undermining the Judge's assertion that a short period of separation made the decision proportionate. The grounds also assert the statistics referred to by the Judge for the time it takes to process a Visa application specifically exclude settlement visas which would not normally be decided within 15 days. The grounds assert the Judge's findings with regard to proportionality, based upon a short period of separation, are arguably unrealistic.

9. The grounds also assert the Decision is contrary to the findings in *Chikwamba*.

10. Permission to appeal was refused by another judge of the First-tier Tribunal but renewed to the Upper Tribunal directly where it was granted on 11 June 2019. The relevant part of the grant being in the following terms:

> "3. The FTT arguably erred in law in failing to consider section EX.1 appendix FM and whether it would 'not be reasonable' to expect the appellant's British daughter to leave the UK. Not only was there no express reference to section EX.1, but the Decision does not appear to include findings on that issue. That in turn potentially impacts on the proportionality assessment of the appellant leaving the UK and reapplying for entry clearance.
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> 4. Whilst the other ground of appeal appears to be weaker, (the assertion that the FTT erroneously assumed that the appellant did not meet the requirements of the Immigration Rules, when it appears that the appellant's representative confirmed that compliance with the Immigration Rules was not relied on; nevertheless permission to appeal is granted on all grounds."

11. There is no Rule 24 reply from the respondent.

Error of law

12. At [6] of the decision the Judge writes:

> "the Appellant's representative conceded that the Immigration Rules could not be met and were not therefore relied upon. It was stated that the issue was Article 8 outside the Rules and section 55 best interests considerations."

13. The appellant was represented by Ms G Fama a barrister instructed by SABZ before the Judge.

14. Appendix FM EX.1. was raised in original grounds of appeal where it is stated at [8]:

> "the Appellant contends that he met all the requirements of Appendix FM EX.1 because he is in a genuine and subsisting relationship with his British children who are settled and residing in the UK."

15. EX.1, as a provision found within Appendix FM, is therefore within the Immigration Rules and the challenge to the respondent's decision under the Rules was not pursued before the Judge.
16. In *Sarkar v Secretary of State for the Home Department [2014] EWCA Civ 195*, the Court of Appeal indicated that, although Article 8 and section 55 were mentioned in the Notice of Appeal, where no evidence had been adduced or submissions made before the First-tier Tribunal to support a claim under Article 8 of the ECHR, it could be treated as abandoned.
17. In *NS (India) [2004] UKIAT 00193* the Tribunal noted that the appellant had specifically withdrawn his Article 8 claim before the Adjudicator. The Tribunal said that the Appellant could not then contend that it was an error of law for the Adjudicator not to consider it. Indeed it would clearly have been inappropriate for the Adjudicator to consider a claim which had not been pursued before him.
18. The challenge as pleaded to the alleged failure of the Judge to consider a matter that had been abandoned appears to have no arguable merit although at the commencement of the hearing Ms Fijiwala acknowledged there was an arguable error in the respondent's decision which may have explained the conduct of the appellant's advocate before the Judge. It was accepted that in light of the findings that had been made concerning the appellant's relationship with his children, section 117B(6) of the Nationality, Immigration and Asylum Act 2002 was relevant and should have been considered as part of the article 8 assessment by the Judge but was not.
19. This section provides:

> '(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.'

20. It was accepted the appellant is not a person liable for deportation. It was found by the Judge that the appellant has a genuine and subsisting parental relationship with his children who are qualifying children. It was accepted by Ms Fijiwala that on the evidence it would not be reasonable to expect the children to leave the United Kingdom.
21. It is conceded the Judge erred in law in not considering this provision as part of the article 8 assessment which is material. In light of this the determination must be set aside.

22. It is also conceded that in light of section 117B(6), and for the reasons set out above, the appeal must be allowed.
23. I substitute a decision allowing the appeal pursuant to article 8 ECHR on the basis that the respondent's own interpretation of how the proportionality of this issue must be interpreted, through Section 117B(6), means the appellant's removal from the United Kingdom has not been shown to be proportionate.

Decision

24. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

25. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated the 15 July 2019