Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17129/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 November 2018	**On 8 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MR R K A
(ANONYMITY DIRECTION MADE)

Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Representation:
For the Appellant: Mr T Lindsay, Home Office Presenting Officer.
For the Respondent: Mr M Al-Rashid, Counsel.

DECISION AND REASONS

1. The Appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-Tier Tribunal with the Secretary of State referred to as "the Respondent" and Mr R K A as "the Appellant".

2. The Appellant in this appeal is married to P M, who has leave to remain in the United Kingdom until July 2019. She has a child, K, from a previous relationship, who was born on 23 December 2004 and is a British citizen. The Appellant appealed a decision of the Respondent dated 22 November 2017, refusing the Appellant's application for leave to remain in the United

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Kingdom. The application had been made on 29 March 2017 on the basis of life as a parent and outside the Immigration Rules on the basis of family/private life.

3. The Appellant's appeal was heard by Judge of the First-tier tribunal Griffith, who in a decision promulgated on 30 August 2018 allowed it.

4. The Respondent sought permission to appeal. This was granted by Judge of the First-tier Tribunal Cruthers in a decision dated 27 September 2018. His reasons for so granting were: -

> "1. This appeal stands allowed by a decision of First-tier Tribunal Judge Griffith. Having assessed the evidence, the judge concluded that the appeal succeeded through the application of article 8 of the European Convention on Human Rights (taken with section 55 of the Borders, Citizenship and Immigration Act 2009).
>
> 2. In my assessment it is arguable, as per the grounds on which the respondent seeks permission to appeal, that the judge may not have sufficiently factored in: (1) the very poor/ abusive immigration history of the appellant; (2) the apparent misrepresentation employed by the appellant's "partner" to obtain leave to remain in the UK; and / or (3) the desirability of the appellant returning to his country of nationality (Ghana) to make appropriate application for entry clearance from there (see, for example, **Chen (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC), circulated on 20 April 2015).**
>
> 3. Overall, there is sufficient in the grounds to make a grant of permission appropriate."

5. Thus, the appeal came before me today.

6. Mr Lindsay relied upon the grounds that sought permission to appeal. At the ouset he handed up two authorities being **R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC)** and **KO (Nigeria) v SSHD [2018] UKSC 53.**

7. Mr Lindsay asserted that the Judge's credibility assessment was fundamentally flawed and that she had failed to give any or any adequate reasons for accepting that the Appellant's partner had given credible evidence. The Appellant's partner had obtained leave to remain as the parent of her child in 2017, just prior to the Appellant's current application, and stated she was the sole carer of a British Citizen child. The Appellant and his partner married in 2014 in the United Kingdom and it was therefore clear that the partner's circumstances had changed by the time of her latest application and the Judge has failed to deal with this issue other than recording that the evidence was that she had made the application, not mentioning the Appellant, on legal advice. Consequently, he submitted that where a sponsor only has limited leave to remain in the United Kingdom, and it was granted on a misrepresentation of the respondent's position, the Appellant should not benefit from this. Mr Lindsay highlighted the Appellant's adverse immigration history which is set out at paragraphs 3, 4 and 5 of the Judge's decision. He asserted that

in the context of the Appellant's deception in the course of the immigration process the Judge had failed to grapple with this issue when assessing credibility. Further, that the Judge failed to attach any, or any appropriate weight, to the Appellant's "appalling immigration history" in assessing the appeal either inside or outside the Immigration Rules. The history recorded in the decision letter was sufficient to enable the Judge to conclude that the Appellant's conduct, short of criminality, meant that he was not suitable for leave to be granted, notwithstanding what is said about the partner's child in the United Kingdom.

8. Finally, whilst the Respondent knows that the Appellant's partner's child is a British citizen, the child is not being required to leave the United Kingdom and indeed the family are not being required to choose; in the circumstances of the Appellant outlined it was incumbent upon the Appellant to make an appropriate application from abroad when the partner is in a position to sponsor him. In short Mr Lindsay submitted that the "Chikwamba" point had not been dealt with by the Judge.

9. Mr Al-Rashid argued that the Respondent's grounds are misconceived. The first two complain about the conduct of the British citizen child's parents. It is now a matter of settled law that this is not a factor to be taken into consideration when assessing the best interests of a child. He referred me to the most recent authority of **KO (Nigeria) v SSHD [2018] UKSC 53**. There is no requirement to consider the criminality or misconduct of a parent as a balancing factor. The issue was the reasonableness of the British citizen child's departure from the United Kingdom in the context of best interests. He asserted that there needed to be "powerful reasons" for removing such a child. The presumption is that a British citizen child should not be removed from the United Kingdom. The Judge properly found, as a primary consideration, that it was in the child's best interest for him to remain in the United Kingdom with both parents. She made proper findings and applied the law correctly.

10. I find that there is here no material error of law. The issue of the relationship between the Appellant and his partner was never in dispute between the parties. It was though, not accepted that the Appellant's relationship with the child was as the Appellant asserted. However, the Judge made a finding at paragraph 42 of her decision that the Respondent's own finding that the Appellant did not have a parental relationship with K was unreasonable, given the information provided by K's mother to the Respondent when she was applying to extend her leave. As she does throughout her decision the Judge acknowledged that there had to be a serious concern about the basis on which this second period of leave was obtained, which appeared to conceal from the Respondent a material change in the Appellant's partner's relationship. However, it was open to the Judge to find, as she does at paragraph 43 of her decision, that the Appellant lives in a family unit with his partner and K and enjoys family life with them, treating K as his own son. K is a British citizen who has grown up in the United Kingdom and is being educated in this country. The Judge goes on to make findings in respect of the Appellant's role in looking after K. She found that it appears that he operates as a carer

largely after K has returned from school and during the holidays when his mother is at work. The Judge found that the Appellant is to that extent the child's primary carer. She then referred herself to the Respondent's own guidance addressing the question of whether it is unreasonable to expect a British citizen child to leave the United Kingdom. It is stated that it will usually be appropriate to grant leave to the parent or primary carer to enable them to remain in the United Kingdom with the child provided there is satisfactory evidence of a genuine and subsisting parental relationship. The Judge went on to consider the evidence and found that it was in K's best interest to continue to be brought up with his mother and the Appellant, the latter having had a presence in his life as a father figure since 2012 when he and K's mother first met and, more significantly, since 2014 when they were married. It is also, she found, in K's best interests to have continuity and stability in his life and to be able to continue with his education. Importantly the Judge acknowledged, as stated in **MA (Pakistan) and others [2016] EWCA Civ 705,** that even where the child's best interests are to stay, it may still not be unreasonable to require the child to leave. That decision made clear that what could not be considered would be the conduct in immigration history of the parents. It also is authority for the application of the reasonableness test requiring the Judge to have regard to the wider public interest in consideration of the immigration history and status of the parents.

11. The Judge found that the Appellant's immigration history was poor and indeed at paragraph 47 of her decision she records that he may well fall into the category of an "undeserving applicant" but nonetheless when looking at the totality of the evidence one who may be allowed to remain. Contrary therefore to the Respondent's grounds the Judge has factored into her analysis the Appellant's poor immigration history but has concluded that the wider public interest in removing him is outweighed by the public interest in allowing K to be brought up by two parents in a stable family unit.

12. I find that overall the Respondent's grounds are no more than a dispute with the Judge's findings.

13. The Judge has come to conclusions that were open to be made on the totality of the evidence having applied relevant case law.

14. There is here no error of law.

<u>Notice of Decision</u>

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

<u>Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008</u>

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.

Signed Date 17 December 2018

Deputy Upper Tribunal Judge Appleyard