Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20907/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 August 2019	**On 17 September 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

O A O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Ogundero of Chris Alexander Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria. He appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 28 September 2018 refusing his application for leave to remain in the United Kingdom on human rights grounds.

2. The judge helpfully summarised at paragraph 6 of her decision the respondent's reasons for refusal. These were in sum that the appellant did not have direct access to his children and could not meet the requirements of the Immigration Rules and also did not meet the eligibility requirements because his previous leave to remain

had expired on 30 September 2009. EX.1(a) did not apply because he did not have a genuine and subsisting parental relationship with his children and the requirements of paragraph 276ADE(1)(vi) applied and there were not very significant obstacles to his integration on return to Nigeria. Exceptional circumstances outside the Rules were considered as was section 55 of the Borders, Citizenship and Immigration Act 2009.

3. The judge noted that while the case was pursued on the basis of pending Family Court proceedings, no application was made for an adjournment nor was she invited to invoke the Protocol on communication between judges of the Family Court and the IAC.

4. The appellant's relationship with his former partner ended in 2012 when she left the family home. There had been arguments prior to her departure. The couple have two children, a son aged 10 who is a British citizen and a daughter aged 7 who is Nigerian with leave to remain in the United Kingdom.

5. The judge noted that after the appellant's partner and children left the family home they had an informal arrangement that he would see the children but in the event, he only saw them about three or four times a year between 2012 and 2016 and had not seen them since, although he had recently had indirect contact with them by email, text and letter.

6. The judge had before her a Cafcass report, the contents of which the appellant did not accept. He denied having been violent to his wife or children though he accepted that his children had witnessed arguments between him and his wife and that this was not "proper". He had started on the Domestic Abuse Perpetrator ("DAP") programme. He denied having physically disciplined his children. He accepted that he could continue to correspond and speak to his children by telephone from Nigeria. His children had told him they wanted to know where he lived and wanted to see him and did not want him to go anywhere apart from being in the United Kingdom.

7. The Cafcass case analysis is dated 30 January 2018. In the professional judgment of the Family Court adviser who wrote this report, there is evidence to support the allegations of the appellant's former partner that he was violent towards her. The adviser described the relationship of the appellant with his children as "somewhat tenuous" especially in respect of his daughter, who "has spent very little time with him". His son's wishes were that he might want to see his father "but not till he was older, maybe 12". The adviser noted that that if the appellant could contribute positively to the lives of his children without placing them or their mother at risk this would allow them to have some sense of paternal family and their own identity. The adviser was unable to support the making of an order for the appellant to spend time with his children, given the clear views of his son and potential to undermine the mother as primary carer, in the event that the domestic abuse had occurred as reported. She supported the exchange of letters between the appellant and his

children through a trusted third party and this was now taking place. There were a few brief text messages between the appellant and his son and there were copies of monthly letters from the appellant to each of his children dating back to January 2019. Each child had written one (undated) letter to the appellant. The son's letter thanked his father for his advice but said it had been a long time since he had seen him but not to worry, he would be coming in two years' time and was glad to be writing to him and could not wait to see him again. His daughter said she was so excited to go to his house and asked where he lived. She did not know he was her father until her mother told her.

8. The judge noted the appellant's denial of violence to his former partner. The judge gave weight to the fact with regard to the claim that the appellant had hit the appellant's son and that it was the son who reported this and not the mother. The appellant said he was attending the DAP programme because he had argued in front of the children and that was not "proper", but the judge commented that if that were the reason for the referral his former partner would also have been referred to attend the programme and she found the appellant's evidence on this issue to be wholly incredible. She considered the appellant's manner of giving evidence before her, seeking to blame his former partner for the breakdown of the relationship, suggested that he was in denial about his former behaviour in the relationship and towards his son.

9. She had concerns about the reliability of his evidence that his children wanted to see his house where he was living and did not want him to leave the United Kingdom. She did not consider that to be evident from the limited correspondence which had been disclosed. She found him to be an unreliable witness. His versions of events were not borne out by the Cafcass report. She considered that while it was an issue yet to be decided by the Family Court for the purpose of the ongoing family proceedings, for the purpose of the immigration proceedings she was satisfied that the appellant was physically abusive to his son in 2012 and relied on the Cafcass report recommendations as regards what is best for the children. She found that their best interests were for them to remain living with their sole carer, their mother, and with indirect access to their father. That access appeared to have begun in about January 2019 when there had been a gap of about three years since the appellant's last contact with the children.

10. The judge found that the appellant had not shown that he had a family life with his children. There was no evidence that he contributed to their upkeep, he did not have access to their school reports, he wrote to them once a month and had very limited text contact. She was told he spoke to them on the telephone but not the content of the conversations.

11. As regards the prospect of family life in the future, the judge considered that on the evidence, bearing in mind the appellant's denial that he had been abusive, his attendance on the DAP course was unlikely to be fruitful. She considered he was a man who did not perceive he had an issue with aggressive behaviour and that he

had little if any insight into the impact of his behaviour on his children. She had regard to the Family Court adviser's recommendation that indirect contact might offer the appellant a chance to build a relationship with his children without presenting a risk to their future safety and stability, but she considered the evidence before her did not suggest that this was a realistic prospect. She did not accept the appellant's evidence that his former partner had lied about his behaviour for her own purposes. The evidence in the Cafcass report was significant, and she accepted that the appellant had caused harm in the past to his children by hitting his son and by abusing his former partner in front of the children. She considered that the totality of the evidence did not suggest there was any prospect of the appellant establishing family life with his children in the foreseeable future and that were it not for the prospect of his imminent removal he would not have enrolled on the course or indeed initiated the contact proceedings. She did not accept that he had initiated the Family Court proceedings for the wellbeing of his children; the very limited nature and extent of his contact with the children after his separation from their mother suggested otherwise. He did not apply to the Family Court until 2017, the year he made his application for leave to remain after ten years as an overstayer and five years after his former partner and the children had left the family home. She bore in mind that it would be in the children's interest to have a relationship with their father if it was safe for them to do so but was unable to find that family life existed between the appellant and the children currently or that there was a realistic prospect of it being established in the future.

12. She went on to consider his private life and considered there was very little evidence of this though she found that Article 8 was engaged in this respect.

13. She noted relevant case law such as MH [2010] UKUT 439 (IAC), Nimako-Boateng [2012] UKUT 00216 (IAC), GD (Ghana) [2017] EWCA Civ 1126, RS [2012] UKUT 00218, Mohammed [2014] UKUT 419 (IAC) and Makhlouf [2016] UKSC 59.

14. She said that though she had found that there was no family life at the moment, in the alternative, even if the Family Court were to decide that personal contact with his children were appropriate, such contact, whilst perhaps regular, would amount to limited family life in the absence of any reliable indication that the appellant intends to support his children financially, that they would stay with him for any or extended periods or that he would be involved in their upbringing. She found therefore that family life at best would be very limited between the appellant and his children. She gave consideration to the best interests of the children, giving considerable weight to the son's evidence that he did not wish to see his father until he was aged 12, two years hence. The children were settled in the United Kingdom with their mother and their current contact with their father was insubstantial and their main focus was their mother and their day-to-day lives with her, their friends and their local community. She considered that as matters stand at the moment, with indirect contact between the appellant and his children, the degree of interference with his protected rights was justified and proportionate to the public interest. Even if he were, as a result of the Family Court proceedings, to be given greater access to

his children such as to amount to the establishment of family life with him, she would find that the degree of interference with his and their protected rights would be justified and proportionate, given that family life had only just been established and there was no indication on the evidence before her that the children would suffer any detriment from being unable to have personal contact with their father in the future.

15. With regard to the argument in respect of MH and Article 6, she concluded that the result of the pending Family Court proceedings could have no material impact on the outcome of this appeal and as a consequence, there was no breach of Article 6. The appeal was dismissed.

16. The appellant applied for and was granted permission to appeal on the basis that the judge's decision conflicted with what had been said in MH, had erred in finding that Article 8 was not engaged with regard to family life, had further erred in finding that his evidence that his children wanted to see his house was unreliable in light of his daughter saying that she was so excited to go to his house and that it was selective as to which parts of the Family Court adviser's report in the Cafcass report she was willing to accept. It was also argued that the judge had erred by failing to consider and adequately factor in the rights of the children to have direct in person access and contact.

17. In his submissions Mr Ogundero relied on and developed the points in the grounds of appeal. He argued that the judge had failed to follow the guidance in MH and the implication was that not permitting the appellant to have a meaningful involvement in the family proceedings breached his Article 6 rights. The judge had had concerns about the appellant's credibility with regard to the Family Court proceedings and the Protocol on communications with the Family Court should have been applied to obtain information about the family proceedings. What the judge had said at paragraph 59 of her decision, that the result of the pending Family Court proceedings could have no material impact on the outcome of the appeal, was erroneous as being purely based on speculation. It was for the Family Court to decide whether there should be direct contact.

18. There was also reference in MH to the respondent's practice not to remove or deport parents or parties when family or other court proceedings were current and to grant short periods of discretionary leave pending the outcome of such proceedings. It was not within the judge's remit, given the pending family proceedings, and was likely to prejudice those proceedings.

19. The judge had erred in finding that there was not family life. The appellant had shown a parental relationship with his children via the documentation in the appeal bundle. There was a failure to take the guidance in SR [2018] UKUT 334 (IAC) into account with regard to section 117B(6). The judge had not considered whether it was reasonable to require the children to leave the United Kingdom. There was a failure to assess whether section 117B(6) applied. The appellant needed to stay in the

United Kingdom while the family proceedings were ongoing. The decision should be set aside.

20. In her submissions Ms Everett argued that there was no error of law in the judge's decision. The issue of whether or not there was family life could be highly nuanced where there were difficult circumstances. The judge had had the Cafcass report and had to decide whether there was family life. There was perhaps a presumption of family life as he was the biological parent, but the judge was entitled to find that there was not family life, having given cogent reasons for this. A wish to create family life was not determinative. The judge had properly considered the Cafcass report and there were concerns about the surrounding evidence concerning violence and domestic abuse. The appellant clearly had no direct contact with his children. The evidence of the complete breakdown rebutted the presumption.

21. The judge looked at all the case law on the issue of how to treat the appellant's pending proceedings. There was no misdirection. If the findings with regard to family life stood and the conclusion about the relationship then it was not a genuine and subsisting relationship so the section 117B(6) issue went away. Article 8 should not generally be used as an opportunity to create family life. Expressing a desire to establish family life was not enough. The judge was concerned about the appellant's reasons but in any event, no error of law had been shown. A further application could be made if there were fresh evidence but the judge's findings were coherent.

22. By way of reply, Mr Ogundero referred to AB (Jamaica) on the basis that indirect contact was a genuine and subsisting relationship.

23. I reserved my decision.

24. As regards ground 1 and the point raised with respect to MH, it is clear from paragraph 1 of the headnote to that case that a decision to remove an applicant in the process of seeking a contact order may violate Article 8. That does not mean that that would automatically be the case. This is in any event not a case of removal but a case of refusal of a human rights claim. If a removal decision is made then MH may have more relevance, also as regards the point at paragraph 3 of the headnote that it is the respondent's practice not to remove or deport parents when family or other court proceedings are current and to grant short periods of leave depending on the outcome of family proceedings. Again, there the context is one of removal rather than refusal of a human rights claim.

25. I consider that it was, contrary to what is argued in the grounds and by Mr Ogundero, open to the judge to find that the result of the pending Family Court proceedings could have no material impact on the outcome of this appeal. The judge gave very careful consideration to the evidence and clearly bore in mind the guidance in the authorities as the context to her consideration of the law. She was clearly concerned at the very limited contact that the appellant had had for a number of years which had just been increased recently at the time when he was seeking

leave to remain in the United Kingdom outside the Rules. She was concerned that the appellant had little, if any, insight into the impact of his behaviour on his children and though she noted the recommendation of the adviser that indirect contact might offer the appellant a change to build a relationship with his children without presenting a risk to their future safety and stability, it was open to her to find that the evidence before her did not suggest that this was a realistic prospect. It was open to her to find that the totality of the evidence did not suggest that there was any prospect of the appellant establishing a family life with his children in the foreseeable future. She had not been asked to invoke the Protocol on communications between judges of the Family Court and the IAC and there was no application for an adjournment on the basis of pending Family Court proceedings. There was nothing in the authorities to which her attention or my attention has been drawn to show that it is not open to a judge, if the evidence so dictates, to conclude that on the one hand there was no family life between a father and his children as the judge found in this case or that if there were, as she noted at paragraph 53, it would be very limited. As a consequence, it was open to her to find that the result of the pending Family Court proceedings could have no material impact on the outcome of the appeal. There is no automatic rule that where contact proceedings are forthcoming an Immigration Judge has to stand back and await the outcome of the Family Court proceedings. It was open to the judge in this case, as she did, to consider the evidence carefully, bearing in mind the relevant legal tests, and conclude as she did. It has not been shown that she erred in law in any of the respects adverted to in the grounds.

26. I have already in effect addressed grounds 1 and 2. The point at ground 3 with regard to the contrast between her concerns about the reliability of the appellant's evidence that his children want to see his house and where he is living and they do not want him to leave the United Kingdom was open to her. All that is argued in contrast to that is that his daughter wrote she was so excited to go to his house but that does not deal with the totality of the concerns the judge had about the reliability of the appellant's evidence and her conclusion that what he had to say was not evidenced from the limited correspondence which had been disclosed. The fact that there were requests from the children for items such as trains and bikes in that limited correspondence does not materially weaken her conclusion that he had not demonstrated that he had a family life with the children. She was not selective with regard to the parts of the Family Court adviser's evidence she was willing to accept. It was open to her to accept the references to physical abuse but to conclude, as she did, on the evidence before her that the possibility that indirect contact could lead to the building of a relationship was not realistic. Proper consideration was given to the rights of the children. It cannot properly be argued that the judge erred with regard to section 117B(6), in light of her sustainable conclusion that there was not family life. No error of law in the decision has been identified and that decision is accordingly maintained.

Notice of Decision

The appeal is 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 10 September 2019

Upper Tribunal Judge Allen