



**Upper Tribunal  
(Immigration and Asylum Chamber)**

PA/02120/2020 (V)

THE IMMIGRATION ACTS

Heard by “*Microsoft Teams*”  
from George House  
on 11 August 2021

Decision and reason promulgated on  
08 September 2021

Before

UT JUDGE MACLEMAN

Between

**O T O**

and

Appellant

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the Appellant: Mr Farrell, of Peter G Farrell, Solicitors  
For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Nigeria, born on 18 November 1992. FtT Judge McLaren dismissed her appeal on protection and on human rights grounds by a decision promulgated on 3 December 2020.
2. The appellant applied to the FtT for permission to appeal to the UT, on the human aspect only. The grounds went to findings on the relationship between the appellant’s infant son and the child’s father. Judge Adio refused permission on 19 January 2021, on the view that given the limited part the father plays in the child’s life, there was no arguable error of law in the outcome.

3. The appellant applied for permission to the UT. The thrust of the grounds is that physical proximity is of the essence of family life; it is difficult to imagine what kind of sustained zoom or skype call an adult might have with a 7 month old child; the FtT did not address the principle that for a father and son relationship to have any chance of functioning properly, an element of close proximity is required; and even if the father's role was limited, the FtT had not taken into account that it was still in the child's best interests to have contact, so as to develop a proper relationship.
4. Ut Judge Rimington granted permission on 23 February 2021, on the view that there was arguably an obvious error, although not identified in the grounds, in that the child had not been born at the date of the respondent's decision, and this was a "new matter", not open for decision unless with the respondent's consent; subject to which, it was arguable that the best interests of the child were not adequately considered.
5. Parties agreed that the new matter was raised with consent of the respondent, as recorded in the decision at [6], setting out the issues drafted by the respondent and approved by the appellant, ending with (vi), "If Article 8 is engaged, would the appellant's removal result in unduly harsh consequences for the appellant or her son?"
6. Mr Farrell submitted further to the grounds, relying on textbook and case law authority that remote communications are not an adequate mode of family life, and that physical proximity is of the essence. Although the adverse credibility findings had to be accepted, the FtT had concentrated on the father, not on the child. Even if the father's role was limited, it was in the child's best interests for it to continue and to develop, which in the case of an infant could not happen without physical proximity. The decision should be reversed.
7. Ms Cunha accepted that the judge had looked at the situation of the child in terms of "unduly harsh consequences" when the test should have been "best interests", but she said that was immaterial. The judge looked at all relevant circumstances and came to the correct conclusion. The child is a baby, his mother is plainly his primary carer, his father plays a very limited role, it is in his best interests to remain with her, and there is no question of them being separated. His father's other children live far away in different family units with their mothers. There was nothing to show any significantly adverse impact on his interests through leaving for Nigeria with his mother. Although the decision did not rehearse the best interests issue, the grounds took nothing away from thorough findings of fact from which the outcome was clear. The decision should stand.
8. Mr Farrell had nothing to add in reply.
9. I reserved my decision.
10. The terms in which the judge analysed the case arose from the way it was put by representatives. The position of the child was not dealt with in the respondent's decision, because the child had not then been born. It was

agreed in the FtT that the issue arose whether the appellant's removal would "result in unduly harsh consequences" for her "or her son". Her representative submitted accordingly; see paragraphs 6 (vi), 44, and 45 of the decision.

11. I note that the phrase "best interests" occurs at 44 (a), where the judge says that the "statement [by the child's father] that his presence alone would be sufficient to support the child is not consistent with the view of a parent committed to his child's best interests"; but that is a passing comment, not the final resolution of the case.
12. The duty to treat the best interests of the child as a primary (but not paramount) consideration is an obvious point. The judge's conclusion should have been considered and formulated in those terms.
13. Apart from the legal test, the appellant's grounds do not disclose any error. It is well established that remote communication is no substitute for family life, most obviously so for an infant; but the judge did even hint that it might be. She doubted if the child's father video-called the baby as often as claimed, but found that even if he did, that could continue from Nigeria to Glasgow as easily as from London to Glasgow. There is no error in that part of the analysis.
14. Physical proximity is obviously at its highest importance in family life with an infant. There is a need to consider family life not only as matters stand but as they might develop. There is no relationship here between the parents, but even without such a family unit, there are cases where a mother cannot lawfully be removed due to the significance of a father's role in advancing the best interests of their child. There is a presumption that it is in the best interests of a child to have contact with both parents.
15. In this instance, the judge found at 44 that (a) the father played a limited part in the child's life; (b) he was not committed; (c) his evidence of visiting twice a month for a full weekend was fabricated; (d) his evidence of poor internet in Nigeria was fabricated; and (e) the child's parents were not spending the periods of time together with the child which they claimed. No error has been suggested in any of those findings, based on which, even if the judge had drawn her conclusions in terms of the best interests of the child, the outcome would have been that removal of the appellant would not be significantly adverse to those interests. The error is not such as to require the decision to be set aside.
16. Alternatively, if the decision had been set aside, I would have remade it, treating the best interests of the child as a primary consideration, to the same effect, based on the FtT's undisturbed primary findings, for the reasons above.
17. The decision of the FtT shall stand.
18. An anonymity direction is in place.

Hugh Macleman

13 August 2021  
UT Judge Macleman

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### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **“working day”** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is **“sent”** is that appearing on the covering letter or covering email.