Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-002953**
HU/51271/2021; IA/07314/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 2 November 2022

Decision & Reasons Promulgated
On the 23 January 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

OKE UMURHOHWO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms W Ansah-Twum, Counsel instructed by Waterdenes Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born in 1989. He arrived in the UK in April 2014 as a visitor and overstayed. He made an application on 29 May 2020 for leave to remain on human rights grounds. That application was refused in a decision dated 12 April 2021 with reference to Article 8 of the ECHR.

2. The appellant appealed against that decision and his appeal came before First-tier Tribunal Nixon ("the FtJ") at a hearing on 28 April 2022. That hearing resulted in the appeal being dismissed in a decision promulgated on 10 May 2022. Permission to appeal having been granted, the appeal comes before me.

The FtJ's decision

3. The FtJ's summary of the appeal before her included that the appellant met his partner, MP, in 2017 and moved in with her in in January 2018. He had not been able to supply documents to support his claim because of his immigration status. His partner has a son, T, with whom the appellant sees himself as a father figure, T's biological father having played no role in his life for over ten years. T suffers from ADHD and receives medication for that condition. Although not noted in the FtJ's decision, T was born in January 2007 and was therefore aged 15 at the time of the appeal before the FtJ.

4. The appellant's claim before the FtJ was that MP could not relocate to Nigeria as T is at school and the school are familiar with his condition. The appellant would have no job to go in Nigeria and his partner has no qualifications.

5. The FtJ concluded that the appellant could not meet the eligibility requirements of Appendix FM of the Immigration Rules ("the Rules") as he had been an overstayer since 2014. She next turned to consider paragraph EX.1. of the Rules. She concluded that the appellant had not established that he and his partner are in a durable relationship. It was conceded on behalf of the appellant before the FtJ that there was insufficient documentation that they had been living together for two years and the earliest documentation that the FtJ had seen, she said, was from September 2021, thus many months off the necessary two-year period. She said that whilst she understood the argument that the appellant's status made it difficult for him to obtain some documents, he managed to have his name on various bills in 2021 and 2022 and his status remains the same "thus defeating this argument". She also said that there was nothing preventing him from registering with a GP.

6. She referred to letters from MP and friends/family but concluded that that evidence was insufficient for her to be able to determine the length of their cohabitation.

7. In the alternative, she went on to conclude that there were no insurmountable obstacles to their relationship continuing outside the UK. She referred to the decision in *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 in relation to the test of 'insurmountable obstacles'.

8. In relation to MP suffering from fibromyalgia, she said that there was no evidence to show that she could not receive treatment for that condition in Nigeria. Similarly, relocating to Nigeria would not prevent them having a child together. She rejected the assertion that they would not be able to find work in Nigeria, although accepted that obtaining employment may be difficult in a new country. She said that there was no reason why the appellant's partner would find it "more difficult than any other unqualified woman in Nigeria". In addition, she referred to the appellant having family members in Nigeria who could accommodate and support them whilst they found employment and a home.

9. Whilst the appellant's partner could not be compelled to go to Nigeria with him, she said that it would be her choice not to accompany him and not return to the UK for family visits. The FtJ concluded that there was no evidence to show that there were very significant obstacles to their relationship continuing in Nigeria. Thus, the requirements of Appendix FM of the Rules could not be met.

10. At [25] she said this:

> "Similarly, as I cannot find on the evidence before me that they are partners within the definition of the Rules, I do not find that he is in a parental relationship with [T]."

11. She noted that although T suffers from ADHD, there was no evidence that the medication he is receiving is not available in Nigeria or that schools could not deal with such a condition. She found that the appellant could not meet the criteria in paragraph EX.1. of the Rules.

12. At [26] she concluded that there were no very significant obstacles to the appellant's re-integration in Nigeria given that he had spent the majority of his life there, speaks the language and would be familiar with the life and culture of the country. She also pointed out again that he has family there who could assist with his reintegration.

13. As to whether there were "exceptional reasons" to consider the case outside the Rules, she concluded that there were not. At [28] the FtJ said as follows:

> "It is not disputed by the respondent that the appellant is in a genuine relationship and that they are now living together. I find therefore that he has established family life in the UK. There can be little argument that the decision interferes with that family life."

14. Going on to consider the issue of proportionality, she noted that the appellant was unable to meet the requirements of the Rules and that he had been in the UK without leave since 2014. She concluded that little weight could be attached to the family and/or private life that he has established. His relationship with his partner could continue either in Nigeria or via modern means of communication and his partner visiting him. In respect of his relationship with T, that relationship could also

continue in a similar way. T would be in the UK with his mother and that would be in his best interests.

15. The FtJ concluded that the factors in favour of the appellant's removal outweigh any family or private life he may have established. Accordingly, the decision was proportionate, she found.

The grounds and submissions

16. The grounds of appeal are fourfold. Ground 1 contends that the FtJ was wrong in stating at [21] of her decision that the earliest documentation in relation to the appellant's cohabitation dates from September 2021. The grounds identify documents from 7 August 2020 to 13 April 2021 which it is said the FtJ neglected to consider.

17. This ground also argues that the FtJ misdirected herself as to the appellant's evidence in that although she referred to the appellant's evidence that it was difficult to get utility bills due to his immigration status, contrary to what the FtJ said the fact that he was able to get some such bills does not 'defeat the argument' that it was very difficult to get them.

18. It is also said that the FtJ failed to attach weight to the evidence of the appellant's partner from her letter of support to the effect that they started living together on 15 January 2018. That was also the effect of her witness statement. At the hearing she was not asked questions about that aspect of her evidence.

19. Ground 2 takes issue with the FtJ's conclusions in relation to insurmountable obstacles. The FtJ, it is said, failed to consider the effect of the appellant's partner changing her treatment team in relation to her medical condition and failed to take into account the evidence as to that condition in the letter from the physiotherapist dated 27 July 2021.

20. The finding that there was no reason why the appellant's partner would find it more difficult than any other unqualified person in Nigeria to obtain employment failed to consider the fact that she is not of Nigerian, African or black heritage, does not speak any of the Nigerian languages, has never been to Nigeria or Africa before, and the fact of her medical condition.

21. Ground 3 contends that there was a contradiction in the FtJ's decision whereby at [25] she said that the appellant does not have a parental relationship with T but then at [28] she said that he had established family life in the UK. The grounds contend that because the appellant is in a durable relationship with his partner he had a parental relationship with T, his stepson.

22. Ground 4 argues that paragraph EX.1 does not include as an option that a child with whom an appellant has a genuine and subsisting parental

relationship, or a relationship with a partner, should remain in the UK. The test is whether it would be unreasonable to expect the child to relocate or whether there were insurmountable obstacles to family life with the partner continuing in Nigeria.

23. Ground 5 contends that the FtJ "failed to attach weight" to the medical letters in relation to T and his partner and the role that he plays in their coping with their conditions. This ground expresses disagreement with the conclusion that they could continue their relationship whilst they remain in the UK and the appellant is in Nigeria.

24. In submissions before me Ms Ansah-Twum relied on the grounds. It was submitted that the documents that the FtJ failed to take into account were significant even though they did not establish a two year cohabitation prior to the date of the decision. They nevertheless bring the appellant closer in terms of documentary evidence to that two year period. That was significant when his partner's evidence is taken into account.

25. Ms Ansah-Twum accepted that the physiotherapist's letter dated 27 July 2021 referred to in the grounds is incomplete in the bundle. It also appeared that the letters from T's school referred to in the grounds were not actually provided to the respondent and were not before the FtJ.

26. It is otherwise not necessary for me to summarise other aspects of the oral submissions made on behalf of the appellant which highlighted aspects of the grounds with reference to the FtJ's decision.

27. Mr Lindsay relied on the respondent's 'rule 24' response. That response variously contends that aspects of the grounds amount only to disagreement with the FtJ's decision. It is, however, accepted in the rule 24 response that the six items of evidence referred to in the appellant's grounds were not expressly referred to in the FtJ's decision. However, even the earliest documentation referred to leaves the appellant short of the necessary two year period of cohabitation to establish a durable relationship within the Rules, it was submitted.

28. So far as the asserted parental relationship is concerned, the decision in *RK, R (on the application of) v Secretary of State for the Home Department (s.117B(6); "parental relationship" (IJR*) [2016] UKUT 31 (IAC) establishes that the test for family life is completely different from the test of whether there is a parental relationship.

29. In oral submissions Mr Lindsay accepted that there was an error in the FtJ's decision in apparently overlooking or not mentioning the evidence referred to in the grounds. In addition, although it was accepted on behalf of the appellant at the hearing before the FtJ that there was a lack of documentary evidence to show the necessary two years' period of cohabitation, it was nevertheless advanced in argument before the FtJ that there was evidence from the appellant's partner and letters from family members attesting to the durable relationship. Mr Lindsay accepted that it

is difficult to say that the FtJ's finding in relation to the durable relationship would have been the had those matters had been considered by the FtJ.

30. However, it was submitted that any error in that respect was not material because even if the appellant could gain access to paragraph EX.1 the FtJ did undertake a consideration of the issue of insurmountable obstacles and concluded that the test was not met. Even taking the appellant's case at its highest, it only meant that paragraph EX.1 applied but the FtJ gave a correct self-direction in terms of the insurmountable obstacles test. Thus, there was no materiality in any error of law.

31. It was submitted that ground 2 was mere disagreement with the FtJ's conclusions. As far as ground 3 is concerned, it was reiterated that the test for family life was not same as the test for whether an individual has a genuine and subsisting parental relationship, as explained in *RK*, which was approved by Court of Appeal.

32. In relation to ground 4, that stands or falls with the other grounds. The question of whether it would be reasonable to expect the child to leave the UK would only need to be engaged with if there was a genuine and subsisting parental relationship. The FtJ was entitled to conclude that there was not.

33. Mr Lindsay did, however, point out that the appellant's skeleton argument that was before the FtJ did make it clear that the appellant relied on the argument that the appellant had been a father figure to T since he entered into the relationship with his partner. It was a question for me to determine, he submitted, whether the FtJ properly engaged with that submission. That was not to say that this aspect of the appeal was conceded but it was drawn to my attention in fairness.

34. Similarly, Mr Lindsay did also very properly point out that there was a letter from T in the appellant's bundle that was before the FtJ, explaining the appellant's relationship with him.

Assessment and Conclusions

35. It is not necessary for me to express a concluded view on every aspect of the grounds because I am satisfied that there are errors of law in the FtJ's decision in terms of the conclusion that the appellant had not established that the appellant's partner meets the definition of that term as set out in the Rules. GEN.1.2.(iv) provides that a 'partner' includes a person who has been living together with the applicant in a relationship akin to a marriage for at least two years prior to the date of application. It is the living together for two years which was in issue before the FtJ.

36. There was, admittedly, a lack of documentary evidence to establish that two year period. In that context, however, the FtJ was wrong to say that the earliest documentation dated from September 2021. As the grounds

point out, there is a letter from Reading Borough Council to the appellant and his partner at the address at which they are said to live, dated 17 November 2020. The council tax letters and the NHS registration letter identified in the grounds date from 13 April 2021 to 8 July 2021. Even the earliest of 17 November 2020 is short of the qualifying two year period for the purposes of the Rules and the definition of 'partner' but it seems to me that there is some merit in the submission made on behalf of the appellant to the effect that this does close the gap to a significant extent and undermines the FtJ's conclusions as to the length of the cohabitation. In concluding that the earliest document was in September 2021, that makes the period of cohabitation a period of only seven months as at the date of the hearing.

37. Furthermore, there is merit in the proposition that the FtJ does not appear to have made a finding on the appellant's partner's evidence in written form that they started cohabiting in January 2018. Although the FtJ referred to that aspect of the appellant's case at [10] the only other apparent reference to written evidence is at [21] where the FtJ said that she has seen letters from the appellant's partner and friends and family but that that evidence was "insufficient for me to be able to determine the length of their cohabitation". That, to my mind, is not a finding in relation to that specific aspect of the evidence from the appellant's partner.

38. The letters from family and friends do not, in fact, assist this aspect of the appellant's argument because they do not refer to the length of the relationship.

39. Nevertheless, I am satisfied that the FtJ fell into error in her assessment of the evidence for the reasons explained above.

40. So far as the relationship with T is concerned, as Mr Lindsay quite properly pointed out, the nature of that relationship is supported by the letter from T in the appellant's bundle. The letter is handwritten. It refers to their bond having progressed "over the couple of years". It states that they play together often, and spend time together in town, in the park and at home. It states that he helps with his homework, sitting next to him, and helped him with his school work during COVID. It has other expressions of the extent of their relationship (and that with his mother).

41. It is not evident from the FtJ's decision that she took that aspect of the evidence into account. If she did, there is no apparent finding in relation to it.

42. Furthermore, it does seem to me, as I mentioned at the hearing to the parties, that [25] of the FtJ's decision is problematic in terms of the assessment of the relationship between the appellant and T. She said that "as I cannot find on the evidence before me that they are partners within the definition of the Rules, I do not find that he is in a parental relationship with [T]". It seems there, that the FtJ was directly correlating the lack of evidence that the appellant and his partner were partners within the

meaning of the Rules, with the question of whether he was in a parental relationship with T. As I have indicated, I am satisfied that the FtJ erred in law in her assessment of the relationship between the appellant and his partner in terms of its duration.

43. Accordingly, in the light of the observations I have made above, in terms of the evidence that the FtJ appears not to have taken into account, or made findings on as to the relationship between the appellant and T and because of the matter identified in relation to [25], I am similarly satisfied that the FtJ erred in law in her assessment of whether or not the appellant has a parental relationship with T. That is not to say that the evidence before the FtJ would otherwise establish that there was a parental relationship, but the FtJ's analysis as far as it went was erroneous in law.

44. Those errors in the FtJ's conclusions and analysis require the decision to be set aside. In the light of the need for a reassessment of the evidence in crucial respects, the appropriate course, having regard to paragraph 7.2 of the Senior President's Practice Statement, is for the to be remitted to the First-tier Tribunal for a hearing afresh, with no findings of fact preserved except as agreed between the parties.

Decision

45. The decision of the First-tier Tribunal involved the making of an error on a point of law. It's decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Nixon.

A. M. Kopieczek 12/12/2022
Upper Tribunal Judge Kopieczek