



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05807/2016

THE IMMIGRATION ACTS

Heard at Field House
On 17 April 2018

Determination Promulgated
On 22 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

MR K O L
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bahja, Counsel for Jesuis Solicitors, Ilford
For the Respondent: Ms Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 2 February 1980. He appealed against the decision of the respondent dated 10 February 2016 refusing him leave to remain in the United Kingdom on the basis of his family and private life. His appeal was heard by Judge of the First-Tier Tribunal Mill on 20 June 2017 and dismissed under the Immigration Rules and on human rights grounds in a decision promulgated on 27 June 2017.
2. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Martin on 4 January 2018. The permission states that the grounds assert that the Judge erred in considering it reasonable to expect a British citizen child to leave the United Kingdom under Section 117B(6). It is arguable that the Judge failed to take the Secretary of State's policy on that matter into account and

that the Judge erred in finding that he could not consider EX.1 as the evidence of the step-child's nationality was not before the Secretary of State.

3. There is a Rule 24 response on file which states that the First-Tier Judge made findings open to him. Reference is made in the response to paragraph 23 of the decision which points out that the appellant's step-son is also a citizen of Nigeria. The step-son's mother, the appellant who is his step-father and the step-son's half-brother are all citizens of Nigeria and the step-son has extended family in Nigeria. The step-son has not yet commenced his formal primary education and the response states that any private life he has formed in the United Kingdom is minimal. The response states that the appellant is well qualified and previously had gainful employment in Nigeria and will benefit on return to Nigeria by the additional educational qualifications he has obtained in the United Kingdom. The response states that the SSHD policy is not legally binding on the First-Tier Judge and that the First-Tier Tribunal Judge directed himself appropriately.

The Hearing

4. Counsel for the appellant referred to his skeleton argument. First of all he dealt with paragraphs 6 to 10 of the argument in which he states that the First-Tier Tribunal Judge failed to apply the respondent's policy on family and migration under Appendix FM and the ten year route as a partner or parent and private life, when he found that it would be reasonable to expect a British child to relocate to Nigeria. I was referred to the case of *SF & Others (Albania)* [2017] UKUT 120 (IAC). This case states that where a decision to refuse an application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the UK with that parent. Counsel submitted that there could be circumstances where it would still be reasonable for the child to leave the United Kingdom but these would be based on the parent's history and conduct in the United Kingdom and the only thing the appellant has against him is that he is an overstayer. He does not have a poor immigration history, he has never absconded, failed to report or made many unsuccessful applications. I was referred to the decision by the First-Tier Judge at paragraphs 17 (iv) and (v) where the Judge finds that the appellant's wife's first child is British and that child is the appellant's step-son and holds a British passport.
5. At paragraph 21 of the decision the Judge accepts that there is a genuine and subsisting relationship between the appellant and his step-son. I was asked to consider the caselaw referred to in the skeleton argument relating to British children, and Counsel pointed out that the respondent's policy was not put to Judge Mill and had it been he might have come to a different conclusion.
6. I was asked to consider the case of *MA (Pakistan)* which states that there can be no doubt that Section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, public interest will not justify removal. I was then referred to the case of *Trebbhawon & Others* [2015] UKUT 674 and I was asked to note that the Judge finds

that the appellant has a subsisting relationship with his step-son, he is not liable to deportation and his step-son is a qualifying child. He submitted therefore that it would be unreasonable to expect the appellant to leave the United Kingdom and I was referred to paragraph 27 of the decision when the Judge states that having reviewed the whole circumstances of the appellant and of the two relevant children this would not be unduly harsh or disproportionate. He submitted that it is not clear what test the Judge was applying. The appellant speaks English and is financially independent. He submitted that these matters were not considered by the Judge and he submitted that the appellant's step-son cannot reasonably be expected to go to Nigeria if the appellant has to leave the United Kingdom.

7. I asked Counsel if I have to consider this claim outside the Immigration Rules only and was told that that is the case and that reasonableness is the issue and Schedule 117B(6) has to be carefully considered.
8. I asked if it is correct that the appellant's step-son is both British and Nigerian and I was told that he is.
9. The Presenting Officer made her submissions relying on the Home Office policy and the reasonableness issue for British children. She submitted that what I have to decide is whether the Judge's unreasonable findings are justified. She pointed out that the child does not live with the appellant and is not cared for by the appellant but by his former partner. She submitted that the child has Nigerian nationality, is fit and healthy and has no special needs. He and the appellant live apart and when the Judge found it would be reasonable for the appellant's step-son to leave the United Kingdom the finding was open to him. She submitted that the Judge gave proper reasons for his finding.
10. Counsel submitted that the Judge's failure to apply the Home Office policy is material. It is clear that he did not apply it and it is clear that he found that there is a genuine and subsisting relationship between the appellant and his step-son. He submitted that it cannot be reasonable to expect his step-son to go to live in Nigeria and there is a material error of law in the Judge's decision.

Decision & Reasons

11. The core of this claim is whether it would be reasonable for the appellant's step-son to leave the United Kingdom when considering Section 117B(6) of the 2002 Act. The appellant is Nigerian and his biological child with his step-son's mother is Nigerian. Also, although the step-son is British he is also Nigerian. There is extended family in Nigeria.
12. The appellant's step-son was born in 2012. This appellant has no right to be in the United Kingdom unless it is found that he is entitled to be here because of his step-son's British nationality, however the Judge at paragraph 25 states that if the appellant's wife chooses not to return to Nigeria his son and step-son will reside with their mother in the United Kingdom which is what is happening now and at present

the appellant is not staying with that family. Counsel has argued that if the appellant has to go back to Nigeria there will be separation problems with the children, however as the appellant and the children do not stay together, although there is a subsisting relationship, I find it would be perfectly reasonable for the appellant to return to Nigeria and for his step son and biological son to remain in the UK with their mother with whom they stay now. Although the First-Tier Judge did not take the Secretary of State's guidance into account, the guidance is not binding and the appellant is an overstayer who has no right to be in the United Kingdom. All his family members are Nigerian. The fact that his step-son has dual nationality carries little weight to the appellant's claim.

13. This application cannot succeed under the Rules and I find that it cannot succeed outside the Rules. The appellant's wife is the main carer of the children and as their mother and the appellant are presently apart I find that it is in his step-son's best interests to remain in the United Kingdom with his mother and half-brother with whom he has always stayed.

Notice of Decision

I find that there is no material error of law in the Judge's decision. His decision, promulgated on 27 June 2017 must stand.

Anonymity has been directed.

Signed

Date 19 June 2018

Deputy Upper Tribunal Judge Murray