Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: HU/11249/2017

THE IMMIGRATION ACT

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd November 2018	**On 6th December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Ms Rose Okoronkwo

(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Isherwood Senior Home Office Presenting Officer

For the Respondent : Mr E Eluwa, of Finsbury Law Solicitors.

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department [SSHD] against the decision of First-tier Tribunal Judge Herbert promulgated on the 26th July 2018 whereby the judge allowed Ms Okoronkwo's appeal against the decision of the SSHD to refuse Ms Okoronkwo's human rights appeal.

2. I have considered whether or not it is appropriate to make an anonymity direction. Having considered all the circumstances I do not consider it necessary to make an anonymity direction.

3. Leave to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Foudy on 7th September 2018. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.

4. The grounds of appeal raise amongst other things the following issues: –

   a) The judge found that the respondent was unable to meet the eligibility requirements under the immigration rules under Appendix FM as a parent. The judge however went on find that the respondent satisfied the requirements of paragraph EX.1. In light of the case of Sabir (App FM -EX.1 not freestanding) [2014] UKUT 00063 the judge misdirected himself in finding that the respondent could succeed as meeting paragraph EX 1.

   b) It is also arguable that the judge erred in treating the adult nephew of the respondent as a child under section 117B (vi).

Factual background

5. The respondent's claim is based upon her relationship with her British citizen nephew. The nephew, Christopher Oguh, was born on 29th December 1999. At the time of the hearing before Judge Herbert, Mr Christopher Oguh was therefore over 18 years and an adult.

6. Mr Christopher Oguh was born in Nigeria and had lived in Nigeria with the respondent until 2012. The mother of Christopher Oguh had been in the relationship with Mr Oguh senior and became pregnant. When Mr Oguh senior refused to marry her, she allegedly walked away from him and Mr Christopher Oguh. Thereafter she had nothing to do with the upbringing of Mr Christopher Oguh. It is not entirely clear as to when, but thereafter Mr Oguh senior came to the United Kingdom and has been here a significant period of time and is settled here. Responsibility for the upbringing of Mr Christopher Oguh fell to Mr Oguh's sister, the respondent.

7. In March 2012 Mr Christopher Oguh was granted a visa to enter the UK to join his father, the brother of the respondent, Mr Oguh senior. The basis for Mr Christopher Oguh coming to the United Kingdom must have been under the Immigration Rules paragraph 297, which would require Mr Oguh to have sole parental responsibility. As the basis for granting entry was not put before the Tribunal I put such considerations aside.

8. At the time of Christopher Oguh's entry to the UK the respondent accompanied him. She entered on a visit visa. On the 7th August 2012 she returned to Nigeria.

9. Once the respondent had returned to Nigeria, it is claimed that Mr Christopher Oguh suffered serious emotional problems because of being separated from the respondent. So the respondent returned to the UK on the 29th November 2012. Mr Christopher Oguh would have been 12 or thereabouts at the time. It is to be noted that the respondent at that stage was alleged to have 2 children of her own, although their ages are not specified, and it was claimed that she was working for a Government Ministry in Nigeria. The respondent re-entered the UK on a visit visa.

10. The respondent has been residing in the UK since that date. In order to enter the United Kingdom in November 2012 the respondent had made a further application for a visit visa. The visa, a multi-entry visit visa valid for two years between November 2012 and November 2014, only permitted the respondent to enter for a period of six months at any one time and as a visitor. Despite the fact that Christopher Oguh was to remain in the United Kingdom and it was to deal with his emotional problems caused by separation, it is claimed that the respondent intended to return to Nigeria.

11. The respondent remained in the UK beyond the six months permitted by the terms of the visa. The present application under appeal was made by the respondent on 4 October 2016 on the basis of human rights.

12. In allowing the appeal Judge Herbert allowed it not only under Article 8 but also under the Immigration Rules. Clearly given the current appeal structure and grounds of appeal it is not possible for an appeal to be allowed under the Immigration Rules. Whilst whether an individual does meet the requirements of the rules will be a significant factor in assessing whether or not the decision is proportionately justified for the purposes of Article 8, it does not alter the fact that the appeal is not being allowed under the Immigration Rules. However as the judge has allowed it also on the basis of Article 8 any error with regard to the rules may make no material difference.

13. However central to the judge's consideration of the appeal were his findings with regard to the Immigration Rules. In seeking to examine the respondent's position under the Immigration Rules and in determining whether or not there was a parental relationship between the respondent and Mr Christopher Oguh the judge has relied upon the case of RK v SSHD (Section 117B) (6) "parental relationship" 2016 UKUT 31.

14. In respect of the case I would firstly draw attention to paragraphs 43 and 44 of the decision:-

> *43. I agree with Mr Mandalia's formulation that, in effect, an individual must "step into the shoes of a parent" in order to establish a "parental relationship". If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a "parental relationship" with the child. It is perhaps obvious to state that "carers" are not per se "parents." A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example whilst the parents are at work) or even longer term (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a "parental relationship."*
>
> *44. If a non-biological parent ("third party") caring for a child claims such a relationship, its existence will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the*

> *child also. It is unlikely, in my judgment, that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents as in a case such as the present where the children and parents continue to live and function together as a family. It will be difficult, if not impossible, to say that a third party has "stepped into the shoes" of a parent.*

15. Here throughout the period that Mr Christopher Oguh has been in the United Kingdom the biological father has been present and living with him. It is also to be noted that there was a break albeit of just short of four months, between 7 August 2012 and 29 November 2012, when the respondent was back in Nigeria. To that extent the judge had to determine whether or not, as set out in paragraph 46 of the decision, the father of the child had relinquished legal or even de facto responsibility for the child and if so to what degree. It does not appear that the judge has made a finding that Mr Oguh Senior has relinquished de facto responsibility for the child.

16. At paragraph 23 and 24 the decision Judge Herbert found that the respondent did not meet the criteria under the provisions of Appendix FM-E-LTRPt.2.2. Thereafter the judge goes on in paragraph 25 to find that the respondent does not meet the requirements of Ex.1.

17. The judge then makes reference in paragraph 26 to the 10 year parent route and claims that under the 10 year parent route the respondent must meet the requirements of "*Appendix EX.1 of Appendix FM".* I have some difficulty in establishing exactly what the judges referring to. There are provisions within the Immigration Rules under appendix FM in respect of partners as to 5 year and 10 year routes but not in respect of parents.

18. However an examination of paragraph EX.1 (aa) means that the provision only applies where the child is under the age of 18 or was under the age of 18 when the applicant was first granted leave on the basis that this paragraph applied. The respondent has never been granted leave under the paragraph. In the circumstances the paragraph does not apply. Further Mr Christopher Oguh was not at the date of the hearing and is not under the age of 18.

19. It appears that the judge was applying Ex.1 as a free standing right. That clearly has been held to be wrong in the case of Sabir (App FM -Ex.1 not freestanding) 2014 UKUT 00063.

20. Further as stated the judge refers to a 10 year parent and a five-year parent route. In Appendix FM -E-ILTRP [in respect of applications as a partner] under E-ILTRP.1.3 there are reference to 5 year and 10 year routes but those are not applicable to a parent. The judge seems to have imported criteria from other parts of the rules which are not applicable in the present circumstances. That may have made no material difference if findings with regard to the Immigration Rules were distinct from and do not influence the findings in respect of article 8.

21. However it is unclear to what extent the judge's misapplication of the rules has influenced his decision with regard to Article 8.

22. The judge within paragraph 31 continues to refer to Mr Christopher Oguh as a child. At the time of the hearing and materially at the time for assessing the Article 8 rights of the parties, Christopher Oguh was not a child. At that stage in order to assess the article 8 rights it was necessary to consider the criteria set down in Kugathas 2003 INLR 170, 2003 EWCA Civ 31. The judge has made no assessment of the factors set out in the case law.

23. The judge in paragraph 36 and 37 refers to the respondent having been granted a two years Visitors Visa from November 2005 to November 2007, then a five-year Visit Visa until November 2012 and thereafter again from 15 November 2012 to 15th of November 2014. The judge suggest that the respondent has been in the United Kingdom therefore a significant period of time perfectly lawfully. That totally ignores the fact that the respondent at any one period of time was only entitled to be in the United Kingdom for six months as a "visitor" and not as a person residing in the United Kingdom. Again the judge has misunderstood the nature of the right of the respondent. The respondent had not been in the United Kingdom lawfully.

24. In the circumstances there are clear errors of law in the way that the judge has assessed the article 8 rights of the parties. It is material that Mr Christopher Oguh was an adult at the time of the hearing. It was material that the father of Mr Christopher Oguh was still living with him. It was material that the respondent had ceased to be lawfully in the United Kingdom and paragraph 117B was therefore applicable. In the circumstances there are clear errors of law which render the decision unsustainable.

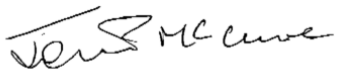
25. I set the decision aside and direct that the matter be remitted back to the First-tier Tribunal for hearing afresh before a judge other than Judge Herbert. I do not preserve any findings of fact.

Notice of Decision

26. I allow the appeal by the SSHD.

27. I set the decision aside and direct that this matter be remitted back to the First-tier Tribunal and that the appeal be heard afresh

28. I do not make an anonymity direction

Signed 

Date 30th November 2018

Deputy Upper Tribunal Judge McClure