Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/31825/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 June 2019	**On 13 August 2019**

Before
UPPER TRIBUNAL JUDGE FINCH

Between
MICHAEL [O]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. L. Youssefian of counsel, instructed by Fadiga & Co Solicitors

For the Respondent: Mr. N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant, who is now 25 years old, is a national of Nigeria. He arrived in the United Kingdom in March 2003 and was enrolled at [H] Primary School on 29 April 2003. He transferred to the [SHRC] Secondary School in September 2005. He applied for leave to

remain under paragraph 276ADE of the Immigration Rules on 15 January 2014 and prior to that date he did not have any leave to remain. He was refused leave to remain on 24 July 2014 on the basis that he had failed to meet the suitability requirements. He appealed and his appeal was allowed under the Immigration Rules and under Article 8 of the ECHR by First-tier Tribunal Judge Amin in a decision, which was promulgated on 25 March 2015. The Respondent appealed and First-tier Tribunal Judge Pooler granted him permission to appeal on 28 May 2015.

2. The appeal came before Deputy Upper Tribunal Judge Lewis on 15 September 2015, but he adjourned the hearing so that the Respondent could apply for permission to rely on a further ground of appeal. Upper Tribunal Judge Southern granted permission on this further ground on 5 May 2016. In a decision, promulgated on 19 August 2016, Upper Tribunal Judge Kamara and Deputy Upper Tribunal Judge Harris found that there had been an error of law in First-tier Tribunal Amin's decision and remitted the appeal so that it could be heard *de novo* in the First-tier Tribunal.

3. Furthermore, in a decision, promulgated on 4 April 2017, First-tier Tribunal Judge Grant dismissed the Appellant's appeal on human rights grounds. First-tier Tribunal Andrew refused the Appellant permission to appeal against this decision on 11 October 2017, but Upper Tribunal Judge Freeman granted him permission to appeal on 10 November 2017. In a decision, promulgated on 10 May 2018, Upper Tribunal Judge Jackson found that there had been an error of law in First-tier Tribunal Judge Grant's decision and set aside the decision. However, she then went on to dismiss the Appellant's appeal on all grounds.

4. However, on 26 November 2018 Upper Tribunal Judge Jackson set aside the substantive decision that had been promulgated on 10 May 2018, on the basis that the decision in *KO (Nigeria) & others v Secretary of State for the Home Department* [2018] UKSC 53 would have had a material effect on her decision. She then directed that the case be listed for a *de novo* hearing before another Upper Tribunal Judge.

5. This hearing was set down to be heard by me on 31 January 2019, but I vacated that hearing on 29 January 2019 in order to have the benefit of the decisions in two cases set down before the President on 13 and 15 February 2019 and I listed the case for a CMR on 31 January 2019.

6. In response to my earlier directions, the Appellant's solicitors filed and served a consolidated bundle for the hearing listed for 20 May 2019 on 15 May 2019. This included a further statement by the Appellant, dated 13 May 2019 and further statements by his father and mother, also dated 13 May 2019. In addition, the Bundle contained a Police National Computer printout. At that hearing, the Appellant disclosed that he had not been in contact with his son since December 2018. As a consequence, the hearing was adjourned part-heard in order for him to make an application for a child arrangements order in a Family Court, if this proved to be necessary.

RESUMED HEARING

7. At the hearing before me on 28 June 2019, counsel for the Appellant explained that it had not been necessary for the Appellant to seek representation from the Bar Council Pro Bono Unit and apply for a child arrangements order from the Family Court as he has been able to resume direct contact with his son. He had been assisted in doing this by his ex-partner's mother. There was a statement from her in the Appellant's Supplementary Bundle and she also attended court on 28 June 2019. She was called as a witness and adopted her witness statement. Mr. Bramble did not seek to challenge the content of her statement or the Appellant's witness statement, dated 19 June 2019, relating to his contact with his son. In addition, he did not challenge the validity of the photographs said to be of the Appellant and his son, which were dated 26 May 2019, 7 June 2019, 14 June 2019 and 18 June 2019 and showed them together at various locations, including McDonald's in Camberwell Green. Both representatives then made detailed oral submissions; counsel for the Appellant relying in part on his written skeleton argument.

SUBSTANTIVE DECISION

8. It is not disputed that the Appellant has a British child, who is living in the United Kingdom, or that the Appellant himself had lived in the United Kingdom since the age of 8. It was the Appellant's case that the decision to refuse him leave amounted to a breach of both his family and his private life rights under Article 8 of the European Convention on Human Rights.

9. In relation to his family life, the Appellant relied on the parental relationship he has with his British son, T. In relation to his private life rights, the Appellant relied on the fact that he has been here since the age of eight, was educated here and that his parents continue to live here.

10. In considering his submissions I have reminded myself that, in paragraph 17 of *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, Lord Bingham found that:

> "In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:
>
> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

11. In relation to the first two questions, which relate to the Appellant's ability to meet the requirements of Article 8(1) of the European Convention on Human Rights, T, who was born on 30 October 2010, is now eight years old and lives with his mother in London. The Appellant lived with T and his mother from December 2012 until February 2013. After that date, the Appellant picked T up from school each Wednesday in order to spend time with him. He also had contact with him most weekends. When the Appellant was living and studying in Coventry between January 2015 and June 2016, the Appellant travelled back to London to see T, as partly evidenced by the rail tickets in the Appellant's Consolidated Bundle.

12. The Appellant then continued to have regular contact with T; picking him up from school on Wednesdays and seeing him at the weekend. However, in December 2018, T's mother and her new partner, started to refuse to permit any further contact between T and the Appellant.

However, after the hearing on 20 May 2019, the Appellant, contacted T's maternal grandmother, A. T., and she arranged for T to be brought to her own house and for the Appellant to meet him there on 26 May 2019. The Appellant also picked T up from school on 7 June 2019 and took him out for a pizza and took him to Macdonalds on 14 June 2019. In addition, he met with him on 18 June 2019.

13. T's mother did not attend the hearing and has not provided a recent witness statement but there were two witness statements made by her in the Appellant's Consolidated Bundle; one dated 23 October 2014 and one dated 9 March 2017. They confirmed that she was happy for T to have contact with the Appellant, that T misses him when he is not around and that the Appellant plays an active role in T's life; playing with him and buying him clothes and toys. She also confirmed that at that time he picked T up from school every Wednesday and took him out and that he also provided them with financial support.

14. In paragraph 3 of her witness statement, dated 18 June 2019, A.T. stated that the Appellant had "a brilliant relationship with his son [T] and that he has had contact with [T] throughout most of his life". In paragraph 4 of her statement, she also said:

> "… [the Appellant] came to see me in May 2018. He asked for my help so that he could see [T] as he had not been to see him for a few months. As I recognise the importance of [T] having a close relationship with his father, I was happy to help. I therefore arranged for [T] to come to my place so that [the Appellant] could take him out for dinner. [T] is very fond of his Dad and loves him very much. So he was very happy to be able to go out with his Dad and both of them enjoyed spending time together".

15. In paragraph 5, she added "since then, [the Appellant] has continued to pick [T] up either straight from school or from my house in order to spend time with him and to take him out".

16 I have also taken into account of the fact that, in paragraph 28 of *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801, Sedley LJ noted that:

> "…while an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement (the "minimum level") is not a specially high one".

17. As a consequence, I find that the Appellant does enjoy a family life with T and that if the Appellant is removed to Nigeria, there will be a breach of their right to enjoy a family life together which will be of sufficient gravity as to engage the operation of Article 8(1) of the

European Convention on Human Rights. This is because T's mother is also British and has a partner and another child who are also living with her in London and T has lived with her all of his life. Therefore, there is no reasonable prospect of T accompanying the Appellant to Nigeria.

18. In addition, the length of time during which the Appellant has lived in the United Kingdom, his attendance at school and college here and his academic achievements meet the minimum level of engagement referred to by Sedley LJ in relation to his establishment of a private life here for the purposes of Article 8(1).

19. In relation to the third issue defined in *Razgar*, it was the Respondent's case that at the time of his initial application, and when it was still possible to appeal under the Immigration Rules themselves, the Appellant had failed to meet the suitability requirements contained in paragraphs S-LTR.1.5. and S-LTR.1.6 of Appendix FM to the Immigration Rules for the purposes of his application for leave to remain under paragraph 276ADE(v) of the Immigration Rules.

20. S-LTR.1.5. states:

> "The presence of the applicant in the UK is not conducive to the public good because in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law".

21. In *Chege ("is a persistent offender")* [2016] UKUT 00187 (IAC) the Upper Tribunal found that:

> "The question of whether the appellant "is a persistent offender" is a question of mixed fact and law and falls to be determined by the Tribunal as at the date of the hearing before it".

22. The Upper Tribunal in *Chege* also found that:

> "A "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or that the continuity of offending cannot be broken. A "persistent offender" is not a permanent status that can never be lost once it is acquired, but an individual can be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. The question whether he fits the description will

> depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts".

23. I have also taken into account the fact that, in paragraph 51 of *Chege*, the Upper Tribunal noted that:

> "… Parliament did not use the phrase "repeat offender" or "serial offender". It used the phrase "persistent offender" and persistence, by its very nature, requires some continuation of the behaviour concerned, although it need not be continuous or even regular".

24. In paragraph 52, the Upper Tribunal also gave, as an example of someone who was not a "persistent offender", "an individual who in his youth had committed a series of offences between the ages of 14 and 17 which led to a string of minor convictions, but in adulthood had led a blameless existence for 20 years".

25. The Appellant accepted that between 30 January 2008 and 24 October 2012, he was convicted of eight separate offences and that he was sentenced to nine months in a young offender institution for the last offence. He also accepted that for part of the time covered by the last charge, he had been an adult.

26. At the time of the initial refusal of leave under the Immigration Rules, these offences had been committed relatively recently. As a consequence, and in the light of the decision in *Chege*, the application of S-LTR.1.5. was a reasonable and lawful response which was open to the Respondent at that time. Therefore, at the date of the decision the Appellant did not qualify for leave to remain under paragraph 276ADE of the Immigration Rules. In any event, the Appellant is only relying on his rights under the European Convention on Human Rights in this appeal.

27. In relation to the fourth issue, it is generally accepted that immigration controls are necessary in a democratic society in order to prevent disorder and crime and to protect the country's economic interests and the Appellant did not submit that he was entitled to leave under the Immigration Rules at the time of his appeal.

28. Therefore, the remaining issue to be resolved was whether removing the Appellant from the United Kingdom would be proportionate. When considering this, I have taken into account section 117B of the Nationality, Immigration and Asylum Act 2002, which applies whenever

an Appellant is relying on Article 8 of the European Convention on Human Rights. It states that:

> "(1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English -
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-
>
> (a) are not a burden on taxpayers. And
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to –
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfuly.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom".

29. The Supreme Court has now recognised that sub-section 117B(6) provides a discrete provision which gives particular weight to the situation which arises when a parent is not

subject to a deportation order, has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable for that child to leave the United Kingdom.

30. In the current case, T is a qualifying child by reason of his British citizenship. For the reasons given above the Appellant has a genuine and subsisting parental relationship with him and this was not disputed by Mr. Bramble. This was a concession which was consistent with the evidence now provided by the Appellant.

31. I have also taken into account the fact that in *SR (subsisting parental relationship, s117B(6)* [2018] UKUT 334 (IAC), the Upper Tribunal found that:

> "If a parent ('P') is unable to demonstrate he/she has been taking an active role in a child's upbringing for the purposes of E-LTRPT.2.4 of the Immigration Rules, P may still be able to demonstrate a genuine and subsisting parental relationship with a qualifying child for the purposes of section 117B(6) of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act'). The determination of both matters turns on the particular facts of the case".

32. In the current case, the evidence indicates that the Appellant has been taking an active role in T's upbringing by collecting him from school, taking him out and maintaining a strong role as his father. He has also had regular, on-going and direct unsupervised contact with T throughout his life, apart from a few months earlier this year and a few months when he was in detention. In addition, there was a letter from Southwark Children's Services, dated 18 December 2014, in the Consolidated Bundle in which it described the bond between the Appellant and T as a "genuine relationship between a father and a son".

33. The Appellant is not married to T's mother and she is responsible for major decisions in T's life but in paragraph 98 of *Secretary of State for the Home Department v AB (Jamaica)* [2019] EWCA Civ 661, the Court of Appeal acknowledged the highly fact-sensitive nature of the existence of a parental relationship and in paragraph 109 it went on to find that it was not necessary to exercise "parental responsibility" in a practical sense to demonstrate that there was a genuine and subsisting parental relationship. Therefore, in the light of the totality of the evidence and the case law referred to above, I find that the Appellant does have a genuine parental relationship with T.

34. Furthermore, T has always lived with his mother and there is nothing to suggest that he will not continue to do so. There is no indication that she is not capable of caring for him and the

Appellant has not applied to be his primary carer. In addition, T's mother lives with a partner in London and they have had a child together. Therefore, it is not reasonably likely that T would be in a position to join his father in Nigeria and any such move would lead to a separation from his primary carer and his sibling.

35. In *JG (s117B(6): "reasonable to leave" UK) Turkey* [2019] UKUT 00072 (IAC) the Upper Tribunal also clarified that:

> "Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court or tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reason able to expect the child to do so".

36. Subsequently, in paragraph 72 of *The Secretary of State for the Home Department v AB (Jamaica) and AO (Nigeria)* [2019] EWCA Civ 661, Lord Justice Singh said that he respectfully agreed with the interpretation given by the Upper Tribunal to section 117B(6) in *JG.*

37. In his oral submissions, Mr. Bramble accepted that it would not be reasonable to expect T to leave the United Kingdom and I find that in the light of the evidence before me and having applied a balance of probabilities, that this is the case.

38. However, Mr. Bramble also submitted that, following *KO (Nigeria) v Secretary of State for the Home Department* [2018] 1 WLR 5273, the Upper Tribunal must take into account that "in the real world" the Appellant was liable to removal as an illegal entrant and that he had not been able to meet the suitability requirements of Appendix FM when he first applied for leave to remain.

39. In my view, the Supreme Court's decision in *KO* was somewhat more nuanced. Lord Justice Carnwath found:

> "16. It is natural to begin with the first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DP5/96 it contains no requirement to consider the criminality or misconduct of a parent as a balancing factor. It is impossible in my view to read it as importing such a requirement by implication.

17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is "reasonable" for the child. As Elias LJ said in *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber*) [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).

18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245:

> "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …"

19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874,

> "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the

> ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"
>
> To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves".

40. As can be seen from the paragraphs above, in *EV (Philippines)* neither of the children's parents had leave to remain and both were going to be removed from the United Kingdom. In *SA (Bangladesh)* the test of reasonableness was applied in the context of there not being a parent with leave to remain here.

41. In addition, in paragraph 51 of *KO* Lord Justice Carnwath found, when considering the case of NS, that:

> "The parents' conduct was relevant in that it meant that they had to leave the country. As I have explained (para 18 above), it was in that context that it had to be considered whether it was reasonable for the children to leave with them. Their best interests would have been for the whole family to remain here. But in a context where the parents had to leave, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable".

42. In the current appeal, T is a British citizen and his mother, who is also a British citizen, is his primary carer. In addition, Mr. Bramble accepted that it would not be reasonable for T to leave the United Kingdom. Furthermore, there was no basis upon which it would be reasonable to assert that T's mother should travel to Nigeria and, thereby, bring to an end the family life she enjoyed here with her new partner and child.

43. The circumstances of the real world that T inhabited were, therefore, very different to that of a child with two parents who were move subject to removal from the United Kingdom.

44. As a consequence, in the particular circumstances of the Appellant's case it would be unreasonable and a disproportionate breach of his and T's family life right if he was not able to remain in the United Kingdom.

45. The Appellant also relied on the private life he had developed since first arriving in the United Kingdom in March 2003 and submitted that it would also be a disproportionate breach of his

right to continue to enjoy a private life here, to remove him from the United Kingdom. When considering this submission, I have reminded myself that there is no evidence to indicate that the Appellant has ever had any leave to remain in the United Kingdom and that section 117B(4) of the Nationality, Immigration and Asylum Act 2002 states:

> "Little weight should be given to-
>
> (a) a private life
>
> …
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully".

46. The fact that the Appellant was a child for some of this time does serve to moderate this provision to some extent. The Appellant's father had come to the United Kingdom in January 1981 and the Appellant's mother joined him here in August 1999, when the Appellant was only five years old. The Appellant remained living with his maternal grandmother in Nigeria until March 2003. When he arrived here, his parents failed to obtain any immigration status for him and, at that time and up until the age of 18, he lacked the legal capacity to make such an application himself. He was also taken into care by the London Borough of Southwark in 2010 and accommodated by them under section 20 of the Children Act 1989 but it also failed to make any appropriate application for leave to remain on his behalf.

47 However, he did become responsible for making his own application for leave to remain, when he became 18, and did not do so until 28 November 2012, when his solicitors applied on his behalf for leave to remain under paragraph 276ADE(1)(v) of the Immigration Rules. This sub-section potentially provided for him to be granted leave to remain on the basis that he was under the age of 25 years and had spent at least half of his life living continuously in the United Kingdom. However, he also had to show that he met the suitability requirements contained in Appendix FM of the Immigration Rules and, for the reasons given above, he was not able, at that time, to establish that he was not a persistent offender.

48. Since that time the decision to refuse him leave has been subject to a number of appeals and cross-appeals. However, this has not provided the Appellant with any continuing leave to remain under section 3C of the Immigration Act 1971, as he has never had any extant leave to remain. Therefore, it is the case that he has been here unlawfully since his arrival.

49. I have also taken into account the considerable weight that has to be given to the fact that the maintenance of effective immigration controls is in the public interest and note that, even now, it is not submitted on the Appellant's behalf that he is entitled to leave to remain under paragraph 276ADE of the Immigration Rules.

50. On the evidence before me at the date of the hearing and applying a balance of probabilities, I do find that the Appellant is no longer a persistent offender. He has not committed any further offences since he was released on immigration bail on 19 October 2012, after his one period of imprisonment.

51. In addition, in their evidence, the Appellant's parents and his ex-partner confirmed that, since his release from prison in December 2012, the Appellant had stayed away from his previous friends and stayed out of trouble. In his own witness statement, dated 4 March 2015, the Appellant also stated "when I was released from the detention centre on bail, I decided to change my life and since then I have tried really hard not to be in trouble. I have concentrated on my education and my life since I was released".

52. The Appellant's consistency of contact with his son is partly a testimony to this commitment. As is the fact that the documentary evidence confirms that, after his release, he enrolled at [WK] College in September 2013 and obtained a BTEC Level 3 Diploma in Business in July 2014. I also note that there were eighteen modules on that course and he obtained a merit for seven of them and a distinction for another.

53. The Appellant then obtained a place at Coventry University to study Business Management and Leadership Skills and started there in January 2015. He was able to do so as he was still supported by the Southwark Social Services, as a young person who had previously been in its care. They continued to pay his fees and maintained him until 2016.

54. The Respondent relied on a letter from Southwark Social Services, dated 16 December 2015, which stated:

> "The Local Authority had notified all parties at Mr [O]'s last tribunal that its intention was to withdraw its support to Mr [O] because he had been asked to leave University as the result of disciplinary matters and failure to disclose relevant information to the university".

55. On 12 June 2019, the Appellant's solicitors wrote to the local authority seeking clarification of this paragraph, but they have not received any reply. In particular, the solicitors asked the local authority whether they had previously informed Coventry University that the Appellant was a "home student" as opposed to an "international student".

56. At paragraph 13 of his statement, the Appellant accepted that

> "There is also mention of a disciplinary issue, although this was not the main reason I was forced to leave the university as that was to do with fees. I remember that I had an argument with a lecturer and that I refused to leave a class when he demanded that I leave, but this was not the major issues at all and was resolved easily…"

57. I have taken into account the fact that the Appellant did not seek to deny that a disciplinary issue had arisen. I have also taken into account that, at paragraph 12 of his witness statement, dated 18 June 2019, the Appellant stated:

> "I also confirm in relation to a letter from Southwark Social Services that I was forced to leave Coventry University because of issues surrounding whether I was a home student or whether I was an international student. I understand that Southwark Social Services had been helping to pay my fees on the basis that I was a home student, but the university then demanded that international fees be paid, so Social Services refused to pay these".

58. As the local authority did not reply, it was not possible to form a definitive view as to the basis upon which it had been paying the Appellant's fees. However, I note that, as the local authority was paying the Appellant's fees on his behalf and had accommodated him since 2010, it would have been its responsibility to ensure that it was paying the correct level of fees on his behalf.

59. I have also taken into account the fact that the Appellant has shown considerable remorse for his criminal past. For example, at paragraph 11 of his witness statement, dated 4 March 2015, he said "I wish to say that I am extremely sorry for my past criminal behaviour. I am extremely ashamed of my past behaviour. I am so remorseful. I was very embarrassed of myself when I read the Home Office's decision listing all those convictions. I just could not believe that I was that person. I was with bad companies and I got into many troubles. I was very young and I just did not know what I was doing".

60. The Respondent had also initially sought to rely on the Appellant's Police National Computer record which noted that the Appellant had been released on police bail after an incident in 2016. However, there was no evidence that this incident led to any prosecution or sentence and Mr Bramble did not rely on this entry in his final submissions.

61. For all of these reasons, I find that at the current time the Appellant can no longer be characterised as a persistent offender. However, this does not directly assist him as he is now over 25 years of age and cannot benefit from paragraph 276ADE(1)(v) of the Immigration Rules.

62. At the hearing before me Mr Bramble also relied on paragraph S-LTR.1.6 of Appendix FM to the Immigration Rules and paragraph 10 of the decision letter, dated 24 July 2014, which stated;

> "The Home Office in partnership with the Metropolitan Police had created 'Operation Nexus'. The purpose of which is to target the increasing number of high-harm foreign national and immigration offenders in London and to actively reduce the significant harm caused by gang-related crime in the London area".

63. He was seeking to establish that the Appellant's previous associations and activities meant that his presence in the United Kingdom was not conducive to the public good. However, he did not seek to rely on the witness statement by Detective Constable Smith or the contents of the Crime Reporting Information System. There was also no other evidence to link the Appellant to any criminal gang. Therefore, I find that on a balance of probabilities there was insufficient evidence to establish that paragraph S-LTR.1.6. applied. When reaching this decision, I have also taken into account the sentences passed and the fact that on 24 October 2012, the Appellant was found not guilty of false imprisonment, sexual touching and possession of an offensive weapon and was convicted on one count of harassment.

64. Therefore, applying a balance of probabilities and taking into account all the evidence about the Appellant's circumstances since his release I find that there was insufficient evidence to establish that the Appellant's presence is not presently conductive to the public good.

65. The Appellant also relied on his educational history in the United Kingdom. The evidence indicated that he has been in education for much of the time since his arrival. The awards given to the Appellant by [H] Primary School confirm that he attended that school from the

Summer Term in 2003 until the end of the Summer Term in 2005 and that he had a positive attitude to his work and was an active participant in school activities. He then started at the [SHRC] (Secondary) School on 5 September 2005 and remained there until July 2010. In the Autumn Term of Year 7, he obtained certificates for achieving 100% punctuality and attendance and also a Bronze Award for gaining 50 merits.

66. I have also taken into account that he has been a successful student and passed a significant number of exams and completed a number of courses at a secondary level. In particular, in June 2010 he obtained Grade C in GCSE English, mathematics, religious studies and physical education, a Grade D GCSE in French, a DD in Applied Science (double award) and a Level 2 BTEC in Sport with a merit. The previous year he had also obtained Grade C in Information and Communications TEC (a half GCSE). He then transferred to [ST] College where he was awarded a BTEC Subsidiary Diploma in Business and passed an EDEXCEL Functional Skills qualification in mathematics at level 2. He attended [KC] College in 2011 – 2012 where he completed an Entry Level Course in Drawing Skills and obtained a Level 2 Award in Food Safety in Catering and a Level 3 Award in Introduction to the Hospitality Industry.

67. He was then offered a place to study for a BSc in Business Economics at Middlesex University on 13 March 2012. He was also offered a conditional place at the University of Portsmouth to study Applied Economics. However, he was not able to take up either of these offers due to being arrested on 27 April 2012 for an offence of harassment and sentenced to nine months in a young offender institution. He was subsequently transferred into immigration detention powers and was not granted bail until 19 December 2012. However, after his release he successfully obtained a place at Coventry University and studied there from January 2015 until the London Borough of Southwark withdrew its funding in 2016.

68. However, in order to apply section 117B lawfully, I am obliged to take into account the fact that I must give little weight to the Appellant's private life which was established here whilst he was present unlawfully. As a consequence, I can also give little weight to his length of residence, certainly from the age of 18, or his educational achievements during that time, as they are both integral parts of his private life. He had also relied on statements from his parents but had not provided any further evidence about the strength of his relationship with them.

69. In contrast, I must give considerable weight to the fact that the maintenance of immigration controls are in the public interest and the fact that the Appellant does not qualify for leave to remain under paragraph 276ADE(1)(v) of the Immigration Rules. In addition, there was insufficient evidence to establish that there would be very significant obstacles to his integration into the community and culture of Nigeria for the purposes of paragraph 276ADE(1)(vi). It was submitted in his skeleton argument that the Appellant had no meaningful relationships with any family members in Nigeria and that he had limited knowledge of that country. It was also submitted that he would have limited employment opportunities there. However, these submissions were not backed up with sufficient evidence and did not take into account the fact that the Appellant was a healthy young man, who had obtained a number of educational qualifications in the past.

70. As a consequence, having applied the proportionality balancing exercise, I find that it did not amount to a disproportionate breach of his private life rights for the purposes of Article 8 of the European Convention on Human Rights to refuse him leave to remain on private life grounds.

DECISION

(1) The Appellant's appeal is allowed on human rights grounds in so far as his removal would be a disproportionate breach of his and T's family life rights taking into account the provision contained in section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

Nadine Finch

Signed Date 5 August 2019
Upper Tribunal Judge Finch