



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-000167
HU/19026/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On the 15 July 2022**

**Decision & Reasons Promulgated
On the 07 September 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**OO (NIGERIA)
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The appellant did not appear and was not represented
For the Respondent: Mr S. Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By an order dated 20 March 2020 made under section 8 of the Children Act 1989, the Family Court sitting in Newcastle upon Tyne ordered that the appellant's name was to remain anonymous ("the Family Court Order"). Accordingly, I make an order for anonymity in these proceedings, to ensure compliance with the Family Court Order.
2. This is an appeal against a decision of First-tier Tribunal Judge Colvin ("the judge") promulgated on 2 June 2021. The judge dismissed an appeal brought by the appellant, a citizen of Nigeria born on 7 July 1979, against

the decision of the respondent dated 7 November 2019 refusing his human rights claim dated 12 June 2019, made on the basis of his family life with his British daughter, JO, who was born on 15 April 2010. The appeal before the judge was brought under section 82 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”).

Factual background

3. The appellant claims to have entered the United Kingdom in July 2006. He was served with enforcement papers in 2008 and 2010 but remained in the country. On 23 April 2012 and 30 March 2016, he was granted two periods of discretionary leave, each for three years, in respect of his relationship with JO, and his British partner, SD, her mother. The appellant’s relationship with SD subsequently came to an end, but the appellant’s case was that he continues to enjoy a genuine and subsisting relationship with JO.
4. Following her separation from the appellant, SD moved to Newcastle upon Tyne with JO. The appellant lives in London. The appellant’s case was that the separation had been acrimonious and that there is a history of SD intermittently refusing to permit him contact with JO. In the past, he visited Newcastle for monthly contact with her, and would speak to her by video call twice each week. The Family Court Order provides for JO to live with SD and for the appellant to have monthly contact with her for four hours, and longer during the school holidays. By the date of the hearing before the judge on 13 May 2021, the appellant had had only limited opportunities to see his daughter pursuant to that order. He had visited her in April 2021 but says that he had been prevented from making other visits due to the Covid-19 restrictions that were then in force.
5. The respondent did not accept that the appellant enjoyed a genuine and subsisting relationship with JO. It would be reasonable for the child to remain in the UK, with her mother, in the appellant’s absence. In relation to the appellant’s private life, the respondent considered that did not meet the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules. He had lived in Nigeria until the age of 27 and had spent his childhood and formative years there. He retained knowledge of the life, language and culture and would not face “very significant obstacles” to reintegrating into life in Nigeria once more. There were no exceptional circumstances that would result in unjustifiably harsh consequences for him, a “relevant child” or another family member, taking into account the best interests of “any relevant child”.
6. In her decision, the judge set out the respective cases of the appellant and the respondent, the submissions she heard, and the law. Her findings of fact commence at [17]. At [18], the judge said that the appellant’s failure to notify the Home Office, in October 2015, that his relationship with SD had come to an end “raises a credibility issue”. At [19] to [23], the judge found that the appellant did not meet the requirements of Appendix FM of the Immigration Rules, on the basis that the appellant had

not demonstrated that he took an “active role” in his daughter’s upbringing.

7. The judge rejected the appellant’s evidence that he had visited his daughter every three to four weeks since 2015: [21]. From 2017 to 2020 he had had little or no contact with his daughter, and even if that was due to the mother’s actions, it had not been until January 2020 that the appellant applied to the Family Court for contact. The appellant had only seen his daughter once pursuant to that order, in April 2021. Even making allowances for the ‘lockdown’ restrictions, the appellant had failed to explain why he had not visited his daughter more frequently. The appellant had no contact with his daughter’s school and provided little evidence of taking any steps to support her. There was no evidence from, for example, a social worker, conveying the views of the appellant’s daughter.
8. The judge went onto address section 117B(6) of the 2002 Act, which is one of the statutory public interest considerations to which a court or tribunal must have regard when considering whether a decision under the Immigration Acts breaches a person’s right to respect for private and family life under Article 8 of the European Convention on Human Rights (“the ECHR”). Section 117B(6) provides:

“(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.”
9. Having directed herself pursuant to *SR (subsisting parental relationship - s117B(6)) Pakistan* [2018] UKUT 334 (IAC) and *Secretary of State for the Home Department v AB (Jamaica)* [2019] EWCA Civ 661 and the relevant guidance published by the Secretary of State, the judge concluded that there had been such minimal contact between the appellant and JO that he did not enjoy a “genuine and subsisting” relationship with her. Since the Family Court Order had been made, the appellant had visited his daughter on only a single occasion. His circumstances differed from those in *SR*, in which *SR* had been found to enjoy a genuine and subsisting relationship with a minor child on the basis of fortnightly unsupervised contact. The judge concluded by stating that, while an assessment of this sort is difficult and must take account of the circumstances created by the pandemic, the appellant had nevertheless not demonstrated to the balance of probability standard that he presently enjoyed a genuine and subsisting relationship with his daughter. See [28] and [29]. The judge dismissed the appeal.

Grounds of appeal

10. The grounds of appeal contend that the judge failed properly to conduct an assessment of the proportionality of the appellant's removal pursuant to Article 8(2) of the ECHR. The judge confined her analysis under Article 8(2) of the ECHR to section 117B(6) of the 2002 Act, failed to conduct a broader Article 8 proportionality assessment, and did not address the appellant's private life at all. The assessment under section 117B(6) was also flawed, the grounds submit, as the judge erroneously compared the facts in *SB* to those at play in these proceedings. *SB* was not authority for being a comparator to be applied in other cases.
11. The grounds of appeal also target some of the findings of fact reached by the judge, contending that it was SD who prevented the appellant from being able to pursue a genuine and subsisting relationship with JO, and failing to ascribe significance to the appellant's visit to see his daughter, and his documented financial support for her.
12. Permission to appeal was granted by Upper Tribunal Judge Mandalia.

Non-attendance of the appellant

13. Neither the appellant, nor his representatives, Jein Solicitors, attended the hearing. I convened the hearing to determine, in the first instance, whether to proceed in the absence of the appellant or his solicitors.
14. The Tribunal Procedure (Upper Tribunal) Rules 2008 make provision for the tribunal to proceed in the absence of a party, in the following terms:

"38. Hearings in a party's absence

If a party fails to attend a hearing, the Upper Tribunal may proceed with the hearing if the Upper Tribunal—

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing."
15. In relation to (a), the tribunal's clerk spoke to Jein Solicitors at my request; I am told that the solicitors said that the notice of hearing had not been served on them but did not apply for an adjournment. The notice of hearing was emailed to 'jeinsolicitors@yahoo.com' on 27 June 2022. The email address to which it was sent it that which features correspondence from Jein Solicitors. I am satisfied that the appellant, through his solicitors, was notified of the hearing.
16. As to (b), that is an assessment that I am to perform by reference to the tribunal's overriding objective to deal with cases fairly and justly. I asked Mr Walker to address me on the merits of the appellant's case, from the perspective of the Secretary of State, to inform this assessment. Mr Walker conceded that the judge's failure to address any factors relevant to the

appellant's broader private life was, in his words, a material error of law. He also submitted that he saw weaknesses in the judge's analysis of the appellant's ability to develop the relationship he currently enjoys with JO in the future and submitted that the analysis of the judge could be said to be one-sided.

17. It would be wrong to proceed on the footing that that conducting a hearing in the absence of an appellant is something that may only take place fairly where the decision of the tribunal is likely to be in the appellant's favour. Nevertheless, on this occasion I am satisfied that, in light of Mr Walker's concession that the decision of the judge involved the making of an error of law on a material point, it was in the interests of justice to proceed in the appellant's absence, for there was no prejudice to him in doing so.

Legal framework

18. This appeal was brought under Article 8 of the European Convention on Human Rights. The essential issue for the judge's consideration was whether it would be proportionate under the terms of Article 8(2) of the Convention for the appellant to be removed, in the light of the family and private life he claims to have established here. This issue is to be addressed primarily through the lens of the respondent's Immigration Rules and by reference to the requirements of Article 8 directly, see Razgar [2004] UKHL 27 at [17].

Discussion

19. Mr Walker was right to concede that the judge's failure to conduct a broader assessment of Article 8 was an error of law. The judge's analysis focussed entirely on the appellant's relationship with his daughter through the lens of section 117B(6) without considering any broader points relating to his family or private life. As the grounds of appeal contend, Article 8 ECHR does not stand or fall with section 117B(6). The judge did not conduct a "balance sheet analysis" of the appellant's Article 8 rights. While in isolation it is not an error of law to omit such an assessment, the exercise is a useful discipline, for it requires judges to identify and address all relevant factors for and against removal.
20. In relation to the appellant's family life Article 8 rights, there was evidence before the judge, which she appeared to accept, that there was a relationship between the appellant and his daughter. In the month before the hearing the appellant had spent a full day with his daughter, on his birthday. On the judge's findings, he previously had enjoyed a genuine and subsisting relationship with her. While the judge was entitled to reach findings of fact that, from 2017 to 2020 the appellant had only seen his daughter twice, nevertheless he still saw her on those two occasions. This evidence demonstrated that there was a relationship of sorts which was capable of attracting some weight in an Article 8 proportionality assessment, which the judge failed to consider.

21. I also consider that it was an error for the judge to treat *SR* a benchmark to calibrate her consideration of what amounted to a genuine and subsisting relationship. That was the error that a different constitution of this tribunal was held to have made, in relation to section 117C of the 2002 Act, in *MI (Pakistan) v Secretary of State for the Home Department* [2021] EWCA Civ 1711. See [30], per Simler LJ, addressing the approach the tribunal had taken to *PG (Jamaica) v Secretary of State for the Home Department* [2019] EWCA Civ 1213, in light of the guidance given in *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176:

“The second way of describing the UT's error is that the UT took the factual situation in *PG (Jamaica)* together with the holding that that factual situation did not justify the "unduly harsh" conclusion reached, and elevated it to a legal proposition based on the apparent similarity of the facts of *PG (Jamaica)* when compared with this case. That is legally impermissible. It is dangerous to treat any case as a factual precedent as *HA (Iraq)* made clear (at [129]). In the particular context of an evaluative exercise there is a limit to the value to be obtained from considering how the relevant legal test was applied to the facts of a different (albeit similar) case, especially where there may be questions as to the true level of similarity between the two cases given the almost infinitely variable range of circumstances and subsisting parent/child relationships that might be involved (see *HA (Iraq)* at [56]). Ultimately it is the statutory test itself that matters and that must be applied by the first instance tribunal making its own evaluation of the facts in the case with which it is concerned.”

The judgment of Simler LJ applies by analogy in the present context.

22. Finally in relation to Article 8 family life, the judge erred in relation to the significance of section 117B(6). Where section 117B(6) is met, that is dispositive of the public interest issue in an appellant's favour. But the converse is not true; where, as here, section 117B(6) is not met, that does not mean that the appeal must fail. All the circumstances of the case must still be addressed.
23. I also consider that the judge failed to address the impact of the appellant's private life on the proportionality of his removal. While, on one view, it may be said that the appellant's private life would be likely only to attract little weight in light of his combination of unlawful and precarious immigration statuses, it cannot be said to attract such little weight as to not be worth considering. The appellant's potential to develop the relationship he currently enjoys with his daughter into a genuine and subsisting parental relationship is a facet of his private life which is likely to attract some weight. The judge did not consider that issue, or any others relating to the appellant's private life.

Setting the decision aside

24. In light of Mr Walker's concession, which I consider to be made correctly, I find the decision of the First-tier Tribunal to have involved the making of an error of law and set it aside.
25. While the judge reached comprehensive findings of fact concerning the appellant's relationship with his daughter, she did not address his wider circumstances, and a full appraisal of his life and family relationships will be required. The judge did not address or quantify the nature or quality of the relationship the appellant currently enjoys with his daughter, even on the hypothesis that it was a parental relationship below the level of "genuine and subsisting" for the purposes of section 117B(6). I do not consider that it will be possible to preserve the findings reached by the judge, in light of the broad spectrum of findings that are yet to be made. Accordingly, I do not preserve any of the findings reached by the judge.
26. Pursuant to section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, having set aside the decision aside I may now either (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or (ii) re-make the decision. Part 7 of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, at [7.2(b)] suggests that remittal will be appropriate where extensive fact-finding needs to take place. Since a comprehensive fact-finding exercise will be required in these proceedings, I remit this appeal to the First-tier Tribunal to be heard afresh by a different judge.
27. This appeal is allowed.

Notice of Decision

The appeal is allowed. The decision of Judge Colvin involved the making of an error of law and is set aside with no findings of fact preserved.

I remit the case to the First-tier Tribunal to be reheard by a different judge.

I do not make any directions for the appellant to submit further evidence to the First-tier Tribunal, that being a matter for the First-tier Tribunal (and, if so advised, the appellant) to consider.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Stephen H Smith

Date 15 July 2022

Upper Tribunal Judge Stephen Smith