



IAC-HW-MP-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/42435/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 8 June 2014**

**Decision & Reasons  
Promulgated  
On 15 June 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVID TAYLOR**

**Between**

**M B A**

**{ANONYMITY DIRECTION NOT MADE}**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms F Allen of Counsel

For the Respondent: Mr E Tufan, Home Office Presenting Officer

**DECISION AND REASONS**

1. Although the appellant to this appeal is, strictly, the Secretary of State I have for the sake of consistency continued to refer to the parties by their original First-tier Tribunal designations. Thus the Secretary of State continues to be described as “the respondent”.
2. The appellant is a 28 year old citizen of Nigeria (born 23 March 1983) who appealed against the respondent’s decision of 7 October 2014 refusing her application for leave to remain in the United Kingdom by virtue of Article 8

of the European Convention on Human Rights. The basis of her claim is that her 11 year old daughter, R, has been lawfully resident in the UK since she and her daughter came here in 2010. Her daughter now has an EEA residence permit in line with R's father. R lives with her father but the appellant has extensive contact rights (as ordered by Luton County Court by consent on 2 May 2012) and, essentially, the child now spends as much time with her mother as she does with her father.

3. The application was refused by the respondent on 7 October 2014. In the reasons for refusal letter of that date the respondent held that the appellant did not meet the requirements of Appendix FM and/or paragraph 276ADE of the Immigration Rules and that there were no exceptional circumstances requiring the respondent to grant the application outside the requirements of the Immigration Rules. It was noted that the appellant had entered the United Kingdom on 2 January 2010 with a visit visa which had expired on 2 July 2010 and had overstayed without leave.
4. The appellant appealed. In a decision promulgated on 9 February 2015 First-tier Tribunal Judge Ferguson allowed the appeal. It had been accepted [4] by the appellant that she did not meet the requirements of the Immigration Rules and was relying only on Article 8 outside the Rules. The main issue was proportionality with particular reference to Section 55 of the Borders etc. Act 2009. I set out below relevant extracts from the decision on the basis of which he allowed the appeal outside the Rules:

“16. The substantive reasons given in the respondent's decision refer to a lack of evidence provided by the appellant that she was having continued contact with her daughter. At the appeal hearing there was considerable evidence available that Ms A was having at least as much contact as provided by the order, and most likely considerably more. The factual circumstances were not really challenged by the respondent at the hearing and it is established on the evidence that R spends considerable time with her mother, Ms A. ... Since the contact order the family relationship had improved so that R now spent more than half the time with her mother, who was responsible for many of the important parental responsibilities, such as choice of school and liaison with the school. Although it is expressed in terms of 'contact', the reality is that R is being raised in a shared care arrangement, spending considerable amounts of each week with her mother, as well as with her father and stepmother.

17. The respondent's decision does not engage with the reality of the situation for this family, relying on a lack of updated information about the contact to reach the decision that it was not disproportionate to remove. The best interests of R are referred to at paragraph 27 of the decision but the decision to remove Ms A is still made because 'there is no evidence of family life with her daughter in the United Kingdom' and because it was considered that R's father 'had sole responsibility for her' (paragraph 29).

19. The considerations set out at Section 117B are not significant on the facts of this case. Although the maintenance of immigration control is still a significant factor in the public interest, Ms A speaks English and does not rely on her private life or a relationship with a partner as reasons to remain in the United Kingdom. Paragraph 117B acknowledges the reduction in the public interest for a genuine parental relationship with a child where it would not be reasonable for the child to leave the United Kingdom.
  20. R and her father are lawfully in the United Kingdom with leave afforded to them under the EEA Regulations. There is no suggestion that R should return to Nigeria with Ms A to maintain family life there. The decision is made on the basis that it is not disproportionate for Ms A to return to Nigeria and exercise family life with her daughter through 'modern means of communication' and occasional visits. That decision does not take into account that R's father does not exercise 'sole responsibility' for her; the evidence showed that Ms A has had increasing responsibility for R since the contact order in 2012 and if anything now exercises more responsibility for her 11 year old daughter than Mr O. In view of the fact that Ms A did have sole responsibility for R during the seven years from her birth in 2003 until her visit to the United Kingdom in 2010, that is not surprising.
  21. R's best interests are met by being raised by both her parents even if that involves for her two separate households. The evidence about the involvement of her mother throughout her life (in contrast to her father who was entirely absent for the first seven years) means that it would be disproportionate to remove Ms A and thereby disrupt family life between her and R. The existence of Skype does not make the decision proportionate."
5. Permission to appeal was granted to the Respondent by First-tier Tribunal Judge Foudy on the grounds that the judge erred in failing to address Appendix FM or to take into account Section 117B of the 2002 Act. She held that the grounds were arguable. Thus the matter came on before me.
  6. On the question of an error of law Mr Tufan, for the respondent, relied on the grounds and in particular the fact that the judge had not fully considered Appendix FM and/or paragraph 276ADE of the Immigration Rules. The judge, he submitted, should have considered the Rules notwithstanding the appellant's concession at the First-tier Tribunal that the appellant did not meet the requirements of the Immigration Rules. The judge should also not have taken into account paragraph 117B insofar as it is clear that the child is not a qualifying child as she has not been in the United Kingdom for seven years.
  7. I did not call on Ms Allen to reply. I indicated that I was satisfied that there had been no error of law in the First-tier Tribunal decision such that it

ought to be set aside and that I would give my reasons in a written decision. I now do so.

8. In reaching my decision I have had primary regard to the recent Court of Appeal decision in **SS (Congo) [2015] EWCA Civ 387** and to the various cases referred to in the court judgment which was handed down as recently as 23 April 2015. It is clear from that judgment – see in particular [44] – that the proper approach should always be to consider first whether an applicant satisfies the conditions of the Immigration Rules. If an applicant does not satisfy the Rules then

“... if there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment where the refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of Section 6(1) of the HRA read with Article 8”. *[My underlining]*.

9. Although the judge did not make a detailed consideration of the Article 8 provisions within the Rules he cannot be criticised for failing to do so having regard to the appellant’s concession that she did not in any event meet the requirements of the Rules. Nor did the judge specifically give reasons for finding that there were good reasons for considering Article 8 outside the Rules.
10. But it is, in my judgment, abundantly clear from the facts of this case as set out in detail by the judge in his decision that the circumstances are unusual. The appellant came to the UK with her young daughter in 2010 in order to see her family and also in order to introduce her daughter to the child’s father. There were undoubtedly exceptional and unusual circumstances in this case, particularly in light of the findings of the judge that the responsibility of both parents towards R is now joint and equal and that for several years the child has been spending as much time with her mother as with her father. Notwithstanding the contact order, the appellant has been largely responsible for the upbringing and welfare of R throughout her life. There can be no reasonable doubt that the child would be adversely affected if her mother were compelled to return to Nigeria without her and there is no suggestion that R should accompany her. Indeed R primary residence is in the UK with her father.
11. Based on the findings of the First-tier Tribunal Judge, which were unquestionably open to him on the evidence, any remittal and re-hearing by a First-tier Tribunal Judge would undoubtedly result in the same decision, namely that the removal of the appellant would be disproportionate having particular regard to the adverse effect that it would have on the child. In my judgment, if there was any error of law by the judge in failing to explain why there were exceptional circumstances

enabling him to consider Article 8 outside the Rules, such an error was not material to the final outcome.

12. The judge's assessment of Article 8 proportionality outside the Rules was more than adequate and in itself did not disclose any error of law or of approach to his findings. For those reasons the decision of the First-tier Tribunal must stand.

### **Notice of Decision**

There was no error of law in the decision of the First-tier Tribunal such that it should be set aside. The decision shall stand.

~~No anonymity direction was sought and none is made.~~

Designated Judge David Taylor  
Deputy Upper Tribunal Judge  
12 June 2015