**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/48211/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 19th January 2016**
**And 15th February 2016**

**Decision & Reasons Promulgated**
**On 4th March 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MR O J A**
(ANONYMITY DIRECTION MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Miss A Cooke instructed by Chris & Co, Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

## DECISION AND REASONS

### The Appellant

1. The appellant, a citizen of Nigeria, appealed with permission against the decision of the Judge of the First-tier Tribunal promulgated on 21st July 2015, dismissing the appellant's appeal against the respondent's refusal of leave to remain on the basis of his relationship with his partner, a British citizen. The appellant and his partner have two children, both British citizens, born on 8th June 2011 and 21st December 2012.

© CROWN COPYRIGHT 2016

2. The Secretary of State in a decision dated 10th November 2014 refused the appellant leave to remain in the United Kingdom pursuant to Appendix FM of the Immigration Rules and Article 8 of the European Convention on Human Rights.

3. The appellant first entered the United Kingdom on 12th March 2005 with a visitor's visa valid from 5th October 2004 until 5th April 2005. He claimed he then entered on 12th March 2005 but there is no copy of this entry in his passport. On 27th May 2010 he was encountered following an enforcement visit to the address of his partner, Miss S who was being investigated by the Kingston Police and Council as she was suspected of benefit fraud. Miss S had been granted asylum on 6th October 2003 after an appeal process and she had been naturalised as a British citizen on 1st August 2009.

4. The appellant claimed that his removal would be in breach of his human rights as he had established a family and private life in the United Kingdom with his partner and two children. The respondent asserted that the appellant did not meet the requirements of Appendix R-LTRP of Appendix FM because he was not classified as a partner which was defined as a person who has been living together with the applicant in a relationship akin to marriage or civil partnership for at least two years prior to the date of the application under Appendix FM. It was also asserted that the appellant had entered into a marriage ceremony which was not recognised in the United Kingdom.

5. At the hearing before the First-tier Tribunal, evidence was given that the appellant has two British citizen children aged 4 and 18 months and that he is involved in their care, picking them up and dropping them at nursery school and looking after them when they are not there. Neither his wife nor his children had been to Nigeria and he left Nigeria ten years ago.

6. The First-tier Tribunal Judge dismissed the appeal stating at paragraph 22 that the appellant did not meet the requirements of the Immigration Rules to remain in this country.

7. The application for permission to appeal asserted that there had been no analysis under the Rules and the judge did not consider whether paragraph EX.1 was applied. It was the submission made by Counsel at the First-tier Tribunal that the appellant met the Immigration Rules. The Immigration Judge accepted that the appellant and his partner were in a genuine and subsisting relationship and they had cohabited for at least two years [paragraph 29]. The judge should have considered whether the other requirement of the Rules was met including whether paragraph EX.1 was met.

8. The judge acknowledged that it would be very difficult for the appellant's partner to relocate to Nigeria and it was submitted that the difficulties for the partner relocating because of her refugee status were considered very significant difficulties and therefore the requirements of the Immigration Rules were met.

9. Secondly, it was asserted, the judge erred in her assessment of the best interests of the children. The judge accepted it would be very difficult for the appellant's partner to relocate to Nigeria and therefore that she might remain in the UK but found at

paragraph 30 "I find that the best interests of the children is to live with both parents wherever they live". The judge failed to consider the effect on the children in the event that their mother could not return to Nigeria because of the difficulties she would face. The judge did not consider the effect on the children being separated from one of their parents or whether each parent would be able to cope with the children without the other parent. This was particularly relevant given the appellant's partner's mental health difficulties. The contradiction in the judge's determination and the failure to consider the effect on the children of being separated from a parent constituted a material error of law.

10. Thirdly, the judge, it was alleged, erred in her proportionality assessment under Article 8. The finding that the appellant could return without his partner was not supported with any reasons as to why it would be proportionate for the family to be separated. The judge failed to consider **EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41**, in particular at paragraph 12 where Lord Bingham stated "it would rarely be proportionate to uphold an order for removal of a spouse if there is a genuine and close bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal". This was raised by Counsel at paragraph 18 of her skeleton argument. The judge states at paragraph 35

> *"She [the appellant's partner] comes from the Democratic Republic of the Congo and having been granted refugee status I accept that she would find it very difficult to relocate to Nigeria where she said she does not feel safe. It will therefore be for Miss S to decide whether she wants to accompany the appellant to Nigeria".*

11. The judge referred to the case of **EV (Philippines) [2014] EWCA Civ 874** in support of her decision. That case, however, concerned a family, none of whom had any lawful leave in the UK and who would be returning as a family unit to their country of origin. In the appellant's case the family might be separated and the only person who has resided in Nigeria before is the appellant. The judge did not acknowledge the distinguishing features of the case.

12. The judge failed to consider relevant and very important factors when assessing proportionality and this constituted a material error of law.

13. In response the Secretary of State asserted it was submitted that the judge may not have expressly referred to EX.1 in the determination but it was clear that the judge considered the best interests of the children and whether it was reasonable to expect the children to leave the UK. This was set out at paragraph 34.

14. At the error of law hearing before me, Miss Cooke essentially relied on the written grounds for appeal but I pointed out that the appellant could not comply with the Immigration Rules because the date of the application was 6th August 2010 and the supporting documentation presented to the First-tier Tribunal dated from 2010, certainly no earlier than 2009. Miss Cooke accepted that the appellant therefore could not comply with the requirements of a partner under the Immigration Rules because the appellant had not evidenced that he and his partner had not been living together for two years akin to a marriage by the date of the application.

15. She did however argue that the best interests of the children had not been fully analysed and certainly in the context of the mother finding it extremely difficult to return to Nigeria as she came to the UK in 2003 as a refugee and was subsequently granted British citizenship.

16. Mr Avery resisted the application.

17. In conclusion, had the grounds rested solely on the premise of an inadequate assessment of the best interests of the children and that the judge had not analysed the failure of the applicant to fulfil the Immigration Rules in depth, I would not be minded to find an error of law.

18. That said, it is very clear from the determination that the judge did not consider Section 117B(6) save to state at paragraph 37 "this takes into account the public interest question into account and the respondent's interest and is not readily upset".

19. It was incumbent upon the judge in an otherwise comprehensive determination to address the issue of paragraph 117B(6) which states:

    *"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".*

    The judge at paragraph 34 considered the prospect despite the fact that the children were British citizens of them leaving to go to Nigeria. There was no engagement with the fact that these children are European Union citizens and the policy of the Secretary of State with regard to Appendix FM would appear that it cannot be argued that it is reasonable for British citizen children to leave the United Kingdom (as part of the European Union). In this case it would appear that the judge's argument seemed to rely on parental choice.

20. Section 117B(6) is a factor which should be specifically engaged with when considering the public interest and should have been weighed in the balance as to whether the appellant should be removed. I therefore found there was insufficient reasoning on that point and an error of law which is material.

21. I set aside the conclusions of assessment of Judge Chana in relation to Article 8 and directed that this matter should be relisted before me in the Upper Tribunal.

22. At the resumed hearing before me both the appellant and his partner attended and gave oral testimony and were cross-examined by Ms Sreeraman. A new supplementary bundle which contained statements of the appellant and his partner, together with documentary evidence from the children's school, was submitted together with a skeleton argument for the appellant.

23. I indicated the findings of fact as made by the Judge of the First-tier Tribunal were retained, that is that the judge found at paragraph 27 on the balance of probabilities the appellant and his partner had been living together for at least two years. The table of evidence submitted on the basis that they had lived together began at 4th March 2010 until 24th March 2015. It was also accepted that the appellant had two children, one born in 2011 and the other in 2012, and that it was the partner's evidence that the appellant took care of the children when she was at college. There was also evidence from the appellant's children's nursery confirming that the appellant dropped and collected the children and that they lived together since 2010.

24. As the First-tier Tribunal judge indicated, a decision as to what is in the best interests of the children will depend on a number of factors such as their age, the length of time they have been in the UK, how long they have been in education, the stage of their education and to what extent they had been distanced from the country to which it is proposed that they return and how renewable was their connection and to what extent they would have linguistic, medical or other difficulties in adapting to that country and the extent to which the course proposed would interfere with their family life or their rights, if they have any, as British citizens.

25. I made it clear that the decision to be revisited was in relation to the Article 8 assessment and I find that because of the particular circumstances of this appeal as submitted by Ms Cooke, not least that these are two British citizen children and the partner was granted asylum from the Democratic Republic of Congo in 2003 and because of the delay in a final decision by the respondent, that not all the relevant factors were taken into consideration when the appellant's application was refused under the Immigration Rules further to **Singh v SSHD** **[2015] EWCA Civ 74**.

26. In line with **Razgar v SSHD [2004] UKHL 27,** I accept that the appellant has established a family and a private life in the UK and the threshold of that private life has been reached. On the face of it the decision is in accordance with the law. The reasons for refusal letter set out at paragraph 34 that the appellant met the suitability requirements detailed in S-LTR1.1 to 3.1 but he failed to meet the eligibility requirements because it was not concluded that the appellant and his partner had a genuine relationship. The First-tier Tribunal Judge accepted on the evidence, not least the documentary evidence and the existence of the children that the appellant and his partner are in a genuine relationship. It is accepted that the appellant is not married to his partner and under the Immigration Rules, as I indicated, the appellant cannot show that he was in a relationship for two years prior to his application. He therefore would fail under the Rules.

27. Nor can the appellant meet the requirements for leave to remain as a parent because he does not have sole responsibility for the children with whom he lives and further under (b) of E-LTRPT the British citizen as the parent or carer with whom the child normally lives is the partner of the applicant. He may not have sole responsibility for his children although as can be seen from below he is heavily involved in their care. I have also had regard to the treatment of paragraph 276ADE and note that the respondent stated that there were no very significant obstacles to his integration in

the country to which he would have to go if required to leave the UK. When considering the applicant's application alone that indeed is the case.

28. Therefore, it would appear that the decision made by the Secretary of State on 10th November 2014 was in accordance with the law and necessary for the protection of rights and freedoms of others through the pursuance of a legitimate aim.

29. I therefore turn to the question of proportionality and the key question in this is the best interests of the children.

30. Again, as found by the First-tier Tribunal Judge under Section 55 of the Borders, Citizenship and Immigration Act 2009, the best interest of the children is to live with both parents in a stable and secure environment. It was noted that the children are very young and indeed one at present has just started school and one has just started nursery school. The children were born in the UK, are British citizens and have only ever lived in the UK. The older child has entered formal education whilst the younger one is at nursery school. I also note that the older child has social and communication difficulties and documentation from the school, namely H H dated 1st February 2016, confirms that the older child had specific special educational needs and this learning difficulty was communication and interaction. He was receiving support from a specialist teacher from Milton Keynes and she confirmed that it would be "better for D and his learning if he were able to remain at our school". It should be remembered that this is a British citizen child and Miss Cooke pointed out that the standard of education would be better in the UK but even if that were not the case, I find that for a child with special educational needs stability and continuity of education which was referred to as an important factor in **Azimi-Moayed and others (decisions affecting children; onward appeals)[2013] UKUT 00197(IAC)** will be even more important for this particular child.

31. **Azimi-Moayed** established the following;

   a. *(1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:*

   *i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.*

   *ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.*

   *iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.*

   *iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.*

   *v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life*

> *deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases.*

32. Not only is it important that the schooling of the children, and particularly the older child, remains stable but his stability of contact with his father is important as well. I accept that the children are not over the age of seven but they are British citizens.

33. The evidence given was that the appellant was the primary carer delivering the children to school and nursery and collecting them and looking after them at weekends when the mother worked. The appellant's partner confirmed that the children had a very good relationship with their father and would be very affected should he be removed.

34. A further factor was that the appellant's partner had obtained refugee status having undertaken flight from the Democratic Republic of Congo and it would appear that the Secretary of State accepted that she had undergone a tumultuous time thereby granting her asylum. The appellant's partner became quite tearful and distressed during the hearing when recounting her experiences in the Democratic Republic of Congo and was fearful of removal to a country with which she was not familiar. The appellant himself stated that she had heard things about Nigeria which she did not like. There was reference in her evidence to mental health difficulties and she stated that she had been near suicidal immediately prior to meeting the appellant who had helped her greatly. The appellant's partner produced detailed evidence dated 2010 from a mental health nurse at South West London and St George's Hospital, which detailed her difficulties in relation to her refugee status and her precarious mental health in 2010. I realise that this evidence dates from 2010 but I find, from her oral evidence, that this is an enduring and ongoing feature of the appellant's partner's presentation.

35. I recite these facts because I think that it may well be the case that the *appellant* alone could return to Nigeria but in the circumstances a separation would, because of the partner's potential to mental health difficulties and her vulnerability, as evidenced by the medical evidence, have a further impact on the children. Not only would she be in difficulties as far as working is concerned and also her course, but should her mental health wellbeing be undermined this will have a further impact on the children.

36. I do appreciate that these children are young children but I find that the fact that they have British citizenship and that they have always lived in the UK to be weighty factors in the proportionality assessment.

37. I have noted the case of **EV (Philippines) and Others** **[2014] EWCA Civ 874** and that the children's interests should be looked at against the reality of the factors, in particular the parents' immigration situation. The fact is that the mother is a British citizen and she was naturalised on 1st August 2009. I can accept that the mother engaged in a relationship with someone who was here unlawfully but the fact is that the children should not be held responsible for the errors of their parents. As was found, Miss S was born in the Democratic Republic of Congo and was granted refugee status in 2003 and is studying in this country on a degree course and is now a

British citizen. The judge at paragraph 35 accepted that the medical services in this country are better than they might be in Nigeria and also that she did not feel safe in leaving the United Kingdom. I found the appellant's partner to be a credible- indeed she was clearly distressed at the thought of uprooting the children or any separation from her partner. The judge at paragraph 35 accepted, and I too accept that it would be very difficult for her to relocate to Nigeria where she does not feel safe. Although it might be for Miss S to decide whether she wants to accompany the appellant to Nigeria or to live in this country in the circumstances I find that she has a choice which can only severely affect the welfare of the children.

38. For the reasons given above I do not think it acceptable that the children should be expected to leave the UK, not least because it is in their best interests to remain here and secondly because their mother will clearly experience great difficulties in leaving for Nigeria. There was detailed evidence given by a mental health nurse in 2010 to support the contention that the partner should stay in the UK in a safe environment together with the children.

39. It is in the best interests of the children to stay with one united family unit and for the appellant and his partner and children to live together. It has been accepted that they have a genuine relationship.

40. I also take into account the various factors under Section 117B of the Nationality, Immigration and Asylum Act 2002:

> *"**117B Article 8: public interest considerations applicable in all cases***
>
> *(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 unlawfully.*

(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".*

In particular I note that the interests of the children are a primary factor but not *the* primary factor and their interests may be outweighed by the public interest. As can be seen from above, Section 117B states that it is in the interests of the economic wellbeing of the United Kingdom that the appellant should be financially independent. The evidence was that the wife has a cleaning job and works as a support worker for children with challenging behaviour. She confirmed that she did not receive housing benefit and that on this basis, it would appear that with the gifts given by the occasional offering from the church members of which the appellant was a voluntary pastor, the family survive independently. There was no question that the appellant could not speak English.

41. I note that under Section 117B(4) little weight should be given to a private life and/or of a relationship formed with a qualifying partner, that is the appellant's partner as she is a British citizen. She knew when she forged the relationship with her partner that he was in the country illegally.

42. I turn to Section 117B(6). The President of the Upper Tribunal held in **Treebhawon and Others** **(Section 117B(6)) [2015] UKUT 00674 held that**

"(i) *Section 117B(6) is a reflection of the distinction which Parliament has chosen to make between persons who are, and who are not, liable to deportation. In any case where the conditions enshrined in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 are satisfied, the section 117B(6) public interest prevails over the public interests identified in section 117B (1)-(3).*

(ii) *Section 117B(4) and (5) are not parliamentary prescriptions of the public interest. Rather, they operate as instructions to courts and tribunals to be applied in cases where the balancing exercise is being conducted in order to determine proportionality under Article 8 ECHR, in cases where either of the factors which they identify arises."*

43. The appellant has a genuine and subsisting relationship with a qualifying child, and indeed two qualifying children, and I have found that it would not be reasonable to expect the children to leave the United Kingdom.

44. Ms Sreeraman's position was that the public interest does not require the removal of a person where they have a genuine relationship with a qualifying child whom it would not be reasonable to expect to leave the UK, but equally this Section does not necessarily ***defeat*** other considerations.

45. I do take into account the fact that the appellant has had a poor immigration history and that he could not have had an expectation that he could live in this country unlawfully and build a family and private life to trump the respondent's interests.

46. I also take into account the delay that was a factor. the appellant's initial application on 24th August 2010 was refused with no right of appeal but he requested a reconsideration on 18th October 2010 because of the medical treatment that his partner was receiving. That request was acknowledged on 25th October 2010 and thereafter the appellant's representatives wrote to the Secretary of State on a variety of occasions which included a pre-action protocol letter to the judicial review unit on 14th March 2013 and representations by an MP. On 12th March 2014 some four years later, Capita Contact Management Team wrote to the appellant with a current circumstances questionnaire and this was returned on 7th April 2014. Further information was requested on 23rd June and I acknowledge that there was a gap of information between 28th August 2014 and 15th October 2014 but the final decision was not taken until 10th November 2014. There has been some considerable delay **EB Kosovo v SSHD [2008] UKHL 41**. Indeed, since the request for reconsideration the appellant has had two children and thus further entrenched his rights to remain in the UK.

47. The appellant is unable to meet the Immigration Rules, not least that he would not be considered to be a partner and could not meet the financial requirements. The Immigration Rules are an important factor and do express the Secretary of State's position. However in all the circumstances, I do find that the public interest is outweighed by the appellant's case. This case can be differentiated from **EV (Philippines)** in that both of these children are British citizens and indeed the wife is a British citizen. It is for their interests and their health that the public interest is outweighed. In these particular circumstances I am not persuaded that a short-term separation can be envisaged. The appellant does not meet the Rules and cannot meet the financial requirements. I was invited to consider that he would be refused under the suitability grounds but as I have pointed out, that was not the finding of the Secretary of State in the reasons for refusal letter and I find it an unattractive argument that such a defect should be presented as a positive factor. It is likely however, although I cannot predict the success or otherwise that the appellant would be caught by the financial requirements. Bearing in mind the mental health of the appellant's partner, who takes care of two young children, and the fact that none of them have ever experienced life without the existence of the appellant, I reject the notion of temporary separation. I do accept that visits would not be possible and because of the particular circumstances, not least the financial constraints, of the appellant's children and his partner.

48. **Huang v SSHD [2007] UKHL 11** is still good law and confirms as follows

*'In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality'.*

49. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007. I find that the public interest is outweighed, in all the circumstances and the appeal is allowed.

**Order**

The appeal of Mr OJA is allowed on human rights grounds.

**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 Date 29th February 2016

Deputy Upper Tribunal Judge Rimington

**TO THE RESPONDENT**
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award bearing in mind the issue involved some complexity.
Signed Date 29th February 2016

Deputy Upper Tribunal Judge Rimington