



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/21800/2016

THE IMMIGRATION ACTS

Heard at Manchester  
On 28<sup>th</sup> June 2018

Decision & Reasons Promulgated  
On 7<sup>th</sup> September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR T J W

(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr M Moksud, Counsel instructed by International Immigration Advisory Services, a branch of DAR and Co, solicitors.

For the respondent: Mr C Bates, Home Office Presenting Officer.

DETERMINATION AND REASONS

Introduction

1. The appellant, who was born in 1968 is a Nigerian national. He came to the United Kingdom in 2006 and was removed that year. He returned illegally and remains here. He made numerous applications all of which were unsuccessful. On 4 May 2016 he made application for leave to remain on the basis of his article 8 rights. This was considered by the respondent under the 10 year route in appendix FM and was refused on 31 August 2016.

2. He is in a relationship with Mrs FB. She is originally from Cote d'Ivoire. She was previously married to a British national and has 3 children from that relationship aged 22, 16 and 12. The appellant currently lives with her and her 3 children. Their natural father continues to have contact. He also has 3 children from a previous relationship aged 10, 9 and 7 He is estranged from their mother, with whom they live. She is a Nigerian national and there was no confirmation as to the children's status.
3. At the time of his application his relationship with Mrs FB had only been in existence one and a half years. Consequently, the respondent did not accept she came within the definition of partner and so he failed on the eligibility grounds. Regarding her children, the appellant had not adopted them, and it was not accepted that there was a genuine and subsisting relationship between them. Furthermore, the appellant did not have sole responsibility. Regarding his biological children it was not accepted there was a genuine and subsisting relationship between them.
4. The appeal was heard before Judge Malik of the First-tier Tribunal on 25 September 2017. In a decision promulgated on 10 October 2017 the appeal was dismissed.

#### The Upper Tribunal

5. Permission to appeal to the Upper Tribunal was granted on the basis it was arguable that the judge, having accepted that it would not be reasonable for Mrs FB's to live in Nigeria had not considered their best interests, bearing in mind the finding that he played a role in their lives.
6. At the outset of the hearing I checked with Mr Moksud his right of audience. This is because there is a letter dated 4 May 2018 from Immigration Advice Services Ltd indicating they are no longer acting. Mr Moksud pointed out he in fact was instructed by a different body, namely, International Immigration Advisory Services. He was able to obtain a letter from DAR and Co, solicitors dated 28 June 2018 stating that International Immigration Advisory Services are a branch office of their firm.
7. Mr. Moksud sought to challenge the decision on the basis the judge did not have adequate regard for the best interests of the children. The relationship with Mrs FB began in October 2004. The appellant is the stepfather of Mrs FB's 3 children. There is no adoption order. Two of those children are minors. He referred me to paragraph 41 of the decision where the judge accepted, having regard to the statements of the 2 children, that on balance he has a role in their lives from October 2015. Mrs FB and her children are British nationals and so are here as of right. The judge found that their contact with their natural father was limited but concluded it would not be reasonable to expect them or their mother to go to Nigeria. Mr. Moksud submitted that Mrs FB does not earn sufficient monies to be able to meet the financial requirements if

an application for entry clearance were made by the appellant. Consequently, this was not a Chickwamba situation. He submitted that if the appellant had to leave this would effectively end the relationship.

8. Regarding the appellant's biological children Mr. Moksud said that their mother was from Nigeria and that neither she nor the children had any confirmed immigration status. However he said that the eldest child was now 10 years of age having been born here. He submitted that that child under the British Nationality Act would be entitled to British nationality. The judge at paragraph 40 had noted that the appellant was not named on that child's birth certificate. However, Mr. Moksud said this was because the appellant had changed his name by deed poll. I have been provided with a copy of this confirming he was previously known as Mr A R and changed his name to Mr T J W on 9 March 2011. On the birth certificate of the eldest child born on 28 June 2008 the father is named as Mr A R. I was referred to letters from the school whereby it was recorded he would collect them.
9. Mr. Bates in response pointed out that at the date of the hearing before the First-tier Tribunal judge none of the appellant's biological children were of an age when they would be entitled by British nationality. None of his children were qualifying children within the meaning of the immigration rules at the time of the hearing. The judge commented on the limited evidence of contact between the appellant and his biological children and found there was nothing to suggest he played an active role in their lives. There was no evidence before the judge that either they or their mother had a right to be in the United Kingdom and on the basis, they were Nigerian it was open to them to return there.
10. Regarding the stepchildren, one of the children was an adult and the next was at college. The judge did accept there was a relationship between the appellant and them at paragraph 41. The judge noted that they were British citizens and were entitled to be here as of right. It was also noted at paragraph 42 they had some limited contact with their biological father. The judge therefore concluded it would not be reasonable to expect them to go to Nigeria with the appellant. The issue for the judge with the proportionality of the decision. Mr. Bates did not accept any separation need be permanent. Whilst Mrs FB earned below the income threshold there was a possibility she could seek other employment to supplement her earnings. He pointed out that it was accepted this was not a Chickwamba situation.

Mr. Bates pointed out that if it were in the best interests of the children for the appellant to remain this was still not a determinative issue albeit it would be a primary consideration. He referred me to MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705 and said the judge had identified strong reasons why it would not be disproportionate: the family and private life was formed in precarious circumstances and had not accepted that Mrs FB was unaware. I

was referred to the provisions of section 117 B in relation to this. The judge also noted that whilst the children may want the appellant to remain behind with them there was no evidence that they would suffer any serious emotional harm in his absence. Their primary carer, namely their mother, would remain with them in the United Kingdom. There was no suggestion that she was incapable of caring for them on her own. They were continuing their education. There was their preference that he remain but a lack of evidence to show that the effect of the appellant's removal would be disproportionate in relation to them.

11. The judge had noted at paragraph 44 that the appellant had a very poor immigration history and had no expectation he would be allowed to remain. The judge commented on him working illegally in the United Kingdom and referred to the decision of Treebhawan and others (Part 5a N IAA 2002-compelling circumstances test) [2017] UKUT 00013. At paragraph 45 the judge pointed out whilst the children may wish the appellant to remain there was nothing to stop him returning to Nigeria and then making an application to re-enter lawfully. Mrs FB had indicated she would support any such application.
12. In summary, the children's wishes were insufficient to outweigh the public interest factors. He submitted it was not in the public interest that the appellant be in the United Kingdom if Mrs FB could not currently meet the financial requirements. To not expect the appellant in that circumstance to make a fresh entry clearance application undermined the purpose of the rules. Regarding a temporary separation, Mrs FB and the children could maintain contact by other means or visit him.
13. Mr. Moksud in response said that he had been instructed that the appellant's biological children had been granted 2 ½ years leave to remain. He also made the point that looking at matters as at the date of the Upper Tribunal hearing the eldest child would be entitled to British nationality. Because of this he emphasised section 117B (6). He also submitted it was unrealistic to expect Mrs FB, with the care of 2 young children, to be able to take on a 2<sup>nd</sup> job to meet the financial threshold.

### Consideration

14. The 1<sup>st</sup> point I make is that procedurally I cannot start to remake a decision but must 1<sup>st</sup> find an error of law. Consequently, I am looking at the case made before the judge. Any new evidence could be considered at the remaking stage or form the basis of a fresh application. I make this observation in light of the comment from Mr. Moksud that the appellant's eldest biological child has now been here 10 years and that those children have been granted 2 ½ years leave. This was not the case before the immigration judge.

15. The judge sets out the appellant's immigration history and at paragraph 15 onwards accurately sets out the reasons for refusal. At paragraph 39 the judge sets out the need to have regard to section 55 and that the best interests of the child is a primary consideration.
16. At paragraph 40 the judge made the finding that there was no evidence to suggest his biological children had lived in the United Kingdom for the time claimed. This was a matter of proofs and a finding open to the judge on the evidence. On this basis the judge concluded there were not qualifying children but were Nigerian citizens.
17. The judge refers to the fact the appellant was not named on the birth certificate of the eldest child using the name he now goes by. There is nothing to suggest that it had been argued before the judge he was named in the certificate before the change of name nor was there any reference to the British Nationality Act. In any event, on the judge's finding the child had not been here the time claimed.
18. The judge concluded that the evidence did not suggest he played an active role in their lives. I note the letter submitted at hearing from the school confirming this could not have been in front of the judge because it is dated 6 June 2018. This was a factual finding open to the judge.
19. The judge then turned to his current partner's three children. The judge takes the point that the eldest child is now an adult. The judge did accept he had a role in their lives. At paragraph 42 the judge then goes on to point out that the children, as British nationals have the right to be here as does their mother. The judge also refers to the contact with their biological father albeit the finding was that it was limited. The judge concluded it would not be reasonable to expect them to go to Nigeria.
20. The consideration of what is in the best interests of a child must be established in isolation of the conduct of other parties. However the conclusion that their interest favours a particular course does not preclude an outcome to the contrary where the public interest demands this. At paragraph 42 the judge is not saying it is in their best interests to be with the appellant. At the end of that paragraph the judge said there was no evidence to suggest it would be contrary to their best interests to remain with their mother absent the appellant nor that a temporary separation would be contrary to their best interests.
21. The judge in the next paragraph turns to the public interest factors set out in section 117 B. The 1<sup>st</sup> point made was that the relationship with the children's mother was not long-standing. Furthermore, the judge did not accept she was unaware at the outset that he was here illegally. Even if this were so she did become aware after a few months. Consequently, any family and private life

was in this context. The judge refers to the appellant working illegally but on his evidence was not currently financially independent.

22. At paragraph 45 the judge accepted that his biological children and his partners children would wish him to remain. This statement is not the same as saying it is in their best interests that he remains. The judge pointed out it was open to the appellant to make an application for entry clearance to join his partner in the United Kingdom. She said she would support him. The judge did not feel the time period would be disproportionate.
23. The decision indicates the judge clearly considered the interests of the respective children, including both the biological children and his stepchildren. The judge had indicated that the respective relationships were limited. It has to be borne in mind that the appellant is estranged from the mother of his biological children and is not living with them. He is not the biological father of his current partner's children and has been in their household a relatively short period. They see their own father still. He has been absent from their lives whilst they were growing up. The judge does not make a finding that it is in the children's best interests that the appellant remains. Rather the judge expresses this as a weaker 'preference' by his stepchildren.
24. The judge anticipated the option of an application for entry clearance. The judge considered the likely timespan and the possibility of maintaining contact in the interval. The judge also briefly considered how the appellant would fare in Nigeria where he has another child. The judge concluded by pointing out that the best interests of the children and the family and private lives involved had been considered and found the decision was proportionate to the legitimate aim of immigration control.
25. Consequently, I do not find a material error of law demonstrated in the decision.

### Decision.

No material error of law has been established in the decision of First-tier Tribunal Judge Malik. Consequently, that decision dismissing the appeal shall stand.

*Francis J Farrelly*

Deputy Upper Tribunal Judge