Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number HU/24361/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 14 November 2018	**On 6 December 2018**
Prepared on 21 November 2018	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

ADEBOYE [A]
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Khosla, Solicitor
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 22 May 1974. He appeals against a decision of Judge of the First-tier Tribunal Courtney sitting at Hatton Cross on 23 February 2018 in which she dismissed the Appellant's appeal against a decision of the Respondent dated 13

October 2016. That decision was to refuse to grant the Appellant leave to remain on the basis of his family and private life.

2. The Appellant entered the United Kingdom in October 2000 on a visit visa. In 2009 he was included as a dependent on an application for leave to remain under Article 8 which was refused. In 2010 he applied for indefinite leave to remain which was refused on 11 May 2011. The Appellant appealed and on 18 April 2012 Judge of the First-tier Tribunal Boardman allowed the appeal to the limited extent that the May 2011 refusal was declared unlawful and a lawful decision remained outstanding. The issue which led to the finding that the decision was not in accordance with the law was a consideration of the best interests of the Appellant's daughter A born 2 December 2008.

3. It appears that the matter was reconsidered by the Respondent because on 16 October 2013 the Appellant was granted leave to remain on the basis of his family and private life valid until 15 April 2016. On 17 March 2016 shortly before that leave was due to expire the Appellant applied for further leave to remain and it was the refusal on 13 October 2016 of that application that gave rise to the present proceedings.

The Explanation for Refusal

4. The application was rejected under the suitability requirements of paragraph S-LTR.1.6 of Appendix FM of the Immigration Rules. In September 2007 the Appellant was convicted of possessing false identity documents and sentenced to four months imprisonment. The Respondent stated that this conviction meant that the Appellant's presence in the United Kingdom was not conducive to the public good.

5. The application also fell for refusal under paragraph R-LTRPT.1.1(d)(i) because the Appellant failed to meet the eligibility requirements contained in paragraph E-LTRPT.2.3(a), the Appellant did not have sole responsibility for A who did not live with him. Neither A nor A's mother were British citizens or settled in the United Kingdom (sub-paragraph 2.3(b)). The Appellant had an order permitting contact to A but there was no evidence to show that he was adhering to it as there was nothing from A's mother.

6. In relation to the private life claim, the Appellant did not meet the requirements of paragraph 276ADE. He had not lived in the United Kingdom for a continuous period of 20 years, he had resided in Nigeria for 26 years and thus had spent the majority of his life there. He spoke English and Yoruba and his mother still lived in Nigeria. He would not face any very significant obstacles to his reintegration into Nigeria. There were no exceptional circumstances which might lead

to a grant of leave to remain outside the Immigration Rules. If the Appellant were to leave the United Kingdom A would still be here with her mother although both were over stayers. There were no insurmountable obstacles to them relocating to Nigeria where they could enjoy their full rights as citizens.

The Decision at First Instance

7. In her determination the Judge rejected the Respondent's argument that the application should fail for lack of suitability because of the Appellant's criminal conviction. She noted that the conviction was in 2007 and the Appellant had not reoffended since. As neither A nor A's mother were British citizens, it was accepted that the Appellant could not succeed under Appendix FM in any event, even disregarding the suitability issue. The Appellant could not succeed under paragraph 276 ADE of the Immigration Rules. He was currently employed in the United Kingdom and there was no reason why he could not obtain employment upon return.

8. The Judge considered the matter outside the rules under Article 8, posing a series of questions, indicative of a structured approach. The first question was whether the Appellant had a genuine and subsisting parental relationship with A. The Appellant had complained that A's mother only allowed him to see A with great reluctance and would certainly not cooperate in providing evidence in support of the uptake of contact. After reviewing the evidence of contact at [24] to [36] of the determination the Judge concluded that there was not a genuine and subsisting relationship between the Appellant and A. However even if she were wrong about that it would still be reasonable to expect A to leave the United Kingdom.

9. A was a qualifying child having lived in the United Kingdom for 7 years (she was born on 2 December 2008) and was now 9 years of age. The Judge pointed to the lack of medical evidence which might otherwise have indicated that it would be unreasonable to expect A to relocate to Nigeria. Although A's mother suffered from ill-health there was again insufficient evidence to show that the mother's problems materially interfered in any way with her ability to bring up A who could speak English which was an official language in Nigeria. Citing the Court of Appeal decision in **EV (Philippines) [2014] EWCA Civ 874** the Judge noted that the best interests of A were to remain in education which she could do upon return to her own country. There was no evidence to show that A had any other family members living in the United Kingdom.

10. Directing herself on the Court of Appeal authority of **MA (Pakistan) [2016] EWCA Civ 705** the Judge noted A's disregard for the Immigration Rules and that he had spent significant time in the United Kingdom without any legal basis of stay. Although the

Appellant may have established a private life he could maintain contact with his UK-based friends through modern means of communications. She dismissed the appeal.

The Onward Appeal

11. The Appellant appealed against this decision relying on a letter written by A's school which indicated that both of A's parents supported her education and attended school events. The grounds argued that insufficient weight had been placed on this evidence. The Judge had recorded two outstanding bills rendered by A's school in respect of the after-school provision of care. The letter from the school had noted that the Appellant was currently funding this care and it confirmed that A stayed with the Appellant during half term holidays. There was another letter which was not referred to by the Judge which was dated 14 October 2016. It was from the Children and Families Department of Sheffield Council inviting the Appellant to attend a meeting with social workers to discuss A's needs. This was highly relevant to the question of whether the Appellant enjoyed a parental relationship with A.

12. The Judge had not considered whether the contact order the Appellant had could be enforced in Nigeria in the event that A and A's mother were also returned there. The Appellant had explained why the level of contact with A had reduced. The two letters and the Appellant's oral evidence indicated a genuine and subsisting relationship with A and the Judge had erred in not accepting this. The grounds also argued that a decision was expected from the Supreme Court on the issue of the reasonableness of expecting a child to leave the United Kingdom. I refer below to that case now reported as **KO Nigeria & Ors [2018] UKSC 53**. The grounds suggested that the onward appeal be stayed pending the handing down of the Judgement in that case.

13. The final point made by the grounds was that the Judge had failed to follow the established authority of Devaseelan in that the Appellant's case was materially indistinguishable from that presented to Judge Boardman at the 2012 appeal hearing when he had found the Respondent's decision to refuse leave to remain to be not in accordance with the law (see paragraph 2 above). There was no good reason to go behind Judge Boardman's findings.

14. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Lambert on 18 June 2018. In refusing permission to appeal she wrote that the decision displayed detailed evidence-based reasoning and the conclusions were open to the Judge on that evidence. The grounds were no more than an attempt to reargue the Appellant's case. The Judge did not need to mention every aspect of evidence. The argument that the Judge had failed to

comply with Devaseelan principles overlooked what the Judge had actually found with regard to issues such as telephone contact. She refused permission.

15. The Appellant renewed his application for permission to appeal on substantially the same grounds acknowledging that the appeal could not succeed under appendix FM. Weight ought to have been given to the Appellant's oral evidence. It was "frankly beyond comprehension why [Judge Courtney] would not be prepared to place weight upon [the letter from the school dated 19 April 2016] with respect to what it says about the Appellant".

16. The renewed application for permission to appeal came on the papers before Upper Tribunal Judge Kebede on 16 October 2018. In a very brief decision she granted permission to appeal stating: "There is some arguable merit in the assertion in the grounds that the Judge arguably failed to consider all the evidence and failed to consider material matters and that her approach was arguably inconsistent with the principles in Devaseelan. All grounds are arguable". The Respondent did not reply to the grant of permission.

The Hearing Before Me

17. As a result of the decision to grant permission to appeal the matter came before me to decide in the first place whether there was a material error of law in the Judge's decision such that it should be set aside and the appeal reheard. If there was not, then the decision of the First-tier would stand.

18. For the Appellant reliance was placed on the grounds of onward appeal. The findings of the First-tier judge were said to be perverse. Judge Boardman had found that family life was being enjoyed. There were three occasions on which contact taken place and he had found from that that family life was established. The Respondent granted the Appellant leave to remain following that decision. The key to the case was that A was now 9 years of age. **KO** had confirmed that the sins of the parents should not be visited on the child although one could not ignore the status of the parents. A's mother had had an appeal, not asylum based, which was dismissed. A's parents were in dispute and that had to be settled by the family court. Contact was not ongoing. A's mother had done all she could to prevent contact. Once the court order was no longer in force for example if all the parties were back in Nigeria A's mother would again refuse contact. The Appellant would have to look to the Nigerian courts.

19. In reply the Presenting Officer argued there was no error of law in the First-tier decision. To prove irrationality or perversity the Appellant would have to cross a high threshold. It was a matter for the Judge

what weight she placed on the documents produced and she had looked at all matters in the round. It was unlikely that the Appellant would have been attending parent's evenings at A's school because he had said it was costly for him to go up to Sheffield. Judge Boardman had found family life on the basis of telephone calls between the Appellant and A but since that decision was made in 2012 six years had passed and it was open to Judge Courtney to revisit the family life issue. The case of **KO** Nigeria now applied. It was not accepted that the Appellant had a genuine relationship with A but even if it was one had to look at a real-world analysis as prescribed by the Supreme Court. The Appellant had no leave to remain neither did A's mother. The natural expectation would be for A to follow her mother to Nigeria. The Judge had looked at each specific factor including A's education and medical needs.

20. Finally in reply the Appellant's solicitor argued that there had been a misreading of the case of Devaseelan. Unless there was evidence that the facts were now different, the decision of Judge Boardman had to be the starting point. The passage of time would change some things but not all. In this case there was nothing to justify a departure from Judge Boardman's finding. If the letter from the school was not accepted that was tantamount to accusing the school of lying. The letter had in fact been submitted in support of the mother's application and it was produced by the Respondent at the First-tier hearing. There was no reason therefore why Judge Courtney had rejected that evidence.

21. I queried whether one could read [32] of the determination as saying that the Judge had rejected the letter from the school because it had been written to support the mother (the Appellant's interpretation of that paragraph). Was it not the case that she had she said she had rejected the letter because it was inconsistent with the evidence she had been given about the contact taken up by the Appellant? In response the Appellant's solicitor said A would be 10 next month and entitled thereafter to United Kingdom citizenship. It could not be reasonable for A to leave the United Kingdom.

Findings

22. The Supreme Court have given guidance on the application of the reasonableness test when considering the position of qualifying children in the case of **KO (Nigeria) & Ors [2018] UKSC 53**. The Supreme Court emphasised the need for "a straightforward set of rules" and that the purpose of their approach in **KO** was "to narrow rather than to widen the residual area of discretionary judgment".

23. There were three appeals before the Supreme Court, one of which **NS** is particularly relevant to the issues raised in the instant appeal before me. It was not a deportation case and thus the public interest

did not require the adults' removal because they had a subsisting parental relationship with the qualifying children (one of whom was more than 10 years old). The Upper Tribunal had recognised that the children would lose much if they and their parents were removed and further the children had no knowledge of life outside the United Kingdom. Their best interests were to remain in the United Kingdom. Nevertheless, the Upper Tribunal considered it outrageous for the parents to be permitted to remain in the United Kingdom.

24. At [51] of **KO** Lord Justice Carnwath (giving the judgment of the whole Court) did not consider that the Upper Tribunal's disapproval of the parents' conduct was relevant to its conclusion under section 117B (6) of the 2002 Act. The parents' conduct was only relevant to the extent that it meant that they had to leave the country. It was in that context that it had to be considered whether it was reasonable for the children to leave with them. The children's best interests would have been for the whole family to remain in the United Kingdom but in a context where the parents had to leave, the natural expectation would be that the children would go with them. Importantly he added: "there was nothing in the evidence reviewed by the Judge to suggest that [removal] would be other than reasonable". As a result, the appeal of the Appellant NS was dismissed.

25. In the light of the decision in **KO** the appropriate test is whether there is a natural expectation that a qualifying child should go with their parents. They in turn are expected to leave if (as in the case before me) neither have leave to be here. That is the relevance of the parents' poor immigration history. The issue is then whether the natural expectation that A would go with her mother could be displaced. Those factors which related to A and which the Judge dealt with in some detail in over 40 paragraphs were relevant.

26. Since the Appellant could not succeed under Appendix FM, the issue before the Judge was whether the Appellant could succeed outside the rules under Article 8. The principal focus of the appeal at first instance was on the relationship between the Appellant and his daughter. She was not living with him but was living with her mother who herself did not have any leave to remain in this country. Since A was not living with the Appellant the issue was not only whether A would be required to leave the United Kingdom if the Appellant were removed but what would the impact be on A if the Appellant were removed and A stayed behind?

27. As the Judge pointed out at [61] the Appellant and A had been living in different cities in the United Kingdom for several years and A had become accustomed to a long-distance relationship with her father. He could maintain contact with her in the future through modern

means of communication and occasional visits by A. Removal of the Appellant to Nigeria would not materially affect the way in which his relationship with A was currently conducted and did not constitute an interference with or lack of effective respect for the family life which father and daughter would have.

28. If the Appellant did not have a genuine and parental relationship with A the question of the reasonableness of expecting A to leave the United Kingdom would not arise since section 117 B (6) would not apply. Further, this was not an appeal by A's mother, if it was and since she was the carer of A it would then be highly relevant to consider whether it was reasonable to expect A to leave the United Kingdom. The refusal of the Appellant's application would not be so detrimental to A's best interests that it would infringe Article 8.

29. The alternative scenario was that A might be expected to leave the United Kingdom. The Appellant would not be able to take her with him, but A's removal would be in the context of the removal of A's mother. The contact order made in the Sheffield County Court dated 19 April 2013 is in the usual form state indicating that it may be a criminal offence under the Child Abduction Act 1984 to remove A from the United Kingdom without the leave of the court. That would not necessarily prevent the Respondent from removing A at the same time as A's mother in accordance with immigration procedures.

30. Judge Courtney had looked at the case through the prism of what was then understood to be the law as prescribed in **MA Pakistan** that one could take into account the poor immigration record of the parents when assessing the reasonableness of expecting a qualifying child to leave the United Kingdom. Following the Supreme Court decision of **KO** that is no longer the correct approach but instead one has to look at what is the natural expectation. Since neither parent has leave to remain in this country the natural expectation would be that they would be both required to leave the United Kingdom, A's mother taking A with her.

31. The Judge nevertheless proceeded to deal with the case on an even if basis. If it was necessary to consider whether it was reasonable to expect A to leave United Kingdom the answer was that it was so reasonable. The Judge first directed herself on what were A's best interests before proceeding to carry out the balancing exercise. The first question she posed was whether the Appellant had a genuine and subsisting parental relationship with A. The grounds of onward appeal took issue with the Judge's conclusion that there was not such a genuine and subsisting relationship (see [37]). Much was made of correspondence provided during the course of the hearing. The Judge was not impressed by the letter from the school seeking payment for after school provision because there was no evidence

that the Appellant had actually paid what he owed in relation to that after-school care.

32. The Judge quoted the letter dated 19 April 2016 which referred to A having regular contact with the Appellant during school holidays. At [32] the Judge noted the inconsistency between this letter and the Appellant's own evidence on whether the Appellant could attend school events (not least because of the distance involved between where the Appellant lived and where A lived). The complaint in the grounds was that the letter was corroboration of the Appellant's claim to enjoy staying contact with A during school holidays and that the Judge had materially erred in law by not placing appropriate weight on the letter.

33. The problem for the Appellant was that the evidence as it came out in from to the Judge was inconsistent and it was therefore a question for the Judge to decide what weight she could reasonably place on the letter. It was her view that she could place no weight on it because of the serious inconsistency in the evidence. The grounds are thus a mere disagreement with the Judge's conclusion on that point. The other problem was that letter itself was somewhat vague. The Appellant had claimed that A had spent Christmas and New Year with him. When saying that there was no supporting evidence for this claim what the Judge was pointing to was that something beyond the Appellant's own assertion to show where A was at the relevant time was required. The letter from the school adopted a broad-brush approach but that was not supportive of the specific claim of the Appellant. Since it was the Appellant's claim that A had spent Christmas and New Year with him it was reasonable to have expected the Appellant to have produced some supporting evidence to show that such a visit took place but no such supporting evidence beyond the Appellant's own assertion and some photographs were put forward.

34. The Judge indicated at [29] that the photographs were "few and far between" being taken in December 2013, December 2015, and in 2016. The hearing took place in February 2018 almost 2 years later and the Judge was influenced by the out of date nature of the evidence. The Appellant had claimed in his statement that he had spent Christmas and New Year 2017 with A but the Judge pointed out at [28] there was no corroborating evidence of that. It was a matter for the Judge to decide what weight she placed on the evidence of contact. Where it was reasonable to expect supporting evidence to be available, but none was it was open to the Judge to take an adverse view of the Appellant's credibility.

35. The Appellant had shown himself to be an unreliable witness, he had falsely claimed to be the custodian of some compensation monies which A was entitled to. That money was paid into court and subject

to court funds office rules, the Appellant was not custodian of it, he was clearly exaggerating his evidence (and by extension his connection with A) by claiming that he was a custodian. In those circumstances it was a matter for the Judge to decide what weight could be placed on inconsistent evidence. The Judge was well aware that A was a qualifying child, she considered A's health status, language and education needs and directed herself that it would be reasonable to expect A to leave the United Kingdom albeit that would presumably be in the context of the removal of A's mother.

36. I do not accept the argument that the Judge failed to follow Devaseelan principles correctly. Judge Boardman had pointed to a gap in the original refusal letter, that there had been insufficient consideration of A's best interests and that this was required before a lawful decision could be made. On that basis the Respondent was prepared to grant the Appellant limited leave to pursue his family life with A. The difficulty for the Appellant was that the situation did not improve from what it was at the time of Judge Boardman's decision, indeed it did not even remain the same but rather the position deteriorated.

37. The evidence of contact showed that contact was sparse and that whatever may have been the relationship between A and the Appellant at the time of the hearing before Judge Boardman, matters had now come to such a pass that it could not be said that the Appellant had a genuine and subsisting relationship with A. The appeal in this case amounts to no more than a disagreement with the decision at first instance. No material errors of law have been pointed out in the determination. The Judge was aware that she had to consider the best interests of the child in this case and she did so with some care.

38. The position had changed since the decision of Judge Boardman and the Judge was correct to look at what the up to date position was at the date of the hearing before her. She arrived at the conclusion that the Appellant did not have a genuine and subsisting relationship with A but such relationship as he did have could be continued upon return to Nigeria.

39. The Appellant raises a concern that upon return to Nigeria A's mother might continue to be difficult as he says she is at the present time about allowing contact. He fears he says that if she were obstructive, he would not be able to obtain legal redress in Nigeria as he can in this country. There are two difficulties with this argument. The first is that there is an element of speculation on the part of the Appellant that upon return to Nigeria he would be unable to continue to see his daughter and Nigerian law would not help him. The second difficulty is that the Appellant's case on contact is contradictory. On the one hand the Appellant claimed to Judge

Courtney that A's mother was being very difficult about contact but on the other hand his evidence was that A was staying with him during school holidays and occasional weekends and he was participating in school activities.

40. These alternatives could not both be true. The Judge evidently decided that the lack of contact was the true position and held that that was because the Appellant could not demonstrate contact. The Appellant's concerns that he might not be able to see the child in Nigeria were entirely speculative and the evidence of contact in this country was sparse. In those circumstances it was open to the Judge to find as she did both that it would be reasonable to expect A to return to Nigeria with her mother and that in any event the Appellant's removal would not be unduly harsh were A to remain in this country.

41. If as was suggested to me in argument A is granted British citizenship in the near future that may or may not affect any further claim by A's mother, but it would not affect the position as found by the Judge because she did not find that the Appellant had a genuine parental relationship with A. Even if he had it was still reasonable to expect A to leave the United Kingdom for the reasons the Judge gave. I do not find that there was a material error of law in the Judge's decision and I dismiss the appeal against that decision.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 3 December 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 3 December 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge