



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/10144/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 13 October 2017**

**Decision & Reasons Promulgated
On 2 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**S N
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. E. Sanders, counsel instructed by Deo Volente Solicitors

For the Respondent: Mr. N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria, born on 6 June 1976. He claimed to have arrived in the United Kingdom illegally on 24 November or 24 December 2004. He fathered a child, PGN, who was born on 22 June 2008 to NI, a national of Nigeria without leave to remain in the United Kingdom. The Appellant then made applications for a residence card on 8 May 2009 and on 1 April 2011 but these applications were refused. He fathered another child, KEAN, who was born on 19 December 2011 to OS, a national of Nigeria without leave to remain in the United Kingdom.

2. The Appellant was encountered working illegally by the Immigration Service on 28 May 2012 and informed of his liability for removal. On 20

June 2012, the Appellant made a further application for a residence card, which was rejected on 23 August 2012. He made a further application for a residence card on 29 August 2012, which was refused on 30 January 2013 and his appeal against that decision was dismissed on 6 June 2013. On 19 September 2013, the Appellant made an application for leave to remain on the basis of his private and family life. This application was refused on 11 October 2013 without the right of appeal but following a judicial review, which was settled by consent, the Respondent reconsidered her decision and issued a further refusal with the right of appeal on 12 February 2015.

3. The basis of the refusal was that the Appellant failed to meet the eligibility requirements E-LTRPT 2.2.-2.4 of Appendix FM of the Rules, in the absence of evidence that he has access rights to his children or is taking an active role in their upbringing. It was further not accepted that the requirements of EX1(a) were met as the Appellant's children are not British nor living in the United Kingdom continuously for at least 7 years. It was not considered that the private life requirements of the Rules were met nor that there were exceptional circumstances justifying the grant of leave pursuant to Article 8 outside the Rules. The Appellant appealed against this decision. A subsequent male child, GN, was born to OS on 27 November 2015.

4. The appeal came before FtTJ Swinnerton for hearing on 12 January 2017. In a decision and reasons promulgated on 1 February 2017, the Judge dismissed the appeal. At the hearing of the appeal, the FtTJ took into consideration additional documentation *viz* an undated and untimed photograph of the Appellant purportedly having contact with his son PGN, a letter to the Appellant from the Respondent in 2012 confirming his entitlement to work and two computer printouts submitted by the Respondent dated 12 January 2017 showing that the Appellant's partner, OS, had been refused leave to remain in the United Kingdom and had appealed and that NI was an overstayer who had been refused leave to remain but had not appealed that decision at the time of the printout. The Judge found the Appellant's oral evidence lacked credibility [17]. She took into account the fact that the Family Court had granted the Appellant indirect contact with his son, PGN from 1 November 2016 and that he could have direct contact commencing on 7 January 2017, on an increasing incremental basis rising to 4 hours from March 2017.

5. The FtTJ took into account her section 55 duty at [35] but at [38] found that the evidence from the Family Court shows that the Appellant has had minimal contact with his son in the last few years and the child's mother described the Appellant's relationship with his son in 2016 as non-existent, but accepted that the Appellant does wish to establish a caring relationship with the child and that under the terms of the interim court order he has been granted limited contact until the end of March 2017 [38]. She went on at [40] to find that, whilst she accepted that it is in the best interests of PGN to re-establish and maintain a relationship with the Appellant but as he is not a UK citizen and neither is his mother, if she

chooses to leave the UK to return to Nigeria then the Appellant's son would be residing in a different country from him. She found that the Appellant would be able to maintain and develop a relationship with his son through social media and skype [46] and whilst she accepted that the Appellant does have a genuine and subsisting relationship with his son, PGN for the purposes of section 117B(6) of the NIAA 2002, it was reasonable to expect the child to leave the UK because he resides with his mother who is a Nigerian citizen with no leave to remain in the UK [49] and [50]. She further found that it would not be unreasonable or unduly harsh to expect the Appellant and his partner and their two children to leave the UK as a unit and go to Nigeria to live together as a family [51].

6. An application for permission to appeal to the Upper Tribunal was made in time on 13 February 2017. The grounds in support of the application asserted that the First tier Tribunal Judge had erred materially in law:

(i) in allowing the Respondent to adduce late evidence, which prejudiced the Appellant due to the fact that it was produced after cross-examination; that this was unfair and due to his strained relationship with NI, the Appellant was unable to rebut the late evidence. The Appellant's evidence was that NI intended to remain in the United Kingdom with PGN;

(ii) in her determination of the reasonableness of expecting the Appellant's son, PGN, which was determined solely on the basis of the late evidence as to NI's immigration status [50] refers and the First tier Tribunal Judge erred in failing to apply the principles set out in MA (Pakistan) [2016] EWCA Civ 705 at [49] and [50] that leave to remain should be granted unless there are powerful reasons to the contrary, if a child has been in the UK for seven years and the First tier Tribunal Judge failed to identify any powerful reasons to depart from that starting point.

7. Permission to appeal to the Upper Tribunal was granted by Designated Judge Murray in a decision dated 17 August 2017, on the basis that there are arguable errors of law in the Judge's decision.

Hearing

8. I heard submissions from Ms Sanders on behalf of the Appellant and Mr Bramble on behalf of the Home Office. I have recorded these submissions in full in my typed record of proceedings.

9. I have concluded that the First tier Tribunal Judge made material errors of law in her decision to dismiss the appeal, for the reasons set out in the grounds of appeal.

10. The issue of procedural fairness arises out of the fact that, following the oral evidence and the submissions on behalf of the Home Office, the Judge asked to see the evidence upon which the Presenting Officer had relied in her submissions *viz* that the application made by the mother of the Appellant's eldest son, PGN had been refused and no appeal had been

lodged against that decision.

11. The attendance note drafted by Mr Sarwar, who was counsel for the Appellant at that hearing, makes clear that he raised a number of objections to the admission of this evidence, including the fact that: (i) it should have been filed and served in line with directions; (ii) it was highly prejudicial to the Appellant's position; (iii) the Appellant is not in a relationship with Ms N and cannot speak to her to clarify any ongoing matters, but if the evidence had been served in advance his solicitors could have written to her seeking clarification; (iv) the line of cross-examination as to his former partner's immigration status were unfair and an attempt to ambush the Appellant, given that the Presenting Officer patently had knowledge of this and (v) the evidence may not be reliable. Mr Bramble accepted the contents of the attendance note.

12. Mr Bramble submitted that the issue of the immigration statuses of the Appellant's current and former partner were raised in the refusal decision so the Appellant was on notice of this issue. He acknowledged that it was not best practice to put in evidence after the evidence has been completed during submissions and it was potentially problematic that the Judge had asked for this evidence during submissions, but it was not material.

13. Whilst I accept that the fact that at the date of decision, neither the Appellant's former or current partner had leave to remain, I have concluded that there was procedural unfairness and that it was material, given that it is clear from her findings at that the First tier Tribunal Judge relied heavily on the fact that the Appellant's former partner did not have extant leave and that, at the date of hearing, no appeal against the refusal of leave to remain had been received by the Home Office. This is apparent from [37], [39], [40], [46] and [50] of her decision and reasons.

14. I further find that the First tier Tribunal Judge made a material error in failing to apply the reasoning of the Court of Appeal in MA (Pakistan) [2016] EWCA Civ 705 at [49] and [50] that, once a child has resided in the United Kingdom for seven years, this should be accorded significant weight in any proportionality exercise, because of its relevance to determining the nature and strength of the child's best interests and *"because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."* It is apparent and I accept the submission that the only reason provided by the Judge for finding that it was reasonable for PGN to leave the United Kingdom was because he resides with his mother who is a Nigerian citizen with no leave to remain in the United Kingdom and there was no evidence that she had lodged an appeal against the refusal of leave to remain. Thus there was no consideration by the Judge of whether this constituted "powerful reasons to the contrary" nor any consideration of any private and family life ties that PGN (who was 8 and a half years of age at that time) had developed in the United Kingdom.

15. It follows that the appeal by the Appellant is allowed. I remit the appeal for a hearing *de novo* before the First tier Tribunal, to be heard by a Judge other than First tier Tribunal Judge Swinnerton.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman
2017

22 December