Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05267/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th December 2018	**On 29th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

ONYEMA [O]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Rashid, Counsel
For the Respondent: Mr Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 2nd August 1976. The Appellant has an extensive immigration history dating back to August 2004. On 12th March 2015 the Appellant submitted a new application under the ten year family and private life route. Following a request in March 2016 for further information the Appellant's application was refused by a Notice of Refusal dated 13th March 2017.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Aujla sitting at Taylor House on 18th September 2018. In a decision and reasons promulgated on 4th October 2018, the Appellant's appeal was dismissed on human rights grounds.

3. Grounds of Appeal were lodged to the Upper Tribunal on 4th October 2018 and on 24th October 2018 First-tier Tribunal Judge Ford granted permission to appeal. Judge Ford noted that there were two Grounds of Appeal:-

   (a) as to the proportionality exercise in that it was argued that given the Appellant was having direct contact with his son under an order of the Family Court and that the child cannot be removed from the jurisdiction without further order. It was contended the Tribunal may have erred in finding that the Appellant's removal would not have consequences of such gravity as to potentially engage Article 8.

   (b) That the First-tier Tribunal Judge had not adequately considered the best interests of the child.

4. Judge Ford considered that both grounds were arguable.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by his instructed Counsel, Mr Rashid. Mr Rashid is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer, Mr Tufan.

6. It is confirmed to me that there is an error in paragraph 1 of the First-tier Tribunal Judge's decision. Therein he refers to the Appellant as being female and a citizen of Ghana. That is clearly a typographical error. It has no bearing on the substance of the decision and I accept that it is an error that is not material and I am perfectly prepared to accept the submission that the Appellant is Nigerian and of course male.

Submissions/Discussion

7. It is pointed out to me by Mr Tufan as a preliminary issue that the Appellant has a partner and child. He acknowledges that there is a contention that the Appellant has a proxy marriage but goes no further than accepting that contention. Further he indicates that prior refusal was withdrawn by the Secretary of State for representation reasons and that the child of the Appellant is a non-qualifying child. However he does accept that there is a prohibitive steps order in place from the Civil Courts and that there is no contact between the Appellant and his former partner.

8. Mr Rashid starts by submitting that the initial question that the judge should have considered was whether it was in the child's best interest to have contact with his father and as this question was not actually put there is no answer provided. The only question raised is to be found at question 32 of the Appellant's interview and that no-one is suggesting that

the child should be removed from his mother. Consequently he submits that the wrong question has been posed and that the determination is subsequently flawed. He submits that the Appellant being a non-qualifying child and aged only 6 it is not appropriate for this issue to have been considered under Section 117D and he refers me to the decision of Mr Justice McCloskey in *JO (Section 55 duty) [2014] UKUT 517* and the manner in which Section 55 impacts in this case. He submits that that is good authority for stating that where the best interests of a child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them even if a child is a non-qualifying child that the judge has not followed this principle.

9. He acknowledges that at paragraph 38 the judge has given some consideration to the child's best interest but submits that the consideration given is woefully inadequate and can be considered as nothing more than cursory, casual and superficial. He submits that the judge had three bundles for him including a letter of 17th September 2018 from the Appellant's contact supervisor pointing out that contact has been going on for over twelve months and that nowhere within the decision does there appear to be any consideration of this document. He points out that there is reference at paragraph 40 to the involvement of the Family Court and I am drawn by him to the reference therein of the following sentence,

> "The child is not at such an age and the Appellant's involvement in his life is not so intense that his sudden departure from the United Kingdom and cessation of personal contact with the child would have drastic consequences for the child or for that matter the Appellant himself."

10. Mr Rashid submits that the words "drastic consequences" are not words that are found in any case law and impose far too high a threshold. He also reminds me that there being a prohibitive steps order in place it would not be possible for the child to visit Nigeria.

11. He submits that it would have been appropriate for the question to be asked would it be in the child's best interest to stop direct contact and that bearing in mind the involvement of the court supervision officers and the conclusions they reach that the judge's findings which are he submits based on no material fact, conflict with the view expressed by the supervising care officer.

12. Secondly, he turns to the issue of private life reminding that the Appellant is now 42 and that he left Nigeria when he was 15. He submits that he has not been there for 27 years and he could not reasonably establish himself. Further he considers the judge has failed to follow guidance given in *UE (Nigeria) and Others [2010] EWCA Civ 975* in that the Appellant is a qualified doctor and it is open to take into account the loss of public benefit when assessing the public interest side of proportionality under Article 8 and that the judge has failed to do so. He asked me to find that

there are material errors of law and to remit the matter back to the First-tier Tribunal for rehearing.

13. Mr Tufan takes me to paragraph 40 and indeed to other paragraphs particularly paragraph 33. He acknowledged that the guidance refers to exceptional circumstances that would result in "unjustifiably harsh consequences". He equates the use of the word 'drastic' to that. He takes me to paragraphs 39 and 41 which he considers shows that the judge knows what the test is and that the judge heard the evidence and considered it and came to a reasoned decision. He submits that that decision was neither irrational nor exceeded any appropriate threshold.

14. As far as the Appellant's private life is concerned the fact that he had not been to Nigeria since a teenager did not in his opinion take anything any further. He points out that the Appellant's medical qualification was based in Moldova and that the test expressed in *UE* is a high one.

The Law

15. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

16. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

17. I accept that the Appellant is a national of Nigeria and a medical practitioner and that he entered the UK as a visitor from Moldova on 8th August 2004 sponsored by his sister who is a settled British citizen. In December 2004 he applied for leave as a postgraduate doctor which was refused. Thereafter there were further applications and refusals. In 2010

he met his partner and they started a relationship which led to the birth of a child on 8th April 2012. The parties parted acrimoniously and the Family Courts made a contact order in respect of the child on 23rd December 2016. It is the Appellant's contention that undertaking a fair balancing exercise of all the facts as evidenced with a particular consideration to provisions of Section 55, his removal would breach his (and his son's) fundamental right to family life. He further contends that his absence from Nigeria for over 26 years and lack of any family there would present very significant obstacles to his reintegration into Nigerian society.

18. The question arises as to whether or not the judge in reaching his decision has materially erred in law. The judge has made findings. The question is; has he made sufficient findings? It is not an issue as to whether or not another judge would come to a different decision. The starting point is paragraph 38 of the judge's decision. Therein the judge has considered the matter in accordance with paragraph GEN.3.2 as to whether there were exceptional circumstances which would render the Respondent's decision in breach of Article 8 because the refusal would result in unjustifiably harsh consequences for the Appellant or his son. Thus the judge applies the correct starting point for his test. He has also emphasised that he has included, and taken into account, the documentary evidence placed before him including the reports from the supervising contact worker and other documents and the letter written by the Appellant's son and importantly he indicates that he has taken into account the documentation issued by the Family Court in respect of the child's arrangements leading to supervise contact.

19. The judge has gone on thereafter to consider the issue as to whether or not the circumstances were so exceptional that the Respondent's decision and consequent removal of the Appellant would have unjustifiably harsh consequences for the Appellant's son or for that matter the Appellant himself. Again the judge has applied the correct test. He has made findings at paragraph 40. I acknowledge that therein the judge has made reference to the words "drastic consequences". I do not find the use of those words constitutes a material error of law for the reason that the judge has at paragraph 38 set out the test and knows that that is the test that he has to follow. He has made findings based on the evidence that was before him and he found that the cessation of personal contact would not have unjustifiably harsh consequences for either of them. Unless such a conclusion is perverse providing the judge has carried out the reasoned analysis, given his findings and importantly considered all documentation then that is a finding that he is entitled to make and it is not for the Upper Tribunal to set it aside. In this instant case the judge has made such findings and has carried out such consideration. I thus do not find that there is any material error of law in the decision of the judge.

20. The other submissions are ancillary but equally they are important. The judge has given due notice to the fact that the Appellant is a doctor and whilst that is a consideration that does not negate the finding and conclusion reached by the First-tier Tribunal Judge. Further the judge has

found that it would not be unreasonable for the Appellant as a single man, albeit that he has been away from Nigeria over 26 years, to reintegrate into Nigerian society. He is a qualified professional man and as set out at paragraph 42 he is fully familiar with the culture and language of the country and has the benefit of an internationally recognised qualification. The judge was entitled to conclude that he could easily establish himself in Nigeria after his return.

21. It is important to note that the judge was purely addressing the immigration issues and not the orders as they currently stand within the Family Court. They may well have some bearing on the future of this matter but on the submissions made before me and the findings made by the judge I am satisfied that the judge has considered all the evidence that was before him and made findings that he was entitled to. The fact that he does not specifically refer to the letter of 17th September is in itself not fatal to his findings because he does refer to all documentation. This is the judge who has thoroughly considered all the evidence and made reasoned findings. As mentioned above it is immaterial that another judge might have come to a different conclusion. What is important in this case is the judge has made reasoned findings which are not perverse and in which circumstances he cannot be considered to have materially erred in law. For all the above reasons the Appellant's appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal Judge discloses no material error of law and the Appellant's appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris