



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06394/2018

THE IMMIGRATION ACTS

Heard at Field House
On 4 June 2019

Decision & Reasons Promulgated
On 12 June 2019

Before

UPPER TRIBUNAL JUDGE WARR

Between

I D O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Adebayo (David & Vine Solicitors)

For the Respondent: Mr S Whitwell

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 9 November 1974. He appeals the decision of a First-tier Judge following a hearing on 21 January 2019 against the decision of the respondent to refuse his application for leave to remain on Article 8 grounds in a decision dated 22 February 2018. The appellant had initially applied for leave to remain on behalf of himself, his wife (RK) and two of their children. However subsequent to the application the appellant and his wife separated and Family Court proceedings ensued. Further representations were made solely on behalf of the appellant on 24 August 2015.

2. The case did not have an untroubled passage to the hearing. The appeal was initially submitted out of time on 9 March 2018 but time was extended on 5 April 2018. Although the appeal was originally listed to be heard on 16 May 2018 it was adjourned as the solicitors had come on record two days previously and required further time to take instructions. The appellant was directed to provide a written update as to any change to the existing prohibited steps order or to any amendment as to access. It was further directed that the appellant was to file a new and updated bundle no later than fourteen days before the substantive hearing.
3. In fact what happened was that the appellant's representative (Mr Adebayo, who appears before me) filed a bundle running to 60 pages of the morning of the hearing. He claimed it had been filed on the last working day before the hearing but could provide no explanation as to why the bundle was sent so late. It was claimed that the solicitors had not received directions. Time was afforded to the Presenting Officer (Ms Lecointe) to consider the material. In addition to the bundle lodged at the hearing the appellant had filed without representation a folder containing documents relating to the Family Court proceedings dated 3 May 2018. It included a sealed child arrangements and prohibitive steps order issued by the Family Court on 29th January 2016.
4. The judge summarises the appellant's immigration and family history as follows:
 - "12. The appellant applied for entry clearance as a student on 15 May 2007 and was issued with entry clearance on 23 May 2007, valid from 1 June 2007 to 31 October 2009.
 13. The appellant entered this country on 15 June 2007. He subsequently overstayed.
 14. He made an application for leave to remain on article 8 grounds by way of an application dated 24 May 2012. The respondent rejected the application by way of a decision dated 21 June 2012.
 15. The appellant submitted a second application for leave to remain on article 8 grounds on 6 July 2012. The respondent refused the application by way of a decision dated 23 August 2013 and no in-country right of appeal was granted.
 16. The appellant submitted a further application for leave to remain on article 8 grounds on 21 February 2014 and consequent to his separation from his wife he served further representations on 24 August 2015. By way of the August 2015 representations he relied upon his length of residence and ongoing child contact proceedings. He further relied upon his children's integration into their local community and his family life with his children.
 17. The application was refused by way of a decision dated 22 February 2018.

Family History

18. The appellant is married to R. K., a Nigerian national. They have three children:
 - D. O. (age 12)

- S. O. (age 11)
- E. O. (age 5)

19. The couple's daughter, G. O., was stillborn on 2 September 2011.
20. The couple's relationship deteriorated, and their separation was marked with animosity. The children continued to reside with their mother, who moved away from London. The Family Court at Oldham (District Judge Fox) subsequently considered the appellant's application for child arrangement orders and consequent to a final hearing ordered on 29 January 2016:

"The children shall live with the mother

There shall be no contact between father and the children

Father must not attempt to remove the children from the care of the mother, nor from any other persons to whom she may have entrusted care. For the avoidance of doubt this includes their school or nursery."

21. In making the Order the court identified several findings of fact:

"The court heard the evidence and considered record (sic) of police interviews of the children and saw a video of child D. O.'s interview with the police.

It is clear that there is insufficient evidence to support a suggestion that the child S. O. had been sexually assaulted by father. Mother did not pursue that allegation before the court.

The court cannot however find that the allegation of such abuse was made maliciously by mother.

The court is satisfied that father has subjected the mother and both children to physical abuse.

Father's contention that mother had coached the children to make untrue allegations is rejected.

The court is satisfied that father poses a risk of harm both to mother and the children."

22. The appellant appealed this decision at an unspecified date in 2018. On a later, unspecified, date the appeal was refused purportedly on the ground of delay.

23. On 11 January 2019 the appellant took steps to file an application for child arrangement orders under section 8 of the Children Act 1989 with the Family Court at Manchester. By way of a letter authored by his family solicitors, David & Vine, Stratford, London, who previously represented the appellant and his wife in their immigration matters, the appellant relies upon his 'certificate of completion' of an anger management course and copies of counselling notes."

5. At the hearing the judge observed that there was no evidence before him that the appellant sought and secured permission from the Family Court to rely upon documents previously filed in proceedings before it. It was taken into account that the appellant had been a litigant in person when he filed and served several of the

documents but he had been represented for several months by those now instructed. The judge ruled as follows at paragraph 26 of the decision

“26. Save for the final order of District Judge Fox, dated 29 January 2016, which prohibits only the disclosure of the names of the persons involved in proceedings, not the order itself, I indicated that I was minded not to consider any other documents filed with the Tribunal that were before the Judge in the Family Court proceedings, though I confirmed that I would welcome any observations from the representatives on this matter. Both Mr. Adebayo and Ms. Lecointe were in agreement that such an approach should be adopted.”

6. The appellant relied on three witness statements which the judge refers to in paragraph 27 of his decision. In the third of his statements there was reference to an application for child arrangement orders made in January 2019. He claimed that assertions as to his violence and abuse were false in his May 2018 statement and that he had lodged an appeal against the District Judge’s decision in 2018. He had attended an anger management course and had sought counselling. The appellant’s sister attended the hearing and gave evidence that the appellant was of good character and she did not believe any of the allegations levelled against him. In submissions the Presenting Officer referred to the appellant’s history of abuse and violence and the findings in the Family Court proceedings. The recent filing of Family Court proceedings could “be identified as solely seeking to create a potential ground for this appeal...”
7. Mr Adebayo asserted there was clear evidence that the appellant had lodged Family Court proceedings and the judge was required to allow the appeal in the light of **RS (immigration/family court liaison: outcome) [2013] UKUT 00082 (IAC)**. He told the judge that the 2018 appeal had been dismissed on the grounds of being out of time. The judge noted that this was not detailed in the appellant’s witness statement.
8. The judge considered the matter within the Rules and found that the appellant had not established that there would be very significant obstacles to the establishment of a private life if returned to Nigeria and he could not meet the relevant requirements of the Rules in relation to his children in paragraphs 57 to 61 of the decision.
9. In relation to the Article 8 claim outside the Rules the judge, having referred to **Makhlouf v Secretary of State [2016] UKSC 59** (in a case in which an appellant enjoys no contact with his children the possibility of such a relationship developing is nonetheless a factor to be considered) found as follows:

“64. The appellant places heavy reliance upon his recent initiation of Family Court proceedings. Mr. Adebayo submitted that a there is clear evidence that the appellant has lodged Family Court proceedings, I am required to allow the appeal and he relied upon *RS (Immigration/family court liaison: outcome)* as authority for this proposition. I do not accept this submission, as the guidance in *RS* directs that the First-tier Tribunal establish whether there is a realistic prospect of the Family Court making a decision that will have a material impact on the relationship between a child and the parent facing immigration measures such as removal. The requirement that there

be a realistic prospect establishes that the simple existence of proceeding is not by itself determinative of the matter. When giving guidance the Upper Tribunal was clear in enunciating that the First-tier Tribunal is required to consider (a) the outcome of the contemplated family proceedings is likely to be material to the immigration decision; (b) there are compelling public interest reasons to remove the appellant from the United Kingdom irrespective of the outcome of the family proceedings or the best interest of a child; (c) there is any reason to believe that the family proceedings have been instituted by the appellant to delay or frustrate removal and not to promote a child's welfare. In assessing the above questions, it is necessary to consider: the degree of the appellant's previous interest in and contact with the child, the timing of contact proceedings and the commitment with which they had been progressed, when a decision was likely to be reached, and what materials are already available to identify pointers to where the child's welfare lay. This approach was approved by the Court of Appeal in *Mohan v Secretary of State for the Home Department* [2012] EWCA Civ 1363; [2013] 1 WLR 922.

65. My starting point is the decision of District Judge Fox, which is clear in terms that the appellant subjected his former wife and children to abuse whilst the family resided together and that the levels of abuse were such that the appellant is not permitted to enjoy contact with his children. The District Judge specifically found that the appellant posed a risk of harm to both mother and children. The appellant has enjoyed no contact with his children since around 2015 and District Judge Fox's order has been in place since January 2016. I note the appellant's reliance upon his not having broken the terms of the order, but this is a neutral factor as he is required to abide by such terms.
66. I find that the appellant has endeavoured to keep from the Tribunal the date of when he filed his appeal against the District Judge's decision. He has failed to detail the date in his witness statement or to produce relevant documentation from the Court. I find that he has done so because he seeks to hide the fact that it was the respondent's refusal of his application for leave to remain in February 2018 that spurred his efforts to resurrect his earlier application for family arrangement orders. I observe that in his grounds of appeal to the First-tier Tribunal the appellant detailed: *'I wasn't able [to] appeal the decision as much as I tried at the time, due to the toll the case and false allegations had had on me mentally and physically.'* This strongly suggests that he had not filed an appeal against District Judge Fox's decision at this point in time. I therefore find, on balance, that the appellant only initiated his appeal against the District Judge's decision consequent to his filing his appeal against the respondent's decision with this Tribunal. I have considered the explanation for not appealing the decision sooner, which is presented by the appellant in very general terms and not supported by medical evidence, and I find on balance that the appellant possessed no interest in appealing the decision until he became aware that his strongest chance of staying in this country was through enjoying contact with his children.
67. The appellant places significant reliance upon his recent initiation of a new application for child arrangement orders, which he describes in his

statement as enjoying a good prospect of success. He further asserts: *'I contend that the respondent's reasons for refusal is unreasonable. In view of the fact that I have put before the respondent the relevant facts and evidence of my relentless effort to pursue direct contact with my children which was only delayed whilst I was waiting for further advice from Counsel. Notwithstanding this, the respondent cannot claim to be unaware of my parental relationship with my children.'* I observe that though he describes his efforts to secure direct contact as being 'relentless', the appellant has failed not only to detail when he filed his appeal but also to acknowledge that it was refused, therefore denying the Tribunal the opportunity to consider the existence of delay between the refusal and the filing of the new application on 14 January 2019. The fact that the appeal was dismissed was only acknowledged by Mr. Adebayo during the course of his submissions. I find that the approach adopted by the appellant is consistent with his predisposition to seek to manipulate and obfuscate, which is further detailed below."

10. In paragraph 68 of the decision the judge deals with the appellant's claim to have attended an anger management course. He raised his concern as to the lack of evidence on this matter with Mr Adebayo during the course of his submissions but records that Mr Adebayo "did not apply to recall the appellant to address my concerns." The judge observes that the usual meaning of "attended" is to be present at". The judge took "judicial note" of the fact that the courses attended by the appellant were online courses which concluded with a multiple-choice test before a diploma was printed at home for the successful applicant. The judge was concerned that the appellant was presenting his diploma as one that had been secured upon attending a course relating to anger management and he had sought "manipulatively to project that he has attended upon a detailed and rigorous professional course..." The judge found it was not a suitable course for the appellant in seeking to address the concerns that had been raised over time as to his emotional state and his management of anger and aggression. The judge took into account the fact that the appellant had commenced counselling after having received the respondent's decision letter. While he accepted the counsellor's qualifications she was reliant upon the appellant providing frank and truthful details as to his history. He noted that the appellant maintained his innocence as to the allegations of violence and abuse and that he continued to minimise his behaviour. In paragraph 70 of his decision the judge refers to the appellant's filing one page of his bank statements concerning payments of £50 to his former wife for maintenance. He was not satisfied for the reasons given in paragraph 70 of his decision that full disclosure had been made. For reasons given in paragraph 71 the judge found that he could place only limited weight upon the evidence given by the appellant's sister.
11. The judge found that the appellant had not been "relentless in pursuing direct contact" with his children but had solely done so to aid his focussed efforts to remain in the UK. The decision continues as follows:
 - "72. On the evidence presented, I do not accept that the appellant has been relentless in pursuing direct contact. Rather, he has sought such contact in recent times solely to aid his focussed efforts to remain in this country. I find that the late filing of the recent Family Court application, itself reliant

upon an online anger management course and therapy sessions that the appellant did not undertake in good faith, is simply a means of seeking to delay or prevent his removal. I find, to the required standard, that the application has not been made to promote his children's welfare. He has expressly stated that he maintains his innocence as to allegations of violence and physical abuse towards his former wife and child, he exhibits no insight as to the effect such behaviour has upon his former wife and children and both his grounds of appeal and his statement are consistent in the appellant being self-absorbed as to what is said about him rather than how his actions impact adversely upon others. On its face, the recent Family Court application possesses very little, if any, merit, as I find to the requisite standard that the concerns of District Judge Fox as to the appellant posing a risk to his former wife and children remain the same early in 2019. In such circumstances, I find that there are compelling public interest reasons to remove the appellant from the United Kingdom irrespective of the outcome of the family proceedings because the evidence provided does not arguably establish that it is in the best interests of his children to resume contact with him. He is a manipulative, self-absorbed man who poses a physical risk to his children, whom he primarily identifies as the most effective means of his being able to remain in this country.

73. As for private life rights, the respondent notes by way of his decision letter that the appellant had been granted limited entry to this country as a student and so was aware upon his entry into this country that he only enjoyed entry on a temporary basis. It is further observed: *'It is considered that any private life that you have established in the UK following the expiry of leave has been done so in the full knowledge that your immigration status was precarious and that you had no permission to be in the UK.'* Further, it is noted within the decision letter: *'You have been resourceful in obtaining accommodation and financial support in the UK despite having no permission to be here and no permission to work following the expiry of your visa on 31 October 2009. You have provided no compelling reasons as to why you would be unable to obtain accommodation and employment in Nigeria or why any financial support you are receiving in the UK could not continue from abroad.'*

12. Having referred to sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 and relevant authorities the judge concluded as follows:

"79. Mr. Adebayo did not seek to rely upon the appellant's relationship with his sister, N.A., or her children, in his submissions. No evidence has been presented as to any dependency between the siblings and the present financial reliance arises solely because the appellant resides with his sister. The level of dependency is not such as to establish a dependency over and above that of normal emotional ties: *Kugathas*.

80. The appellant enjoyed leave to remain between 2007 and 2009 and since this time he has been an overstayer. Little weight is therefore to be given to such private life: sections 117B(4) and (5) of the 2002 Act. The Supreme Court confirmed in *Rhuppiah v. Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1WLR 5536, at [49] that a small degree of flexibility is built into the concept of 'little weight' and so applicants who rely upon their private life under article 8 can occasionally succeed. I observe as

positive factors that the appellant speaks English and resides with his sister. However, I further observe that he received treatment for glaucoma from the NHS whilst he was an overstayer, has abused his wife and children, has provided no evidence as to integration within his community beyond his sister's evidence and has sought to hide the true nature as to how he spends his days and weeks.

81. Whilst the appellant may desire to visit G.O.'s grave, and his evidence on this issue is general in nature, providing no detail as to the regularity of his attendance whilst he resides in London, this alone is not a determinative factor when assessing article 8. Mr Adebayo did not draw my attention to any authority establishing that article 8 establishes a right to visit a grave and I am not persuaded that there is existing a general right to visit a grave and mourn on one's own or with family members or that there are any particular facts, such as strong personal relationships and/or powerful cultural norms, that create the right in this case. The option remains for the appellant to seek to enter this country on occasion to visit the grave, but I do not find that it is a matter that reduces the public interest in the appellant's removal.
 82. Being mindful as to the public interest, I find to the required standard that in such circumstances the respondent has established that his decision to remove the appellant is proportionate and lawful in the circumstances and would not result in a disproportionate breach of the appellant's article 8 rights."
13. There was an application for permission to appeal. The application was refused by the First-tier Tribunal but permission was granted by the Upper Tribunal on 9 May 2019 on the basis that it was "just arguable" that the judge had erred in referring to the order made by the Family Court without first obtaining the consent of the Family Court.
 14. It was also considered arguable that the judge had erred in referring to the internet for information about the anger management course the appellant had attended.
 15. Mr Adebayo relied on the grounds although some as he acknowledged had been identified by the Upper Tribunal as being "weaker than others". The judge had indulged in post-hearing internet research contrary to the authority of e.g. **Nigeria [2008] UKAIT 00015**. This was very unwise given there was no opportunity to respond to his findings. The fact that the appellant had completed an anger management course was crucial.
 16. He acknowledged that the point which had been made in paragraph 7 about the disclosure of documents to third parties without an order of the Family Court judge was a weaker point since the parties had agreed the procedure. The appellant had lodged the appeal in person and had not realised that disclosure of documents was not allowed.
 17. Mr Whitwell submitted that the evidence considered by the First-tier Judge had been agreed between the parties and there had been no error in the judge's approach. The

judge had directed himself appropriately in paragraphs 24 to 26 of the decision. The judge had only referred to the order made.

18. In relation to the recent lodging of proceedings the judge was entitled to take into account the prospects of success and the submission that the appellant had gained insight into his behaviour by attending an anger management course (see paragraph 40 of the decision). It did not appear from paragraph 41 that the appeal proceedings were live. Mr Whitwell referred to Mohan v Secretary of State [2012] EWCA Civ 1363 at paragraph 18 in relation to the guidance provided by the Tribunal in RS in particular paragraph 43(i): "is the outcome of the contemplated family proceedings likely to be material to the immigration decision?"
19. Further in paragraph 43(ii) the guidance stated: are there compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interests of the child?" There plainly were as the judge had found in paragraph 65 of the decision. The judge had found in paragraph 66 that the appellant possessed no interest in appealing the decision until he became aware that his strongest chance of staying in the country was through enjoying contact with his children. The judge had raised his concerns about the anger management course with Mr Adebayo at the hearing as appeared from paragraph 68 of the decision but Mr Adebayo did not apply to recall the appellant.
20. At the conclusion of the submissions I reserved my decision. I have carefully considered all the material before me. I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.
21. The first of the arguments advanced was acknowledged to be the weaker of the two since the parties had consented to the proposal of the judge to consider just the court order. The judge did not consider the documentary evidence filed before the Family Court but simply the order. As the parties were in agreement with that course I cannot see that the judge materially erred in proceeding as agreed. I note that there had been ample time prior to the hearing for the appellant's representatives to get the case in order and the judge was not assisted by the way the case has been presented to him.
22. The judge was confronted with a large amount of evidence at the hearing and it was reasonable for him to deal with the issue of the anger management course in the way that he did. He had expressly raised his concerns as Mr Whitwell points out at the hearing and the appellant had been given the opportunity to address those concerns but that opportunity had not been taken. In the circumstances of this case I do not find that it was a material error for the judge to seek further information. I note that in paragraph 9 of the grounds the assertion was made that the First-tier Judge "had a clear opportunity to ask the appellant the necessary questions on the nature, structure and the content of the said courses." It is quite clear that the argument is without merit for the reasons given by Mr Whitwell by reference to paragraph 68 of

the judge's decision. For the reasons I have given I am not satisfied that the grounds raise a material error of law in the judge's decision.

23. This appeal is dismissed and the appeal of the First-tier Judge is confirmed. The First-tier Judge made an anonymity order in this case which it is appropriate to continue.

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.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed

Date: 10 June 2019

G Warr, Judge of the Upper Tribunal