



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/12499/2017

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 2<sup>nd</sup> April 2019**

**Decision & Reasons  
Promulgated  
On 30<sup>th</sup> April 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**OLUSHOLA [A]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr T Ojo, C W Law Solicitors

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a national of Nigeria, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 3<sup>rd</sup> October 2017 to refuse his application for leave to remain in the UK on the basis of his family life. First-tier Tribunal Judge Obhi dismissed the appeal in a decision promulgated on 15<sup>th</sup> November 2018. Permission to appeal to this Tribunal was granted on renewal to the Upper Tribunal by Upper Tribunal Judge McWilliam on 7<sup>th</sup> March 2019.

2. The background to this appeal is that, following several visits to the UK, the Appellant was granted entry clearance as a visitor and entered the UK on 27<sup>th</sup> January 2010. This application for leave to remain under Tier 1 was granted until 21<sup>st</sup> September 2013. His application for an EEA residence card was refused on 19<sup>th</sup> March 2014 and a subsequent application for leave to remain on the basis of his human rights was refused on 17<sup>th</sup> September 2015. A further application for leave to remain on the basis of human rights was refused on 28<sup>th</sup> April 2016. A further application was made on 25<sup>th</sup> January 2017 on the basis of the Appellant's claimed relationship with [HA], a British citizen, and their British citizen child born on 9<sup>th</sup> September 2016. The refusal of that application on 3<sup>rd</sup> October 2017 is the subject of this appeal. The First-tier Tribunal Judge dismissed the appeal on human rights grounds. The Appellant appeals against that decision on two grounds as articulated in the application for permission to appeal and developed by Mr Ojo at the hearing.
3. It is contended in the first ground that the Immigration Judge erred in her conclusion at paragraph 36 that, if the Appellant is removed from the UK the extent to which he will be able to play any role in the child's life will be "further diminished". She went on to find that he is unlikely to be able to have any physical contact with her but could continue to have Skype and telephone contact with her. It is contended that the judge did not give any reason for this conclusion and that this conclusion infected the entire decision rendering it unsustainable in law.
4. It is contended in the second Ground of Appeal that the judge erred in her assessment of the relationship between the Appellant and his daughter. At paragraph 16 of the decision the judge confirmed that the Appellant and his partner took turns to look after their daughter during the hearing of the appeal, it is contended that this confirms that the Appellant has a subsisting relationship with his daughter to the extent of being comfortable with him outside the court. It is contended that it is in the best interests of the child to be looked after by the two parents irrespective of their relationship and that the judge failed to give adequate weight to this matter which renders the decision unsustainable.
5. Permission to appeal was granted by Upper Tribunal Judge McWilliam on the basis that it is arguable that the judge erred in assessing reasonableness in the context of the Appellant's daughter in accordance with the decision in **JG (s.117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC)**.
6. It makes sense to take the grounds in reverse order. In considering the judge's approach to the Article 8 issue I firstly note that the judge, having heard oral evidence and considering the documentary evidence before her as to the relationship between the Appellant and the mother of the child, identified the issues to be determined at paragraph 31 where she said; "the Appellant claims to have a genuine and subsisting relationship with [HA] and a genuine parental relationship with their child. There is no dispute that he is the father of the child as there is DNA evidence of

paternity. The issues are whether the relationship with his wife or the child is subsisting". The judge concluded at paragraph 35 that the Appellant and Ms [A] are not in a genuine and subsisting relationship. That finding has not been challenged.

7. The judge went on to consider the Appellant's relationship with his daughter from paragraph 36. In considering whether the relationship with his daughter is a genuine and subsisting parental relationship the judge made the following relevant findings. "As the evidence of neither the appellant nor Ms [A] was reliable, it is difficult to know what role he plays in her day-to-day life" [36]. "I did not inform the impression that he plays a significant role in her life" [36]. "I am concerned only with whether the Appellant has a genuine and subsisting relationship with the child" [38]. "I was invited to find that the Appellant is involved in taking the child to nursery and that he has contributed to the nursery fees, but when he was asked more probing questions it was clear that he was not in fact involved as directly as he wished to portray" [39]. "Ms [A] is the child's primary carer and there is no evidence to suggest that she does not undertake that role entirely" [39]. "The difficulty I have is that having found both the Appellant and his partner to lack credibility I cannot assess the extent of his role in the child's life. There is no independent assessment of his role. Any finding I made would be speculative" [40].
8. The judge went on to find "I remind myself that the burden of proof is on the Appellant and if he is unable to present sufficient evidence for me to make a finding, I cannot make a finding. That is the position in relation to his claim that he has a genuine and subsisting relationship with his child" [41]. "The extent of that family life [with his child] that his involvement in her life are not established" [45] and at paragraph 46 where the judge said "the only safe findings I can make in this case are that the Appellant does not have a genuine and subsisting relationship with Ms [A], that she is the child's primary carer and the extent of his involvement in the child's life is unclear".
9. In granting permission Judge McWilliam identified a potential error in the assessment of whether it was reasonable to expect the child to leave the UK (**JG**). However that assessment in EX.1 of Appendix FM of the Rules and Section 117B(6) only comes into play where the Appellant has a genuine and subsisting parental relationship with a qualifying child.
10. It is abundantly clear, putting all of the findings together as highlighted above, that the judge found that the Appellant did not discharge the burden upon him to establish that he has a genuine and subsisting parental relationship with his child.
11. Mr Ojo pointed to the observations at paragraph 16 of the decision where the judge referred to the fact that the Appellant and the child's mother took turns to look after the child outside the courtroom. However, it is clear that the judge did not consider that this was a factor in her assessment of the relationship between the Appellant and the child. The

arrangements for looking after the child on the day at the hearing could not amount to evidence of such weight as to undermine the judge's clear findings that the Appellant had not discharged the burden upon him.

12. In my view the judge's findings as to the relationship between the Appellant and the child were open to her on the evidence and are sufficiently reasoned and clear.
13. Ground 1 relates to the judge's assertion about the potential for ongoing contact between the Appellant and the child at paragraph 36. However these conclusions are not relevant in circumstances where the judge had found it not established that there is a genuine and subsisting parental relationship between the Appellant and the child.
14. Any criticisms as regards the judge's assessment as to whether it was reasonable to expect the child to leave the UK in accordance with the guidance in **KO and Others v SSHD [2018] UKSC 53** and **JG** do not establish any material error either in light of the judge's findings that the Appellant had not established that there is a genuine and subsisting parental relationship between the Appellant and the child. The judge had no need to look at whether it is reasonable to expect the child to leave the UK in these circumstances.
15. I do accept that the judge's assertion at paragraph 38 that as the child is not leaving the UK EX.1 does not apply directly is not a correct interpretation of **JG** and **KO**. However the judge acknowledged that this does not directly apply because she was concerned only with whether the Appellant has a genuine and subsisting relationship with the child. Ultimately this case is determined by reference to that part of EX.1 and Section 117B(6).
16. The Appellant has not established that there is any material error of law in the First-tier Tribunal Judge's decision.

### **Notice of Decision**

The decision of the First-tier Tribunal does not contain a material error of law.

The decision of the First-tier Tribunal will stand.

No anonymity direction is made.

Signed

Date: 25<sup>th</sup> April 2019

**A Grimes**

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**  
**FEE AWARD**

The appeal has been dismissed therefore there is no fee award.

Signed

Date: 25<sup>th</sup> April 2019

**A Grimes**

Deputy Upper Tribunal Judge Grimes