



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/14893/2017**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 7 February 2019**

**Decision & Reasons
Promulgated
On 13 February 2019**

Before

Deputy Upper Tribunal Judge MANUELL

Between

**CHARLENE [W]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Corban, Solicitor (Corban Solicitors)

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Permission to appeal was granted by First-tier Tribunal Judge Hodgkinson on 27 December 2018 against the decision to dismiss the Appellant's Article 8 ECHR appeal made by First-tier Tribunal Judge Beg in a decision and reasons promulgated on 13 August 2018. The Appellant is a national of Nigeria, who had sought existing leave to

remain under paragraph 276B of the Immigration Rules, i.e., 10 years' continuous lawful residence.

2. Judge Beg found that the Appellant had not shown that she met the Immigration Rules. There was too large a gap in her claimed continuity of lawful leave. Nor could the Appellant show that could satisfy the requirements of Appendix FM because her British Citizen partner and sponsor was unable to meet the minimum earnings level prescribed. The Appellant's child was a British Citizen but her best interests were to remain with her mother who had no continuing right to remain in the United Kingdom. The child, mother and father could all live in Nigeria, as the mother and father held Nigerian nationality, had lived in Nigeria previously and had a network of family support there. The child (born on 9 October 2017) was young enough to adapt and it was in effect reasonable for the child to go to Nigeria with her parents. There was no Article 8 ECHR disproportionality in such circumstances. Hence the appeal was dismissed.
3. When permission to appeal was granted it was noted that there was no challenge to the judge's finding that the long residence provisions of paragraph 276B had not been met. Nevertheless, as was submitted, it was arguable that the judge failed to conduct an adequate Article 8 ECHR balancing exercise, had failed to recognise the best interests of the British Citizen child and had not had regard to Home Office guidance.
4. There was no rule 24 notice from the Respondent but Ms Isherwood indicated at the start of the hearing that the appeal was opposed.
5. Mr Corban for the Appellant confirmed that there was no challenge to the dismissal of the continuous lawful long residence claim. He relied on the grounds submitted and the grant of permission to appeal. No adequate Article 8 ECHR balancing exercise had been conducted. The judge had approached the case on the basis that both parents would be removed, whereas only the mother faced removal. There was a very strong expectation that the British Citizen child's best interests will be to remain in the United Kingdom, which was Home Office policy. The judge had misunderstood Appendix FM which the Appellant could satisfy. The judge had ignored the evidence of the Appellant's husband's relationship with his other child living in the United Kingdom and had not considered the reasonableness of separation of the Appellant's child from either the Appellant or the child's father. Discussion and

dialogue followed with Mr Corban, who contended that the decision disclosed material errors of law and should be set aside. The appeal should be allowed and the decision remade in the Appellant's favour.

6. Ms Isherwood for the Respondent relied on KO (Nigeria) [2018] UKSC 53, which in effect the judge had anticipated although the Supreme Court's decision clarifying the law had been handed down after the promulgation of the First-tier Tribunal's determination. After considering all of the evidence and examining the child's best interests, the judge had decided that it was reasonable for the child to go to Nigeria with her parents. That was a choice open to them and was a "real world" choice. The judge had found that Appendix FM was not met: not only were the financial requirements not satisfied, no application in the prescribed form had been made: R-LTRP1.1(c) applied. The judge had addressed all of the submissions made in the skeleton argument presented at the First-tier Tribunal hearing. Evidence had been taken from the Appellant's partner and the judge had reached conclusions open to her. The appeal should be dismissed.
7. The main focus of the First-tier Tribunal appeal was on the paragraph 276B claim. That was dismissed by the judge with clear findings and sound reasons, which have not been challenged.
8. The judge's consideration of the alternative claim based on family life was attacked at some length by Mr Corban, somewhat artificially in the tribunal's view. It is, for example, clear that the judge accepted that the Appellant was not an overstayer: see [27] of the decision. Nor was any other alleged error of fact shown. The Appellant was unable to meet Appendix FM, as Ms Isherwood correctly emphasised, although there was no suggestion that the Appellant would never be able to do so, which is obviously relevant for proportionality purposes.
9. Mr Corban's submissions about compliance with Appendix FM were plainly wrong, as the tribunal pointed out at the hearing. Similarly, his submission that the judge had not considered the evidence about the Appellant's husband's other child was equally wrong. The judge noted the husband's evidence at [8] of the determination and explained the findings she reached at [21] of the determination. They were open to her on the evidence presented.

10. As the British Citizen child's father is also a British Citizen, it was and is obvious that the child concerned does not *have* to leave the United Kingdom and Judge Beg made no such suggestion. It is a question of "real world" choice for the parents, choices which include the Appellant's making an application under Appendix FM for entry clearance application, sponsored by her husband, or of going to live in Nigeria as a family, which is the cultural background of the parents (both of whom are Nigerian citizens) and their child, who must also be entitled to Nigerian nationality. There was no evidence identified before the First-tier Tribunal judge that the process of obtaining entry clearance would necessarily be protracted or that the child would suffer harm as the result of a temporary separation from either parent. As the judge found that the Appellant's husband had not proven that he had contact with another child of his living in the United Kingdom, either choice was demonstrably open to the couple. The key fact was the choice of the venue for the couple's family life was not one which they could dictate absent compliance with the Immigration Rules or very compelling circumstances outside the rules, which the judge found did not exist.
11. As noted above, the judge carefully considered the Appellant's child's best interests and reached sustainable conclusions as to the reasonableness of the child's departure from the United Kingdom. In the tribunal's judgment, the experienced First-tier Tribunal judge produced a full and balanced determination, reflecting current law such as KO (Nigeria), which securely resolved the live issues. The tribunal finds that there was no error of law and the onwards appeal must be dismissed.

DECISION

The appeal to the Upper Tribunal is dismissed.

There was no material error of law in the First-tier Tribunal's decision and reasons, which stands unchanged.

Signed

Dated 7 February 2019

Deputy Upper Tribunal Judge Manuell