



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

Appeal Number: IA/44596/2014
IA/44607/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On 26 April 2016

On 28 April 2016

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ORO

SJAOF

(ANONYMITY ORDER MADE)

Respondents

Representation:

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

For the Respondent: Ms A Adeolu, legal representative, David and Vine Solicitors

DECISION AND REASONS

1. This is the Secretary of State for the Home Department's appeal against the decision of Judge of the First-tier Tribunal R Cooper who, on 11 February 2015, allowed the appeals of the Respondents against a refusal, dated 21 October 2014, to grant them leave to remain on

the basis of their family and private life rights. In summary, the Judge found that the Respondents' removal would constitute a disproportionate interference with Article 8 separating as it would the 1st Respondent from her eldest son and the 2nd Respondent from his father and brother, both of whom were lawfully resident in the UK pursuant to EEA free movements rights. The Appellant essentially contends that the Judge failed to give adequate reasons for concluding that the 1st Respondent had a genuine and subsisting parental relationship with her eldest son given her findings that the son only began to reside with the 1st Respondent after the appealed decision was made.

Background

2. The Respondents are both nationals of Nigeria. The 1st Respondent was born on [...] 1978 and is the mother of the 2nd Respondent, who was born on [...] 2011 in the UK. The 1st Respondent entered the United Kingdom as a student on 06 August 2004 with leave to remain until 30 January 2006. She gave birth to her eldest son, AF, on 28 January 2006. It was not in dispute before the First-tier Tribunal (see paragraph 24), or before the Upper Tribunal at the error of law hearing, that AF was lawfully resident in the United Kingdom on the basis of his rights as a family member of an EEA national exercising Treaty rights within the terms of the Immigration (European Economic Area) Regulations 2006. There was nevertheless a degree of uncertainty as to the full circumstances surrounding AF's lawful residence. According to the Reasons For Refusal Letter dated 21 October 2014 AF held an EEA residence permit. The First-tier Tribunal decision (paragraph 3) indicated that this was valid until 30 November 2016. There was no evidence before the First-tier Tribunal in relation to the immigration status of AF's father (who is also the father of the 2nd Appellant). The First-tier Tribunal Judge presumed (paragraph 31) that AF derived his residence permit from his father, who the First-tier Tribunal Judge believed was either married to or lived with an EEA national exercising Treaty rights.
3. The 1st Respondent applied for further leave to remain as a student and this was granted until 21 October 2007. AF was, at this time, a dependent on his mother's application. The 1st Respondent's leave to remain was however revoked on 01 July 2006 as she failed to attend her course of studies.
4. On 28 September 2012 the 1st Respondent applied for Leave To Remain on the basis of her family and private life rights, with the 2nd Respondent as her dependent. On 26 February 2013 the 1st Respondent was convicted of an offence involving false or improperly obtained ID documents and she received a 12 month sentence of imprisonment. It was unclear to the First-tier Tribunal Judge whether this sentence was suspended, and it remains unclear to the Upper Tribunal. No deportation action was however initialised against the 1st

Respondent. Her application for Leave To Remain was refused on 18 September 2013 but, following the initiation of judicial review proceedings, the decision was reconsidered and refused on 21 October 2014.

5. In her 2014 decision the Appellant considered the 1st Respondent's conviction and refused the application on the basis that the 1st Respondent did not meet the suitability requirements of Appendix-FM. The Appellant was not satisfied the 1st Respondent had a genuine or subsisting relationship with AF because she failed to supply evidence that she had contact with him (he was living with his father at the date of the decision who was his primary carer). The Appellant proceeded to consider the Respondents' applications under paragraph 276ADE but was satisfied that the requirements of that paragraph were not met. The Appellant considered whether there were any 'exceptional circumstances' but concluded that the 1st Respondent could maintain any relationship she had with AF through remote forms of communication, and that the 2nd Respondent would be returned to Nigeria with his mother, who would ensure his well-being.

Decision of the First-tier Judge

6. The Judge heard evidence from the 1st Respondent and considered the documents contained in the bundles prepared by both parties. The Judge was not impressed with the 1st Respondent as a witness, finding (paragraph 41) that she had been "*less than straightforward in providing information to the [Secretary of State for the Home Department] and the Tribunal.*" The Judge was not satisfied there was much in the way of cogent evidence that AF had lived with the 1st Respondent between 2009 and December 2014, though she did find that AF had lived with the 1st Respondent from December 2014 up to the date of the hearing. The Judge found, contrary to the 1st Respondent's assertions, that she had worked illegally in the United Kingdom. The Judge found there was some evidence of the 1st Respondent's involvement in AF's school life and that the 1st Respondent 'may' have been living with the father of her two children for periods, including 2009 to 2012. The Judge stated (paragraph 43) that she gave particular weight to the fact that the 1st Respondent, in her written statement, provided no details of her life with AF save for one reference to taking him to and picking him up from school when he lived with his father. The Judge did not accept that the 1st Respondent had been primarily responsible for AF's care since 2012. At paragraphs 38 and 57 the Judge stated that AF's residence with the 1st Respondent 'may' have been made for immigration reasons.
7. The Judge nevertheless found (at paragraphs 52 and 66) that the 1st Respondent's relationship with AF constituted family life, and found that the 2nd Respondent's relationship with his father and AF also constituted family life. Having found that the 1st Respondent had a genuine and subsisting relationship with AF, and having previously

found that it would be unreasonable for AF to go to Nigeria (in light of his settlement at school and his relationship with his father), the Judge concluded that it would not be in the public interest, notwithstanding the 1st Respondent's breaches of both immigration and criminal laws, for her to be removed. The Judge consequently allowed the appeals.

Grounds of appeal

8. The Appellant contended that the First-tier Tribunal Judge failed to give adequate reasons for finding that it would be disproportionate to remove the Respondents. It was argued that a 'proper global consideration of the evidence' gave rise to a clear inference that AF's cohabitation with the 1st Respondent was solely or primarily for immigration reasons. Given that AF had previously lived with his father it was submitted that he could remain with his father again and that removal of the Respondents would entail 'little disruption' as the status quo would effectively be maintained. The Appellant stated, *"while it may not be reasonable for the 1st [Respondent's] eldest child to leave the jurisdiction, it is submitted that this is a choice for the parties to make."*
9. Permission to appeal was granted on the basis that it was arguable the First-tier Tribunal gave inadequate reasons in light of its factual findings.

Submissions of the parties

10. At the outset of the hearing Mr Avery indicated that, although the EEA residence cards issued to AF and his father had been withdrawn, the Appellant's decision to do so had itself now been withdrawn. This was confirmed in a letter from David & Vine Solicitors, dated 16 February 2016, that an appeal (IA/26659/2015) issued by AF's father was withdrawn following the withdrawal of the challenged decision. In the absence of any further evidence or submissions from the Appellant to the contrary, and with no objection from either representative, the error of law appeal proceeded on the basis that, at the date of the First-tier Tribunal's decision, both AF and his father were lawfully resident in the United Kingdom pursuant to EU rights of free movement.
11. Mr Avery adopted the reasoning contained in the grounds of appeal. There was said to be an 'odd' disconnect between the Judge's findings and her conclusions. It was accepted by Mr Avery that there was, between the 1st Respondent and AF, a 'relationship of sorts', but it was submitted that, on the Judge's findings, this was 'not particularly strong.' In these circumstances it was submitted that the Judge's reasoning in support of her finding that there was a genuine and subsisting relationship between the AF and the 1st Respondent was inadequate.

12. Mr Adeolu submitted that the grounds were no more than a disagreement with conclusions that the Judge was entitled to reach. It was submitted there was sufficient contact between the 1st Respondent and her eldest son to establish a genuine and subsisting relationship and that the Judge's reasoning was adequate. I reserved my decision.

Discussion

13. It is clear from the Judge's decision that she did not find the 1st Respondent an impressive witness. Nor was she impressed with the documentary evidence adduced in support of the appeal. The Judge nevertheless concluded the 1st Respondent did "... *have a parental relationship with [AF], albeit not one to the extent claimed by her.*" Holistic consideration of the Judge's decision shows reasoned findings that do support this conclusion. It was not disputed before the First-tier Tribunal that AF had lived with the 1st Respondent for the first three years of his life. The Judge found (paragraph 36) that AF had been living with the 1st Respondent since December 2014. The Judge accepted that the 1st Respondent took AF to school and collected him, and that she did have some involvement in his school life in light of her signature on two of AF's school reports for the year 2012/2013. The Judge also accepted (paragraph 44) that AF's father did have some contact with the 2nd Respondent. At paragraph 59 the Judge found that the 1st Respondent did have contact with AF when he was living with his father and was listed as a '*parental contact*' for him at school, and that she recently attended a parent-teacher event.
14. The Judge's conclusion must also be considered in light of the unchallenged evidence that AF is the son of the 1st Respondent and the brother of the 2nd Respondent. It is settled law that from the moment of a child's birth and the fact of it, there exists between a child and his parents a bond amounting to family life which subsequent events cannot break except in exceptional circumstances (*Gul v Switzerland* 1996) 22 EHRR 93, at 32). Mr Avery accepted that the 1st Respondent had a 'relationship of sorts' with AF. Although the Judge found that AF's father had 'primary responsibility' for AF, this does not logically exclude the 1st Respondent from nevertheless still maintaining a 'genuine and subsisting relationship'. Such a relationship does not require the 1st Respondent to have 'primary responsibility'. For example, one parent separated or divorced from the other may still have a 'genuine and subsisting parental relationship' with the couple's child even if the other parent has primary responsibility for the child's care.
15. Mr Avery submitted that the relationship between the 1st Respondent and AF was 'not particularly strong.' This may be so, but it does not logically exclude the existence of a genuine parental relationship. The same can be said in respect of the Judge's finding that AF's residence with the 1st Respondent 'may' have been made for immigration

purposes. I am satisfied that the Judge's reasoning in support of her finding that the 1st Respondent had a genuine and subsisting parental relationship with AF was adequately reasoned and was a finding she was rationally entitled to make on the evidence before her.

16. In assessing the proportionality of the removal decision the Judge applied paragraph 117B(6) of the Nationality, Immigration and Asylum Act 2002. For the reasons already given I am satisfied the Judge was entitled to find the 1st Respondent enjoyed a genuine and subsisting parental relationship with her eldest son. There was no challenge to the Judge's finding that it would be unreasonable for AF to leave the United Kingdom either in the Appellant's grounds of appeal or in Mr Avery's submissions. Given that AF and his father were lawfully present in the United Kingdom pursuant to EU free movement rights, and given that the father had 'primary responsibility' for AF, this was clearly a conclusion the Judge was entitled to reach.
17. In *Treebhawon and others (section 117B(6))* [2015] UKUT 00674 (IAC) The President of the Upper Tribunal (IAC) found that section 117B (6) was a reflection of the distinction which Parliament has chosen to make between persons who are, and who are not, liable to deportation. In any case where the conditions enshrined in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 are satisfied, the section 117B(6) public interest prevails over the public interests identified in section 117B (1)-(3). On the basis of the evidence presented to both the First-tier Tribunal and Upper Tribunal it appears that the 1st Respondent was not liable to deportation. The Judge, in any event, clearly accorded weight to the factors contained in section 117B, including the 1st Respondent's illegal status in the United Kingdom, and specifically stated that she gave "*substantial weight*" to the fact that the 1st Respondent has a criminal conviction for dishonesty.
18. Whilst another Judge may have been entitled to reach a different conclusion in respect of the nature of the 1st Respondent's relationship with her eldest son, I can detect no legal error in the approach adopted by the First-tier Tribunal. In these circumstances I am satisfied that the First-tier Tribunal has not committed a material error of law.

Decision:

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal stands.



27 April 2016

Signed:
Upper Tribunal Judge Blum

Date:

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Respondents in this appeal are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellant and to the Respondents. Failure to comply with this direction could lead to contempt of court proceedings.