



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

Appeal Number: HU/10582/2016

THE IMMIGRATION ACTS

Heard at Manchester

**Decision &
Promulgated
On 14 June 2017**

Reasons

On 12 June 2017

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

**CA
ANONYMITY DIRECTION MADE**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Adewusi, Crown & Law solicitors

For the respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

1. I have anonymised the appellant's name because this decision refers to the circumstances of his child and family proceedings relating to that child.

2. The appellant is a citizen of Nigeria. He has appealed against a decision dated 13 April 2016 refusing leave to remain on the basis of his private and family life in the UK. He has separated from the mother of his British citizen child, J, born in April 2013. His application to remain focussed upon his relationship with J.

First-tier Tribunal decision

3. In a decision dated 7 October 2016 First-tier Tribunal Judge Blair dismissed the appellant's appeal on the papers available, without a hearing, in line with the appellant's earlier request that his appeal be considered without a hearing.
4. Judge Blair referred to a letter from the appellant's solicitors dated 30 June 2016 requesting an extension of time to submit evidence [9 and 10]. This application enclosed an order from the family court made after a hearing on 23 May 2016. This order set out the timetable for family proceedings to determine whether the appellant should be permitted to spend time with J - a further hearing was set for 18 July 2016. With this in mind, the First-tier Tribunal had accepted the invitation to extend time to submit evidence and to adjourn the hearing to 28 September 2016.
5. Judge Blair observed at [11] that no further evidence was served and there was therefore very little documentary evidence available. The Judge specifically commented "*There was no further update from solicitors about any of this*". This is erroneous. In a letter dated 28 July 2016 the appellant's solicitors appeared to apply for a further adjournment. This application enclosed a further order from the family court dated 18 July 2016. This makes it clear that J's mother opposed the application for the appellant to spend time with his daughter, on the basis that he posed a risk to her safety. This order refers to a further court hearing in September 2016 at which time consideration would be given to whether a finding of fact hearing is necessary.
6. Judge Blair has not referred to the letter dated 28 July 2016 or the family court order enclosed with it. The relevant material was clearly available on the file and has been overlooked - the application for an adjournment was simply not addressed and the most up to date order from the family court was not considered.
7. Both representatives agreed that in these circumstances the First-tier Tribunal decision contains an error of law but that the decision should be remade by the Upper Tribunal. The factual position is uncomplicated and little further fact-finding is necessary. I therefore

concluded that I should remake the decision.

Remaking the decision

Hearing / adjournment request

8. Mr Adewusi invited me to grant an adjournment to enable the appellant to attend a domestic violence prevention course. I declined to grant an adjournment for the reasons provided below.
9. First, the family proceedings have come to a clear end-point. There are no pending proceedings and therefore no realistic prospect of the family court making a decision that will have a material impact on the relationship between J and her father in the immediate future - see Mohammed (Family Court proceedings-outcome) [2014] UKUT 419 (IAC).
10. In an order dated 17 November 2016 DJ Talbot made findings of fact, having heard evidence from the appellant, J's mother and J's aunt. These include the following:

“1. January 2013 - whilst the mother was six months pregnant with J, the father punched the mother in her stomach. The mother fell to the ground.

2. Between February 2013 and early 2014 the father raped the mother on about 50 occasions. The first occurred during February 2013, when she was seven months pregnant. The father repeatedly stated it was his right to have sexual intercourse with the mother as a Nigerian man, regardless as to whether she consented.

3. In or about April 2013 the father took J from the mother's arms and held her in the air by her clothing. The father stated that if the mother did not let him leave he would drop J. The father pushed the mother to the floor and put J on top of her.

4. 12 Jan 2014 - the father pushed the mother to the floor and kicked her legs, whilst she was holding J. H and P, J's elder half-siblings were woken up by this incident and were crying and shouting 'leave mummy'.

5. 2014 - the father approached the mother from behind and slapped and punched her to the head. The father pushed the mother's head into a wheelie bin and continued to punch her head. The mother's head was tender as a result and she sustained marks to the right side of her head and face.

6. 5 May 2014 - the father dragged the mother to the back of

a shop, whilst J was in her arms. The mother passed J to H. The father took the mother's phone and began punching her to her face and numerous items in the shop were knocked over. All three children were present during this incident and were distressed.

7. On a date between 9 and 23 April 2015 the father attended the mother's sister's home address and hit H with a large wooden spoon in her mouth as he stated that she was not eating hot food fast enough. H's mouth was cut and bleeding."

11. The matter was set down for a dispute resolution appointment and a final hearing took place on 17 March 2017. At that hearing the appellant was granted only indirect contact twice a year. It is also recorded that the appellant "*expressed his intention to self-refer to an appropriate domestic violence prevention course as he would wish to pursue an application for direct contact in the future*". The family proceedings have therefore clearly concluded.
12. Second, any adjournment would be open-ended. It is clear that the appellant has no realistic prospect of contact with J at present or in the immediate future. The family court has very recently made clear findings of fact that have now been accepted by the appellant. These findings are such that he must undertake a period of self-reflection and complete a domestic violence programme, before making any future application for contact. He has not even been assigned to such a programme, albeit I accept it appears that he has referred himself for one. The time frame is simply too lengthy and uncertain for an adjournment to be a viable option in the circumstances of this case.
13. Third, there has already been substantial delay in determining this matter. Now that the family proceedings have been finally determined it is appropriate to determine the appellant's appeal on the basis of all the information available - see RS (immigration and family court proceedings) India [2012] UKUT (IAC) and Mohan v SSHD [2012] EWCA Civ 1363.
14. I therefore decided that in all the circumstances, this appeal can be fairly determined without an adjournment.
15. After refusing the adjournment application, Mr Adewusi made very brief submissions. He simply asserted that the appellant should be given the chance of future contact by being granted leave in order to complete the domestic violence programme,

and that this course is in the best interests of J. Mr Adewusi did not take me to any authority to support this approach and did not refer to the relevant statutory framework.

16. After hearing from Mr Adewusi I told Mr McVeety that I did not need to hear from him as I had decided to dismiss the appeal, for reasons I now give in writing.

Article 8 - best interests

17. I begin the Article 8 assessment by evaluating the primary consideration of J's best interests. J is a British citizen. There has been a very recent determination of J's best interests by the family court. It has been determined that it is in her best interests to only have twice-yearly indirect contact with her father and to reside with her mother.
18. I accept that it would be in J's best interests for her father to begin the process of rehabilitation as soon as possible, with a view to building on the possibility of a safe relationship in the future. There is no clear reason why that process of rehabilitation cannot take place in Nigeria. The appellant needs to evidence a reduction in his risk, and this can be done in several ways, and is not limited to the completion of a domestic violence programme in the UK.
19. On balance, I conclude that the best interests of J, viewed through the lens of Article 8 private life, would not be served any better at the present time, by the appellant remaining in the UK. She can continue to have indirect contact with him from Nigeria and he can continue the process of rehabilitation in Nigeria.

Section 117B(6)

20. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 states as follows:

"In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

- (a) the person has a genuine and subsisting parental relationship with a qualifying child; and
- (b) it would not be reasonable to expect the child to leave the United Kingdom."

21. The correct approach to section 117B(6) is set out in MA (Pakistan) V SSHD [2016] EWCA Civ 705 (7 July 2016). Section

117B does not apply here. Although J is a British citizen and therefore a 'qualifying child', her father does not have a genuine and subsisting relationship with her. The family court has clearly concluded that it is not in J's best interests for him to have any form of direct contact with her. The appellant therefore does not meet the requirements of section 117B(6) (a), and it is unnecessary to consider section 117B(6)(b). Mr Adewusi placed no reliance on section 117B at all.

Private life

22. The appellant has a private life in the UK, having been here since 2010. Mr Adewusi did not place reliance upon any community, employment, family or religious links between the appellant and the UK. Mr Adewusi relied entirely upon the need for the appellant to complete the domestic violence programme in the UK. I accept that the appellant's removal from the UK will breach whatever unparticularised private life he has developed here and will also mean that he cannot complete the domestic violence programme in the UK. This may well delay or impact upon his prospects of securing direct contact with J. However, for the reasons I set out above it will not necessarily put a complete end to the possibility of future contact, as rehabilitation can be evidenced in alternative ways.

Balancing exercise

23. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act. By section 117A(2) thereof I am obliged to have regard to the considerations listed in section 117B. I consider that section 117B applies to this appeal in the following way:

(a) The public interest in the maintenance of effective immigration controls is clearly engaged. The appellant arrived in the UK as a Tier 5 migrant in 2010. This leave ran out on 1 December 2012. He was given leave on the basis of his claimed family life until 29 November 2015, and made an in-time application to remain on that same basis. The appellant has therefore been in the UK in a temporary capacity since 2010. He does not meet the requirements of the Immigration Rules.

(b) There is no infringement of the "English speaking" public interest, given the appellant is an English speaker.

(c) The economic interest is engaged albeit there is no reason why the appellant would not be able to access employment if

given leave to remain.

(d) The private life established by the appellant during the entirety of his time in the UK qualifies for the attribution of little weight only.

24. I regard it as a significant factor that the appellant has been found to have used serious violence against J's mother, in front of J and her half siblings, over an extended period of time. Mr Adewusi did not take me to any evidence to suggest that the appellant's attitude and behavior has changed. Simply signing up for the domestic violence programme is not indicative of rehabilitation.
25. Applying the guidance in RS (supra) together with the considerations set out above, I make the following findings.
- (i) There are compelling, significant public interest reasons to exclude the appellant from the UK irrespective of the pending domestic violence programme and any future application for contact. The most obvious reason relates to the findings of fact of DJ Talbot. These demonstrate that the appellant has used serious violence against J's mother over an extended period of time.
 - (ii) J is only three years old and probably has no memory of her own of the appellant. Any memory that she does have is likely to be a negative one, given DJ Talbot's findings of fact. J's welfare and best interests at this point do not require the appellant's presence in the UK.
 - (iii) When all the circumstances are considered in the round, the appellant's wish to remain in the UK to complete a domestic violence programme to support a future application for contact, and the private and / or family life vested in this, is overwhelmingly outweighed by the public interest in removing him.

Decision

26. The decision of the First-tier Tribunal contains an error of law.
27. I remake the decision by dismissing the appellant's appeal pursuant to Article 8 of the ECHR.

Signed: Ms Melanie Plimmer
Judge of the Upper Tribunal

Dated: 13 June 2017