Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05937/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 16 June 2017 **On 19 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR ADENIYI OLUWAFEMI ADEWUYI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N. Sadeghi, counsel instructed by SMK Solicitors
For the Respondent: Mr P. Armstrong, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria, born on 4.10.84. He arrived in the United Kingdom in May 2010 as a student and his leave expired on 31 December 2011 after which he overstayed. He made applications for leave to remain in 2012, 2013 and 2014, which were unsuccessful but he did not leave the UK. In June 2015, the Appellant made an application for leave to remain in the UK on the basis of his long residence and private and family life. This application was refused on 7 September 2015 and the Appellant appealed against this decision.

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2. His appeal came before First tier Tribunal Judge O'Malley for hearing on 28 September 2016. In an appeal promulgated on 4 November 2016 she dismissed the appeal. An application for permission to appeal in-time was made on 13 November 2016 on the basis that:

(i) the Appellant's partner was granted British nationality whilst the decision of the First tier Tribunal Judge was pending and the Judge was informed of this but ignored it. The Appellant's youngest child was born in the United Kingdom and is thus entitled to British nationality;

(ii) the Judge's findings regarding support for the Appellant if returned to Nigeria are based on assumption rather than evidence;

(iii) the Judge failed to take into account the fact that the Appellant and his partner are from different countries as his partner is from Guyana;

(iv) the Judge failed to properly consider the human rights of the Appellant and his partner and the best interests of their children.

3. Permission to appeal was granted by Judge of the First tier Tribunal Osborne on 20 April 2017 on the basis that it was arguable that the Judge failed to make a finding as to what is in the best interests of the relevant child and that all the issues raised are arguable.

4. In a rule 24 response dated 11 May 2017, the Respondent asserted that the finding of the Judge in respect of the best interests of the Appellant's child was neither irrational nor perverse; that no evidence had been provided to indicate that the post hearing evidence relating to the acquisition of nationality was placed before the FtTJ. It was also submitted that the current appeal appears to have limited utility given that a fresh application for leave to remain under Appendix FM with additional evidence as to nationality was made to the Respondent on 1 December 2016 and could be considered once the current appeal was concluded.

Hearing

5. At the hearing before me, Mr Armstrong for the Respondent indicated that having spoken to the Appellant's representative that he accepted that if the documents had been sent and received and not considered prior to determination there was a material error of law in the Judge's decision.

6. Having ascertained from the file that evidence of the Appellant's partner's British nationality had been sent to the First tier Tribunal on 11 October 2016 and the Judge's decision had not been signed until 20 October 2016 and had been promulgated on 4 November 2016, I concurred that there was a material error of law by the First tier Tribunal Judge in that this material evidence had not been considered prior to determination and promulgation of the appeal. Moreover, the principle in play had been considered by the Court of Appeal in *NA (Libya)* [2017]

EWCA Civ 143 where the Court reiterated that whilst in that case the First tier Tribunal Judge was not at fault in failing to take account of a CG decision which was promulgated after she had signed her decision but before it had been promulgated, there had been an error of law nevertheless.

7. In respect of the ground of appeal in respect of which permission to appeal was primarily granted, this is concerned with the manner in which the First tier Tribunal Judge assessed the best interests of the Appellant's daughter (the younger child at that time having not yet been born. The Judge held at [50]:

"The decision is to be seen through the prism of section 55 BCIA to ensure that the decision safeguards and promotes the welfare of children who are in the United Kingdom. I find that the decision does not fall foul of that requirement."

I find that the Judge materially erred in that there is no analysis or reasoning as to the best interests of this particular child and why the decision refusing to grant the Appellant leave to remain is not contrary to section 55 BCIA.

8. In light of the fact that Mr Armstrong indicated that the new application made on 1.12.16 was on hold pending the outcome of this appeal I decided to proceed to re-make the decision.

9. I heard submissions from Mr Armstrong first, who set out a brief history of the Appellant's immigration history and the Respondent's decision. He submitted that the public interest in this case means that the Appellant needs to show why he could not make an entry clearance application from Nigeria and that in light of *MA Pakistan* at [54], [88] and [114] he should not be allowed to remain in the UK just because he decided to remain and start a family. Mr Armstrong submitted that there was nothing to stop the family going with the Appellant whilst an entry clearance application is being made, given that the children are 8 months and 2 years old and it will not impact on them at that age if they have to go with him to Nigeria. The Appellant's partner studied to be a teaching assistant and there is no expectation that she would not be able to get a job earning over £18,600 so could support the Appellant. He submitted that the Judge did consider the best interests of the child at [50] and this was brief but sufficient. The family are receiving benefits and support from the Church. If the Appellant is absent it would make no difference as he is not bringing any money into the family home. There was no reason why the Appellant's partner cannot go to Nigeria and English is commonly spoken in Nigeria.

10. Mr Sadeghi on behalf of the Appellant invited me to allow the appeal and reverse the decision of Judge O'Malley. In respect of the best interests of the child he submitted that the starting point is *ZH (Tanzania)* that requires the best interests of the child to be assessed before launching into the proportionality assessment. As Judge Osborne observed in the grant of permission to appeal a finding should have been made as to best interests. Any assessment of the child's best interests must involve consideration of the fact that the child was born in the UK and the Appellant's partner has no connection with Nigeria as she is originally from

Guyana. She would face difficulties in caring now for two young children either without the support of the Appellant or in an entirely foreign country. He submitted that financially speaking the Appellant is not contributing financially but he is supporting the family unit by caring for the children.

11. Mr Sadeghi submitted that the balancing exercise would also account for the decision to grant the Appellant's partner British Citizenship and the effective certainty that this would follow. An application to register the first child was granted and their second child was born British. The Judge was aware at the point of decision making that the second child was due to be born within 2 weeks of promulgation of that determination. Thus the best interests consideration impacted on both aspects. He also sought to rely upon the judgment in *Chikwamba* and the fact that only rarely when children are involved would it be appropriate for someone to leave and apply for entry clearance outside the Immigration Rules and the fact that the Appellant is an overstayer does not amount to criminality or an awful immigration history sufficient to rebut the presumption in *Chikwamba*. Mr Sadeghi also relied upon *VW Uganda* at [43] and the likelihood of return via entry clearance should not be ordinarily be treated as a factor rendering removal proportionate, if anything the reverse is the case.

12. Mr Sadeghi submitted that the added pressure on the Appellant's partner of becoming a single mother is now worse since the birth of their second child. The Judge's finding at [45] was partly on the basis that the Appellant's partner moved to the UK from Guyana and see [46] of the decision but her circumstances were materially different when she came to the UK in 2011 in that she was not a parent. There is no evidence that she could migrate to Nigeria as a Guyanese national and she is now British as are the children, which adds much greater weight to the life she has here and the presumption that British Citizens be allowed to remain in the country of their birth. Judge O'Malley referred to support that would be available from the family in Nigeria from the Appellant's sister in law but no such evidence had been presented at the previous hearing nor was there any basis for that presumption. His brother has pre-deceased him and the Appellant has had no contact with his sister in law for several years and there is no evidence that she could support anyone else, not least a family of four. Mr Sadeghi also submitted that I was bound to consider the application of section 117B of the NIAA 2002 and the test is the same ie. one of reasonableness and the public interest does not require removal where there is a subsisting relationship with a British Citizen child. He submitted that for the reasons he has outlined that test is made out.

13. I reserved my decision, which I now give with my reasons.

Decision

14. First tier Tribunal Judge O'Malley at [30] found the evidence of the Appellant and his partner to be honest and straightforward. Her findings in respect of the Appellant's private life pursuant to paragraph 276ADE of the Rules were not subject to challenge. Thus the scope of my consideration was the application of Appendix

FM and EX1 in light of the grant of British Citizenship to the Appellant's partner and children and Article 8 outside the Rules. This change in circumstances is evidenced not only in the correspondence sent on 11 October 2016 attesting that the Appellant's partner had been granted British citizenship but also by way of copies of the details pages of the British passports of the Appellant's partner, Ms W, issued on [2016] and their oldest daughter, born on [14] whose passport was issued on the same day as her mother's. There is also a birth certificate relating to their youngest daughter born on [16], all of which were served under cover of a letter from the Appellant's solicitors dated 2 June 2017 and received on 7 June 2017.

15. The Respondent's refusal decision of 7 September 2015, whilst accepting that the Appellant has a genuine and subsisting relationship with his partner, is predicated on the basis that the Appellant's partner did not meet the eligibility requirements ie E-LTRP 1.2. of Appendix FM of the Rules. Likewise in respect of the parent route, albeit in addition the Appellant does not have sole responsibility for his children and lives with them and his partner in a family unit. Given that the Appellant's partner and children are now British he can now meet the eligibility requirement at E-LTRP 1.2. The question is whether EX1 applies.

16. I address first whether the Appellant can succeed by way of the partner route. The test at EX1(b) is whether there are insurmountable obstacles to family life with his partner continuing outside the UK. Insurmountable obstacles are defined at EX.2 as "*very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.*" Whilst I accept that the Appellant's partner is Guyanese and that the couple have two young children aged 8 months and 3 years, there is no evidence before me to show that any obstacles or hardship that she would encounter in Nigeria would reach the high threshold so as to amount to insurmountable obstacles or very serious hardship.

17. The position in relation to the children, however, is somewhat different in that there are now two children and both are British. The test at EX1(a) is whether or not it would be reasonable to expect the children to leave the United Kingdom. Mr Armstrong correctly pointed out that they are both very young and thus of an age to adapt if they had to accompany their father to Nigeria. However, both children are British citizens and as Mr Sadeghi submitted, the staring point for consideration of their best interests is their Lordships decision in *ZH (Tanzania)* [2011] UKSC 4 where Lady Hale held at [32]-[33]:

"32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhaba (in 'The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship', in *Migrations and Mobilities: Citizenship, Borders and Gender* (2009), edited by Seyla Benhabib and Judith Resnik, at p 193) has put it:

'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.'

33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that …"

18. In *R on the application of Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 the Court held as follows at [51] :

"51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant – even if residing in the UK unlawfully – was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in Chikwamba v Secretary of State for the Home Department."

19. I have also had regard to the Respondent's guidance "Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes August 2015" which provides *inter alia* as follows at 11.2.3:

"11.2.3. Would it be unreasonable to expect a British Citizen child to leave the UK?
Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano… Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.
The circumstances envisaged could cover amongst others:
- **criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;**
- **a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."**

20. It is clear from the Respondent's guidance that unless there is criminality or a very poor immigration history it is not reasonable to expect a British child to leave the UK in order to accompany the parent facing removal. Whilst the Appellant is an overstayer, having arrived lawfully as a student in 2010 and having thereafter remained lawfully for only 18 months, I do not consider on the evidence before me that, absent any aggravating factors, this constitutes a "very poor immigration history" comprising repeated and deliberate breaches of the Rules.

21. Therefore, in light of the above jurisprudence and the Respondent's own guidance as to the circumstances when it would be unreasonable to expect a British child to leave the UK, I find it would not be reasonable to expect the two children to leave the UK for Nigeria on either a temporary or a permanent basis and it would clearly be contrary to their best interests to expect them so to do. Nor do I consider it reasonable to expect the Appellant to return to Nigeria in order to obtain entry clearance to join his family under the partner route of Appendix FM of the Rules. Whilst it is not certain that he would be granted leave to enter, this is because his partner is currently on maternity leave and whilst she could return to work as a teaching assistant in order to fulfil the financial requirements of the Rules, given the young ages of the children her ability to do so without the support of her partner in respect of childcare would be compromised. This would also clearly be contrary to the best interests of the children.

22. For the reasons set out above, I find that the Appellant meets the requirements of R-LTRP 1.1.(d) of Appendix FM of the Immigration Rules ie on the basis of his family life. In these circumstances it is not necessary for me to go on to consider whether there are compelling circumstances justifying consideration of Article 8 outside the Rules.

Decision

23. The appeal is allowed on human rights grounds.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman 12 July 2017