Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/16172/2018
HU/16178/2018
HU/16176/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 October 2019	**On 24 October 2019**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between
AOO (FIRST APPELLANT)
OAO (SECOND APPELLANT)
OOO (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Not represented
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant is a citizen of Nigeria born on 1 August 1970. The second and third appellants are his children, who were born on 21 February 2001 and 2 February 2010. The appellants have been in the UK since April 2011. On 10 February 2018 they made a human rights application, seeking leave to remain in the UK on the basis of their private life in the UK. The respondent refused the application on 17 July 2018.

2. The appellants appealed to the First-tier Tribunal where their appeal was heard by Judge of the First-tier Tribunal Craft ("the judge"). In a decision promulgated on 24 June 2019, the judge allowed the appeals of the second and third appellants and dismissed the appeal of the first appellant.

3. There is no challenge to the decision in respect of the second and third appellants. Accordingly, the judge's decision to allow their appeal stands and is unaffected by this decision.

4. The first appellant is now appealing against the decision of the First-tier Tribunal.

Decision of the First-tier Tribunal

5. The judge stated that the Tribunal was required to have regard to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and set out in detail the consideration of that provision by the Court of Appeal in *MA (Pakistan)* [2016] EWCA Civ 705.

6. The judge observed that the first appellant's circumstances had changed significantly since the application was made, as the second and third appellants were no longer living with him and were now residing with their mother (his former wife). The judge summarised the evidence before the Tribunal about the mental health of the second appellant and the circumstances in which the second and third appellant had ceased living with the first appellant.

7. At paragraph 28 the judge found that it was disproportionate to refuse the human rights claims by the second and third appellants. The judge stated:

> "In this case, applying Section 117B(6) and taking note of the guidance in the cases referred to above the Tribunal has concluded that immigration controls will not be prejudiced, or undermined, by allowing [the second and third appellants] to remain in the United Kingdom".

8. I pause to observe that section 117B(6) was not relevant to the appeals by the second and third appellants, as it applies to individuals in a parental relationship with a qualifying child, not to a qualifying child him or herself. However, this issue was not raised by either party and, as mentioned previously, the decision in respect of the second and third appellants is not being challenged.

9. In respect of the first appellant, the judge found that his immigration status in the UK had always been precarious and that there would not be very significant obstacles to his reintegration into Nigeria given his social and cultural ties to the country and his capacity to obtain employment there. The judge also found that the second and third appellants are no longer reliant for accommodation on the first appellant as they live with their mother.

Error of Law

10. The grounds of appeal were drafted by the first appellant without the benefit of legal representation. They are drafted in general terms and, in summary, assert that the judge erred by placing immigration control over and above the best interests of his children.

11. There is a clear error of law that undermines the decision. Although it is not addressed specifically in the grounds, I am satisfied that the wording of the grounds is sufficient to encompass it.

12. The error is that the judge interpreted Section 117B(6) of the 2002 Act in light of *MA (Pakistan) a* without appearing to recognise that the Supreme Court in *KO (Nigeria) v SSHD* [2018] UKSC 53 reversed the previous generally held understanding of Section 117B(6) by deciding that the question of whether it would not be reasonable to expect a child to leave the UK is focused exclusively on what is reasonable for the child without consideration of the appellant's immigration history and misconduct.

13. After delivering my decision, I proceeded to hear evidence and submissions in order to remake the decision.

Remade Decision

14. Section 117B(6) of the 2002 Act provides as follows:

> "(6) 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".

15. It was not in dispute that the first appellant is not liable to deportation and that his children (the second and third appellants) are qualifying children. It was also not in dispute that it would not be reasonable to expect the second and third appellant to leave the United Kingdom, given the unchallenged findings of the First-tier Tribunal about the "compelling family and other considerations" weighing against removal of the second and third appellants from the UK. The only issue in dispute was whether the first appellant has a "genuine and subsisting parental relationship" with the second and third appellants.

16. The evidence indicates that until January 2019 the second and third appellants were living with the first appellant and that, until that date, he had been significantly involved in all aspects of their upbringing. In January 2019 the second and third appellants moved to reside with their mother. There have been serious concerns raised about the first appellant perpetrating physical violence on his former wife and excessive corporal punishment on the second and third appellants, and that his conduct may be connected to the second appellant's mental health problems.

However, there is no evidence of criminal proceedings or of a court order limiting contact between the first appellant and his children.

17. Ms Cunha argued that there was no evidence to show a continuing relationship between the first appellant and his children that has subsisted since they relocated to their mother's home in January 2019. She argued that given the nature of the issues raised, in terms of family dynamics and violence, one would expect to see a professional report concerning contact between the first appellant and his children; and in the absence of such evidence the first appellant cannot be found to have discharged the burden of showing he is in a subsisting relationship.

18. The evidence of the first appellant, given orally at the hearing, is that he has a continuing and ongoing relationship with his children. He stated that he sees them at least once a month and that he provides funds to their mother in order to support them. He sought to corroborate his claim to provide financial support by showing bank statements where cash had been taken out, which he said was taken out by his former wife. Whilst I do not consider the bank statements helpful to his claim (they merely show money taken out, and do not show a transfer to his former wife) having heard the first appellant respond to questioning, I accept that he is being truthful when he states that he sees the children approximately once a month and makes some funds available for them on an informal basis, via their mother.

19. The Court of Appeal has confirmed in *SSHD v AB (Jamaica) & Anor* [2019] EWCA Civ 661 that the assessment of whether there is a genuine and subsisting parental relationship between a parent and child is highly fact-specific and will involve consideration of the role played by the parent in his children's lives. A parent can have a genuine and subsisting parental relationship even when they do not provide any direct parental care and have only limited contact.

20. The first appellant has been involved in the upbringing of his children throughout their lives and they lived with him (after the separation from their mother) until January 2019. Since that date he has maintained contact with his children and has continued to see them on a regular basis. Given the active parental role undertaken by the first appellant throughout the lives of the second and third appellants, and that he has maintained contact with them since they ceased residing with him in January 2019, I am satisfied that he has a genuine and subsisting parental relationship with them.

21. The evidence indicates that there are potentially serious issues of abuse. However, there is insufficient evidence for me to make a finding one way or the other on this point; and, in any event, it is not necessary for me to do so. The question to be addressed is whether there is a genuine and subsisting relationship; not whether the relationship has (or had) an abusive element. The evidence overwhelmingly supports the view that the appellant has had a significant (indeed, central) parental role throughout

the lives of his children who lived with him until only 10 months ago. This condition of section 117B(6) is therefore met.

22. Section 117B(6) is a self-contained provision, such that if all of its conditions are satisfied, the public interest will not require a person's removal. The appellant meets all of the conditions as he is not liable for deportation, has a genuine and subsisting relationship with two qualifying children, and it would not be reasonable to expect those children to leave the UK. Article 8 would therefore be infringed by the appellant's removal from the UK.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. I set that decision aside and remake the decision by allowing the appellant's appeal on human rights grounds.

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

Unless and until a Tribunal or court directs otherwise, the appellants 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 appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Upper Tribunal Judge Sheridan Dated: 23 October 2019