Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11732/2017

THE IMMIGRATION ACTS

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

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

ADESANYA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Moriarty, Counsel instructed by Rashid & Rashid, Solicitors
For the Respondent: Ms A. Everett, Home Office Presenting Officer

DECISION AND REASONS

1. I have drawn upon what I said in finding that the determination of the First-tier Tribunal disclosed an error of law in setting out the history of this appeal.

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2. The appellant is a citizen of Nigeria who was born on 29 May 1971. He appeals against the determination of First-tier Tribunal Judge S. Meah promulgated on 25 July 2018 dismissing his appeal against the decision of the Secretary of State to refuse his application for further leave.

3. The appeal comes by way of a human rights appeal and it falls within the statutory requirements of what is now the new Part 5A of the Nationality, Immigration and Asylum Act 2002. The relevant provisions are to be found in s. 117B, Article 8 and the public interest considerations applicable to all cases. Before dealing with the relevant material it is necessary to point out that this is not a deportation appeal and the further provisions of s.117C do not apply to it.

4. The issue is a narrow one, and that is whether the judge correctly applied s. 117B(6), which is in the following terms:

> "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."

5. In the decision of the Supreme Court in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 the Supreme Court has provided guidance as to the extent to which other considerations come into play in looking at whether it would be reasonable to expect the child to leave the United Kingdom. According to the decision of the Supreme Court, this is a self-contained exercise which refers simply to the interests of the children and does not therefore engage in a wider consideration of the reasonableness of the departure of the children from the United Kingdom, given the nature of the father's immigration status, his immigration claims and his own behaviour.

6. In view of the approach adopted in *KO (Nigeria)*, albeit an approach which was not developed until the Supreme Court gave its judgment, the decision of the First-tier Tribunal Judge was wrong in law. It did not engage with the decision of the Supreme Court in *KO (Nigeria)*. I set it aside.

7. Since the time I found the error of law, the Upper Tribunal (The President and UTJ Gill) has developed the thinking upon how the principle identified by the Supreme Court should be approached in practice. In *JG (s 117B(6): "reasonable to leave" UK)* Turkey [2019] UKUT 72 (IAC), the headnote reads:

> *Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court or tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so.*

8. The effect of this approach is to exclude the normal operation of a proportionality balance in which all the various factors are assessed in a holistic fashion such that the reasons in favour of the appellant's removal (normally his poor immigration history) are weighed against the impact upon the child. By focussing solely on the effect upon the child, the Tribunal (the body to whom s. 117B is directed) is excluded from a consideration of the appellant's conduct.

9. So much is clear from what is said in paragraph 41 of *JG*:

> We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals.

10. The hearing before me proceeded on the basis of submissions only.

11. In paragraph 56 of the determination of the First-tier Tribunal Judge, there was an express finding that it was accepted by the respondent that the appellant has a genuine subsisting parental relationship with his two children. However, in paragraph 57, the judge found that this was outweighed by the fact that the appellant's failure to meet the suitability requirements and his criminal offending.

12. This approach by the First-tier Tribunal is now no longer lawful.

13. The appellant is the father of two British children born on 30 July 2012 and 14 April 2014 respectively. Those children are living with their mother, who is also a British national. It follows from this that it would not be reasonable to expect the child to leave the United Kingdom. The consideration is confined to the children's own best interests. The appellant has a genuine and subsisting parental relationship with those children although he does not live with them.

14. Ms Everett, on behalf of the Secretary of State, was not able to submit that he did not have a genuine subsisting parental

relationship with his children notwithstanding the fact that the appellant does not live with them in the same household, given the facts as found by the judge.

15. In these circumstances she did not feel able to argue that it was reasonable for these children to go to Nigeria.

16. I entirely endorse the approach adopted by Miss Everett on the facts of the case.

DECISION

(i) Having made a material error of law, I set aside the determination of the first-tier Tribunal.

(ii) I re-make the decision allowing the appeal against the decision of the Secretary of State refusing to grant him further leave to remain in the United Kingdom on Article 8 grounds.

ANDREW JORDAN
DEPUTY UPPER TRIBUNAL JUDGE
25 April 2019