Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **AA 13100-11**

THE IMMIGRATION ACTS

At **North Shields** signed: **15.07.2013**

on **03.09.2012 & 05.07.2013** sent out: **16.07.2013**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Dola Sherif OLUWATAYO

appellant

and

Secretary of State for the Home Department

respondent

Representation:
(on 3 September 2012)
The appellant in person
Mr J Kingham for the respondent
(on 5 July 2013)
Henry Olusola Davies (counsel instructed by Andrew Jackson & Co, Liverpool) for the appellant
Mr Clive Dewison for the appellant

DETERMINATION & REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Katharine Gordon), sitting at North Shields on 4 January 2012[1], to dismiss an asylum and human rights appeal by a citizen of Nigeria. Another first-tier judge granted permission, on the article 8 part of the case only, "after some hesitation" on the basis that, though Judge Gordon had found that the appellant "was not serious about regaining contact" with his two children with a British wife, from whom he had lived

[1] She dates her decision 2011; but, since the decision under appeal was made only on 18 November last year, she cannot have up-dated her system yet.

apart since (on his own account) no later than 2006, the children's own best interests might require it.

2. The children[2] are two girls, born in 2001 and 2003: the judge had dealt with the case on the basis that the appellant had had since 2003 to make an application for contact with his children; but his mother had seen them herself in 2005, and thought that was when the appellant had last seen them. The judge had before her a letter to the appellant's solicitors from the Legal Services Commission [LSC] dated 7 November 2011, asking him for further financial information about an application he had made to them. She commented that this was as far as the evidence went for his having made a contact application, as he had claimed in his witness statement. That was entirely correct on the information before the judge.

3. The judge, most of whose attention was understandably directed towards the appellant's asylum/article 3 claim, which she was unarguably justified in rejecting, dealt with his claimed difficulties in getting contact with the children, which he said were the result of his wife's having moved house without telling him where she had gone, and forbidding his parents, the only point of contact he had left, from disclosing her address, as follows

> His witness statement says that they are … with their mother who is estranged from him. If the appellants [*sic*] genuinely wanted contact with his children, he has had very many years to make application for it. She left him in 2003, 8 years ago. That he has recently applied for contact (if indeed he has) does not satisfy me that the application is genuine.

4. That treatment of the case would have been quite adequate, if the evidence showed that the appellant had lived apart from his wife, and not seen the children since 2003, when the elder was only two, and the younger just born. However, as the judge who granted permission pointed out, the appellant claimed to have lived with the children "for the early part of their lives", in other words till the elder was five, and the younger three. I too thought this required some further consideration of their best interests; and, following the hearing of 3 September 2012, I ruled that, to this extent only, there was an error of law on the part of the judge which required a re-hearing of this appeal.

CONTACT PROCEEDINGS

5. As it happened, such consideration of the children's best interests was about to take place, before a court whose primary rôle that would be. The appellant's solicitors, Andrew Jackson & Co of Liverpool, had written to the Tribunal on 13 June 2012, forwarding material for use at the September hearing "oral or dealt with on the papers": they did not specify which it was to be. However they enclosed "a letter from our client's Family Solicitor" (themselves, though they did not point this out), confirming that there would be an initial hearing in the appellant's contact proceedings, before Liverpool County Court on 11 September 2012.

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[2] **as to whom I make an order forbidding publication of any information that might lead to their identification.**

6. The appellant appeared at the hearing before me, and produced a further letter from his solicitors, with a notice from the County Court, making it clear that the hearing on 11 September would be an appointment for directions to be given on their application for an order that the children's grandparents should be required to disclose their mother's address to the court, so that the appellant's contact application could proceed on notice to her.

7. In the circumstances I decided to follow the form of order made in *RS* (immigration and family court proceedings) India [2012] UKUT (IAC) 218. With equal reluctance (see *RS* paragraph 50 on) I adjourned these proceedings till after the decision of the family court on contact was known. It seemed to me that there were two possible results in the short term: either

(a) the appellant's contact application were to be allowed to proceed on notice to the children's mother, by way of a direction that the grandparents disclose her address; or
(b) it might effectively be stopped in its tracks (whether before or after a welfare report was obtained) by such a direction being refused.

8. If (a) were the result of the present stage of the contact proceedings, then the following further results were possible: either

(a) an order for direct contact between the appellant and his children; or
(b) an order for indirect contact only; or
(c) no order for contact at all.

9. In my view the long history of this case meant that there were likely to be compelling public interest reasons for the immediate exclusion from this country (see *RS* paragraph 43) of the appellant unless the contact proceedings resulted in an order for direct contact. Only that was likely to bring down the balance on the side of the appellant's being allowed to stay in this country, in the children's best interests or for any other reason. In the circumstances, I directed that further consideration of this case at a hearing would only be required if that were the result of the contact proceedings. As it turned out, that was not the case; but there was a further hearing, as will be seen below.

10. In accordance with my directions, following the hearing of 3 September 2012, the appellant's solicitors regularly reported to me by e-mail the progress of the County Court case. Eventually the contact proceedings concluded in an order made on 25 April 2013, after hearing counsel for the appellant, and the children's mother in person, and reading a report from CAFCASS,

> And upon [the appellant] acknowledging that it is in [the children's] best interests to have indirect contact only with him due to the extent of their wishes and feelings howsoever held … [*to the effect that the appellant should*] have fortnightly indirect contact with the children … by way of photographs, letters, cards or age appropriate gifts

A post office box was to be set up for this purpose, its cost to be shared between the parties. Continuing proceedings related only to a proposed change in the children's names.

FINAL HEARING

11. By the time the order of 25 April 2013 reached me, I had already arranged to sit at North Shields on 5 July to hear another case; so I directed that this one too should be re-listed for final hearing there then. Meanwhile, since the previous hearing, the final decision in *RS* (immigration/family court liaison: outcome) India [2013] UKUT 82 had become available. In that case the family court had taken the view that the children's best interests would be served by annual visits to their father in India. While recognizing that the result of every case about children must depend on the individual best interests of each child, I plan to follow the general approach taken at this stage of *RS* too.

12. The first-tier proceedings had been entirely concerned, so far as the appellant's family life in this country went, with the two children who were the subject of the contact proceedings. The same was the case with the appellant's application for permission to appeal, and this was the only basis on which permission was granted, and on which I ruled that there had been an error of law on the part of the first-tier judge which required a further hearing.

13. Shortly after I made that ruling, I received from the appellant's solicitors a copy of a certificate, which he said showed the recent birth of a child by him to a woman who is only 21, but now a British citizen: however they made no application for the proceedings before me to take any different course from the one directed. Events did not stop there, because, after some time together, the appellant and the mother of his child fell out, and he now faces a criminal prosecution for assault, brought by the police on her complaint, and to be heard before the Teesside Magistrates' Court on 25 September 2013.

14. Mr Davies told me, on the appellant's instructions, that the appellant and his baby-mother were now reconciled, and invited me to put the hearing back, so that I could take into account an e-mail he expected to receive from her, confirming that. I declined to do so; this relationship, though apparently in existence at least at the time of the previous hearing before me, had formed no part of the case, either before the first-tier judge or before me, and consequently was not material to these Upper Tribunal proceedings.

15. While I might have had a discretion to allow the appellant's present relationship and child to be brought into these proceedings, it seemed to me that it would have been wrong to do so. There had been no opportunity for either the Home Office or the First-tier Tribunal to investigate what was essentially a wholly new case; and for me to do so effectively and fairly would have required a further adjournment of proceedings which had already been going on for much too long. If I had had to consider e-mail

evidence from the appellant's present baby-mother here and now, I should have been unlikely to give it any significant weight without her appearing to be cross-examined on it. If the present situation is as the appellant says it is, then he will be able to raise it in connexion with any removal directions given as a result of these proceedings; nor did Mr Dewison suggest it should be dealt with now.

CONCLUSIONS

16. At Mr Davies's request, I heard the appellant give a short personal account of the problems he had had, either in earning anything, given his lack of immigration status, to support his new child and her mother, or to pay for lengthy contact proceedings, and expressing a wish to be allowed to stay in this country and do his best for them. However, these proceedings are about the best interests of his two earlier children: as the County Court order records, he himself acknowledged that these would be best served by indirect contact only between him and them, and a means was agreed of ensuring that, by a method which does not require his continued presence in this country.

17. That acknowledgement, whatever motives the appellant may have had for it in his own situation, does him credit as a father; but the order set out at **10** also means that there is no significant factor outweighing the strong public interest already noted in his removal. The appellant is 32, and says he arrived in this country with his father as a visitor in 1998, when he was about 17. He never left, but was given notice of removal as an overstayer on 29 August 2003. On 5 September he applied to stay as a husband, which was refused on the 9th: his appeal against that decision was finally dismissed on 7 September 2006.

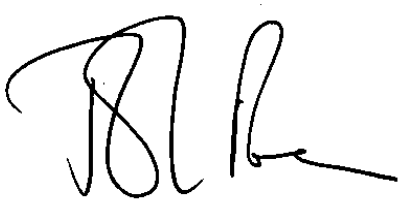
18. Following that, no more was heard from, or done about the appellant by the Home Office till 5 May 2011, when he made further representations, rejected on the 9th. He must have had one or more criminal convictions before the sentence of 28 days he received for breaking his licence conditions by being found in possession of a bladed weapon earlier that year; but I have not been given details of them. According to what he told the judge, he had been convicted of wounding contrary to section 20 of the Offences of the Person Act 1861. On 17 June the appellant claimed asylum, refused on 18 November, which led to these proceedings: the judge's reasons for rejecting the history on which he based his claim are unassailable.

19. The result is that, leaving aside the question of the appellant's present baby-mother, said to be a British citizen (but I have neither seen her nor her passport) and their children, and the pending criminal proceedings involving the two of them, his current position is this. He was nearly grown-up when he arrived in this country in 1998, but may not have been wholly to blame for the initial decision to overstay his leave, if he did so with his father. However, by 2003 he was grown-up enough not only to be

married, but to have begotten two children. That marriage had broken down by 2005, when he last saw those children. Following the dismissal of his first appeal on that basis in 2006, the appellant continued to overstay without any claim to remain here at all till 2011.

20. Since the beginning of 2012, when the appellant's appeal against refusal of his very late asylum claim was dismissed, there has been no good reason whatsoever for letting him stay in this country, except for the pending case about the children which has resulted in an order for him to have indirect contact only with them. He has family in Nigeria, and the judge rejected his claim to have had difficulties in connexion with them. The balance is overwhelmingly in favour of this appellant's immediate removal.

Appeal dismissed



(a judge of the Upper Tribunal)