Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05198/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th November 2018	**On 28th November 2018**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

BARRY ADEWALE LAWAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Babarinde, legal representative, Hatten Wyatt Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Carroll promulgated on 13 August 2018, in which the Appellant's appeal against the decision to refuse to revoke his deportation order (dated 24 August 2009) dated 17 March 2017 was dismissed.

2. The Appellant is a national of Nigeria, who was given his date of birth both as 24 August 1968 and 24 August 1967. He has asserted in different

applications to have entered the United Kingdom in 1989 or 2007, but there is no record of entry on either date, or at all. The Appellant accepts that he has never had any lawful leave to remain in the United Kingdom. He first came to attention of the authorities in 2005 when he applied for indefinite leave to remain, which was refused on 23 November 2005. He made a further application for indefinite leave to remain on the basis of 14 years long residence on 2 February 2006 and the following day was arrested on suspicion of forgery. On 31 March 2006 he was sentenced to 12 months' imprisonment by the Inner London Crown Court for possession of a false instrument and was subsequently served with a notice of intention to make a deportation order. His appeal against the intention to deport him was dismissed on 8 February 2007 following which he stopped complying with his bail conditions and absconded. A Deportation Order was made on 24 August 2009.

3. Prior to the appeal, the Appellant had made a further application for indefinite leave to remain on the basis of long residence which was refused on 28 July 2008. On 11 December 2008 the Appellant submitted an application for an EEA residence card under an alias as the family member of an EEA national which was ultimately refused on 23 March 2010.

4. On 2 March 2016, the Appellant applied for further leave to remain on the basis of his relationship with a British Citizen partner, her daughter and on the basis that he had resided in the United Kingdom for over 20 years. That application was refused on 8 June 2016 but further to judicial review proceedings, there was agreement for withdrawal of decisions made by the Respondent in 2016 and the Appellant was given an opportunity to submit further representations for a fresh decision to be made. It is that decision dated 17 March 2017 which is the subject of these appeal proceedings.

5. The Respondent refused the application the basis, in summary, that although it was accepted that the Appellant was in a genuine and subsisting relationship with his partner and had a genuine and subsisting parental relationship with two children, one of whom is a British Citizen, it was not accepted that it would either be unduly harsh for the family to relocate to Nigeria with the Appellant, nor unduly harsh for the Appellant's family members to remain in the United Kingdom without him. The decision letter contained detailed consideration of the best interests of the children and detailed consideration of the Appellant's partner's medical conditions. However, the Appellant's circumstances did not meet any of the exceptions set out in paragraph 399 of the Immigration Rules on the basis of family life nor paragraph 399A in relation to private life, the latter because he had never been lawfully resident in the United Kingdom. Further, there were no very compelling circumstances to outweigh the very significant public interest in deportation on the facts of the Appellant's case and the decision letter makes detailed reference to the Appellant's immigration and criminal history. In accordance with

paragraph 390 and following of the Immigration Rules, the Respondent refused to revoke the deportation order against the Appellant.

6. The Appellant's appeal was originally heard by Judge Andonian in the First-tier Tribunal who in a decision promulgated on 8 January 2018, allowed the appeal. However, that decision was set aside by Mr Justice Nicklin sitting as a Judge of the Upper Tribunal in a decision promulgated on 15 March 2018 and the matter remitted to the First-tier Tribunal for a de novo hearing.

7. Judge Carroll dismissed the appeal in a decision promulgated on 13 August 2018 on all grounds having refused an application for an adjournment. Essentially, although the genuine family relationships between the Appellant and his partner and children (including stepchild) were accepted, the Appellant did not satisfy any of the exceptions to deportation set out in either the Immigration Rules or section 117C of the Nationality, Immigration and Asylum Act 2002; nor were there any exceptional or compelling circumstances such as to outweigh the public interest in deportation and there was no disproportionate interference with the Appellant's right to respect for private and family life protected by Article 8 of the European Convention on Human Rights.

The appeal

8. The Appellant appeals primarily on the basis that the Appellant did not receive a fair hearing before the First-tier Tribunal, first, because an application for an adjournment to allow the Appellant's partner to give oral evidence was refused (medical evidence for conditions and complications in pregnancy was available to show her non-attendance), and, secondly, because the Respondent was permitted to produce an additional file of evidence on the morning of the hearing contrary to paragraph 13(1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

9. The Appellant also appeals on the basis that the First-tier Tribunal erred in relying on an/or placing undue emphasis on section 117C of the Nationality, Immigration and Asylum Act 2002 which does not apply to deportations under section 3(5)(a) of the Immigration Act 1971, that his deportation is conducive to the public good. Further, that the First-tier Tribunal erred in fact in concluding that the Appellant and his partner failed to mention that his stepdaughter was born in Nigeria in 2006 and lived there until 2012 when it was clear on the face of the documents relied upon by the Appellant that she was born in Nigeria.

10. Permission to appeal was granted by Judge McCarthy on 13 September 2018 on all grounds. The reasons for the grant of permission focus on the first ground of appeal in relation to the refusal to adjourn, with the comment that there was no need to consider the other grounds which on their own would probably be too weak to grant permission to appeal but in the circumstances gave further concerns as to the fairness of proceedings and therefore permission was not restricted.

11. At the oral hearing before me, Mr Babarinde relied on the grounds of appeal in full. At the first hearing before the First-tier Tribunal, written statements were submitted and substantive oral evidence was given by the Appellant and his partner. The first decision was however set aside for a de novo hearing, and it was submitted that before the second hearing there was no opportunity for further written or oral evidence. Mr Babarinde claimed that an application for adjournment of the hearing on the basis that the Appellant's partner was unfit to attend to give evidence, was made in good time prior to the hearing (although in fact made only three working days prior to the relisted hearing) and no updated written statements by or on behalf of the Appellant were prepared because it was assumed that the application for adjournment would be granted. When it was refused, the original written statements from the first hearing before the First-tier Tribunal were relied upon. Mr Babarinde also referred to difficulties in the solicitors being able to see the Appellant's partner prior to the First-tier Tribunal due to health concerns and her pregnancy.

12. In relation to the claimed factual error, it was submitted on behalf of the Appellant that there was no attempt to mislead either the Respondent or the First-tier Tribunal. There had been no dispute that the Appellant's stepchild was born in Nigeria and at the date of application she had not been naturalised as a British Citizen. These were matters all known to the Respondent at the relevant time and referred to in the refusal letter.

13. On behalf of the Respondent, Mr Melvin submitted that there was no material error of law in the decision of the First-tier Tribunal. In particular, it was not open to the Appellant or his legal representatives to rely on an assumption that adjournment would be granted. There had been ample time for evidence to be obtained in preparation for the de novo hearing. In any event, there were significant adverse credibility findings against the Appellant, including on numerous matters (including for example the absence of evidence about the Appellant's three children in Nigeria with his first wife) on which his current partner would not be able to shed any additional light, nor was there any procedural unfairness from her being unable to give oral evidence on such matters.

14. The Respondent's position was also that the First-tier Tribunal had adequately and lawfully considered the best interests of the children involved and included sufficient findings and reasons to comply with the recent decision of the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53.

Findings and reasons

15. I deal first with the ground of appeal in relation to the application for an adjournment. The reasons for the application and its refusal are set out in paragraphs 10 and 11 of the decision of the First-tier Tribunal, which states as follows:

> *"10. The appellant's representative made an application for an adjournment of the hearing on the basis that the appellant's*

partner was not fit to attend the hearing in order to give evidence, as a result of high blood pressure and the imminent birth of her third child. I consider the evidence submitted in support of the application, including correspondence from Kings College Hospital dated 5 April 2018, 18 July 2018 and a statement of fitness for work dated 20 July 2018.

11. No indication was given as to when the appellant's partner would be able to attend the hearing to give evidence in support. Having regard to the overriding objective set out in the Tribunal Procedure Rules and in view of the fact that she had submitted a full witness statement (pages 4 and following of the appellant's bundle), I refused the application for an adjournment, being satisfied that there was sufficient evidence before me to reach a decision without the necessity for the appellant's partner to attend the hearing."

16. In the grant of permission to appeal, Judge McCarthy comments that it is arguably inconsistent for the application for an adjournment to be refused on the basis that sufficient evidence is available from the Appellant's partner and go on to conclude that there was a lack of evidence from her on key issues regarding whether it would be unduly harsh to expect her and her children to relocate to Nigeria with the appellant and by reference to paragraph 27 specifically. The grounds of appeal refer to adverse credibility findings made on the basis of negative inferences from the failure of the Appellant's partner to provide information, in particular at paragraphs 26, 29, 31 and 32 of the decision.

17. It is necessary to set out more fully those paragraphs for the purposes of the assessment of whether the First-tier Tribunal unfairly drew adverse inferences from a lack of evidence due which was caused or at least contributed to the situation created by the Tribunal itself in refusing to adjourn the appeal hearing. The relevant paragraphs identified state, so far as relevant, as follows:

"26. I go on to consider the appellant's family circumstances which are, of course, central to the 2016 application. I note that in the 2007 Tribunal determination contained in the respondent's bundle there is reference to 3 children by the appellant's first wife. They were said to be aged 13, 10 and six and 2007 and were all born in Nigeria. There is no evidence relating to these children, including as to their whereabouts, in the application giving rise to the decision under appeal.

27. It is accepted by the respondent that the appellant is in a genuine and subsisting relationship with [...] And that she is a British national. She was born in Nigeria in 1988. For the reasons given above, I have heard no evidence from her. I note that the appellant is in his witness statement (paragraph 6) and she has lived in the United Kingdom "since she was a minor". In a witness statement [she] says that, having been born in Nigeria,

she came to the United Kingdom in July 2002 as a dependent of her stepmother when she was 14. Both she and the appellant failed to mention that she must return to Nigeria at some point on before 2006 because that is where she gave birth to the appellant stepdaughter in 2006. That child did not enter the UK until 2012. The appellant said that she had lived in Nigeria with her father. I touch very little weight to this aspect of his evidence and find that the failure by the appellant and [his partner] to mention the fact that the appellant stepdaughter was born in Nigeria in 2006 and lived there until 2012 further damages the Appellant's credibility.

...

29. The respondent's bundle contains medical evidence relating to [the Appellant's partner] ... I note also, in the context of the impending birth, that the pregnancies recorded as being a planned pregnancy in hospital notes which are attached to a letter dated 19 February 2018 from the appellant's representatives on the Tribunal file.

...

31. In considering proportionality, must consider the best interests of the appellant stepdaughter and his daughter as a primary consideration. It is, however, not the only consideration can be outweighed by other factors, depending upon the circumstances. Generally, when considering the best interests of children, it can be said that the best interests are to live in family unit with both parents. There is no evidence to indicate that either the children have any health or educational problems or that appropriate educational medical facilities will not be available to them in Nigeria. The appellant stepdaughter was born in Nigeria and spent half life there. The appellant's daughter born in 2015 still very young and the parents will be the focus of her life. The appellant (and [his partner]) have both spent a substantial part of the lies in the United Kingdom but I not satisfied that the appellant is credible as of the claim that he no longer has any meaningful links with Nigeria, not least in the fact that both he and [his partner] failed to mention the fact that the appellant stepchild was born there in 2006. It is clear also from the evidence admitted in support of this appeal that the appellant and [his partner] have friends who share their Nigerian heritage.

32. Clearly, I can make no findings in relation to a child that is, as yet, and born. However, the evidence before me. Far short of demonstrating that it would be unduly harsh for the appellant stepdaughter and daughter to live in Nigeria and that it would be unduly harsh for them to remain in the UK without the appellant. Although I have no doubt that the appellant helps with the children that this is a great assistance to [his partner] while she

> *is working, it is a matter for her whether or not she chooses to return to Nigeria with the appellant and the children to live there is a family unit. If she chooses not to, she will have to make appropriate childcare arrangements in the UK and there is no evidence to show that the impact of such arrangements upon the children would be unduly harsh. It is also not argued that [the Appellant's partner] would be unable to access appropriate medical care in Nigeria."*

18. Thereafter, the decision considers the Appellant's private life and then states the conclusion that for all of the reasons given and those given by the Respondent, the provisions of the Immigration Rules have not been satisfied, nor have the provisions of section 117C of the Nationality, Immigration and Asylum Act 2002 and there are no exceptional or compelling circumstances to outweigh the public interest in deportation.

19. When considering the fairness of the refusal to adjourn the hearing, the background to the request and evidence available to the First-tier Tribunal is relevant. Following the initial First-tier Tribunal decision being set aside by the Upper Tribunal, the parties were sent notice on 15 June 2018 of the hearing before the First-tier Tribunal, listed for 25 July 2018. Contrary to the submissions of Mr Babarinde, an application for an adjournment was not sought "in good time" prior to the relisted hearing. The Appellant's solicitors sought an adjournment of that hearing on 20 July 2018, only three working days prior to it, on the basis that the Appellant's partner was due to give birth and was not fit to attend the hearing date to give evidence in the appeal.

20. There is and was no basis upon which the Appellant or his solicitors could or should have assumed that the adjournment request would be granted such that the hearing on 25 July 2018 would not proceed. To the contrary, as professional advisers it was incumbent upon them to properly prepare for the hearing unless and until it was in fact adjourned by the First-tier Tribunal. Such preparation could and at least arguably should have included in this case an updated written statement from those to be called as witnesses in the appeal, including the Appellant and of particular relevance in relation to the adjournment request, for the Appellant's partner.

21. The First-tier Tribunal was correct to note that there was a full witness statement from the Appellant's partner, running to 5 pages, albeit prepared for the first hearing and dated 21 November 2017. That statement set out the Appellant's partner's immigration history and her relationship with the Appellant and status of the children. Reference is made in the written statement to all family members being settled and integrated in the United Kingdom with no remaining family in Nigeria. It is said in relation to the Appellant's stepdaughter that it would not be fair or considerate to remove her from the UK and relocate back to Nigeria for the Appellant's sake. More generally, the Appellant's partner states that she needs his moral, physical, spiritual, financial and loving support and

the children need him as a role model in the home. The Appellant's written statement goes no further than asserting that his deportation would have an adverse impact on his family and friends in the UK.

22. The First-tier Tribunal's summary of the evidence before it from the Appellant and his partner was accurate and there was no factual error in the references made to a lack of evidence on specific key issues and a lack of evidence from the Appellant and his partner as to the Appellant's stepdaughter being born in Nigeria and spending the first half of her life there.

23. It is of course trite to recall that written statements are required to be filed as evidence with the intention and knowledge that the matters contained therein will stand as evidence in chief from the particular witness. Although it may be necessary to ask additional supplementary questions, it is not envisaged as a matter of usual procedure or practice for significant further detail or evidence to be given orally in chief when a written statement has been prepared and submitted. The suggestion by Mr Babarinde in oral submissions that the refusal of an adjournment, preventing oral evidence from the Appellant's partner, in some way restricted the evidence that she was able to give on key issues such as whether it would be unduly harsh for family members to relocate to Nigeria with the Appellant or unduly harsh for them to remain in the United Kingdom without him is without any foundation. Such matters could and should have been included in her written statement as evidence in chief. There was more than ample opportunity following the Upper Tribunal's decision promulgated on 15 March 2018 to remit the appeal for a de novo hearing and following the listing of the appeal on 15 June 2018 for a further or updated and full written statement to be prepared from the Applicant's partner. Contrary to the suggestion by Mr Babarinde, the process of giving oral evidence is not an opportunity for a witness to be examined or cross-examined to elicit key information in support of an appeal which has not hitherto been referred to at all or in any detail. I do not find any procedural unfairness or any restriction on the Appellant to prepare his case and produce evidence in support of it, including from his partner, by the refusal to adjourn the hearing to allow his partner to give oral evidence.

24. In any event, the paragraphs of the First-tier Tribunal's decision identified by the Appellant in the grounds of appeal and by the Judge in granting permission to appeal do not in fact expressly contain any adverse credibility findings from the lack of oral evidence from the Appellant's partner. The First-tier Tribunal makes legitimate reference to the lack of any or any detailed evidence on key issues in the case, some of which would not have been matters necessarily within the Appellant's partner's knowledge, nor in fact matters which could not in any event have been either covered in full in a written statement from the Appellant's partner or the combination of written and oral evidence from the Appellant himself.

25. For example, the reference to there being no evidence in relation to the Appellant's eldest three children from his first wife who were all born in Nigeria in paragraph 26 of the First-tier Tribunal's decision cannot even arguably be unfair or in any way a result of the refusal to adjourn to allow the Appellant's partner to give oral evidence. This is a matter primarily for the Appellant to address and he failed to do so.

26. The reference in paragraph 27 of the decision of the First-tier Tribunal that neither the Appellant nor his partner refer expressly in their evidence to the Appellant's partner having returned at some point to Nigeria where she gave birth to the Appellant's stepdaughter in 2006, nor that she did not enter the UK until 2012 is factually correct; although I accept that information could be gleaned from other documents before the First-tier Tribunal. In any event, the evidence to which were little weight is given is that as to the Appellant's partner's history in Nigeria and the adverse credibility inferences were open to the First-tier Tribunal on the basis that the Appellant had not expressly dealt with his stepdaughter's residence in Nigeria and what could be inferred as at least some familiarity with that country as a result, a matter potentially relevant to whether relocation there would be unduly harsh.

27. There is nothing in paragraph 29 which makes any specific finding at all and certainly no findings of adverse credibility nor any reference to a lack of evidence from the Appellant's partner or otherwise. This paragraph simply recites the medical evidence in relation to the Appellant's partner and the contents of this paragraph therefore bear no relevance to the grounds of appeal on fairness or the adjournment. Similarly, paragraph 31 contains assessment of the best interests of the children which is uncontroversial and not factually disputed by the Appellant. The only adverse credibility finding contained within it that it was not accepted that the Appellant no longer has any meaningful links with Nigeria, in part because his stepdaughter was born there in 2006 and the family have friends of Nigerian heritage. Again, that finding is sustainable on the evidence and the appellant's partner's lack of oral evidence has no obvious bearing upon it in light of all the circumstances such as to give rise to even potential unfairness in the conclusions drawn.

28. In relation to paragraph 32 is a finding that the evidence before the First-tier, Tribunal falls very far short of demonstrating that it would be unduly harsh for the children to live in Nigeria nor that it would be unduly harsh them to remain in the UK without the Appellant. It is for the Appellant to establish his claim, which in part is that he satisfies one of the exceptions set out in paragraph 398 and following of the Immigration Rules and/or section 117C of the Nationality, Immigration and Asylum Act 2002 or that there are very compelling or exceptional circumstances to outweigh the public interest in deportation (as one of the factors relevant to an application to revoke under paragraph 390 and following of the Immigration Rules). On the evidence before the First-tier Tribunal, he failed to do so. It is impossible to see how there could be any suggestion that that situation would have been remedied by the Appellant's partner

giving oral evidence before the First-tier Tribunal, particularly in circumstances where there is no procedural expectation for detailed oral evidence to be given to rectify the omission of detail in her own written statement and the lack of any detailed evidence from the Appellant himself, written or oral, on these key issues. In all of these circumstances there is no procedural unfairness in the refusal to grant an adjournment of the hearing and the first ground of appeal therefore fails.

29. The second ground of appeal, that there was unfairness in the hearing before the First-tier Tribunal because the Respondent was permitted to produce an additional file of evidence on the morning of the hearing was not developed orally before me at all. There is nothing in the decision of the First-tier Tribunal to suggest that there was any objection to the admission of these documents at the time, with copies being provided and time allowed for both representatives to consider the documents prior to the start at the hearing. No application for adjournment was made for additional time to consider the same. In any event the further documents related to the Appellant's 2008 EEA application which was only relevant as one small part of the adverse credibility findings to show that the Appellant submitted an application in a way designed to mislead the Respondent as to his true identity and was not specifically relevant to the findings in relation to whether or not the exceptions to deportation would be satisfied on the facts of this case. This ground of appeal has no merit and is also dismissed.

30. The third ground of appeal, that the First-tier Tribunal erred in relying on section 117 of the Nationality, Immigration and Asylum Act 2002 was also not developed before me orally. In any event this ground of appeal also has no merit. Section 117A(1) expressly states that this part (the provisions in section 117A to 117D) applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8 and as result would be unlawful under section 6 of the Human Rights Act 1998. That expressly encompasses a decision made under section 3(5)(a) of the Immigration Act 1971 to deport the Appellant on the grounds that his deportation is conducive to the public good. The sections came into force on 28 July 2014, prior to the decision to refuse to revoke the deportation order and appeal of it to the Tribunal. On its face there can be no suggestion that is not applicable to the present appeal.

31. The final ground of appeal in relation to the birthplace and initial residence of the Appellant's stepdaughter has largely been dealt with in conjunction with the first ground of appeal above. Although this information was available on the face of documents before the First-tier Tribunal, there was no error in the decision recording that neither the Appellant or his partner mentioned this in their written and/or oral evidence before the First-tier Tribunal. In any event, even if there was a factual error in this regard it could not be material to the outcome of the appeal given the finding that the evidence before the First-tier Tribunal felt

very far short of demonstrating that any of the exceptions to deportation were met in this case.

32. For these reasons, I find no error of law on any of the grounds submitted in the decision of the First-tier Tribunal which is therefore confirmed.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed Date 19th November 2018

Upper Tribunal Judge Jackson