Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07870/2019

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre	**Decision and reason promulgated on:**
On: the 19th May 2021	**the 13th October 2021**

Before

Upper Tribunal Judge Bruce

Between

Adekunle Adewale Adenuga
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Waheed of Counsel, instructed by JDS Solicitors
For the Respondent: Mr Bates, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria born in 1969. He seeks leave to remain in the United Kingdom on human rights (Article 8 grounds).

2. The Appellant arrived in the United Kingdom on the 27th October 2018 with leave to enter as a visitor. That leave expired on the 27th April 2019 but before that date, on the 18th February 2019, he made an application for leave to remain on Article 8

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grounds. The application was refused on the 15th April 2019. The Appellant exercised his right of appeal to the First-tier Tribunal and on the 17th September 2019 his appeal was dismissed by First-tier Tribunal Judge Thorne. The Appellant was granted permission to appeal against that decision on the 16th July 2020 permission was granted. The matter came before me on the 12th November 2020.

3. My 'error of law' decision is dated the 12th November 2020. It is appended hereto but in brief summary I found that the decision of Judge Thorne should be upheld insofar as it related to the Appellant's relationship with his current partner in the United Kingdom, but should be set aside insofar as it related to the Appellant's daughter in the United Kingdom, who resides here with her mother. The error identified was a failure to conduct a complete 'best interests' assessment in accordance with the Tribunal's obligations under s.55 of the Borders Citizenship and Immigration Act 2009.

4. This decision is the 'remade' decision in respect of that remaining aspect of the Appellant's case. The question before me is whether the refusal to grant the Appellant leave would put the United Kingdom in breach of its obligations under Article 8 ECHR/s6(1) of the Human Rights Act 1998. The focus of my enquiry is his relationship with his daughter.

The Evidence: Discussion and Findings

5. The Appellant's daughter was born in Nigeria in 2010. At the date of the appeal before me she is aged 10 years and 6 months old. She came to the United Kingdom in 2015 in the company of her mother, Mrs Temitope Bolanle Adenuga. She has lived here ever since. On the 22nd September 2020 she and her mother were both granted Indefinite Leave to Remain. As I understand it this was granted under the EU settlement scheme, Mrs Adenuga's partner – now former partner – having been an EU national.

6. Mrs Adenuga appeared before me by way of Skype connection. Unfortunately this had to organised rather hastily and I am very grateful to her for agreeing to do so with only minutes notice. She adopted the three witness statements she has already given in this appeal, and provided a colour photocopy of her passport so that Mr Bates could be satisfied that she is indeed the author of those statements. She answered questions put to her by both representatives. In closing submissions Mr Bates indicated that he took no issue with anything she had said, and I consider that he was right to do so. There was nothing incredible or inconsistent in Mrs Adenuga's evidence on the facts, although as I return to below, I

do not necessarily accept some of her conclusions about what might happen in the future should the Appellant have to return to Nigeria.

7. I have read Mrs Adenuga's evidence in the round with the remaining evidence before me and I find as follows.

8. After Mrs Adenuga and her daughter came to the United Kingdom in 2015 the Appellant maintained day to day contact with his daughter by telephone. In evidence she said that her daughter was aged four at the time: I assume from this that they must have arrived earlier in the year as the child would not have turned 5 until November 2015. Her daughter would speak to her father every day. She would ask her mother why she could not see him in person, and when she started going to school queried why other children had their fathers there all the time and she did not. She wanted him to be able to take her to school like the other dads did. I note from the evidence recorded by the First-tier Tribunal that during this period the Appellant was in possession of a multiple entry visit visa so was also able to visit his daughter from time to time, thus maintaining the connection that he had had with her before she left Nigeria.

9. As to the situation that has pertained since the Appellant arrived here in October 2018, Mrs Adenuga is unequivocal in her evidence that he has maintained a close and constant relationship with his daughter. Their separation as a couple has evidently been amicable, since he has frequently visited the home that she shared with her subsequent partner without apparent difficulty. He sees his daughter between 2 and 4 times per week, and throughout the school holidays. He either picks her up from school or at weekends comes to the flat directly. On the days that he sees her he spends up to five hours with her depending on the circumstances although it is usually between 2 and 4 hours. He takes her swimming, takes her to the park, before the pandemic attended in person parents' evenings at her school and helps her with her homework. He takes her to visit his extended family who live in the United Kingdom and this is important for her integration into that wider family. He takes her to church most Sundays, and Mrs Adenuga regards him as having been of "great assistance" in promoting their daughter's spiritual development. He supports his daughter financially and is generally a big help to Mrs Adenuga. Mrs Adenuga told me that she has recently split up from her partner in the United Kingdom. She has not seen him since February and since then the Appellant's help to her has extended to taking her other, younger daughter out to the park etc as well. His daughter walks and her half-sister goes in the buggy. Mrs Adenuga describes the Appellant's contribution to her daughter's well being as "immeasurable" and "vitally important".

10. On the basis of this credible evidence I accept, as does Mr Bates, that the Appellant enjoys a genuine and subsisting relationship with his daughter in the United Kingdom. I further accept, as does Mr Bates, that it would be contrary to her best interests for there to be an interference with that relationship, since the optimal position, as Mr Bates puts it, would be for her to grow up being able to have both of her parents with her here in the United Kingdom as they presently are. There has never been any suggestion on the part of the Respondent that this child should be expected to return to Nigeria with her father, and now that she has ILR such a prospect is even more remote. I accept that as far as the child is concerned, it is important for her wellbeing that her father remain here.

11. I am less persuaded by what might be termed the ancillary points made by Mr Waheed in his submissions and examination in chief. I accept that the Appellant provides financially for his daughter – that has been the consistent and unchallenged evidence. However considering that he is presently unable to work in the United Kingdom, and that he previously enjoyed a good employment status in Nigeria, I find it difficult to see that this adds materially to my considerations, since it is self-evident that this devoted father would continue to provide for his daughter even if he lives abroad, as indeed he has done in the past.

12. Similarly, I am not persuaded that Mrs Adenuga's fears about her own financial position in the future are made out. She presently works as a cleaning manager for Morrisons supermarket, where she ordinarily works 30 hours per week. Her regular hours are 7am to 12pm but as she made clear this can be subject to sudden and unpredictable change. Because she is the manager she is responsible if one of her team calls in sick and must cover that shift. Sometimes this necessitates starting even earlier, or working into the afternoon or evening. Also, she has other responsibilities that sometimes require her to extend her hours – for instance in the week before the hearing she had to go in for an audit that required her to be there later than usual. When these circumstances arise Mrs Adenuga does one of two things. She either calls upon a friend, or asks the Appellant to collect their daughter and look after the little one too. Her evidence was that her good friend helps her out regularly- it is the norm that she drops the children with her in the early morning to enable her to get to her shift at 7am. This same lady had agreed, last minute, to do the school run to allow Mrs Adenuga to give her evidence to the Tribunal. Thus whilst I accept that the Appellant currently plays an important part in Mrs Adenuga's childcare management, he is not the only person offering her assistance. Nor are the two options she currently relies upon the only ones that could be available to her in the

future. As Mr Bates points out, she could speak to Morrisons and ask if they could guarantee her hours, she could engage a childminder or perhaps an afterschool club.

13. Finally I am unable to attach any significant weight to Mr Waheed's suggestion that the best interests of the Appellant's daughter's younger half sister would be materially impacted by my decision. There is no prospect of the siblings being separated. At its highest this younger child – a small toddler who made her own vigorous contribution towards the hearing - will miss out on trips to the park with the Appellant, and may possibly have some understanding that her sister is upset about something. In the absence of any particular evidence on the point Mr Waheed's submissions in this regard were wholly speculative.

Legal Analysis

14. The central question I must answer in this appeal is whether the decision to refuse to grant the Appellant limited leave to remain represents a disproportionate interference with his Article 8 rights, in particular the family life that he enjoys with his minor daughter in the United Kingdom. Ultimately that is a matter for me, having regard to all of the available evidence and relevant factors. I am however mindful that the Immigration Rules as presently drafted are designed to reflect where the government believes the balance should be struck when assessing the rights of the individual against the wider public interest. This has two consequences for my decision. If I am satisfied that the Appellant in fact meets all of the requirements of the rules, absent particular circumstances that will in itself demonstrate that the decision is disproportionate: see TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109. If on the other hand he cannot meet those requirements, this is a matter that attracts a significant weight in the balancing exercise.

Appendix FM: Family Life as a Parent

15. The requirements for leave to remain as the parent of a child in the United Kingdom are set out in Appendix FM. The requirements are as follows:

> R-LTRPT.1.1. The requirements to be met for limited leave to remain as a parent are-
>
> (a) the applicant and the child must be in the UK;
>
> (b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and either
>
> (c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

> (ii) the applicant meets all of the requirements of Section ELTRPT: Eligibility for leave to remain as a parent, *or*
>
> (d) (i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and
>
> (ii) the applicant meets the requirements of paragraphs E-LTRPT.2.2-2.4. and E-LTRPT.3.1-3.2.; and
>
> (iii) paragraph EX.1. applies.

16. As to R-LTRPT.1.1 (a): it is accepted that both applicant and child are in the United Kingdom. Nor has sub-paragraph (b) been placed in issue, the Appellant having made a valid human rights claim on the basis of his family life.

17. In respect of the two limbs of R-LTRPT.1.1 (c) I proceed on the basis that no 'suitability' issues arise, since Mr Bates did not draw any to my attention. The rule then refers the decision maker to the eligibility criteria set out at section ELTRPT. These are, even by Appendix FM standards, long and complex. I do not propose to set them out here except where necessary. The parties agreed on the following:

    i) The child is under 18 and living in the United Kingdom.

    ii) She is settled in the United Kingdom

    iii) Direct access has been agreed between the parents

18. Disagreement however arises in respect of section E-LTRPT 2.3 (b). This reads:

> (b) the parent or carer with whom the child normally lives must be-
>
> (i) a British Citizen in the UK, settled in the UK, or in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d);
>
> (ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and
>
> (iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

19. Before me Mr Bates accepted that there are no issues arising under subsections (b)(i) and (ii). He did however submit subsection (iii) to be a provision that defeats this claim, at least as far as the rules are concerned. The Appellant is 'eligible' to apply for leave to remain as a partner: this is in fact what he originally did. Mr Bates contends that the term 'eligible' must be given its ordinary meaning here – if it meant to say that he *qualified* for leave to remain as a partner, it would say so. The fact that the Appellant did not succeed in his application is therefore irrelevant: Mr Bates contends that the mere fact that he was able to make the application defeats any claim under the 'parent' route.

20. This is a thoroughly baffling provision. Although this part of Appendix FM is ostensibly concerned with the status of the applicant parent, it is self- evidently directed at protecting the family life rights of children who are present and settled in the UK. Mr Bates is quite right to draw a distinction between the terms "qualify" and "eligible" and yet if the provision is to be read as he contends, then the protection of those rights would be contingent on whether their applicant parent has a partner in the UK. It would only be those parents who did not have a partner capable of meeting the eligibility criteria who could succeed. Those who do have partners, but are nevertheless unable to meet all of the requirements for leave to be granted on that basis, would on Mr Bates' suggested reading, be excluded. Thus the family life rights of one group of children would be treated in a markedly different way from another group. A child whose father did not have a girlfriend would be able to continue to enjoy the benefits of his parenting, whereas the child whose father was in a relationship would be deprived. I cannot conceive of any policy justification for this, and Mr Bates was unable to offer one.

21. What then can the rule be read to mean? At page 36 of the document entitled *Family Life (as a partner or parent), private life and exceptional circumstances* and under the heading *Eligibility that must be met by a parent on a 5 or 10-year route (without consideration of exceptional circumstances under GEN.3.1. or GEN.3.2.)* the following guidance appears:

> For both entry clearance and leave to remain applications as a parent, **if the child normally lives with their other British citizen or settled parent or carer, that person cannot be the partner of the applicant** (which for leave to remain includes a person who has been in a relationship with the applicant for less than 2 years prior to the date of application) and the applicant must not be eligible to apply for entry clearance or leave to remain as a partner under Appendix FM.
>
> **The parent route is not for couples who are in a genuine and subsisting partner relationship**. An applicant cannot meet the parent route if they are or will be eligible to apply under the partner route, including where for example the definition of partner cannot be met, or other eligibility criteria for access to a 5-year route are not met. Applicants in this position must apply or will only be considered (where they are not required to make a valid application), under the partner route, or under the private life route.

22. Although this guidance is not particularly clear, it does to my reading indicate that what the provision is concerned to exclude is the possibility that couples who could not meet the requirements of the 'partner' route would use the 'parent' route as a back door to obtaining leave. Within the scheme of Appendix FM that would make some sense. If a whole family unit intend to migrate together, it can be expected that they will all

meet the rules together: see for instance NA (Bangladesh) [2021] EWCA Civ 953. Where however there is already a split family, and it is the child's right to a family life with both parents that is at stake, different considerations will apply.

23. I bear in mind that E-LTRPT.2.3 (b)(iii) simply reads that the applicant "must not be eligible to apply for leave to remain as a partner". That is the wording of the rule: it does not say "must not be eligible to apply for leave to remain as the partner of the child's primary carer" or words to the same effect. I am nevertheless satisfied that the meaning of the rule as presently drafted is unclear. If it is read as Mr Bates contends, it would produce a result inconsistent between one class of children and another. In the absence of any justification – in policy or logic – for that, I am driven to give a purposive interpretation to the Rule, in line with the published guidance, and indeed the overall scheme of Appendix FM. The point of this section of the rules is to protect the family life of parent and child and there can be in that context no distinction between a father who has a girlfriend and a father who does not. It makes no difference to the child: he is still her dad.

24. For the foregoing reasons I am satisfied that the Appellant has shown that he meets, at the date of the hearing, the requirements for leave to remain as a parent under Appendix FM. It follows that I need not conduct any further enquiry into whether the decision is disproportionate, and the appeal is allowed on that basis.

Decision and Directions

25. The decision of the First-tier Tribunal is set aside to the limited extent identified above.

26. The appeal is allowed.

27. There is no direction for anonymity.

Upper Tribunal Judge Bruce
1st September 2021