OUTER HOUSE, COURT OF SESSION

[2019] CSOH 28

P919/18

OPINION OF LORD BURNS

In the petition

SN

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Winter; Drummond Miller LLP
Respondent: Webster; Office of the Advocate General

15 March 2019

[1] This is a petition for judicial review of a decision of the Upper Tribunal Immigration and Asylum Chamber dated 8 June 2018 refusing the petitioner permission to appeal to that Tribunal from a decision of the First-tier Tribunal (FtT).

[2] The petitioner is a Nigerian national born 3 July 1978. He came to the United Kingdom on 26 January 2007 having married an EU national after which he obtained a spouse visa valid until 8 July 2007. He then was granted an EEA residence card for a period of five years. His wife returned to her country of origin but the petitioner stayed in the United Kingdom. He had a relationship with a woman here by whom he had a child B who was born in the UK on 23 April 2009. The petitioner did not live with the child's mother but

had regular contact with the child until the relationship broke down in 2014. Allegations had been made against him concerning the child B and another older child of the petitioner which were false and in respect of which no criminal proceedings were taken. An application for a permanent EEA residence card was refused on 23 April 2013. He applied for leave to remain on 23 May 2016 on the basis that he was the parent of a United Kingdom national and on the basis of his private life. That application was considered under the 10 year parent and private life routes under appendix FM and paragraph 276ADE(1) and outside the Immigration Rules. The application was refused in a letter dated 5 February 2017. Permission to appeal was refused by the FtT. He then applied for permission to appeal from the Upper Tribunal. That was refused on 8 June 2018.

[3] The FtT judge was satisfied that the petitioner was the father of B. The central issue was whether or not the petitioner had established that he had a genuine and subsisting parental relationship with her. If so, he would come under the exception set out in EX1 of Appendix FM of the Immigration Rules. Even if he was unsuccessful under paragraph EX1, he could succeed outwith the rules in terms of section 117B of the Nationality, Immigration and Asylum Act 2002 since the public interest would not require his removal if he had a genuine and subsisting parental relationship with B and it would not be reasonable to expect B to leave the United Kingdom. The latter proposition was not in dispute.

[4] The evidence before the FtT demonstrated that the petitioner had some continuing contact with B between 2009 and 2014 until the petitioner's relationship with B's mother came to an end. The petitioner explained in his statement to the FtT that he would go over and see B and her mother and they would occasionally come to his house to stay over. Then he did not see B for a period. That was because of the allegations made against him and because of "processes and procedures" conducted by the Social Work Department he could

not see B. He stated that he was advised by solicitors not to try and establish contact. In the course of 2015 he still wanted to see B and decided to approach family law solicitors in Glasgow for assistance. However he had by that time lost touch with B's mother and did not know where she was. He found an old contact number for the mother and discovered that they were in Walsall. He arranged to see B in Walsall in about September 2016. Around this time the child was taken from her mother and put into care in Walsall. When the petitioner learned of this, he instructed a family law solicitor in Walsall to obtain access to her. The family court was asked to allow access and there was evidence before the FtT that the first session of supervised contact with B occurred on 26 October 2017. There was a plan for this to develop but, at the time of the hearing, he was still waiting to hear further from the local authority about that plan.

[5] The FtT refused the appeal on the basis that the petitioner had not demonstrated that he had a genuine and subsisting parental relationship with B. She had always stayed with her mother and the petitioner had never stayed with the child on any permanent basis. He had never tried to obtain custody of her. Although it would not be reasonable for B to leave the United Kingdom and be separated from her mother, she could remain in the United Kingdom even if the petitioner went back to Nigeria. The judge considered the matter under reference to article 8 of ECHR and section 117B of the 2002 Act. It was noted that the petitioner was an over-stayer. There was no evidence that he tried to keep in touch with his other children. The judge accepted that the child would be happy to see the petitioner but had only seen him for one day in 2017 under supervision. It was noted that one of the witnesses led on behalf of the petitioner had lied in his statement to the Tribunal and another was patently unreliable.

[6] The First-tier Tribunal judge also noted that the petitioner had been refused a permanent resident card in April 2013 and then did nothing to regularise his immigration status until 23 May 2016 when he had made the current application. It was only then that he sought an order for contact with B. The FtT judge concluded that his relationship with B had been exaggerated and he had taken the steps he had in respect of establishing contact with her in order to advance his application for permanent residence.

[7] The FtT refused permission to appeal that decision and the grounds of appeal to the Upper Tribunal at paragraph 5 criticised the approach of the FtT. It was asserted that the FtT's findings failed to take account of material evidence before it and pointed to the fact that the petitioner had regular contact with the child prior to her being taken into care. Contact thereafter was not possible because of social work processes and procedure. He had consulted a solicitor in order to obtain access to his daughter but delays were caused by the child's mother's move to Walsall. He had then attempted to obtain contact through the family courts there.

[8] The Upper Tribunal judge refused permission to appeal. The FtT judge was said to have undertaken a thorough assessment of the petitioner's claim and was entitled to conclude, upon the evidence before it, that the petitioner did not have a genuine and subsisting relationship with B.

[9] That decision was itself criticised by Mr Winter who appeared on behalf of the petitioner. He said that the error in law of the Upper Tribunal was that the judge's findings were not supported or adequately supported by what was set out in paragraph 5 of the application for permission to appeal. That paragraph identified errors demonstrating that the assessment of the FtT was flawed and reference was made to the petitioner's statement to the FtT paragraphs 21-40.

[10] I am not able to accept that the Upper Tribunal fell into error in dealing with the application for permission to appeal. The description of the FtT's assessment of the petitioner's claim as a thorough assessment does not demonstrate an error of law. The FtT had considered the evidence before it both from the petitioner and from his supporting witnesses. The judge had regard to the history of the petitioner's relationship with B and to the apparent difficulties that had been encountered by the petitioner in that regard. The judge did not leave any important considerations out of account. The central problem was that the judge was not convinced that the efforts by the petitioner to see his daughter were motivated by a desire to have a genuine and subsisting relationship with the child. Rather, as was explained in paragraph 28, he had "exaggerated" his relationship so as to be allowed to remain in the United Kingdom. Such a conclusion was a legitimate one upon the basis of the evidence placed before the FtT judge. His contact with his daughter prior to the breakdown of the relationship with her mother was intermittent. He had never lived with either the mother or his daughter. He had never tried to get custody of his daughter although he was aware that she was in care (see paragraph 23 of the FtT's decision). He had no contact with her thereafter. There was no evidence that he tried to see her when in care and when she must have needed his support. The only contact with his daughter had occurred a matter of weeks prior to the hearing before the FtT.

[11] Furthermore, the tribunal judge was plainly unimpressed with the quality of the witnesses which the petitioner led on his behalf. The second witness was the nephew of the petitioner but he had never met B and when shown the letter which purported to form his evidence, said that he had not written it. When asked if he had ever known B he said that he "would need to make sure". The FtT judge describes this witness as "a waste of time". The lack of credibility of this witness impacted upon the petitioner's own credibility. The

evidence directed to the genuine and subsisting relationship between the petitioner and his daughter was of such quality that the FtT cannot be faulted for having rejected the contention that the relationship was as the petitioner claimed it to be. Furthermore, because of the coincidence in time in progressing his application for a permanent residence card and of his attempts to obtain contact with his daughter from the family court in England, it was a legitimate inference that these efforts were made, not to advance his relationship with the child, but to advance his application to remain in the United Kingdom.

[12] Mr Winter also argued that the approach of the FtT was inconsistent with cases such as *SR Pakistan* 2018 UKUT 00334 (IAC) paragraphs 35-40 and *Makhlouf* v *SSHD* 2007 3 All ER 1 paragraphs 48-49 in which Lady Hale had made it clear that the orders of a family court reflected what was in the best interests of the children and there would have to be a very good reason to conclude that an order from the family court was not in the best interests of a child. I accept that, as a general rule, the FtT judge should give careful consideration to the order of the family court as indicating what is in the best interests of a child. However, in this case, the FtT found that the petitioner's actions in seeking such orders were motivated by self-interest. The FtT had seen and heard the petitioner and his witnesses and had considered the petitioner's evidence of how he had interacted with his daughter against the context of his immigration history. This was not a dimension of the relationship between the petitioner and B which the family court would have been able to examine.

[13] It is clear from paragraph 30 of the FtT's decision in particular that the best interests of the child were properly considered. It is acknowledged that she had expressed a desire to see the petitioner but it was also pointed out that there will be no significant difference in the child's life if the petitioner was removed, having regard to the history of the relationship

between the petitioner and B. Indirect contact could take place and B could be taken to Nigeria to see her father.

[14] In all the circumstances I find that the Upper Tribunal made no error in refusing permission to appeal. The FtT's finding that the petitioner's relationship with his daughter was not subsisting or genuine was a conclusion which the FtT was entitled to come to upon the evidence before it. Furthermore, the FtT's findings on the motivation behind what moves the petitioner had made in seeking to re-establish a relationship with the child were conclusions properly available to it upon the view of the evidence reached.

[15] I shall therefore refuse the prayer of the petition and reserve meantime all questions of expenses.