



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/02783/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 20 January 2016**

**Decision & Reasons Promulgated
On 17 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

**A T O
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Adeolu, David & Vine, Solicitors, Stratford

For the Respondent: Mr Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 19 November 1974. He appealed against the decision of the Respondent dated 5 January 2015 refusing him leave to remain in the United Kingdom on the basis of his family and private life here. His appeal was heard by Judge of the First Tier Tribunal Mayall on 12 June 2015. He dismissed the appeal under the Immigration Rules and on human rights grounds in a decision promulgated on 28 July 2015.

2. An application for permission to appeal was lodged and permission to appeal was granted by Judge of the First Tier Tribunal Heynes. The permission refers to the grounds of application which state that the Judge erred in making findings contrary to the concession of the Respondent, wrongly asserted that the relationship between the Appellant and his son was an issue and applied the wrong standard of proof in relation to Section 117. The permission states that while the Judge was entitled to make findings on the relationship between the Appellant and his son on the basis of the evidence before him at the Hearing, it is arguable that insufficient reasons were given for the Judge's findings in relation to Section 117B and Article 8.

The Hearing

3. The Appellant's representative submitted that the subsistence of the relationship of the Appellant and his child should not have been considered by the Judge as the refusal letter accepts that there is a subsisting relationship between the Appellant and his child. He submitted that because the Judge made a decision on this he became the primary decision maker on this issue which is unsatisfactory.
4. The representative went on to deal with whether the Appellant is suitable and eligible in terms of the Immigration Rules. He submitted that the Appellant did not deceive the Respondent. He did not disclose that he was the father of a child in the United Kingdom because he did not think he was. His application was made on 10 May 2013 and this child was born on 16 April 2013. The representative submitted that the Appellant's relationship with the child's mother had been casual and it was only when he had a DNA test done that he realised the child was his. He submitted that there was no deception on the part of the Appellant.
5. I put to the representative that in the refusal letter the Respondent states that in the Appellant's most recent application he did not disclose that he has a child in Nigeria, born in 2009. The representative submitted that this was not deliberate deception. What motive could the Appellant possibly have had for not declaring this? He could not have benefitted in any way. He submitted that this should not be classed as deception and should not stop the Appellant from being granted leave to remain in the United Kingdom. He submitted that this is not a material issue.
6. I asked the Appellant's representative if he finds that all the terms of Appendix FM of the Immigration Rules have been satisfied by the Appellant and he said they have when EX1 is taken into account.
7. The Presenting Officer made his submissions referring to the evidence given by the Appellant at his First Tier Hearing. When he made his application to come to the United Kingdom his evidence was that he would be staying with the mother of his child and his child, in the United Kingdom but at the First Tier Hearing he told the Tribunal that he and the child's mother had split up. His son is British. The Appellant arrived in the

United Kingdom on 12 June 2014 with a visit Visa to visit his sister. The Appellant's evidence before the First Tier Tribunal was that he and the child's mother had lived together for just over three months and the child's mother was unable to attend Court for the First Tier Hearing. The Presenting Officer submitted that there has been a fundamental change in the Appellant's circumstances since he made his application. He submitted that that is how the Judge approached the Appellant's relationship with his child and because of this fundamental change the Judge was entitled to question whether the Appellant has a subsisting relationship with his child.

8. I was referred to Paragraph 29 of the decision. The Appellant's application for leave to remain is dated 29 September 2014 and his evidence before the First Tier Tribunal was that he split from his partner in September 2014. He submitted therefore, that the First Tier Judge's concern was based on a different set of circumstances from the circumstances when the refusal letter was issued. He submitted that because of this change of circumstances the judge was entitled to make findings about the Appellant's relationship with his child and whether it is subsisting or not. He submitted that the Judge found that there was no subsisting relationship and based on what was before him he was entitled to this finding. There was a deficiency of evidence before the First Tier Judge about the Appellant's relationship with his child. His ex-partner did not attend the Hearing and the Judge found that if the Appellant had been looking after the child in the way he states, surely his partner would have attended the Hearing to give evidence on his behalf.
9. The decision makes it clear that the Judge found the Appellant's evidence not to be reliable and he adequately explained why he made his finding about the Appellant having no subsisting parental relationship with his child in the United Kingdom. He submitted that the permission states in any case, that the Judge was entitled to make these findings because of the change in the Appellant's circumstances.
10. The Presenting Officer submitted that the Judge's findings relating to Section 117B(6) are adequate and I was referred to Paragraph 31 of the decision. He submitted that it is difficult to see how Section 117B can assist the Appellant's claim.
11. The Presenting Officer submitted that proportionality was assessed and reference was made to the need for effective immigration control having to be considered when public interest is dealt with. The judge referred to the manner of the Appellant entering the United Kingdom and his deception and submitted that this Appellant cannot avail himself of Paragraph 117B(6) because of the Judge's findings in Paragraph 31. These findings resulted in the Judge not being satisfied that the Appellant has a genuine parental relationship with his child. He is not living with his partner or his child. The Judge does not accept the Appellant's evidence. He submitted that the Judge has given sufficient reasons for his findings relating to Section 117B and Article 8. He submitted that the Judge's

decision is sustainable. The Appellant came to the United Kingdom and does not have sole responsibility for his child. The child stays with his mother. The Appellant came to the United Kingdom as a visitor and the terms of Paragraph 276ADE cannot be satisfied as the Appellant has only been in the United Kingdom for four months. He submitted that there are no significant obstacles to this Appellant's integration into Nigeria and the Judge was entitled to refuse his claim under Family and Private Life.

12. With regard to exceptional circumstances the Presenting officer submitted that the Appellant states that he provides for his partner and his child but he has only been in the United Kingdom since June 2014 and the child was born in April 2013. It is clear from the Appellant's evidence that he was not supporting the child before he came to the United Kingdom. The child has always been with his mother. The Appellant only stayed with his child for a short period and no longer stays with him. He submitted that the Appellant can return to Nigeria. He has a child there who was born in 2009 and he has family life in Nigeria.
13. The Presenting Officer referred to the Appellant's son being British but submitted that the evidence before the First Tier Judge, of a subsisting relationship, is lacking.
14. I was referred to the case of ***SS Congo and others (2015) EWCA Civ 387*** and the Presenting Officer submitted that compelling circumstances are required for the Appellant's claim to succeed under Article 8. The Judge has found that the Appellant is not credible or honest and when proportionality is assessed it would be not be disproportionate for the Appellant to return to Nigeria.
15. The Appellant's representative referred me to paragraph 29 of the decision. He submitted that a subsisting relationship with a child must go beyond actually living with the child. He submitted that the best interests of the child have to be taken into account and he submitted that this Appellant's relationship with his child has continued since he left his ex-partner. He submitted that the Judge was wrong to base his decision on the Appellant no longer living in the same household as the child.
16. I pointed out to the Appellant's representative that the only evidence of the Appellant's relationship with his child is his oral evidence as his ex-partner was not at the Hearing.
17. The representative submitted that the Judge has made an error of law by not considering Article 8 of ECHR. He submitted that this has to be considered along with Section 55.
18. I pointed out that the grounds of application make no mention of Article 8. He submitted that Article 8 is imputed within number one of the grounds. I was asked to set aside the decision of the First Tier Judge and find there are material errors of law in the decision.

Decision

19. The Judge did not err by making findings contrary to the concession of the Respondent relating to the relationship between the Appellant as his son as there has been a fundamental change in his circumstances and in his relationship with his son since his application was made.
20. With regard to deception it is plausible that the Appellant did not think he was the father of his son in the United Kingdom although this is not accepted by the First Tier Judge but I have noted that when he applied to visit his sister in the United Kingdom he did not mention his child in Nigeria, who was born in 2009. His representative states that this was not deliberate as this could not have benefitted the appellant in any way but nonetheless, this should have been disclosed and this may have been another reason for the First Tier Judge finding the Appellant's evidence to be unreliable.
21. The terms of the Immigration Rules cannot be satisfied under Appendix FM or Paragraph 276ADE. The Judge has explained why in his decision. This has to be taken into account in the proportionality assessment. The Appellant cannot qualify under the "parent" route as the Appellant does not have sole responsibility for his child. The child stays with his mother and has only had his father staying with him for a very short period and that has now ended. The Judge has found that he does not have a genuine and subsisting parental relationship with his child. The Appellant cannot benefit from EX.1. At Paragraph 33 the Judge correctly states that there have to be compelling circumstances for an appeal to be considered under Article 8 of ECHR.
22. With regard to Section 117B and Article 8 I have considered the way the Judge dealt with Section 117B(6). The child is a qualifying child but the Appellant does not fall within the provisions of Section 117B (6). There is no evidence that the Appellant is financially independent and when Article 8 and Section 117 are considered there is no disproportionate interference with the Appellant's Article 8 rights or those of his son if he is removed from the United Kingdom.

Notice of Decision

23. There is no material error of law in the Judge's decision.
24. The decision promulgated on 28 July 2015, by Judge of the First Tier Tribunal Mayall, dismissing the Appellant's appeal under the Immigration Rules and on Human Rights grounds must stand.
25. Anonymity is directed.

Signed

Date

Deputy Upper Tribunal Judge Murray