Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35141/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 December 2017	**On 23 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

M M
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Kumudusena of Liyon Legal
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Coll promulgated on 3 February 2017. Permission to appeal was initially refused by First-tier Tribunal Judge Lambert on 4 September 2017 but subsequently granted by Upper Tribunal Judge Pitt on 11 October 2017.

2. I am grateful to the helpful manner in which Ms Fijiwala has brought to my attention concerns in respect of the decision of the First-tier Tribunal Judge to an extent that she concedes that there was a material error of law, and, moreover, that in remaking the decision the Respondent concedes the substance of the appeal.

3. In the circumstances I do not propose to rehearse in any great detail the background of this case - which is helpfully set out in the decision of the First-tier Tribunal. In brief summary however I note the following.

(i) The Appellant is a citizen of Sri Lanka born on [ ] 1984. He entered the United Kingdom in September 2009 as a Tier 4 Student migrant with leave valid until 20 January 2011. He was successful in applying for further leave in this capacity until 31 May 2014. By way of form FLR(FP) signed on 27 May 2014 he applied for further leave to remain on the basis of family life / private life pursuant to Article 8 of the ECHR. His application was based on his relationship with his son, C, born on [ ] 2013. The circumstances were slightly unusual in that the Appellant's child lived with his mother, TJ, a British citizen born on [ ] 1991, and her same-sex partner. It was the Appellant's case that he enjoyed contact with his son and was actively involved in C's life and was making significant financial contributions.

(ii) The Respondent refused the Appellant's application for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 20 August 2015. The application was refused with reference to paragraph S-LTR.1.7 of Appendix FM of the Immigration Rules on the basis that it was considered that the Appellant had not cooperated with requests for information in respect of his application. The application was also refused with reference to certain of the 'eligibility' requirements under Appendix FM. It was noted that the Appellant had not provided a birth certificate for C and so the Respondent was not satisfied that he was indeed the father. Nor had evidence been provided to establish that the child was living in the United Kingdom. It was considered that in such circumstances the Appellant did not satisfy the requirements of paragraph E-LTRPT.2.2. Further the requirements of E-LTRPT.2.3 were considered not to be satisfied because the Appellant did not have sole parental responsibility for the child. Further the Respondent was not satisfied with regard to E-LTRPT.2.4(b) of Appendix FM by reference to not being satisfied that the Appellant was taking an active role in C's upbringing. The Respondent nonetheless gave consideration to paragraph EX.1 and declared herself satisfied that the Appellant had a genuine and subsisting parental relationship with a child, but noted that because the Appellant had not satisfied the eligibility requirements paragraph EX.1 could not avail him. The application was also refused with reference to paragraph 276ADE(1) of the Immigration Rules. It was also considered that there were no exceptional circumstances to warrant a grant of leave to remain outside the Rules.

4. The First-tier Tribunal Judge manifestly conducted a very thorough review of all of the evidence before her, and made detailed and well-reasoned findings of fact. Whilst I note that there has been some challenge to the Judge's findings, in my judgement there is nothing in any of those

challenges that identifies an error of law. It seems to me that the findings were entirely open to the First-tier Tribunal Judge.

5. In substance, the Judge accepted the Appellant was the father of C and that the child was residing with his mother and her same-sex partner in the United Kingdom. The Judge also accepted that there was some contact, albeit not as frequent or as extensive as the Appellant had claimed. It was also accepted that there had been some recent financial contributions - but the Judge considered that these had only been made recently perhaps with a view to the fact of the ongoing appeal. The Judge did not consider that the Appellant was as actively involved in C's upbringing as he had claimed, and also made a finding to the effect that C's mother's non-attendance at the appeal was suggestive of the fact that she did not consider that her son would be affected adversely if the Appellant were required to leave for Sri Lanka.

6. Notwithstanding these findings the Judge concluded that *"the Appellant has a genuine and subsisting parental relationship with"* C (paragraph 53). On that basis the Judge found that the family life element of Article 8 was engaged. This is curious because the Judge had found that paragraph EX.1 did not apply (paragraph 52), yet the premise for paragraph EX.1(a) is indeed the existence of a genuine and subsisting parental relationship. (It is to be recalled from the rehearsal of the background above that the Respondent had accepted that EX.1 was satisfied by virtue of a genuine and subsisting parental relationship with C – see paragraph 3(ii) above.)

7. Be that as it may, Ms Fijiwala now concedes that the Judge fell into error when considering section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

8. At paragraph 60(iv) of the Decision the Judge set out her considerations under section 117B(6). She stated *"First, the Appellant does not have parental responsibility and nor does he have a residence order"*. With reference to the case of **R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC)** Ms Fijiwala points out - as is set out in the headnote of that decision - *"It is not necessary for an individual to have parental responsibility in law for there to exist a parental relationship"*. In the circumstances Ms Fijiwala concedes that the Judge fell into error in her assessment of the applicability of section 117B(6), and her factoring into the overall consideration of the case the public interest considerations pursuant to Part 5A of the Nationality, Immigration and Asylum Act 2002. Ms Fijiwala acknowledges that this was a material error of law in respect of the proportionality assessment that it was incumbent upon the Judge to conduct.

9. Moreover Ms Fijiwala draws to my attention the Respondent's policy in respect of applicants with a genuine and subsisting parental relationship with a British citizen child, in particular by reference to matters set out at paragraph 7 of the decision in **SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC)**. In essence, absent criminal behaviour or a serious adverse immigration history, it is the Respondent's position that it would be disproportionate to remove such an applicant and thereby disrupt the relationship between the applicant and the British citizen child. On that basis - bearing in mind this is an Appellant against whom there is no suggestion of a criminal record and who has an immigration record that indicates compliance with the terms and conditions of his leave and an application made at or about the time of the expiry of his last leave - there is no relevant adverse feature. In consequence the Respondent now concedes that it would indeed be disproportionate to remove the Appellant from the United Kingdom - such removal necessarily having an adverse impact upon the family life enjoyed between him and C notwithstanding the Judge's conclusions that the extent of that relationship was more limited than the Appellant had asserted in his application and evidence on appeal.

10. I am content that the concessions made by the Secretary of State in respect of both 'error of law' and the substance of the appeal are entirely appropriate and well made. In the circumstances I find material error of law and set aside the decision of the First-tier Tribunal. It falls to me to remake the decision, and on the basis of the concession of the Respondent I remake the decision by allowing the appeal on human rights grounds.

Notice of Decision

11. The Decision of the First-tier Tribunal contained a material error of law and is set aside.

12. I remake the decision in the appeal. The appeal is allowed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **21 January 2018**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal and in all of the circumstances make a full fee award of any fee which has been paid.

Signed: Date: **21 January 2018**

Deputy Upper Tribunal Judge I A Lewis
(*qua* a Judge of the First-tier Tribunal)