



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: HU/04810/2019 (V)

THE IMMIGRATION ACTS

**Heard at Field House
On 1 October 2020**

**Decision & Reasons Promulgated
On 8 October 2020**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**A J J
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Record, Counsel (direct access)

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

**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

1. The Appellant is a citizen of Nigeria. His date of birth is 10 July 1984. He made an application for leave to remain based on his family life here. This

application was refused by the Secretary of State on 18 September 2018. The Appellant appealed. His appeal was dismissed by Judge of the First-tier Tribunal Judge Walker in a decision dated 24 October 2019 which was promulgated the same day, following a hearing at Taylor House on 29 August 2019.

2. The judge of the First-tier Tribunal made an anonymity direction. There is no reason for me to interfere with this. I make an order that it continues.
3. Permission was granted to the Appellant to appeal against the decision of First-tier Tribunal Judge Walker by Tribunal Judge Kamara on 6 July 2020. Thus, the matter came before me to decide whether the judge erred.

The history

4. The Appellant came to the UK on 4 September 2004, having been granted leave as a student until 31 October 2008. He made an application for leave to remain as the spouse of a settled person on 21 April 2008. This application was rejected on 30 April 2008. He made another application for leave to remain as the spouse of a settled person on 2 May 2008. This application was granted until 13 May 2010. The Appellant made an application on human rights grounds on 17 May 2010. His application was rejected on 27 May 2010. The Appellant made a further application on 17 February 2015. He was granted leave outside of the Rules until 1 November 2017. He made an application on human rights grounds on 30 October 2017 based on his relationship with his children. The application was refused by the Secretary of State on 18 September 2018. The Respondent decided that the Appellant had not provided evidence to support his claim of a genuine and subsisting relationship with his children. The Respondent did not accept that the Appellant met E-LTRPT.2.4 or EX1.1. of Appendix FM.

The decision of the First-tier Tribunal

5. The Appellant's children are both British citizens. His eldest child, 'JJ,' was born on 13 February 2011 and his second child, "KJ", was born on 5 June 2012. Both children are qualifying children for the purposes of EX1.1 and s.117B(6) of the Nationality, Immigration and Asylum Act 2002. Their mother, "NW," is also British citizen.
6. It was the Appellant's case before the First-tier Tribunal that although he had a problematic relationship with NW, he is now living with her and his children in the family home. He was unable to submit documentary evidence (with his application) of his relationship with his children because NW refused to provide it because of ill feeling on her part, at that time. His children are aged 8 and 7. He cares for them. He collects them from school, he is listed as an emergency contact at their schools, he cooks for them, helps them with homework and plays with them.

7. The Appellant and NW gave oral evidence. The judge made findings starting at paragraphs 30 -53. The judge accepted that the children are the biological children of the Appellant. They have never been to Nigeria, they are both at school age and doing well at school. The judge concluded that it would be unreasonable for the children to leave the UK.
8. The judge said that the Appellant has not provided sufficient evidence to show that he is taking an active role in the children's upbringing. At paragraph 32 he said that the only document that he has provided which shows any connection between himself and the children is a letter from his GP dated 20 August 2019. This states that the Appellant is a registered patient at the practice and that the children are also registered there. The judge said that there is no evidence to show when the Appellant became registered at the practice and there is nothing that shows that the Appellant has had prior involvement with any health problems experienced by his children.
9. The judge considered that there was no mention of the Appellant in JJ's school report. There was nothing from the school to show that the Appellant is named as an emergency contact or that he had ever attended parents' evenings or had any involvement in the children's education at all. The judge considered nine photographs which show the Appellant with his children. They were not dated and there was no evidence about when and where they were taken. Some were, according to the judge, "clearly taken on the same occasion". The judge concluded that they show the Appellant with his children on four or five different occasions.
10. That was, according to the judge, the sum of documentary evidence that connects the Appellant with his children. The judge said there was no independent evidence and no evidence from other family members.
11. The judge found at paragraph 34 "had the Appellant genuinely been taking an active role in the children's upbringing I would have expected to see evidence from, for example, their school - especially as in his witness statement the Appellant says that he is known at their school ...".
12. The judge rejected the Appellant's evidence that he lives with NW and the children. The judge set out the clear inconsistencies in the evidence at paragraph 36 onwards. The judge at paragraph 41 concluded that "given that the Appellant's case is that he has lived at the same address as [NW] since 2011 the amount of documentary evidence he has produced to show his address is surprisingly scant".
13. The judge at paragraph 42 said that there was no evidence from the Appellant's employer relating to his address and there were no council tax bills showing the Appellant to be living with. There were no utility bills or correspondence of any kind from any earlier than May 2019. The judge concluded in the final sentence at paragraph 42 "this is far less than I would expect to see if the Appellant had genuinely been living with [NW] for eight years as claimed."

14. The judge at paragraph 43 referred to the “numerous inconsistencies” in the evidence and the “extraordinary paucity of documentary evidence produced by the Appellant. The judge found that this “seriously damaged” the Appellant’s credibility.
15. The judge found that when considering the documents relied on by the Appellant in order to establish a connection with his children and the family’s address, they postdate the decision of the Secretary of State and the judge found that they “could have been obtained simply to support his case”. The judge considered the documentary evidence in the light of Tanveer Ahmed [2002] UKAIT 00439. The judge concluded as follows:-

“Balancing the evidence carefully in this case I find that the numerous weaknesses and inconsistencies that I have identified render the Appellant’s account incredible and outweigh the possible reliability of those documents which have been produced”.
16. The judge found at paragraph 44 that the Appellant and NW were not credible witnesses. The judge was not satisfied that the Appellant is actively involved in his children’s upbringing. At paragraph 44 the judge said:-

“I also do not accept that he provides care for the children at home as claimed in his witness statement. I accept that he may occasionally take them to the park to play football or to McDonalds, or for outings as shown in the photographs, but that is all”.
17. The judge concluded that the Appellant was not taking an active role in his children’s upbringing and therefore he was unable to meet the requirements of E-LTRPT.2.4.(b). He could therefore could not meet the Immigration Rules.
18. The judge went on to consider Section 55 of the 2009 Act and assessed the children’s best interests to be to continue living with their mother because the Appellant’s involvement in their lives is limited to occasional visits. The judge said at paragraph 46:

“Whilst I accept that the Appellant’s removal would have an impact on his children, given the limited nature of his involvement, I am not satisfied that his removal to Nigeria would cause either him or them any unjustifiably harsh consequences. I am, not satisfied that this appeal should be allowed under paragraph GEN.3.2 of Appendix FM.”
19. The judge went to consider Article 8 outside of the Rules with attention to Section 117B(6) of the 2002 Act. He identified the remaining question which was whether there is a genuine and subsisting parental relationship between the Appellant and his children. The judge said at paragraph 48 that he was mindful of the decision in SSHD and VC (Sri Lanka) [2017] EWCA Civ 1967 where it was held that to have a “genuine and subsisting parental relationship” the parent must have a “subsisting” role in personally providing at least some element of direct parental care to the child.

20. The judge said as follows at paragraph 49:-

“49. I accept that, as is made clear by the decision of SR (subsisting parental relationship – S117B(6) Pakistan [2018] UKUT 0034, even if a parent has been unable to demonstrate for the purposes of the roles that they have been taking an active role in a child’s upbringing, they still might have a genuine and subsisting parental relationship with them. However, the case also makes it clear that in order for this to be case, there must be an element of direct parental care of the kind referred to in VC (Sri Lanka).

50. In my judgment and for the reasons set out above, the Appellant has failed to show the necessary degree of parental care to establish that he has such a genuine and subsisting parental relationship with his children. That being so, Section 117B(6) does not apply to him.”

The judge noted at paragraph 51 that it was not advanced before him that he had a genuine and subsisting relationship with NW; however, in any event he was not satisfied that there was such a relationship. The Appellant’s case was not advanced on private life grounds and in any event the judge found that there were no obstacles to return to Nigeria.

The Grounds of Appeal

21. Ground 1 asserts that the judge made an error when assessing family life. It is argued that there was enough evidence on the balance of probabilities to show that the Appellant lived with his partner and children. Given that the application was made in time and the children are settled and at school it was disproportionate and not in the public interest to require relocation.
22. Ground 2 asserts that the judge erred when considering the position of the children because there was evidence from both the Appellant and NW that the Appellant has contact with his children which was evidence that the judge accepted. NW’s evidence in her witness statement was that the children loved their father and would suffer should he return to Nigeria. It is asserted that at paragraph 44 where the judge accepted, amongst other things, that the Appellant may occasionally take the children to the park, it is not clear to the reader what the judge intended by the word occasionally.
23. The judge did not take into account the evidence when considering the best interests of the children. There was evidence of contact and evidence that the children have a bond with their father. The grounds assert that there was enough evidence that the Appellant sees his children even if the judge’s decision that he does not live with them is sustainable.
24. Ms Record expanded in the grounds of appeal in oral submissions.

The Rule 24 Response

25. The First-tier Tribunal clearly recorded all the documentary evidence produced by the Appellant at paragraphs 41 and 42 of the determination and notably the grounds do not state that there were further documents that the judge did not consider. The judge clearly notes (a point the grounds fail to refer to) that all the documentary evidence post-dated the Respondent's refusal letter. Additionally, the Appellant, despite allegedly living at the same address as his "partner" failed to receive letters sent from the Home Office to that address.
26. The FTTJ was entitled to hold that the major discrepancies in the evidence of the witnesses (paragraphs 38 & 39 of the determination), and the absence of any documentary evidence to show cohabitation demonstrated that the Appellant was not in a genuine and subsisting relationship with the children or his "partner".
27. Mr Melvin made oral submissions in the context of the written submissions.

Error of Law

28. Ground 1 does not properly identify an arguable error of law. It is an attempt to reargue the case. It lists several disagreements with the decision of the judge. The judge was entitled to conclude that the Appellant and NW were not credible. The judge identifies a considerable number of inconsistencies in their evidence as regards where the Appellant was living at the date of the hearing and throughout the eight-year period when the couple said that they were living together. The judge was entitled to conclude that the Appellant was not living with NW and their children. There was a dearth of evidence as properly identified by the judge. Whilst there may have been a reason why evidence was not available to the Secretary of State, there was no reasonable explanation given to explain why the evidence was not forthcoming by the time of the appeal before Judge Walker.
29. The judge was entitled to conclude that the Appellant did not meet the relationship requirements because he was unable to establish that he was taking and intended to continue to take an active role in the children's upbringing.
30. The Upper Tribunal in SR (subsisting parental relationship - S117B(6)) (Pakistan) [2018] UKUT in respect of this requirement of E-LTRPT 2.4 said as follows:
 - "25. ... In order for a parent to meet the requirements of (b), all the particular facts will need to be considered in the round, including *inter alia*: the age, and if appropriate the wishes and feelings of the child; the nature and extent of the direct and indirect contact between parent and child; its duration; whether the parent has 'parental responsibility' and; the nature and extent of the role played in decision-making for the child and his/her upbringing."

31. Whilst there was contact between the Appellant and his children there was simply no evidence to support a conclusion that the Appellant was taking an “active role in the child’s upbringing”. There was no evidence available to the First-tier Tribunal that the Appellant was involved in any of the important decisions relating to the children’s upbringing. I am satisfied that the judge did not make an error of law as regards this aspect of the Immigration Rules.
32. As properly identified by the judge this test (taking and intending to continue to take an active role in the children’s upbringing) does not need to be satisfied to meet the requirements of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002; namely that the Appellant has a genuine and subsisting parental relationship with a qualifying child. He found against the Appellant despite there being evidence of a relationship between the Appellant and his children. There is an unequivocal finding by the judge at paragraph 44 that there is a relationship between the Appellant and his children. While the judge found that the evidence established that contact between the Appellant and the children was occasional and recently established, there is no finding made by the judge that the Appellant has cynically manipulated a relationship with his children after the decision solely to bolster his case. Mr Melvin accepted this much. If the judge found this to be the case, he should have made clear findings.
33. The judge found against the Appellant because he and NW had not been honest about their relationship. While the evidence before the judge did not establish that there had been a consistent relationship, at the date of the hearing there was evidence that established that the Appellant saw his children – he took them to the park, to McDonalds and played football with them. This was supported by photographic evidence. This much was accepted by the judge. While the judge was entitled to conclude that the Appellant and NW were not been credible about their relationship, he did not make clearly reasoned findings about his relationship with the children. The judge said that contact was occasional but did not elaborate further. It is not clear what occasional means in this context.
34. The Appellant at paragraph 3 of his witness statement and NW at paragraphs 7 and 8 of her witness statement both describe a fatherly relationship between the Appellant and his two young sons. The judge did not explain why a biological father who does not live with his children but has a relationship with them and sees them occasionally does not have a genuine or subsisting relationship for the purposes of s117B (6). Without countervailing evidence it is difficult to see how the judge came to the conclusion that it would be in the children’s best interests to remain in the United Kingdom with their mother and to be separated from their father with whom they have a relationship albeit that contact was described as occasional.

35. The judge's decision in respect of the children is flawed. It is inadequately reasoned. I set aside the decision of the judge to dismiss the appeal on Article 8 grounds.
36. There was no further evidence relied on by the Appellant that was not before the First-tier Tribunal. The parties agreed that I could go on and make the decision on the evidence before the First-tier Tribunal.
37. It is possible to have a genuine and subsisting parental relationship with a child, in cases where contact has only recently resumed and when contact is on a limited basis and for that relationship not to include the parent playing an active role in the child's upbringing. In the Secretary of State v VC [2017] EWCA Civ 1967 at [42] McFarlane LJ accepted the submission that the requirement to establish whether "the person has a genuine and subsisting relationship with a child" albeit for another part of the Immigration Rules, namely 399(a), contains four elements;
- (a) a relationship between the child and the foreign criminal;
 - (b) which is 'parental', rather than of some other kind;
 - (c) the relationship must be 'genuine'; and
 - (d) the relationship must be 'subsisting' (in the sense that it exists or has a real existence)' and that simply to establish biological parentage is insufficient - there must be a genuine existing parental relationship."
38. The Appellant has not submitted further evidence about the frequency of contact with his children; however, this must be considered in the context that his evidence is that he lives with them. This was not accepted by the judge. The judge described contact as occasional without any explanation of what this means.
39. There is evidence which establishes that the relationship goes beyond a biological link. The judge's findings at paragraph 44 support this. It is not a matter of the Appellant having any unpleasant characteristics that would prevent him from having a healthy parental relationship. In the light of the evidence of contact and the findings of the judge, I am satisfied that the level of contact the Appellant has with his children is sufficient to establish that it is in their best interests for their father to remain in the UK and to continue to see them. There are no countervailing circumstances that would suggest otherwise. The children's best interests are a primary though not paramount consideration when assessing proportionality.
40. I conclude that the evidence of photographs and the evidence of the Appellant and NW establishes that the Appellant's relationship with his children is a genuine and subsisting parental relationship. While they were not credible about their own relationship and the case advanced before the First-tier Tribunal was exaggerated, it is difficult to see (in the absence of a finding that the Appellant has manipulated a relationship with his children to bolster his case) why NW would support the

Appellant's appeal in the absence of a parental relationship from which her children would benefit.

41. The First-tier Tribunal focused on the Appellant's credibility in respect of his relationship with NW and where he was living, but neither of these issues is determinative of the issue in respect of his children. It may have been a recently resumed or established relationship which would explain the lack of historic evidence, but nevertheless the evidence was sufficient to establish a genuine and subsisting relationship with his children.
42. I find that the Appellant has a genuine and subsisting parental relationship with his children. Considering all the circumstances, I find that it would not be reasonable to expect the children to leave the United Kingdom. The appeal is allowed under Article 8.

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 their 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.

Signed Joanna McWilliam

Date 5 October 2020

Upper Tribunal Judge McWilliam