



Upper Tribunal

**(Immigration and Asylum Chamber) Appeal Number: HU/13583/2019
(P)**

THE IMMIGRATION ACTS

**Decided under rule 34 (P)
On 2 November 2020**

**Decision & Reasons Promulgated
On 5 November 2020**

**Before
UPPER TRIBUNAL JUDGE KEKIĆ**

**Between
[R A F]
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation (by way of written submissions)

For the appellant: The Legal Resource Partnership

**For the respondent: Mr C Avery, Senior Home Office Presenting
Officer**

DECISION AND REASONS

Background

1. This appeal comes before me following the grant of permission to appeal to the appellant by Upper Tribunal Judge Gill on 20 July 2020 against the determination of First-tier Tribunal Judge Buckwell, promulgated on 5 February 2020 following a hearing at Hendon Magistrates' Court on 6 January 2020.
2. The appellant is a Ghanaian national born on 21 October 1991. He came to the UK with limited leave under Tier 5 from 23 July 2014 to 16 August 2014 as the personal assistant to a musician. He then overstayed. On 30 October 2018, he made an application for leave to remain on family/private life grounds on the basis that he was the father of M, a British child born in July 2017. He explains that he overstayed because he had been sacked by his employer and he was confused and felt stranded. His relationship with the mother of his child (whom he met in 2015) had already broken down by that stage.
3. The application was refused on 2 August 2019. The respondent was not satisfied that the appellant had sole responsibility for his son or that the child lived with him. The respondent noted that although a letter had been provided, allegedly from the child's mother, there was no sworn or notarised statement from her and no independent evidence of contact. Further, the respondent found that the appellant failed to meet the eligibility requirements of the Immigration Rules because he had been here without leave for over four years and paragraph 39E did not apply. He could not meet the long residence requirements under paragraph 276ADE and it had not been shown that there would be very significant obstacles to his reintegration on return to Ghana. The best interests of the child were considered but it was concluded that there were no exceptional circumstances which would warrant a grant of discretionary leave.
4. The appeal came before Judge Buckwell. He heard oral evidence from the appellant and his sister. The evidence was that the appellant used to have an amicable relationship with his former partner but that changed when he made his application for leave in November 2018 and wanted to provide further documents from her to the Home Office. He had recently made an application for contact through the Family Court. He had not seen his son for some three months at the date of the hearing. Prior to that he used to see him about three times a month. His parents and two siblings lived in Ghana. He had a sister in the UK with whom he lived. She had a husband and children. They all had a relationship with the appellant's child but had not seen him for several months.
5. The judge accepted that that it would not be reasonable for the two year old child, a British citizen and minor, to leave the country however he found that the relationship between the appellant and his

son was very fragile and that they had not been in contact for some time. He noted that despite the application lodged with the Family Court, the child's mother did not want to allow the appellant access and there was no court order at the date of the hearing which gave him any right to contact. He found that there was no subsisting parental relationship and that the requirements of EX.1 did not apply. He considered article 8 but found that there was no family life between the appellant and his son and that no evidence had been put forward as to family life between the appellant and anyone else. He considered that the appellant would not face very significant obstacles on return to Ghana where he still had close family. He had regard to the fact that the appellant had spent the majority of his time in the UK unlawfully, had shown an utter disregard for the Immigration Rules and had commenced his relationship during a time when he had no basis to be here. He considered that the appellant's child's best interests were to remain with his mother in the UK. Accordingly, he dismissed the appeal.

6. The appellant was refused permission to appeal on 15 May 2020 by First-tier Tribunal Judge O'Garro but was granted permission on renewal to the Upper Tribunal on limited grounds. I shall deal with these below.

Covid-19 crisis: preliminary matters

7. The matter would ordinarily have then been listed for a hearing but due to the Covid-19 pandemic and need to take precautions against its spread, this did not occur and instead directions were included in the grant of permission dated 20 July 2020 but which was sent to the parties on 14 August 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.
8. The Tribunal has received written submissions from the respondent dated 1 September 2020 which opposed the appeal and urged the Tribunal to uphold the judge's decision. The appellant's representatives by way of correspondence dated 28 August continue to rely on the grounds for permission; specifically, to those which dealt with the best interests of the child. Neither party objected to the proposed course of determining the appeal. Having had regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN), the Senior President's Pilot Practice Direction (PPD) and the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I am satisfied that is the appropriate way of disposing with this matter. The parties

have been able to participate fully in the proceedings and further delay has been avoided. I am satisfied that I am able to fairly and justly deal with this matter in the manner proposed and now proceed to do so.

Discussion and conclusions

9. I have considered all the evidence, the determination, the grounds for permission, the grant of permission and the submissions made.
10. The appellant sought permission to appeal on several grounds but the grant of permission was limited in the following terms: *"It is arguable that Judge of the First-tier Tribunal Buckwell may have erred in law in reaching his finding that the appellant did not enjoy a parental relationship with his son for reasons advanced at paragraphs 3 and 4 of the grounds. In addition, the judge arguably failed to take into account the decisions of SR (subsisting parental relationship s.117B(6)) Pakistan [2018] UKUT 00334 and SSHD v AB (Jamaica) [2019] EWCA Civ 661. to paragraphs 12 and 13 of the grounds which related to the reasonableness of the child leaving the UK. This may arguably be material either because (1) paragraph 83 of the judge's decision may amount to a finding by him that it would not be reasonable for the appellant's son to leave the UK; or (2) in the alternative, the judge arguably failed to take into account the guidance in SR (Pakistan) on the issue. Paragraphs 12 and 13 of the grounds, which relate to the reasonableness of the appellant's son leaving the UK, may therefore be argued".*
11. The arguments on which permission was granted were that the judge had erred in finding there was no parental relationship between the appellant and his son (at 3 and 4 of the grounds) and that he had not considered the impact of the appellant's departure on the child (at 12 and 13 of the grounds). It is argued that the appellant had provided a letter of support from his former partner and photographs of his child. It is submitted that it was only when the appellant requested documents in support of his application, that his former partner withdrew her support and that the judge did not give weight to this fact. It was argued that the judge failed to consider that the appellant's removal would mean leaving behind his son which would involve significant hardship and that there had been no consideration of the fact that the child had never lived abroad and had no experience of the outside world. Included in these arguments was the submission that the best interests of the child were not given primary consideration.
12. The judge was required to consider the circumstances as they stood at the date of the hearing. There can be no dispute about that. In reaching his conclusions, the judge properly directed himself (at 79-84) and had regard to all the evidence before him (at 24-25 and 82).

He also accepted that in principle it would be in a child's best interests to have contact with both parents (at 28). He took account of the appellant's oral and written evidence (at 35-39) and noted that the situation had changed between the appellant, his former partner and thus his son when he made his application for leave to remain and that he had not seen the child for some months prior to the hearing. The appellant's sister's evidence was that it was difficult for them to bond with the child because of the child's mother's conduct and that lack of contact could occur for up to three months. She confirmed that prior to the appellant's last contact, he had seen the child some two to three months earlier.

13. In assessing the evidence, the judge found that the relationship between the appellant and the child was very fragile (at 85). He had regard to the reality of the situation, noting that no court order had yet been obtained for contact, that the child's mother did not provide access and that there was, therefore, no subsisting parental relationship. Although it is argued that the judge did not have regard to the appellant's evidence that his former partner only became difficult and ceased to grant access when the appellant sought documentation to support his application for leave, no explanation is provided as to why that would be so when the claim is that she had previously supported it. Crucially, the grounds do not explain how consideration of this fact would have made any difference to the outcome of the appeal. The fact remains that the appellant did not have contact with his child and that even previously, according to his sister's evidence, contact was intermittent, sometimes with three months of no access. Based on the situation at the date of the hearing, it was open to the judge to conclude that there was no current subsisting relationship between father and son (at 85 and 86). In assessing article 8, the judge had full regard to s.55 (at 92) and properly found that the child's best interests were to remain with his mother in the UK. He took note of the absence of any current court order and the lack of any evidence that suggested any likelihood that there would be a favourable one in place in the near future. He found that it would not be reasonable for the child to leave the UK (at 82). These are all conclusions based on the evidence and which were open to the judge to reach.
14. There was no need for the judge to consider that the child had never been abroad and had no experience of living outside the UK because the judge found that it would be unreasonable to expect the child to leave his home here with his mother. There is no error in that. On the issue of the impact of the appellant's departure on the child, there was not a shred of oral or documentary evidence to support the contention that the removal would cause him "*significant hardship*" as the grounds claim. At best, the appellant's contact with his child has been intermittent. The boy is very young and his home is with his

mother and her family. In the absence of any evidence that he would be adversely affected by the appellant's removal, it is difficult to see what the judge could have taken into account had he considered the issue. All that he could have said was that the evidence was lacking on this point.

15. The grant of permission refers to case law and it is maintained that the judge may not have taken the principles contained therein into account. Neither SR (Pakistan) nor AB and AO (Jamaica), however, were relied on by the appellant's Counsel. SR was a father who entered the UK as a student and subsequently married. His marriage later broke down but had resulted in the birth of a child of around the same age as the child in the present case when the matter was considered by the court. The difference is that he had a court order which gave him direct contact for three hours on a fortnightly basis. The court found that as a result of that direct contact he had been providing parental care to the child and had a genuine and subsisting parental relationship with her. AB was a father to an older child whom he saw three times a week. It was accepted that he had a subsisting parental relationship as he provided care and helped with homework. AO was permitted only indirect contact with his son. In his case the court rejected the contention that he had a genuine and subsisting parental relationship with his child.
16. The principles to be derived from these judgments are essentially that a parent can have a genuine and subsisting parental relationship even where he/she has no active role in the child's upbringing, that specific factors such as the child's age and the role played by the parent must be considered but that there had to be an element of dependency (RK [2016] UKUT 00031 (IAC) approved). What also emerges from these cases is that some form of direct contact is required. In the present case, as at the date of the hearing, there was no direct contact, there had not been any such contact for the recent past and the appellant played no role in his child's life. On that basis, these judgments do not assist the appellant and the judge did not err in his findings and conclusions. If, in the future, the appellant's situation changes, it will be open to him to make a fresh application on the basis of any new circumstances and evidence.

Application to adduce fresh evidence

17. On 18 June 2020 and again on 17 August 2020, the appellant's representatives purport to make a fresh application to adduce further evidence although there is no reference to Rule 15 (2A) in either item of correspondence. The correspondence consists of two emails and two recent documents from the Family Court at Southampton. The first email attaches a court order made on 18 June 2020 allowing the appellant indirect access by video platform for no more than 30

minutes twice a week. The second is an order dated 21 July 2020 which gives permission to the appellant to disclose the previous order to the Upper Tribunal.

18. I have regard to Rule 15(2A) of the Upper Tribunal Procedure Rules 2018. That provides the following:

(2A) In an asylum case or an immigration case—

*(a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, **that party must send or deliver a notice to the Upper Tribunal and any other party—***

(i) indicating the nature of the evidence; and

(ii) explaining why it was not submitted to the First-tier Tribunal; and

(b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence (added emphasis).

19. No such notice has been served. Whilst it may be seen that the documents were not in existence at the date of the hearing, the emails which were submitted by the representatives are silent as to the requirements of Rule 15(2A) and do not confirm that either document was served on the respondent. Indeed, all they do is attach documents although one seeks an update.

20. The Senior President's Practice Directions at 4.1 say this:

"UT rule 15(2A) imposes important procedural requirements where the Upper Tribunal is asked to consider evidence that was not before the First-tier Tribunal. **UT rule 15(2A) must be complied with in every case** where permission to appeal is granted and a party wishes the Upper Tribunal to consider such evidence. **Notice under rule 15(2A) (a), indicating the nature of the evidence and explaining why it was not submitted to the First-tier Tribunal, must be filed with the Upper Tribunal and served on the other party** within the time stated in any specific directions given by the Upper Tribunal; or, if no such direction has been given, as soon as practicable after permission to appeal has been granted" (added emphasis).

And at 4.2:

*"A party who wishes the Upper Tribunal to consider any evidence that was not before the First-tier Tribunal **must** indicate in the notice whether the evidence is sought to be adduced: (a) in connection with the issue of whether the First-tier Tribunal made*

an error of law, requiring its decision to be set aside; or (b) in connection with the re-making of the decision by the Upper Tribunal, in the event of the First-tier Tribunal being found to have made such an error".

21. The rules and the Practice Directions have not been followed. No proper application has been made as required under the Procedure Rules and I have no information as to whether the documents have been served on the respondent. This is fresh evidence which was not before the First-tier Tribunal Judge. I am not told whether the evidence is for the purpose of the error of law decision or whether it is to be taken into account at a later stage, if an error of law is found. In all the circumstances, given the absence of a correctly made application, I am not willing to admit the documents at this stage for the purposes of the consideration of whether there have been any errors of law. I note that in any event the grant of indirect access takes the appellant's case no further than AO (discussed above) and that the appellant does not need to be in the UK to continue such contact. As stated, if in the future his circumstances change and he obtained direct access, it will be open to him to seek leave on that basis.

Decision

22. The decision of the First-tier Tribunal does not contain errors of law and it is upheld.

Anonymity

23. The First-tier Tribunal judge did not make an anonymity order but I do so pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to protect the identity of the appellant's child.
24. Unless the Upper Tribunal or a court directs otherwise, no reports of these proceedings of any form of publication thereof shall directly or indirectly identify the appellant or his child. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed

R. Kekić
Upper Tribunal Judge

Date: 2 November 2020