



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/14336/2016
HU/14344/2016
HU/14345/2016

THE IMMIGRATION ACTS

Heard at Field House
On 5th September 2018

Decision & Reasons Promulgated
24th September 2018

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

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N O K A
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Appiah instructed by The Legal Resource Partnership
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria. She appealed together with her partner and their son against the decision of the Secretary of State of 13 May 2016 refusing to grant leave to remain.

2. The judge set out the appellant's history, noting that she claimed to have first entered the United Kingdom in July 1996. Her husband, the second appellant, arrived in 2007 and it was said that they met in 2008. Their son, the third appellant, was born in the United Kingdom in 2013. Very sadly his twin brother died shortly after birth, and the third appellant has a number of significant health problems.
3. The judge dismissed the appeals both under the Immigration Rules and outside the Rules. As well as the third appellant, the appellant also claimed to have family life and/or private life with her nephew J.
4. The judge did not accept that she had been in the United Kingdom since 1996. He accepted that she had been in the United Kingdom since about 2008: the earliest she could have arrived was 2004.
5. The point of challenge concerns the first appellant's relationship with her nephew J. The judge noted the evidence with regard to J, that he is 12 years old, he has been in care since 2010 and has fortnightly unsupervised contact with the first appellant who is his aunt. His mother is currently sectioned under the Mental Health Act and his father is dead. The social worker said that J loves the contact he has with the first appellant and would like to live with her one day, but she could not be assessed as a possible carer until her immigration status was secured. He is currently with a good foster carer.
6. The judge said that the most that could be said was that it was plainly in J's best interests to remain in care in the United Kingdom unless and until a suitable long term carer could be identified. He said that he did not know whether that could conceivably be the appellant, were her appeal to be successful, but he could not assume that that would be the case, not least because of the needs of her own child. It seemed likely that the loss of direct contact with the first appellant would now be very distressing for J, but the judge considered that that fell well short of showing that his best interests require that she remained in the United Kingdom. He went on to conclude subsequently that the first appellant's relationship with J is not a parental relationship.
7. The main issue in the grounds of appeal was a contention that the judge had erred in his assessment with the relationship between the first appellant and J. It was argued that in light of the conclusion that the loss of direct contact would be very distressing to J interference would be proportionate, that, in line with what was said in RK [2016] UKUT 31, it was not necessary to be a parent in order to share a parental relationship, this was relevant to the assessment and to section 117B(6) of the 2002 Act, and that the judge had failed to consider the relationship between the two children. It was also argued in the grounds that there had been a failure adequately to assess paragraph 276ADE, but the judge granting permission referred only to the issues concerning the relationship between the appellant and J.

8. In her submissions Ms Appiah noted the various points in the evidence where reference was made to the relationship between the first appellant and J and the longevity of that relationship. She argued that though it might not have been said in RK there can be said to be a parental relationship between the first appellant and J. In essence the criteria set out in the relevant IDI were met.
9. In her submissions Ms Willocks-Briscoe argued that the issue concerning J could not be looked at in a complete vacuum but it was necessary to consider the earlier findings, which included the findings set out above, the earliest of which it was accepted if the appellant had entered the United Kingdom in 2004. That was important as reference had been made to her living with her sister between 2001 and 2004 and assisting with her sister and nephew. Paragraph 16 contained a careful assessment of the evidence in the context of the appropriate legal test. It had not been argued that any relevant evidence had not been considered. The judge was aware of the difficult circumstances of J and the impact on him of the appellant's removal. Paragraph 12 of RK did not really take matters further. Fortnightly visits did not show that the appellant had taken a role and was making an active contribution to J's life. It was no more than visits. There were no court orders giving her legal guardianship or any other evidence to show she was a de facto primary carer. There was no evidence that she made decisions about his life and the evidence was silent on how they were made and was also silent as to his status in the United Kingdom. As was set out at paragraph 13 of RK in the guidance, even if the appellant as his aunt were living with the child she would not primarily be considered to be in a parental relationship with him. The findings were open to the judge and he had done what was required and the assessment was balanced.
10. By way of reply Ms Appiah argued that the social worker's email said that there were fortnightly contacts and she referred to regular contact and fortnightly contact. It was the case that there was no evidence of J's status in the United Kingdom and that should have been addressed by the judge and had not been.
11. Subsequent to paragraph 17 where J's situation was considered the judge only referred to the appellant and her son and not to J in light of the findings at paragraph 17. Even if it were right that there was no evidence to show the first appellant's presence prior to 2004, what had been said was with regard to the level of contact and more intense contact after J's father died in 2005. Given that he wished to live with the first appellant and she to have him living with her, the relationship could not be said to be only one of an aunt visiting a nephew once a fortnight.
12. I reserved my determination.
13. I have set out above what the judge said about the evidence concerning J and his findings on that. There was a little more than that, but Ms Willocks-Briscoe was right to say that a judge is not obliged to set out each and every bit of the evidence. I think that Ms Appiah is right to say that the social worker's email says a little more than fortnightly contact in that she also refers to regular contact having been maintained.

In the appellant's representative's letter of 30 July 2010, reference is made to the fact that after J's father died she had J to stay with her from Friday to Sunday every week to help her sister and also out of love for J. It is also said that she had been a mother to J who indeed recognised her as his "other" mother. There is also reference in the appellant's witness statement of 24 November 2017 to the fact that she had previously looked after her sister and nephew and they had a strong bond. She referred to the strength of her relationship with her nephew and the fact that she plans to care for him but is unable to do so due to her immigration status. She refers to the fact that her nephew's social worker has previously confirmed to the Secretary of State that she is a suitable carer who plays an important role in his life.

14. In RK the Upper Tribunal referred to the situations in which a person might have "parental responsibility" and been in a "parental relationship" with a child. It was said in the headnote that as regards the latter for the purposes of section 117B(6), this depends on the individual circumstances and that the role that individual plays establishes that he or she has "stepped into the shoes" of a parent.
15. The Tribunal referred to the Secretary of State's guidance, which Ms Willocks-Briscoe helpfully provided me with. A number of factors are considered on the issue of whether a person has a "genuine and subsisting parental relationship". It is a question of whether they have a parental relationship with the child and issues such as what the relationship is, whether they are the child's de facto primary carer, whether they are willing and able to look after the child, are they physically able to care for the child are to be considered. From this it is clear that the appellant is not her nephew's primary carer but she is willing and as far as can be seen to be the case able to care for him and physically able to care for him. I should say that, like Ms Appiah, I do not quite understand why the judge thought that the fact that the appellant has a child albeit a child with significant health problems, would mean that she would not be thought to be a suitable person to care for him.
16. The guidance goes on to consider whether it is a genuine and subsisting relationship including whether the child lived with the person, where the applicant lives in relation to the child and how regularly they see each other. Clearly they do not live together, and they see each other fortnightly as set out above. J lives in the London Borough of Lewisham and the appellant lives in Middlesex so they are not very close but equally not very distant. It is relevant also to note that the guidance says that unless there are very exceptional circumstances they would generally expect that only two people could be in a parental relationship with the child.
17. From Ms Appiah's argument there would be three people in a parental relationship with J. His mother has been sectioned and effectively he has no more than a biological relationship with her. Clearly he will have a parental relationship with his foster carer, and if the appellant's arguments are made out, he would have a parental relationship with her also. In these particular circumstances I do not consider that the appellant is ruled out on the basis of that part of the guidance because she would make a third

person. Effectively the parental relationship with J's mother, as noted above, is no more than the biological relationship given her unfortunate circumstances.

18. The guidance goes on to ask whether there are any relevant court orders governing access to the child, whether there is evidence provided within the application as to the views of the child, of the family members or social worker other relevant professionals and to what extent the applicant is making an active contribution to the child's life.
19. With regard to this, there must I think be court orders for the appellant's nephew to be a looked after child in Lewisham. It seems from what the social worker and the appellant say that his views are clear that he would like to live with the appellant and the local authority has not been in a position to assess the appellant as a prospective long term carer given that her legal status in the United Kingdom is not secure. The contribution the appellant makes to J's life is the fortnightly visits and it seems regular contact otherwise and there is of course the historical contact which appears to go back over a number of years and at times has been, on the appellant's evidence, very close indeed.
20. As regards factors which might prompt close scrutiny, the person has little or no contact with the child or regular contact is not made out, the point that any contact although recent in nature is not made out and the point of support being only financial in nature is not made out. The final criterion is that the child is largely independent of the person. That is somewhat difficult to assess. He has been in care since June 2010, and to that extent is independent of the appellant but not in the sense that he is grown up and has become independent but rather that that is the circumstance in which he lives and the extent of her contact with him has to be factored into that. It is also said that other people who spend time with or reside with the child in addition to their parents such as grandparents, aunt or uncle, would not generally be considered to have a parental relationship with the child for the purposes of the guidance.
21. That does seem however to envisage a situation where the child is living with their parents in which the situation one can readily imagine that an aunt would not be considered to have a parental relationship with him, but in the particular circumstances of this case that is not precluded where the child does not live with his parents.
22. At paragraph 42 in RK the Tribunal said that whether a person is in a parental relationship with a child must necessarily depend on the individual circumstances which will include what role they actually play in caring for and making decisions in relation to the child and that is likely to be a most significant factor. It was accepted that it was not necessary for an individual to have "parental responsibility" in law for there to exist a "parental relationship" although whether or not that is the case will be a relevant factor. What is important is that the individual can establish that they have taken on the role that a "parent" usually plays in the life of their child. In effect the individual must "step into the shoes of a parent" in order to establish a "parental relationship".

23. I do not consider that taking the evidence at its highest that can be said to be the relationship between the appellant and her nephew. The judge's conclusion that she is not in a parental relationship with him is one that is clearly sustainable on the basis of this evaluation of the law and the guidance. It may be with better evidence a stronger claim could be made out in the future, but as matters stand, I consider that the judge's findings at paragraph 16 are sound. Sympathetic though the case clearly is, I do not accept that an error of law in the judge's decision as contended for has been made out, and as a consequence the judge's decision dismissing this appeal stands.

Notice of Decision

The appeal is dismissed.

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.



Signed

Date: 20th September 2018

Upper Tribunal Judge Allen