**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/07096/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 21 August 2019** | **On 16 September 2019** |

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**
**DEPUTY UPPER TRIBUNAL JUDGE METZER**

**Between**

**SS**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr S. Karim, Counsel instructed by Eldons Berkeley, Solicitors
For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Jamaica born on 6 August 1980. He arrived in the UK with leave as a visitor on 17 July 2002 expiring on 17 January 2003. He overstayed and on 10 May 2011 he applied for leave outside the Immigration Rules. He was granted discretionary leave for 3 years and applied in time for further leave which was granted. On 7 August 2017, he applied in time for indefinite leave to remain.

2. In a Decision dated 5 March 2018, the Respondent refused the Appellant's application by reference to paragraph 322(1) of the Immigration Rules because the application was for leave for a purpose not covered by the Rules. The Respondent considered the application by reference to Article 8 of the European Convention on Human Rights ("ECHR"). The Appellant did not meet any of the time critical requirements of Paragraph 276ADE (1) of the Immigration Rules and the Respondent considered there were no very significant obstacles to his integration on return to Jamaica. The Respondent also considered the application on the basis of the Appellant's claimed relationship with his minor child and concluded that he did not have sole parental responsibility and had not shown he was taking an active role in the child's upbringing. The Respondent did not accept there were any exceptional circumstances justifying a grant of leave by way of reference to the Appellant's right to respect for his private and family life protected by Article 8 of the ECHR.

3. On 19 March 2018, the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The grounds included a reference to the Appellant's relationship with his British citizen child from whose mother the Appellant separated in 2014.

**Proceedings in the First-tier Tribunal**

4. By a decision promulgated on 1 November 2018, First-tier Tribunal Judge Swaniker, ("The FtJ") following a hearing on 16 October 2018, dismissed the appeal because she found that the Appellant had failed to produce sufficient appropriate evidence to show the nature of his relationship and contact with his child and had also failed to show he would face very significant obstacles to integration upon return to Jamaica.

5. By an email of 6 January 2019, the Appellant claimed that neither he nor his solicitor had received the FtJ's Decision. A copy of the Decision was sent to the Appellant and his then solicitors who had not attended the hearing before the FtJ. On 22 February 2019, the Appellant through his present solicitors lodged an application for permission to appeal.

6. By a Decision of 22 March 2019 another judge of the First-tier Tribunal, Judge Grant-Hutchison, refused permission to appeal.

7. The application for permission was renewed to the Upper Tribunal on the same grounds drafted by Counsel as summarised below and by a Decision of 10 May 2019, Upper Tribunal Judge Allen granted permission on all grounds.

8. On 17 May 2019, the Upper Tribunal issued notice that the matter was to be heard on 6 June 2019. By a letter dated 5 June 2019 and received by the Upper Tribunal on the same day, the Appellant's solicitors sought permission to add additional grounds for appeal which referred exclusively to the Respondent's policy for the grant of indefinite leave to remain to those who were granted discretionary leave before 9 July 2012 and had accrued 6 years' continuous leave. On 6 June 2019, the Appellant attended a hearing as did a representative of the Respondent. On 12 June 2019,

Deputy Upper Tribunal Judge Shaerf, following submissions, refused permission to admit the additional grounds of appeal lodged on 5 June 2019.

9. The Appellant's grounds of complaint about the FtJ's Decision as set out in the original grounds upon which permission was granted can be simply stated. It is asserted that the FtJ failed to give any, or any adequate, reasons for rejecting the testimony of the child's mother, "RS" from whom the Appellant separated in 2014; erred in rejecting the letters from the Appellant and RS on the grounds that they were 'self-serving'; and/or erred in her approach to the question of whether the Appellant had a genuine and subsisting parental relationship with his British citizen child "R".

**The FtJ's Decision**

10. The FtJ summarised the basis of the Appellant's claim and the evidence she heard from the Appellant and RS [9] and [10]. She made findings of credibility and fact between [13] and [18] and her findings and conclusions are to be found at [19] and [28].

11. At [13], the FtJ started her findings by stating that it was common ground that the Appellant has a British citizen child in the UK who lives with his mother and that the Appellant and the child's mother, RS, are no longer in a relationship and that the child lives with his mother in Birmingham whilst the Appellant is resident in London. She found there to be a paucity of reliable evidence going to the extent and quality of the Appellant's relationship with his son.

12. At [14], the FtJ noted that the child's mother attended the hearing and gave evidence to the effect that the Appellant has contact with the child and is involved in the child's life but stated that she was "struck by the failure to provide reliable supporting evidence to demonstrate such involvement".

13. The FtJ noted at [15] that the Appellant had said in his oral evidence that he only received one 'request for evidence' letter from the Home Office. He had responded with his letter of 14 January 2018 and his former partner's letter of 5 February 2018 but found that neither letter was supported by any further documents. She noted that the Appellant's letter referred to the Respondent's letter of 6 January 2018 whilst his former partner's letter referred to the Respondent's letter dated 23 January 2018 and found that the different dates in their letters pointed to the Appellant having received two separate request letters from the Respondent and "his not being candid in his evidence in this regard", which pointed "to his not being an overall witness of truth".

14. At [16], the FtJ set out examples of readily available evidence of a parent with a genuine subsisting relationship with his child and an active involvement in their life and therefore did not accept RS's account in her oral evidence of the extent of the Appellant's involvement in their child's life "to ring true" in the absence of what was described as the kinds of supporting evidence she considered such a relationship

with the child would readily throw up. Nor did she accept the Appellant's evidence in this regard to be reliable.

15. At [17], she found there to be an inconsistency in RS's evidence by her indication in her letter of 5 February 2018 that the Appellant's contact with the child had been sporadic over the years but increased noticeably in December 2017, being different from her oral evidence in which she said they had always tried to maintain contact but this had been more frequent since the latter part of 2017. She did not accept that Ms Sergeant was "an overall credible witness" and rejected the explanation that the Appellant was not registered at the child's school because he lived far away and the name registered at the school was for an emergency contact. She regarded that omission as "telling". It was also regarded as significant that the Appellant did not know the name of his son's main school teacher and she stated that "a truly concerned and involved parent would know, even if they lived a distance from their child's school". She therefore found that the Appellant lacked any true interest and involvement in his son's life.

16. At [18], whilst the FtJ accepted the Appellant did presently have some degree of contact with his child, she found that it was very limited and sporadic and that he only sought to establish contact with his son and son's mother once he received the Respondent's refusal. She found that his contact with the child and evidence of this was engineered to support the claim about the Appellant's involvement in his child's life and therefore was created to assist the Appellant in his efforts to regularise his immigration status and not on account of any genuine and subsisting relationship between the Appellant and his child and/or any real desire for the Appellant to be involved in his life. She attached no weight to the letters of 14 January 2018 and 5 February 2018 from the Appellant and RS, both of which she found to be 'self-serving' and without credible supporting evidence such as to reasonably be expected of a parent with a genuine interest and involvement in his child's life.

17. Accordingly, at [19] the FtJ held that the Appellant had failed to establish he met the requirements of the Immigration Rules and he did not have sole responsibility for his child and failed to provide reliable evidence to show he is taking and intends to continue taking an active role in his son's upbringing and therefore did not meet the requirements for leave to remain in the UK under the parent Rule. She reiterated those findings at [22] and [23] and at [24] to [26] held further that the Appellant had provided no credible evidence in which to succeed on the basis of his private life under Article 8 of the ECHR outside the requirements of the Immigration Rules.

**The Hearing in the Upper Tribunal**

18. At the hearing before us, Mr Karim accepted he was limited to the original grounds. He submitted that the FtJ did not set out adequately the reasons for finding the Appellant, and in particular RS, not to be credible. Mr Karim referred to the potential significance (although he did not rely upon it as determinative of the issue) that she had chosen to attend the hearing in support of the Appellant without a continuing relationship with him since 2014 and without having any obvious motive to support

him. He submitted that it was wrong to find that the letter from Ms Sergeant could properly be described as 'self-serving' on the basis that she had no interest herself in relation to the Appellant's appeal and he submitted that the FtJ was wrong to conflate the reference to the paucity of evidence with the adverse credibility findings against the Appellant and his former partner. Ms Everett accepted in the course of the hearing that there was some blurring between findings of paucity of evidence in support of the Appellant's evidence of involvement in his child's life but submitted that the findings were reasonable ones upon the evidence and should be upheld.

**Our Findings**

19. Having considered the Decision and the submissions with care, we find that the FtJ made material errors of law. We are satisfied that the FtJ failed to give adequate reasons for finding that the Appellant's former partner was not credible in her evidence in support of the Appellant. We do not consider that the FtJ was entitled to find that RS's evidence about the extent of the Appellant's relationship with his child "did not ring true" on the evidence which was available, nor was she entitled to conclude that the absence of possible additional supporting evidence adversely affected the credibility of both the Appellant and RS. Even if she was entitled to make such findings, we consider that the explanation for making adverse credibility findings against the Appellant was not adequately reasoned and in respect of RS, having acknowledged that the relationship had been over for a considerable period, the FtJ failed adequately or at all to set out why nonetheless, she should not be treated as a witness of truth with no axe to grind. We also find that the FtJ erred further in dismissing the significance of not simply the Appellant's former partner supporting him but also in wrongly finding that there was a material inconsistency in relation to the evidence of the extent of the Appellant's contact with his son and that there was a significant inconsistency between the letter of 5 February 2018 and her oral evidence in relation to the extent of contact. We find there were no such material inconsistencies. Further, we find that there was a material error in the FtJ finding that the same letter of 5 February 2018 was 'self-serving' by RS in support of the Appellant's appeal. We do not understand, in the absence of any further explanation, why that letter could properly be so described given the absence of any continuing relationship between the Appellant and RS. We further find that the FtJ erred in her approach and findings as to whether the Appellant had a genuine and subsisting parental relationship with his son for the reasons set out above, primarily because there was no proper or adequately explained reasons for rejecting the Appellant's and Rs's evidence of the extent of such a relationship between the Appellant and R.

20. It follows, therefore, that we conclude that the FtJ made material errors in her assessment of the evidence of the Appellant, his former partner and the documentary evidence in support of the Appellant's claim to a genuine and subsisting parental relationship with his son.

21. The appropriate course is therefore for the matter to be remitted to the First-tier Tribunal to be heard before a judge other than First-tier Tribunal Swaniker with no findings of fact preserved.

22. We have decided to remit the appeal to the First-tier Tribunal having regard to paragraph 7.2 of the Practice Statement of the Senior President of Tribunals. There needs to be a full factual assessment of the basis of the Appellant's claim. Despite the fact that there may be elements of the FtJ's decision which identify possible reasons to doubt the credibility of the Appellant's claim, those matters will require a fresh appraisal before another judge.

**Decision**

23. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Swaniker with no findings of fact preserved.

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

Given that this appeal involves a minor, 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, or any other person anonymised in this decision. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Deputy Upper Tribunal Judge Metzer 12/09/19