



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12504/2017

THE IMMIGRATION ACTS

Heard at Field House
On 15 April 2019

Decision & Reasons Promulgated
On 1st May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

D C S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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.

Representation:

For the Appellant: Ms T Srin dran, Counsel instructed by Crimson Phoenix Solicitors
For the Respondent: Mr J McGirr, Senior Home Office Presenting Officer

REMAKE DECISION AND REASONS

1. This is the re-making of the decision in the appeal of the Appellant following my earlier decision promulgated on 18 January 2019 in which I concluded that the First-tier Tribunal had materially erred in law when dismissing the Appellant's appeal against the Respondent's refusal of his human rights claim. My error of law decision is annexed, below.
2. In summary, I concluded that the First-tier Tribunal had erred in concluding that the Appellant did not have a genuine and subsisting relationship with his baby daughter DZ, a British citizen. Having found a material error I set out what I considered to be the two core issues falling to be considered at this resumed hearing. These are:
 - (a) does the Appellant have a genuine and subsisting parental relationship with DZ within the meaning of section 117B(6)(a) of the Nationality, Immigration and Asylum Act 2002, as amended;
 - (b) if he does, is it reasonable to expect DZ to leave the United Kingdom, with reference to section 117B(6)(b) of the 2002 Act;

The evidence before me

3. In re-making the decision in this case I have had full regard to the following sources of evidence:
 - (a) the Respondent's original appeal bundle under cover of letter dated 12 June 2018;
 - (b) the Appellant's original appeal bundle indexed and paginated 1-60;
 - (c) a supplementary bundle indexed and paginated 1-20 provided in compliance with my previous directions under cover of letter dated 12 April 2019.

The supplementary bundle includes updated witness statements for the Appellant and his partner LJ, together with supporting letters from members of LJ's family in the United Kingdom.

The hearing before me

4. At the outset of the hearing, Mr McGirr confirmed that he had received the Appellant's supplementary bundle and considered it in the context of the current case law relating to section 117B(6) of the 2002 Act, in particular KO (Nigeria) [2018] UKSC 53, JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) Rev 1, and AB (Jamaica) [2019] EWCA Civ 661.
5. Mr McGirr then stated the Respondent's position in this appeal in very clear terms: he accepted that the Appellant and LJ are in a genuine and subsisting relationship and that the Appellant also has a genuine and subsisting parental relationship with DZ. He accepted that it would not be reasonable to expect DZ to leave the United Kingdom. Finally, he accepted that in light of the previous two matters the Appellant must succeed in his appeal.

6. In light of Mr McGirr's stated position I did not call on Ms Srin dran for submissions.

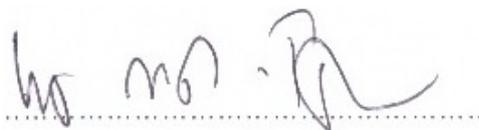
Re-making the decision

7. In light of Mr McGirr's very clear, and in my view properly considered and correct concessions, I conclude that the Appellant's appeal falls to be allowed with specific reference to section 117B(6) of the 2002 Act.
8. Although not strictly necessary in light of the Respondent's position, I would add the following observations. It is abundantly clear from the evidence as a whole that the Appellant is and has been for some time in a perfectly genuine and subsisting relationship with LJ. They have cohabited now for a number of years, have one child together already and another on the way (LJ is due to give birth to their second baby in June of this year).
9. In my view it was also clear, even on the evidence before the First-tier Tribunal, that the Appellant did have a genuine and subsisting parental relationship with DZ. Although she was still then a young baby, it was clear enough that he was a devoted father and was doing all he could to care for her in the best way that a new parent can. As matters now stand, almost a year after DZ's birth, the unchallenged evidence clearly shows that he continues to be what has been described as "a hands-on dad". The requirement under section 117B(6)(a) is satisfied.
10. In relation to the reasonableness test, the guidance provided in KO (Nigeria), together with the conclusions in IG and their approval by the Court of Appeal in AB (Jamaica) clearly supports the position taken by Mr McGirr. Whether or not DZ would in fact leave the United Kingdom is beside the point and the concession that it would not in fact be reasonable for DZ to leave this country, even if that was not a realistic prospect, is perfectly sound.
11. At the hearing I made it clear to the Appellant that the success of his appeal does not automatically lead to settlement and that he must be fully aware that his status in this country will remain precarious for some time to come.

Notice of decision

The decision of the First-tier Tribunal contained material errors of law and I have set it aside.

I remake the decision and allow the Appellant's appeal.



Signed

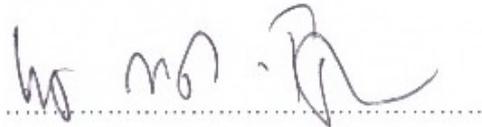
Date: 25 April 2019

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have remade the decision and allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a reduced fee award of £70.00. This is because the Appellant's case evolved over time and it clearly required consideration on appeal.

A handwritten signature in black ink, appearing to read 'Ms Norton-Taylor', written over a horizontal dotted line.

Signed

Date: 25 April 2019

Deputy Upper Tribunal Judge Norton-Taylor

ANNEX: ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12504/2017

THE IMMIGRATION ACTS

Heard at Field House
On 19 December 2018

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

D C S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms T Srin dran, Solicitor from Crimson Phoenix Solicitors

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

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

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DECISION AND REASONS

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Widdup (the judge), promulgated on 19 October 2018, in which he dismissed the Appellant's appeal against the decision of the Respondent, dated 2 October 2017, refusing his human rights claim.
2. In essence that claim had been based upon the Appellant's alleged parental relationship with two British citizen sons in the United Kingdom, D and E. By the time the appeal came before the judge in October 2018, the Appellant had entered into a relationship with a British national, LJ, and the couple had had a baby daughter, DZ, born in May 2018. She is also British.

The judge's decision

3. It is right to say that the judge was unimpressed by numerous aspects of the Appellant's own evidence, particularly relating to a number of convictions in the United Kingdom and his failure to have disclosed those to the Respondent in the latest claim.
4. The judge concluded that as a result of the convictions (and as set out in the Respondent's reasons for refusal letter) the Appellant did not meet the suitability requirements under Appendix FM to the Immigration Rules. Notwithstanding that conclusion the judge went on to consider EX.1 of Appendix FM (strictly speaking, this was unnecessary, given the conclusion on suitability).
5. At paragraphs 69-71 he finds that the Appellant had some contact with his two sons, but that there was very limited financial support and no involvement in important decisions relating to the children's upbringing.
6. Ultimately the judge finds that there was no genuine and subsisting parental relationship between the Appellant and his sons.
7. The judge then turns to consider the Appellant's relationship with DZ. At paragraph 74 the judge states as follows:

"I accept that the Appellant lives with [LJ]. There is no evidence about his parental relationship with DZ and I cannot speculate on this. She is now only 5 months old and her relationships are still developing. I do accept, however, that as a general rule, it is in the best interests of children that they are brought up knowing both parents."

8. Then at paragraph 84 the judge goes on to state:

"DZ is British and she is therefore a qualifying child. I have already referred to the lack of evidence about his relationship with her. I cannot reach conclusions which are based on speculation and in the absence of evidence I cannot find

that the Appellant has yet developed a genuine and subsisting relationship with her.”

9. On the basis of the factual findings relating to the three children the judge concluded that the Appellant’s appeal must fail.

The grounds of appeal and grant of permission

10. There are three grounds put forward: first, that a number of the judge’s findings relating to the two sons were wrong; second, that the judge failed to have regard to the evidence relating to the Appellant’s relationship with DZ; third, that the judge erred in respect of his consideration of LJ’s position.
11. Permission to appeal on all grounds was granted by First-tier Tribunal Judge Baker on 13 November 2018.

The hearing before me

12. Ms Srindran relied on the grounds of appeal. She submitted that the judge had erred in respect of his findings on the two sons. In respect of ground 2, she submitted that the judge had failed to deal with the Appellant’s relationship with his baby daughter. Ground 3 was not the subject of any additional oral submissions.
13. Mr Lindsay relied on the Respondent’s Rule 24 reply. He submitted that ground 1 was really only a disagreement with the judge’s factual findings. The real issue related to the Appellant’s claimed relationship with DZ. Relying on what the judge said at paragraphs 74 and 84, Mr Lindsay asked me to accept that the judge was concluding that there was no reliable evidence as to his relationship with his daughter. There was no corroborative evidence from other sources such as friends or a hospital. The only evidence aside from that of the Appellant himself was that of LJ and her evidence had been found wanting by the judge in other respects.
14. The burden was always on the Appellant to show a genuine and subsisting parental relationship and it was clear that the judge had found that the Appellant had failed to discharge that burden. Mr Lindsay submitted that there needed to be evidence of direct care by the Appellant for his daughter. The judge had given adequate reasons and there was nothing perverse about his findings.

Decision on error of law

15. As regards grounds 1 and 3, I conclude that there are no material errors of law. The findings relating to the two sons set out in paragraphs 69–71 are properly reasoned and were clearly open to the judge. Although as a matter of law he should not have been considering EX.1 because the suitability issue precluded the Appellant from getting that far along the Appendix FM route, the judge, having made his findings, did apply the correct test in respect of Section 117B(6), namely whether or not there

was a “genuine and subsisting parental relationship”. It was clear that he concluded there was not, and this conclusion was open to him.

16. As regards LJ’s circumstances there is no error here. All other things being equal, there was nothing to indicate that the Appellant could have succeeded in respect of her circumstances alone, given in particular that he was unable to rely on EX.1 for the reasons I have set out previously.
17. I do however conclude that there is a material error of law in respect of the judge’s treatment of the Appellant’s relationship with DZ.
18. In my view, the judge has either failed to consider relevant evidence or has failed to provide any or any adequate reasons for rejecting relevant evidence in respect of this important matter. My reasons for this are as follows.
19. First, the judge had already accepted that the Appellant was in a genuine and subsisting relationship with LJ and that they lived together. The cohabitation had clearly existed before DZ’s birth in May 2018. There was no issue as to paternity. Therefore, the reality of the situation before the judge, leaving aside the particular issue of “direct care”, was that the Appellant was living under the same roof with his partner and that as from May 2018 until the date of the hearing in October 2018, the couple were the cohabiting parents of a baby. Although there is of course no presumption as such that the Appellant or indeed any father would necessarily have a genuine and subsisting parental relationship with their new-born baby, it is right to say that the common experience is that fathers have a more limited role or input into the baby’s day-to-day caring than that of the mother.
20. Second, in both paragraphs 74 and 84 the judge refers to the lack of evidence. He has not used the word “reliable” himself, and although Mr Lindsay has asked me to insert this term into the relevant sentences, I view this submission with caution. I must of course read the judge’s decision in a sensible way, but I am also concerned with what has in fact been stated on its face as being the basis upon which an important aspect of the Appellant’s case has been rejected.
21. I fully appreciate that the judge regarded the Appellant as an unreliable witness. However, in respect of LJ he had, at paragraph 58, already said that he preferred her evidence to that of the Appellant in certain respects. Further, LJ had given evidence, in the form of her witness statement, that the couple had struggled to conceive, and that DZ was loved and wanted by both of them. In addition, in paragraph 14 of that statement she had stated that the Appellant was “an amazing father” who was a “very hands on dad”. I cannot see any or any adequate reasons that this particular evidence was considered by the judge. Alternatively, there are no reasons provided as to why this evidence was apparently rejected out of hand. It did not emanate from the unreliable source of the Appellant alone, but came from the partner, whom the judge had already found was in a genuine relationship with the Appellant.
22. Third, on my reading of paragraph 74 the judge appears to be suggesting that because DZ was so young her relationships were still developing, but it was still in

her best interests to be brought up knowing both parents. If he was saying that the very young age of DZ in and of itself precluded the existence of a genuine and parental relationship in respect of the Appellant, that must be wrong: a father can have such a relationship from the moment of the child's birth. If he is accepting that DZ's best interests lay in being brought up by both of her parents (and given the fact that they all lived as a single family unit, this would appear to be a sensible reading of what he intended to say) then this would not sit well with his conclusion that there was in fact no genuine and subsisting parental relationship.

23. Taking matters as a whole I conclude that the finding that there was no genuine and subsisting relationship between the Appellant and DZ is unsustainable.
24. This must be a material error, as the judge has not gone on to consider the issue of reasonableness under Section 117B(6) in any alternative conclusion.
25. I set the First-tier Tribunal's decision aside.

Disposal

26. There is no reason whatsoever to remit this appeal to the First-tier Tribunal and I do not do so. I will retain it in the Upper Tribunal and set it down for a resumed hearing before me in due course. The judge's findings in respect of the Appellant's two sons are to be preserved (there has been no suggestion that this should not be the case). The resumed hearing will in effect be concerned solely with DZ and the following questions:

- i. does the Appellant have a "genuine and subsisting parental relationship" with DZ?
- ii. if so, will it be "reasonable" to expect DZ to leave the United Kingdom?

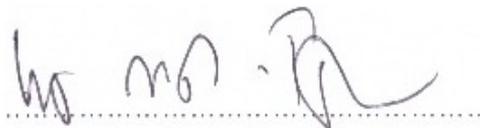
I will set out relevant directions below.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and I set it aside.

I adjourn this appeal for a resumed hearing in the Upper Tribunal on a date to be fixed.

Signed



Date: 16 January 2019

Deputy Upper Tribunal Judge Norton-Taylor

Directions to the parties

- 1. At the resumed hearing, the only live issue relates to the Appellant's relationship with DZ and the application of section 117B(6) of the Nationality, Immigration and Asylum Act 2002;**
- 2. Updated witness statements for the Appellant and LJ are to be provided, together with any other evidence relevant to the live issues. This evidence shall be served on the Respondent and filed with the Upper Tribunal no later than 14 days before the resumed hearing;**
- 3. Oral evidence from the Appellant and LJ will be permitted at the resumed hearing provided that updated witness statements have been filed and served in accordance with the previous direction.**