



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21817/2016

THE IMMIGRATION ACTS

Heard at Manchester
On 13th June 2019

Decision & Reasons Promulgated
On 30th July 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

MR OLUWASEUN [S]
(NO ANONYMITY DIRECTION MADE)

Appellant

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr C Holmes, Counsel, instructed by Citizens Advice Bureau.

For the respondent: Mr C Bates, Senior Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant has been given permission to appeal the decision of First-tier Tribunal Judge Brookfield. In a decision promulgated on 12 February 2009 the Judge dismissed his appeal against the respondent's refusal to grant him leave to remain.

2. He is a national of Nigeria. He came to the United Kingdom on 23 December 2004 on a visit Visa and subsequently overstayed. In or around 2009 he began a relationship with Ms [MC]. She is from Zambia. She was granted humanitarian protection on 14 February 2012 until 13 December 2017.
3. She gave birth to a daughter, [TS], on 21 July 2009. The appellant was named on the child's birth certificate.
4. The appellant had previous unsuccessful applications for leave to remain on 23 October 2015 and 19 February 2016. Then, on 16 March 2016 he applied for further leave to remain on the basis of his article 8 rights.
5. His application was considered by the respondent under the immigration rules and was refused on 1st September 2016. Whilst the relationship was accepted as being genuine and subsisting the appellant did not satisfy the eligibility requirements in that he failed to provide evidence of cohabitation for two years. The respondent had regard to EX 1 but concluded the family could live in Nigeria. He had not been in the United Kingdom the necessary period of time to succeed under paragraph 276 ADE on the basis of his private life. The respondent concluded that there would not be very significant obstacles to his reintegration into his own country. The respondent said he could maintain contact with his daughter by telephone from abroad.

The First tier Tribunals

6. His appeal was initially heard by Judge of the First-tier Tribunal M Davies at Manchester on 27 November 2017. It was dismissed in a decision dated 4 January 2018. The judge had concluded the appellant did not enjoy family life with Ms [C] and her daughter. In the alternative, if family life existed then the judge concluded it was proportionate to expect the respondent to return to Nigeria and then make an application for entry clearance.
7. The appellant successfully appealed that decision to the Upper Tribunal. The matter was remitted back to the First-tier Tribunal for a fresh hearing which was listed before First-tier Tribunal Judge Brookfield. By the time of that hearing his daughter had been granted British citizenship. The judge set out the relevant provisions in appendix FM and paragraph 276 ADE. Reference was made to section 117 B, particularly section 117 B(6).
8. Again, the appeal focused upon the relationship with Ms [C] and her child. The judge heard evidence about a breakdown in the relationship. In the course of an argument the appellant had disputed paternity which prompted the separation. The judge

referred to a four-year break in the couple's relationship and then they began living together again.

9. The judge commented that no DNA evidence had been produced. The judge said all that the child's birth certificate established was that he had claimed to be the child's father for the purposes of registration. The judge did not find it established that he was the biological father.
10. The judge then considered the situation in the alternative: of the appellant being the child's father and family life existing with his partner and child. The judge referred to section 117 B(6) and the respondent's Instructions to Caseworkers of February 2018. The judge concluded the appellant had only a limited involvement in the life of the child and was not satisfied there was a genuine parental relationship. Ms [C] had indicated she had no intention of leaving the United Kingdom and that the child would stay with her. The judge therefore concluded the respondent's decision would not mean the child would be leaving the United Kingdom.
11. The judge referred to the respondent's policy that it was appropriate to refuse leave to a parent whose conduct gives rise to public interest considerations of sufficient weight to justify their removal. The judge referred to the appellant's overstaying. The judge found that he had deceived the respondent from the outset when he applied for the visit visa as he intended to overstay. The judge referred to the parties having lived apart for four years and that the Visa processing time from Nigeria was within 60 days. The judge concluded that the sponsor and the child could cope in his absence whilst he applied for entry clearance.

The Upper Tribunal

12. Permission was sought on a number of grounds. It was argued the judge had raised the question of paternity herself. Reference was made to the statutory presumption of paternity following registration contained at regulation 2 of the British Nationality (Proof of Paternity) Regulations 2006.
13. It was also argued that the judge erred in the application of section 117 B 6 by being influenced by the appellant's conduct when considering the child and in the consideration of whether it would be reasonable for his child to be expected to leave the United Kingdom. The judge's assessment of the evidence generally was also challenged.
14. At hearing, Mr Holmes confirmed that he had appeared for the appellant in both earlier appeals. He said there had been no issue raised as to the paternity of the child. The matter was not raised in the papers nor at the hearing nor by the judge with the parties.

15. Mr Bates acknowledged that the refusal letter had accepted the relationship with genuine and subsisting and had not challenged the paternity of the child. There had been the same presenting officer at both First-tier hearings and Mr Bates had spoken to him about the issues in dispute. He indicated the presenting officer had challenged the relationship between the appellant and his sponsor at both hearings notwithstanding this had not been an issue in the refusal letter. He suggested the appellant's representatives were aware of this issue given the content of the bundle which contained evidence about cohabitation. Mr Bates advised that in the course of questioning the appellant about his relationship with his partner in the first tribunal the presenting officer went to ask him about the child. This was because the breakup between the parties was associated with him denying paternity in an argument. He made the point that if this were canvassed at the first tribunal then by the time of the rehearing the appellant's representatives would have been aware this was a potential issue.
16. To benefit from section 117 B6 it must be established that he is in a genuine parental relationship. The judge concluded he was not. Reasons are given at page 12 of the decision, at paragraph (xxxvii). Reference is made to the respondent's instructions whereby parental relationship encompasses situations in which the appellant is playing a genuine parental role in the child's life. The judge referred to the absence of Father's Day cards from his daughter, paintings where he is included. There is an absence of essays where she mentions him.
17. The judge did accept that he collected from school each day because her mother is working and he is named as a point of contact for the school. There were letters in support but the judge pointed out the makers had not attended.
18. Mr Bates accepted that if the judge erred in concluding there was no genuine parental relationship then based upon the respondent's own guidance and the case law in relation to section 117 B6 the appeal should succeed.
19. Mr Holmes made the point that the appellant was named on the birth certificate 10 years ago. Furthermore, there was evidence from the school that he had been delivering his daughter to school for four years. The evidence about the relationship between the appellant and Ms [C] went beyond the original two years originally required with the application. A substantial volume of documents in support had been provided. Mr Holmes submitted that the judge considered this evidence but failed to step back and consider the totality of the evidence. For instance, the judge had made the point that whilst the appellant may be named on medical and school records checks are not made. He submitted the judge failed to

consider the evidence in the round as to whether this was also subterfuge or if all the evidence indicated a genuine relationship.

Consideration

20. The reasons for refusal letter sets out the respondent's reasons for refusing an application. When a decision is appealed, this forms the basis for the appellant's preparations. As a matter of basic fairness, the appellant must be advised in advance of any other points being made to have time to address these matters. The decision had accepted the relationship between the appellant and his partner was genuine and subsisting. In considering the application under the rules there was insufficient evidence of two years cohabitation. There was no dispute about his daughter at that stage.
21. It is fairly clear from the original First-tier appeal hearing the relationship between the appellant and his partner was in fact being challenged. This came about because the evidence was that the appellant and his sponsor had fallen out and separated. Apparently in the course of an argument the appellant had questioned the paternity of the sponsor's child. Mr Holmes attended at both hearings and said that the paternity of the child was not a live issue at the hearing. The judge has not been invited to comment on this. Whether or not it was a new issue is something to be taken into the balance. It was relevant towards the assessment of the family situation. The judge was entitled to explore this provided the parties have been given an opportunity to comment.
22. The judge has considered the evidence produced. It is not from me to interfere with factual findings unless there is an apparent error in the process which those findings were made. In terms of the ultimate resolution of the appeal the most important issue is whether the appellant has a genuine and subsisting relationship with the British child.
23. Mr Bates has accepted that the judge materially erred in the consideration of section 117 B6 and the reasonableness of expecting the child to return. Notably, JG (S117B(6): "reasonable to leave" UK) Turkey[2019]UKUT 00072 advises the question must be considered not from the de facto position but on the hypothesis that the child would leave even if this is not likely. Clearly therefore the judge was wrong in stating because the mother said she would not leave this was no longer an issue. However, this section is only activated if a genuine and subsisting parental relationship is established.
24. I find merit in the point made by Mr Holmes of the need to assess the evidence in the round. Firstly, the appellant was named on the child's birth certificate as her father. This happened 10 years

earlier before the child had British status. There is nothing to suggest he thought this would confer any advantage to him. I have been referred to the statutory presumption in relation to registration. These factors are all supportive of him being the father. They are not conclusive that he is the biological father but are presumptive indicators.

25. Paternity was not the central issue: what was the key was whether he has a genuine parental relationship. R (on the application of RK) (s.117B(6); "parental relationship") IJR [2016] UKUT 00031 held that it is not necessary for an individual to have "parental responsibility" in law for there to exist a parental relationship; (ii) whether a person who is not a biological parent is in a "parental relationship" with a child for the purposes of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 depends on the individual circumstances and whether the role that individual plays establishes he or she has "stepped into the shoes" of a parent.
26. There was evidence about the appellant and the sponsor being together in the period after the refusal letter. Evidence was produced showing a common address. It is correct that the use of a common address does not necessarily mean the person lives there. However, before concluding subterfuge it is necessary to assess all of the matters in the round. If the appellant were in a genuine and subsisting relationship with his partner it is difficult to see how he would not also be in a genuine and subsisting relationship with the child. There was the evidence from the school about the appellant collecting the child on a regular basis over a number of years. The explanation given was that the child's mother was at work. He was also named as the point of contact. Mr Holmes also made the point that the respondent sought the appellant's consent when his daughter applied for British nationality. This suggested at least one part of the Department was acknowledging his position.
27. Specifically on the question of the parental relationship the judge at page 12 paragraph (xxxvii) refers to the absence of Father's Day cards and paintings from the child showing the appellant or reference to him in essays. It cannot however be assumed that this is necessarily the situation with all parental relationships. Families have different ways of expressing their affection. Equally, if the appellant were being devious he could have encouraged the child to produce such material.
28. Furthermore, even if a parent does not demonstrate they have been taking an active role in a child's upbringing they may still be able to demonstrate a genuine and subsisting parental relationship with a qualifying child for the purposes of section 117B(6). This turns on the particular facts (see SR (subsisting parental relationship - s117B(6)) Pakistan [2018] UKUT 00334 (IAC)).

Conclusion

29. The judge's finding that the appellant did not have a genuine parental relationship are not sustainable on the reasons given. As that issue is determinative of the outcome I am in a position to remake the decision. There have already been two First-tier Tribunal hearings and I do not seem a need for further fact-finding on this net point. From the information provided and the arguments advanced I accept the existence of a genuine and subsisting parental relationship.
30. Following from this, the appeal will succeed by reason of section 117 B 6 as acknowledged by Mr Bates. The judge repeatedly referred to the appellant's conduct. It is now established the child should not be penalised because of this. Furthermore, the respondent's own guidance envisages something much more significant than applying for a visit Visa intending to overstate. There is clear error in the way the judge approached the reasonableness issue of the child leaving. The decision of JG (S117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 was heard on 15 February 2019 and promulgated on 26 February 2019. consequently, First-tier Tribunal judge Brookfield promulgated her decision of 21 February 2019 and so did not have the benefit of this guidance.

Decision.

The decision of First-tier Tribunal judge Brookfield materially errs in law. I remake the decision allowing the appeal.

Deputy Upper Tribunal Judge Farrelly.
29 July 2019