



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03017/2017

THE IMMIGRATION ACTS

Heard at Field House
On 10 August 2018

Decision & Reasons Promulgated
On 30 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KINGSLEY [O]
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Walker of the Specialist Appeals Team
For the Respondent: Ms M Butler of Counsel instructed by Sutovic & Hartigan,
solicitors

ERROF OF LAW DECISION AND REASONS

The Respondent

1. The Respondent, Kingsley [O] (the Applicant) is a citizen of Nigeria born on 17 March 1971. On 20 November 2002 he arrived and was given leave to enter as a visitor for six months.

2. It appears that his next contact with the Immigration Authorities was an application which led to the grant of leave expiring on 10 October 2015. He made in time an application for further leave which on 14 January 2016 was held to be invalid. He submitted on 30 March 2016 another application for further leave to remain as an unmarried partner. His partner has a child born in 2002 from a previous relationship and they have a child born 2010. On 31 January 2017 a final Care order was made to place both children in local authority care. The Applicant and his partner are separated. He lives in London and she lives in the North-West.

The Secretary of State's Decision

3. On 2 February 2017 the Appellant (the SSHD) refused the Applicant further leave as he had failed to submit adequate evidence of his earnings to show he met the financial criteria and to produce evidence of facility in English as required by Appendix FM to the Immigration Rules and so he failed to meet the eligibility requirements. The provisions of Section EX.1 of Appendix FM were not engaged because the Applicant's child was in foster care and there was no evidence of continuing contact.
4. The Applicant did not meet any of the time critical requirements of paragraph 276ADE(1) of the Immigration Rules and would be able to re-integrate in Nigeria without facing very significant obstacles. There was no evidence to show there were any exceptional circumstances which warranted the grant of leave under Article 8 of the European Convention outside the Immigration Rules.

First-Tier Tribunal Proceedings

5. By a decision promulgated on 3 May 2018 Judge of the First-tier Tribunal Iqbal allowed the appeal on human rights grounds, finding the Applicant had a genuine and subsisting relationship with his child born in 2010 and the requirements of Section EX.1 of Appendix FM were met.
6. On 29 June 2018 Judge of the First-tier Tribunal Landes granted the SSHD permission to appeal on the basis that it was arguable the Judge had not given adequate reasons for her conclusion that the Applicant had a genuine and subsisting relationship with his child who was in care.

Upper Tribunal Proceedings

7. The Applicant attended the hearing. I explained the purpose of the hearing and the procedure to be adopted. Mr Walker acknowledged receipt of the Applicant's latest bundle filed on 1 August.
8. I noted the Applicant's original bundle before the Judge of the First-tier Tribunal included copies of some documents from the Care proceedings in the Family Court. I enquired where evidence of the consent of the Family Court to their production and use in proceedings in the Immigration and Asylum Chamber (IAC) was to be found and was informed that it had not been obtained. I indicated that without such consent

any Judge in the IAC would have difficulty in dealing with the documents emanating from the Family Court.

9. Ms Butler accepted the documents in the bundle filed on 1 August 2018 comprised new evidence seeking to establish the current position of the Applicant in relation to his child.

Submissions for the SSHD

10. Mr Walker submitted that the Judge had erred in finding that the Applicant was in a genuine and subsisting relationship with his child. She had failed to take into account the social worker's report. He referred generically to the judgment in *SSHD v VC (Sri Lanka) [2017] EWCA Civ. 1967*. The new evidence in the latest bundle was subsequent to the hearing in the First-tier Tribunal but did not establish any reason to depart from the conclusion in the social worker's report that the children of the Applicant's erstwhile partner should not return to live on a permanent basis with the parents.

Submissions for the Applicant

11. Ms Butler referred to paragraphs 17 ff. of the Judge's decision. She had referred to the detailed account and diary notes of the Applicant and the full and detailed account he had given of his relationship with his child. He had taken up specific issues with the child's carers identified in his statement and she had gone on to consider the longer term nature of that relationship and had concluded that her positive findings in favour of the Applicant were supported by the evidence. Family re-unification remained a possibility which the Applicant was pursuing and as noted in the final Care plan at section 10 on page C66 of the Applicant's bundle. The SSHD had failed to refer to this in the permission application.
12. The factual context in *VC (Sri Lanka)* was very different from that of the Applicant. In *VC (Sri Lanka)* the Respondent was the father of two children who had separated from his wife. She and the children had moved away from where the father lived and he was found to have had a consistent and well-established alcohol problem prior to his sentence of imprisonment for sexual assaults when very drunk and had played little part in caring for the children before his sentence or thereafter.
13. In this case, the local authority had no issue with the Applicant. The reason the Applicant's child had been taken into local authority care was because the mother had severely chastised the child and the Applicant lived in London, far from the child in the North-West. The Judge had taken account of the best interests of the child at paragraph 20 of her decision and her decision should stand.

Findings and Consideration

14. The Judge did not make mention of any adverse evidence or consider the impact of the final Care order to which she referred at paragraph 16 of her decision. It may be that she appreciated that documents emanating from the Family Court were not admissible for lack of permission but if she had come to that realisation after the

hearing, then she should have issued directions and re-convened or on her own motion sought to exercise the Family Court Protocol. The result is that this is a material error of law which must have infected her subsequent proportionality assessment. The error is compounded because there are no findings in relation to any of the factors identified in Part VA of the Nationality, Immigration and Asylum Act 2002 as amended and no proportionality assessment. Paragraph 24 of the decision cannot be said to have identified those matters which were in favour of allowing the appeal and those in favour of dismissing it.

15. Further, there was no express assessment of the best interests of either of the Applicant's step-child and child or reference to the specific legitimate objectives identified by Article 8(2) of the European Convention. The limited consideration of the public interest at paragraph 24 was infected by the failure to address material parts of the evidence.
16. The decision of the First-tier Tribunal cannot stand and is therefore set aside. No findings of fact are preserved. It was not appropriate to re-make the decision in the absence of any permission from the Family Court for consideration of the documents which had emanated from it. In these circumstances I consider it appropriate to remit the appeal for hearing afresh in the First-tier Tribunal before a Judge other than Judge Iqbal. I also make the direction below to the First-tier Tribunal in relation to the Family Court.

Anonymity

17. There was no request for an anonymity direction and having considered the appeal and having avoided any identifying reference to the children I consider none is required.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contained a material error of law and is set aside. The appeal is remitted for hearing afresh to the First-tier Tribunal.

DIRECTIONS

On remittal to the First-tier Tribunal, the relevant Judge of the First-tier Tribunal is to consider making a request under the Family Court Protocol in relation to the Care proceedings of which there are full details in the Appellant's bundle: see amended Tab C under cover of the Applicant's solicitors' letter of 9 April 2018.

No anonymity order is made.

Signed/Official Crest

Date 21. viii. 2018

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal