Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00708/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31st January 2019	**On 28 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

SAMUEL [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Appiah, Counsel
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Roopnarine-Davies promulgated on 31st August 2018. At the appeal hearing before the Upper Tribunal the Appellant has been represented by Ms Appiah of Counsel and the Respondent Secretary of State has been represented Ms Everett, Senior Home Office Presenting Officer.

2. The decision under appeal from First-tier Tribunal Judge Roopnarine-Davies was made following a hearing at Taylor House on 21st August 2018 in which the learned First-tier Tribunal Judge considered the Appellant's

human rights appeal outside of the Rules, there having been a concession made by Counsel representing the Appellant at the First-tier Tribunal that the provisions of the Immigration Rules on the basis of family life were not met.

3. Within her decision the Judge found that the Appellant was born on 16th April 1985, was a national of Nigeria and that he had applied on 1st March 2017 for leave to remain as a partner of [NS], a British citizen, and their daughter [A] who was born on 9th May 2014. [A] also is a British citizen. The Secretary of State had refused the application under Appendix FM of the Immigration Rules as amended, also under paragraph 276ADE and on the basis of Article 8 of the ECHR. The Appellant had appealed to the First-tier Tribunal. After hearing evidence both from the Appellant and the Sponsor, the Judge found at onwards that it was clear that the Appellant had a relationship with the Sponsor and his child and they with them, but stated that the issue was the nature and strength of that relationship. The Judge found,

> *"I was satisfied that the Sponsor's intentions are genuine and that she intends to live permanently with the Appellant, but I have doubts as to the Appellant's intentions given the length and nature of their relationship. He presented as a confident and worldly individual and she as a serious and modest adult."*

4. The judge went on to find in paragraph 12,

> *"The Appellant made no attempt to make contact with the Sponsor even though he was aware in 2013 that she was pregnant with his child. He did not do so until allegedly in 2016 by which time he was an overstayer. The Sponsor believed that he failed to make contact because he was out of the country, but this was not the case. He had been in and out of the UK since 2010. He married an EEA national in 2014 and though he claimed that the relationship ended in 2015 and that he and the Sponsor wished to marry. He has taken no steps to divorce her. The Sponsor was not aware that he had been previously married until he was detained in 2017."*

5. The judge went on to find:

> *"13. … The Appellant has not shown on balance that the relationship was established since 2016. He did not refer to the relationship in documentary form until January 2017, when he knew that he was due to be removed. He was unaware of the Sponsor's earnings. They do not share a bank account or hold any assets jointly. It was not clear how he was able to contribute to food and clothing for their daughter, though he claimed that he was not working. He claimed that his father died in 2015 when the Sponsor believed this to be in 2013. He has not shown other than by assertion that he has no assets or prospects in Nigeria. His father had an industrial window cleaning company*

in which he worked prior to coming to the UK. He has not shown that his father is dead or that his mother has dementia and he is not in contact with her or his siblings in the UK. The frequency with which he visited the UK and that he was in possession of a five year visa undermined his claims that he does not have assets. The Sponsor's evidence was that she understood him to be from a long line of royal antecedents.

14. In coming to this view I took of the precarious nature of their relationship, I took into account that the sponsor is a 32 year old professional woman who has had a relationship in the past and is able to form a judgment of the Appellant's intentions. Nevertheless, I must consider the evidence in the round and although I accept that they have a relationship I have concerns whether at this stage of the relationship his intentions are to live with her permanently. I am not satisfied that the relationship is yet akin to one of husband and wife and permanent.

15. I also find that the Appellant's relationship with his daughter is tenuous. The evidence suggested that his lack of status in the UK has taken precedence. His past behaviour showed a complete lack of concern for her in the first two years of her birth. The relationship is only approximately sixteen months or just over 1 year old and in its inception. The child is only 4 years old. She is at nursery on five days per week from 9am to 6pm when her mother returns home.

16. I do not doubt the Appellant has some relationship with his daughter but it has not been shown that it is of the strength claimed. I must consider her best intentions and this must be done without reference to his immigration history. It goes without saying that it is in the best interests of the child to be with both parents and that if that is not possible then with the mother. This is a paramount, but not the paramount consideration. The child had been with her mother since birth. She is a loving and constant and consistent parent unlike the Appellant. She has taken good care of her. The child is very young. The appellant has not shown that his intentions at this stage are to live permanently with the Sponsor in the UK. She and the child are not being required to leave the UK. They are British citizens. The child's best interests are to be with the mother in the UK. Her grandparents also live here and are close to her and her mother albeit they live in Preston and the Sponsor in London."

6. The Judge went on to state that when considering Article 8 the question was whether the refusal was proportionate, balancing the strength of the public interest in the removal of the Appellant against the impact of removal on his partner and daughter. The Judge found that the Appellant did not put forward a strong or compelling sufficient claim to outweigh the public interest in immigration control and found that the couple's

relationship at its highest was only sixteen months old and that it did not consider that a temporary separation would be disproportionate in all the circumstances. The Judge therefore dismissed the appeal on human rights grounds.

7. The Appellant now seeks to appeal that decision and in that regard, I have considered both the original and the renewed Grounds of Appeal. What is in effect argued within those Grounds of Appeal is that the First-tier Tribunal Judge erred in making no reference to the mandatory considerations of Section 117 of the Immigration Act 2002 especially Section 117B(6). This sub-section states that,

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where:
>
> (a) the person has a genuine and subsisting relationship with a qualifying child, and;
>
> (b) it will not be reasonable to expect the child to leave the United Kingdom."

8. These grounds go on to argue that the learned Judge gave inadequate reasons when finding that the Appellant's relationship with his daughter was tenuous. This finding was said to be contrary to the evidence of the Appellant and the mother that the Appellant is a supportive father. It is argued that the Appellant drops his daughter at school and picks her up and takes her shopping, etc. and that they have been living as a family with the Appellant living with the mother and the child since he was granted bail in April 2017. It is argued that the Judge's reasons are not supported by the evidence and that the Judge failed to give sufficient reasons for that decision.

9. The grounds go on to argue that the Judge erred in paragraph 20 of the decision regarding temporary separation but Ms Appiah. does not pursue that Ground of Appeal or part of that Ground of Appeal before me today. It is also argued in the original grounds that the decision was perverse, but again that argument has not been pursued before me today.

10. In respect of the renewed grounds, it is argued that in assessing the strength of the Appellant's relationship with his child, the First-tier Tribunal applied a higher test than was appropriate. The grounds point out that the Appellant was granted bail to the partner's address and they live together. It is said that the partner was surety in the bail application and was well-known by the school as the child's father and he discharged his fatherly role accordingly. It is argued that the Judge erred in finding that the relationship was tenuous and that the Appellant was not committed to the relationship with the child.

11. Although permission to appeal was initially refused by First-tier Tribunal Judge Ford on 6th September 2018, permission to appeal was then granted by Upper Tribunal Judge Canavan on 17th December 2018. A preliminary issue is the fact that First-tier Tribunal Judge Ford found that the Appellant

sought permission to appeal four days out of time, against the First-tier Tribunal Judge's decision dated 31st August 2018. Judge Ford stated that the only reason given for the delay was said to be financial constraints, but she was not satisfied that it was unfair or unjust not to extend time and therefore did not extend time. When granting permission to appeal Upper Tribunal Judge Canavan stated in paragraph 2,

> "*Even if the judge had doubts about the Appellant's motivation and the commitment to his relationship with his partner and child, it appears that she accepted (i) the Appellant had a genuine relationship with his partner and child and (ii) that it was in the child's best interests to be brought up by both parents. It is arguable that the judge failed to make clear findings relating to the Appellant's relationship with his partner and child with reference to the relevant legal framework. In particular it is arguable that she failed to make any clear finding as to whether the Appellant had a genuine and subsisting parental relationship with the child and whether it would be unreasonable to expect the child to leave the UK for the purposes of Section 117B(6).*"

12. On that basis she granted permission to appeal. However as both legal representatives agree when granting permission to appeal, Judge Canavan clearly should also have gone on to consider the question about extending time as specific to Rule 21(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008. In circumstances where the Appellant makes an application to the Upper Tribunal for permission to appeal, and that other Tribunal refused to admit the Appellant's application, that is something that has to be considered by the Upper Tribunal when granting permission. Ms Everett on behalf of the Secretary of State does not object in the circumstances of this case to the permission being granted and the case being admitted. On the basis that there is no objection to the appeal being admitted to the Upper Tribunal I do admit it and do extend time. In my judgment the delay of four days is not that great. I accept also what is said regarding the financial constraints on the Appellant in terms of actually paying for thee grounds to be legally drafted by the solicitors or counsel which caused a delay. Further given the fact that Judge Canavan did consider that the appeal potentially had arguable merit, it is appropriate in those circumstances for time to be extended and I therefore do extend time. That is not objected to by the Secretary of State in this case.

13. I am most grateful for the oral submissions by Ms Appiah of Counsel for the Appellant and Ms Everett for the Secretary of State.

14. Ms Appiah referred me in oral submissions to some of the evidence before the First-tier Tribunal Judge including a letter from Head Start Day Nursery contained within the Respondent's bundle at page C9 which is a letter dated 11th January 2017 from the Nursery Manager Caroline Turner, but signed by Deborah Davies, Director in Ms Turner's absence. In that document it stated that since June 2016 the Appellant Mr [A] had

accompanied [NS] to collect [A] from nursery in New Barnet two to three times per week, when she is dropped off and collected from nursery. It stated that he had attended parents' evening meetings with [NS] to discuss [A]'s development and that the Appellant was also an emergency contact on her records at the nursery. It said the nursery staff had observed that he has a positive interaction with [A] and he has a pleasant character and positive interaction with staff at the nursery. Ms Turner writes that there might be an impact on [A]'s social development if Mr [A] was to leave suddenly.

15. At page 19 of the Appellant's bundle was also an updated letter from the nursery dated 9th August 2018 again from the Nursery Manager Ms Turner, but signed again by Deborah Davies. In this letter it was stated that Mr [A] dropped [A] at nursery every morning and occasionally picks [A] up from the nursery at the end of the day. That appears as argued by Counsel for the Appellant Ms Appiah to have been an increase in the number of times where the Appellant is dropping [A] at nursery. Again the letter stated that the Appellant attended parents' evenings and was an emergency contact and again discussed his positive reactions with [A] and the staff and the impact on [A] if he was to leave suddenly.

16. Ms Appiah argues that it is unclear in paragraph 15 of the decision why the Judge found that the Appellant's relationship with his daughter was tenuous. What the Judge should have been looking at she argues, is what the relationship was at the date of the hearing and bearing in mind she says that [A] at that stage was 4 years old, that that is the key stage for her and her memories to be developed. She argues that the reason there given is inadequate. She further argues that inadequate reason is given in paragraph 16 where it is said that the Judge accepted the Appellant had some relationship with his daughter but it has not been shown to be the strength claimed. Ms Appiah argued that the Appellant in his signed statement gave evidence in paragraphs 8 and 9 regarding taking responsibility for his daughter's morning routine included washing her and giving her breakfast and taking her to a nursery every morning and that sometimes he would collect her from the nursery in the afternoon and activities they did together like going to the park and their special bond. She also referred me to the statement from [NS] which in paragraph 6 she mentioned how it was that when the Appellant was detained in January 2017 [A] was greatly impacted by that and regressed in different ways; she stopped sleeping in her own bed; appeared to have nightmares and she began to ask [NS]'s male friends and male strangers if they were her daddy despite them visiting Samuel, the Appellant, in detention when possible.

17. Ms Everett on behalf of the Secretary of State argues that the decision of the First-tier Judge is sustainable and that there is no material error. She submits that it is always a challenging and nuanced task faced by any Immigration Judge in deciding whether or not a relationship is genuine and what motivations for any relationship might be. She relied upon the fact that the Judge had made findings about matters that the Appellant did not

know about his partner's history as set out in paragraph 13 of the decision and matters in which they had been inconsistent in the evidence that they had given. Ms Everett argues that although the Judge did not consider Section 117 of the Nationality, Immigration and Asylum Act 2002 when making her findings, and that that is an error, it is not a material error and that the Judge would have made the same findings irrespective. She argues that when one is considering Section 117B(6) one has to consider whether or not the person, in this case the Appellant, has a genuine and subsisting parental relationship with a qualifying child. She argues that the Judge made clear findings that the relationship between the Appellant and his daughter was tenuous and was not of the strength claimed.

My Findings on Error of Law and Materiality

18. The provisions of Section 117A-D of the Nationality, Immigration and Asylum Act 2002 as inserted by the Immigration Act 2014, do need to be considered in any case in which the Tribunal is considering whether or not a decision made under the Immigration Act breaches a person's right to respect for private and family life under Article 8 and as a result would be unlawful under Section 6 of the Human Rights Act 1998. This is made clear by Section 117A(1) of the 2002 Act. In this case quite clearly there is DNA evidence to show that the Appellant and [A] were father and daughter. In such circumstances she is clearly a qualifying child for the purposes of Section 117D being a person who is under the age of 18 and who is a British citizen. In those circumstances the Judge should clearly have considered the import and consequences of Section 117B and in particular 117B(6) and considered whether or not there was a genuine and subsisting parental relationship with a qualifying child and whether or not it would be reasonable to expect the child to leave the United Kingdom. In this case the Appellant was not liable to deportation and under that Section makes it clear that public interest does not require a person's removal if there is a genuine and subsisting parental relationship with a qualifying child and it is not reasonable to expect the child to leave the United Kingdom.

19. In this case although the Judge has made findings regarding what he considers to be a precarious relationship between the Appellant and the Sponsor, and made findings at paragraph 14 that she accepted that they have a relationship, but was concerned whether they intended to live with each other permanently. The judge has not specifically gone on to consider Section 117B as far as that relationship was concerned.

20. The judge found as far as the Appellant's relationship with his daughter was concerned was that the Appellant's relationship with his daughter was tenuous and that the evidence suggested the Appellant's lack of status in the UK taking precedence and a complete lack of concern for the daughter over the first two years from her birth. The Judge found their relationship was only approximately sixteen months old and still in its inception. [A] was only 4 years old and at nursery five days a week from 9am to 6pm. The Judge went on in paragraph 16 to say I do not doubt the Appellant has

some relationship with his daughter, but it is has not been shown to be the strength claimed.

21. I am unclear having read the Judge's reasons as to exactly what the judge means by 'tenuous' and 'not of the strength claimed' when trying to import that into whether it is not a genuine and subsisting relationship for the purposes of section 117B(6). The Judge has looked at the longevity of the relationship and the lack of involvement by the Appellant during the first two years of [A]'s life. But the evidence before the First-tier Tribunal Judge was seemingly that the Appellant had lived with the Sponsor and [A] at the Sponsor's home address since he was bailed there in April 2017. Clearly as at the date of hearing [A] was just 4 years old and therefore the Appellant had been living with her and her mother for sixteen months, a significant proportion of [A]'s life. It is unclear from the Judge's findings what the Judge had accepted or rejected from the evidence from the Appellant, sponsor and nursery regarding the quality of the relationship the Appellant had with his daughter as at the date of the hearing, as opposed to their lack of relationship over the first two years of her life.

22. I do not find that I can simply say that on the judge's findings that it would be necessarily the case that the judge would have found that the relationship between the Appellant and his daughter was not genuine and subsisting as at the date of the hearing before the First-tier Tribunal for the purposes of section 117B(6). Had the judge given clearer reasons as to which parts of the evidence was accepted and which were not that might be a different matter but simply stating that she accepts that he has a relationship with his daughter but has not been shown which is the strength claimed does not allow me to make that finding. I therefore do find in the circumstances of this case that the judge's failure to consider Section 117B and in particular 117B(6) is a material error of law.

23. Although criticism is made of the findings in respect of the relationship between the Appellant and the Sponsor, those findings at paragraphs 12 and 13 are well reasoned and cogent and were findings that the Judge was entitled to make.

24. It has been submitted to me by both legal representatives that if any material error is found in the circumstances of this case that it be appropriate for the entire decision of the First-tier Tribunal Judge to be set aside with no preserved findings of fact and for the matter to be remitted back to the First-tier Tribunal for re-determination before a different constituted Tribunal. In the circumstances I do set aside the decision of First-tier Tribunal Judge Roopnarine-Davies and I remit the case back to the First-tier Tribunal for rehearing before a differently constituted Tribunal not to be before First-tier Tribunal Judge Roopnarine-Davies, with no preserved findings of fact.

25. The First-tier Tribunal did not make any findings or orders in respect of anonymity being necessary and therefore I do not make any anonymity order in this case.

Signed Date 31st January 2019

R F McGinty

Deputy Upper Tribunal Judge McGinty