



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10091/2018

THE IMMIGRATION ACTS

Heard at Bradford
On 5 September 2019

Decision & Reasons Promulgated
On 12 September 2019

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

TO
ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Najwa, Counsel

For the respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original first Appellant in this determination identified as TO.

Introduction

1. I have anonymised the appellant's name because this decision refers to family proceedings relating to his child ('D'). D, a British citizen, was born in August 2014. His mother ('L') and the appellant are no longer in a relationship.
2. The appellant is a citizen of Nigeria. He has appealed against a decision dated 10 April 2019, in which First-tier Tribunal ('FTT') Judge Moran dismissed his appeal on human rights grounds.

Background

3. The appellant entered the United Kingdom ('UK') in October 2008 as a visitor and overstayed. In 2013 he made an asylum claim, which was then withdrawn. Following this, he made a human rights claim, which was refused. His appeal against that decision was refused by FTT Judge James following a hearing on 13 May 2013. As noted by Judge Moran at [17], Judge James made extensive adverse credibility findings regarding the evidence from the appellant and L. The appellant's appeal rights were exhausted on 24 May 2013.
4. The appellant then made various unsuccessful applications to remain in the UK. This appeal relates to an application to remain made on 15 January 2015, on the basis of his relationships with D and L. It must be noted that D was not yet born at the time of Judge James' decision. This application was refused in a decision dated 10 April 2018. The decision-maker noted that at the time, the appellant was seeking a child arrangements order ('CAO') but did not have direct access to D.
5. The appellant has relied upon an undated CAO. The date is missing from this document. Ms Najwa told me it was dated 14 August 2018 but Judge Moran referred to the CAO as having been made following a hearing on 18 February 2019. The summary of a CAO dated 18 February 2019 at [4(e)] and [13] of the grounds of appeal is consistent with the copy of the only undated order before me. In an order dated 8 July 2019 DJ O'Neil granted the appellant permission to disclose the CAO to the tribunal determining issues relating to his immigration status. This refers the final order in case MA17P01296. Permission has not been granted to disclose any other order to this Tribunal and I have therefore only considered the undated order behind the 8 July 2019 order in the appellant's bundle. In any event this was the only order that Ms Najwa relied upon. This seems to relate to a hearing on 18 February 2019. On this occasion, the court ordered, inter alia: L to make D available for supervised contact with the appellant at a contact centre every other Saturday; video / telephone contact on the alternate Saturdays, and; additional contact during holidays and special occasions.
6. By the time of the hearing before Judge Moran: the appellant and L were divorced in 2017; prior to this L made allegations of domestic violence and findings of fact were made against him in family proceedings in November

2016; although the appellant saw D when he was younger, contact broke down in 2016 when it became “*very occasional*” – see [24] of Judge Moran’s decision; the appellant re-commenced regular (supervised) contact in March 2019 pursuant to the CAO; this contact was successful and it was envisaged at the time that contact would be unsupervised, with the support of L, after another three sessions; the appellant lived with his girlfriend in Leeds, whereas L and D lived in Wigan.

7. Judge Moran considered the appellant to be an unreliable witness who exaggerated the contact he had with D and his claim to have financially supported him. The appellant’s domestic violence to L was noted. Judge Moran found that a powerful motivating factor for the appellant pursuing contact was in order to remain in the UK. Judge Moran concluded that the appellant was not taking an active role in D’s upbringing and as such the Immigration Rules could not be met. Judge Moran also concluded that as the appellant was not providing D with “direct parental care” he did not have a genuine relationship for the purposes of s. 117B(6) of the Nationality, Immigration and Asylum Act 2002 (‘the 2002 Act’).

Error of law

8. In a decision dated 25 June 2019, Upper Tribunal (‘UT’) Judge Coker granted the appellant permission to appeal observing that in requiring direct parental care in order to establish a genuine and subsisting relationship, Judge Moran arguably erred in law. Ms Najwa made it clear that this was the only ground of appeal relied upon. Mr Diwnycz conceded that Judge Moran erred in law in this respect - he clearly predicated his conclusion that the appellant did not have a genuine and subsisting parental relationship with D, on the absence of him exercising direct parental care to D – see pages 9 and 10 of the decision.
9. Mr Diwnycz was correct to make this concession. In SSHHD v AB (Jamaica) [2019] 1 WLR 4541, [2019] EWCA Civ 661, Singh LJ (with whom King LJ and Underhill LJ agreed) made it clear that when determining whether there is a genuine and subsisting parental relationship for the purposes of s. 117B(6) of the 2002 Act, there is no requirement for that relationship to involve at least some element of direct parental care to the child. Rather, no further gloss should be put upon the wording of s. 117B(6). The application of the relevant wording will depend on an assessment of the facts of the particular case before it. The exercise is a highly fact-sensitive one.
10. In concluding that the absence of a genuine and subsisting parental relationship between the appellant and D follows from the absence of evidence of direct parental care, the FTT erred in law and the decision needed to be remade.

Re-making the decision

11. Both representatives agreed that the re-making of the decision on Article 8 requires limited fact-finding and can be done in the UT. I have had regard to

para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to be remade in the UT.

12. Ms Najwa indicated that the appellant wished to proceed without any further adjournment. I noted that the appellant had not provided an updated witness statement and neither had L. Both representatives however agreed that it was in D's best interests for there to be no further delay and that the appellant and L could provide oral evidence regarding the arrangements since Judge Moran's decision.

Evidence

13. I therefore heard oral evidence from the appellant and L, who were both cross-examined by Mr Diwnycz. Although there were some inconsistencies that emerged regarding the nature and extent of contact between the appellant and D since the last FTT hearing, the evidence was broadly consistent and can be summarised as follows:
 - (i) L has been and remains happy for the appellant to have unsupervised contact with D, as she believes they have a good relationship.
 - (ii) There has been very limited unsupervised contact since the FTT hearing. The appellant was only able to provide two examples of this: when he took D on an outing to Southport in April with a friend and his son in April 2019 and when he attended D's sports day in June / July 2019. L gave a further example of the appellant taking D to Church about three weeks ago. The appellant did not refer to this at all.
 - (iii) No firm or clear arrangements have been made between the appellant and L regarding regular contact between father and son. Indeed Ms Najwa pressed the appellant on this at some length and asked, "*what has been agreed?*" on three occasions. The appellant said he would love to have D on a Sunday but "*nothing*" has been agreed.
 - (iv) The reason provided for the sporadic contact and the lack of any agreement for regular contact related to the geographical distance between the appellant and D/L.
14. The documentary evidence available since the FTT's decision was very limited indeed. Apart from the two court orders I have referred to, there were also photographs of D, some of which include the appellant and a letter dated 15 July 2019 in support of contact, from L.

Submissions

15. After hearing evidence from the appellant and L, I heard brief submissions from the representatives. Ms Najwa accepted that the appeal entirely turns upon one issue: does the appellant have a genuine and subsisting relationship with D? Mr Diwnycz accepted that if the answer to that is yes the appeal must

be allowed on Article 8 grounds because the requirements of s. 117B(6) would be met. Ms Najwa accepted that if the answer to that question is negative, the appeal must be dismissed and there is no need to go on to do any additional Article 8 assessment.

16. Ms Najwa was entirely correct to narrow the ambit of the appeal in the manner she did. It is plain from the appellant's poor immigration history that although he has been in the UK for over 10 years, little weight can be attached to his private life. No particularly strong features of private life were identified or even alluded to. As to the remainder of s.117B, there is a very strong public interest in the removal of the appellant given his immigration history and the un-appealed adverse factual findings made by Judge James and Judge Moran. I therefore need only address s. 117B(6) of the 2002 Act.

Legal framework

17. S. 117B(6) of the 2002 Act states:

“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 parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.”

18. AB (Jamaica) (supra) provides guidance on the proper application of both (a) and (b) of s. 117B(6). I entirely accept that if (a) is met, it would not be reasonable to expect D to leave the UK for the purposes of (b). D is a qualifying child as he is a British citizen. The sole issue in dispute is therefore whether the appellant has a genuine and subsisting parental relationship with D.

19. As explained by Singh LJ in AB (Jamaica), this turns on an assessment of all the relevant facts and circumstances. This must include an assessment of the child's best interests which must be a primary considerations. This will also include a consideration of (but is not limited to or determined by) what role the appellant actually plays in caring for and making decisions in relation D and the nature and extent of contact. In this regard I note the observations of King LJ at [109] of AB (Jamaica) (my emphasis underlined):

“In order to demonstrate a genuine and substantial parental relationship, it is common ground that it is not necessary for the absent parent to have parental responsibility and, in my judgement, it is hard to see how it can be said otherwise than that a parent has the necessary "genuine and substantial parental relationship" where that parent is seeing his or her child in an unsupervised setting on a regular basis, whether or not he has parental responsibility and whether or not by virtue of a court order. Equally, the existence of a court order permitting direct contact in favour of the absent parent is not conclusive evidence of the necessary parental relationship. It may be that a court would conclude that there is no

"genuine and substantial parental relationship" where, for example, a parent has the benefit of a court order but does not, or only unreliably and infrequently, takes up his or her contact."

20. The application of the relevant wording in s. 117B(6)(a) will depend on an assessment of the facts of the particular case before it. The exercise is a highly fact-sensitive one.

Findings

21. I entirely accept that it is in D's best interests to have a relationship with his father and for that relationship to be encouraged to develop. I make that finding bearing in mind that notwithstanding the appellant's past, the family courts considered the development of contact to be in D's best interests – hence the terms of the CAO. I note (as contended at [13] of the grounds of appeal) that the appellant may have had a closer relationship to D for the first two years of his life to 2016. Contact was then stopped by L and did not properly re-start (other than the very occasional) until the family court ordered supervised contact and other less direct contact in March 2019. Contact has therefore only relatively recently re-started. I accept that the appellant gets on with D and D gets on with him when he sees him, but the relationship is clearly a very limited one, in which the appellant merely plays and chats with D.
22. Although the appellant has seen D outside of a contact centre on a few occasions since the last FTT hearing, these have been sporadic and irregular. The appellant struggled to identify a single occasion when he had unsupervised contact with his son. The three occasions cited (Southport, sports day, Church) have all been in the presence of many others at all times. D has apparently never been to the appellant's home or spent any meaningful period of time alone with D since the resumption of contact earlier in the year.
23. The appellant explained he has mostly seen D in the presence of L. When I asked him about this he explained that in the past he simply did not know what to do. He gave an example of being given the child and not being told how to change his nappy. That example must relate to the past. The appellant was unable to give any concrete example of the way in which he took on the role of a parent when he saw D on the limited occasions he did. He was only able to say he held his water bottle and wiped his nose at sports day. It is clear that the appellant relies upon L to parent D in every material way, and has demonstrated no real commitment to developing the contact he has with D beyond the fleeting and irregular. It is noteworthy that the appellant found it very difficult to recall when contact took place. He even forgot about taking D to Church three weeks ago.
24. Both the appellant and L said that contact could increase if they lived nearer to each other but neither gave any reason to believe that this was a realistic prospect given financial restraints and other commitments. L has other

children in Wigan. The appellant offered no evidence as to how or when he would relocate from Leeds, closer to Wigan.

25. In any event, I was struck by the lack of any real intent or motivation on the part of the appellant to make arrangements to see his son. I asked L if she would be happy for the appellant to collect D from school and to see him more often. She indicated that she would have been happy for that to have taken place. It has not, save for the very limited occasions referred to above. The appellant seemed able to make and finance arrangements to attend the contact centre on alternate Saturdays but has not been able or willing to make regular arrangements after this. I note that the appellant and D have contact over the telephone / video. The appellant is not entirely uninterested in D but he is clearly not interested or motivated enough to even devise a plan as to how and when the current level of sporadic contact will develop. The relationship between D and the appellant remains uncertain. Indeed, contact between them seems to have reduced in the last few months. The appellant has demonstrated an absence of motivation to develop the relationship. I do not accept this can simply be blamed on distance. The appellant has not been pro-active. He has not explained why friends have been unable to assist him with coach fares to Wigan. The appellant is not a motivated father. The current relationship between him and D is very limited indeed and on the evidence before me there is no realistic prospect that it will develop beyond fleeting and sporadic contact from time to time.

Conclusion

26. Having considered all the relevant facts holistically, together with D's best interests, I have decided that notwithstanding the re-commencement of contact, it has become increasingly limited in recent months and when this is considered together with the absence of any realistic plan regarding contact in the foreseeable future, the appellant cannot be said to have a genuine and subsisting parental relationship with D.

Decision

27. The FTT's decision contains an error of law and is set aside.
28. I remake the decision by dismissing the appeal on Article 8 ECHR grounds.

Signed: *UTJ Plimmer*

Ms M. Plimmer

Judge of the Upper Tribunal

Date:

6 September 2019