IAC-BFD- MD

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09530/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 31st July 2015	**On 21st August 2015**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ATIBA JAMEL DEON ALEXANDER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Home Office Presenting Officer
For the Respondent: Mr G Brown, of Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the First-tier Tribunal decision allowing Mr Alexander's appeal against the Secretary of State's decision of 23rd October 2014 refusing to grant him asylum and refusing him leave to enter the United Kingdom.

2. For the purposes of this decision I shall refer to the Secretary of State as "the Respondent" and Mr Alexander as "the Appellant", reflecting their positions as they were in the appeal before the FtT.

3. The Appellant is a citizen of Trinidad and Tobago born 19th December 1987. He has an extensive immigration history which it is necessary to recite here. He first came to the United Kingdom in 2006 on a visit visa. He overstayed this visa and remained here until 2008. During that time he started a relationship with a woman, OA, whom he subsequently married in the UK in November 2014.

4. The Appellant returned to Trinidad and Tobago from 2008 until 2011. He then came back to the United Kingdom on 1st September 2011 and attempted to gain entry at Gatwick airport. No doubt in view of his past immigration history the Appellant was refused entry but was granted temporary admission until 7th September 2011 for his removal back to Trinidad and Tobago. The Appellant failed to return to Gatwick, absconded from the conditions of his temporary admission and remained here unlawfully. He managed to avoid coming to the attention of the authorities again until he was arrested in Huddersfield by West Yorkshire Police on charges of possession of an offensive weapon and wounding with intent. His arrest took place on 15th December 2013 over two years after he failed to report to Gatwick airport for removal. He then claimed asylum on 16th December 2013, the day following his arrest by the police. He also claimed that he had resumed his relationship with OA, who by this time had given birth to a son J, from a relationship with another man. He stated that, although he was not the biological father of J, he regarded J as his own child.

5. The Appellant's appeal was heard on 17th February 2015 by Judge Kempton. She heard evidence from the Appellant, his wife OA, his father and OA's mother. The Judge found that the Appellant was not entitled to a grant of asylum. She made clear findings on that matter and there has never been any challenge to those findings. However she did go on to say at [32],

> "In this case, there is a separate strand to the grounds of appeal. That is in relation to Article 8 and private and family life. It may be that this is an argument which could bear more fruit for the appellant."

6. After setting out the background to the Article 8 claim the Judge said this at [34],

> "When he returned to Trinidad, he tried to maintain contact with his then girlfriend, OA. The distance proved too difficult for her and she entered into another relationship with another man by whom she became pregnant. He disappeared on learning of the pregnancy. When the appellant managed to return to the UK on 1 September 2011, he immediately sought out OA and met her son, J, born on 16 March 2010. He calls the appellant "Daddy" as he wants to be like the other children at the nursery and now at school, which he has started. J never had any meaningful contact with his natural father. The appellant has been a constant in his life as a father figure for the past three and a half years. The appellant looks after J to allow OA to work in a café. She was working part time 24 hours a week but in the past several weeks she has been working more hours, nearer full-time, on account of the need for her to undertake overtime to cover staff leave. The appellant and OA wish to have a child of their own and to that end, they have made enquiries about IVF treatment which will cost £3000. They married in Huddersfield on 19 November 2014. They continue to have a strong and loving relationship."

7. The Judge went on in [40] to say;

> "However, the nature and quality of the relationship with all three members of this small family is very strong, I can see that. I can also see that they are each devoted to the other members of the family and that they are a very strong unit…"

8. She then took into account Section 117B (as inserted by section 19 of the Immigration Act 2014) Article 8: Public interest considerations applicable in all cases.

   After consideration she allowed the appeal under Article 8.

9. Permission to appeal to the UT was sought by the Respondent on the grounds that the FtT's decision disclosed a material misdirection as the Judge had erred in her approach when considering Article 8. This was because she did not specifically consider the Appellant's position under the Immigration Rules and therefore had not considered whether other factors outweighed his child's best interests.

10. The Respondent referred to Section 117B(6) and said it was arguable that the Judge had treated an acceptance of the best interests of the child being to remain in the United Kingdom, as answering the question of whether it would be reasonable for that child to leave the United Kingdom. She did so without further enquiry into what is reasonable and whether the child's interests can be outweighed by other considerations.

11. Permission was granted on 11th March 2015.

Appeal Hearing/Submissions

12. The appeal came before me on 31st July 2015 at Bradford. I heard submissions from both representatives on the error of law. The Appellant was in attendance but not required to give oral evidence.

13. Mr Diwnycz relied in the main on the grounds seeking permission. He expanded them by submitting that the Judge in short, had erred, by straying into a free standing Article 8 assessment. He did accept however that there was no challenge to the background factual matrix which the Judge had relied on to make her findings.

14. Mr Brown responded by saying that the Judge had been put in the position of the primary fact finder because the Respondent's original Reasons for Refusal letter of 23rd October 2014 does not reflect what has now been found to be the correct position under the Appellant's Article 8 claim. The Reasons for Refusal letter did not accept the relationship between the Appellant, OA and J as genuine. The Judge however considered the evidence and made clear findings that the Appellant is the *de facto* father of J and that the relationships are genuine ones and that the Appellant had been in a relationship with OA since his return here in September 2011. The relationship between the appellant and J led the Judge to consider Section 117B.

15. He said she had set out adequate reasons why family life between the Appellant, OA and J could not continue in Trinidad and Tobago. Those findings were adequate to

demonstrate insurmountable obstacles. What they amounted to is this the Appellant's wife works in the UK, they have a home here and J has started school here. Added to this the Appellant is a relationship with a qualifying child and therefore Section 117B applies.

Is there an Error of Law?

16. At [38] the Judge succinctly sets out the issue before her.

> "It is the position of the respondent that the appellant can return to Trinidad and Tobago and live there, perhaps in Tobago. It is also the position of the respondent that the appellant can enjoy family life with OA and J in Tobago. Maybe in theory that would be possible. However, OA will not go there. All her family is in the UK. All of the appellant's family is in the UK. The respondent considers that it would not be unduly harsh for the appellant to return and for the whole family unit to go with him. I disagree."

17. Whilst it is correct to say that the Judge engages in the Razgar test and nowhere does she spell out that she has had regard to Appendix FM and 276ADE, nevertheless it appears she kept those matters in mind when arriving at the findings she made. She accepted and sets out at [39] that the Appellant had entered into a relationship when he had no right to be here; continued with that relationship when he returned as an unlawful overstayer and committed a crime. Nevertheless she found that when considering all matters as she is required to do, paragraph 117B(6) of the Nationality Immigration and Asylum Act (as inserted by Section 19 of the Immigration Act 2014) tipped the balance in favour of the Appellant.

18. Paragraph 117B makes clear that those factors which are listed must be taken into account. However it is also correct to say that if an Appellant can bring himself within the exception contained in Section 117B(6) then the assessment of proportionality would result in a decision in the Appellant's favour because the public interest side of the scale has been removed.

19. The Judge has made a clear finding, and this has not been challenged, that the Appellant has a genuine and subsisting parental relationship with a qualifying child. There is a second part to 117B(6) and it is said on the Respondent's part that the Judge erred because she failed to give adequate reasons why it is not reasonable to expect J to leave the UK and follow the Appellant to Trinidad and Tobago.

20. Interestingly the question of whether an Appellant, who, as in this case, is a child's step-father, can on a literal interpretation of Section 117B(6) be said to have a subsisting "parental" relationship with a qualifying child, was not raised before the FtT. For the purposes of this decision it seems to have been accepted that the Appellant counts as J's 'parent'.

21. That being so the only question to be answered is whether the Judge has said in sufficient terms it would not be reasonable to expect J to leave the United Kingdom.

22. Whilst I accept that the Judge may not have given the answer to this question in stark terms, it is plain from a full reading of the decision that she found the following. J is a British child who has lived here all his life with his mother, is just about to start primary school, lives with his mother who says she will not go to Trinidad and Tobago, because she has employment here and has her home here. The Judge further found that J would be 'devastated' to lose the person he regards as his father.

23. As I said earlier there is no real challenge to the background facts or findings made in this case. There is certainly no suggestion made that any of the findings made are perverse or irrational. I am satisfied therefore that whilst the Judge's findings may be described as generous they are ones which were open to her to make.

24. For the foregoing reasons I am satisfied that the decision of the FtT discloses no material error of law. The appeal of the Secretary of State is therefore dismissed.

Decision

25. The decision of the First-tier Tribunal discloses no error of law and the decision therefore stands.

No anonymity direction is made

Signature **Dated**
Judge of the Upper Tribunal