



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13419/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 9th August 2018

Decision & Reasons Promulgated
On 12th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR SAMUEL DAMILOLA AJAYI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Adejumobi (legal representative), Immigration Advice Service (Manchester)

For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Foudy, promulgated on 24th April 2018, following a hearing at Manchester on 17th April 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, who was born on 1st April 1985. He appealed against the decision of the Respondent dated 9th October 2017, refusing his application for leave to remain in the UK on the basis of his private and family life.

The Appellant's Claim

3. The essence of the Appellant's claim was that he entered the UK on a visitor's visa on 30th March 2007, and did not return back to his country, remaining thereafter in the UK for some eleven years. His leave had ended on 26th November 2007. During the course of his time in the UK he married a Senegalese woman called N C. They had a son by the name of A, who was born on 6th May 2016. The relationship between the Appellant and N C then broke up. However, the Appellant still had contact with his child, A, who is a British citizen by virtue of the mother having ILR in the UK. The Appellant lives with his brother. The Appellant provides financial support to A and buys him things. The Appellant wishes to remain in the UK so that he can exercise parental rights including discipline with respect to A.

The Judge's Findings

4. At the hearing before Judge Foudy, the Appellant was unrepresented. N C also was not in attendance. However, there was evidence in the form of letters of support and a statutory declaration from N C. In the letters of support she had said, for example in the letter of 18th July 2017 (at page 35) where N C said that the Appellant "supports me to take him [his son] to his medical appointments. Samuel will often take A out to buy him clothes, shoes, pampers, wipes, food and all the necessary things A needs. ..." None of this, however, was particularised in the letter. Nor was it explained exactly how much time and in what way the Appellant made contact with his son, A. The judge made this clear (at paragraph 8 of the determination) when finding against the Appellant. The judge also noted how the Appellant spoke of taking A to school and yet he later admitted "that the child was too young to attend school and changed his evidence to say that he took him sometimes to a childminder" (see paragraph 8). Furthermore, although the Appellant had adduced evidence "of monetary payments he makes for A, however, he claims not to earn any money". I have seen myself in the bundle at various pages, for example at pages 44, 48, 47 and 49, payments that have been made by the Appellant into the bank account of N C, ranging from £20 to £50 to £100, but the fact was that Judge Foudy found that the Appellant could not have realistically been making these payments if he did not claim to earn any money. The judge also found that the Appellant had not been able to express the nature of the relationship that he had with his son, failing to indicate his love for his child, and all of this was problematic because neither the Appellant's brother nor N C gave evidence to corroborate the Appellant's evidence.
5. Judge Foudy ended the determination by stating that, having considered what exceptional circumstances there were in this case, she came to the conclusion that this was a case where the Appellant could not succeed, and not get leave to remain outside the Immigration Rules, because either he lives with his mother, who he has always lived with and

"there is no evidence that she is failing to ensure the welfare of either. There is no evidence that A has any special health or educational needs. If this appeal is dismissed A will continue to live in the UK in the care of his mother" (paragraph 10). Accordingly, the Appellant would stay in touch with A through "modern

means of communication” and moreover visits from Nigeria would be possible in the future for the child “if N C is agreeable” (paragraph 11).

6. The appeal was dismissed.

The Grant of Permission

7. On 12th June 2018 permission to appeal was granted by the Tribunal on the basis that the Appellant had produced photographic evidence at the hearing which showed him with an infant, a toddler, and also with a male and a female and other children in different environments, and this evidence had not been recorded by the judge in the determination. There was no examination of the evidence by the judge of these photographs.
8. Second, that the absence of the mother and the brother, although criticised by the judge, was not something that had been enquired into by the judge, and the Appellant himself had not been asked why they had not attended. Moreover, it was arguable that even if it was not explained what the frequency and nature of the contact was that the Appellant had (as explained in N C’s letter of 18th July 2017 at page 35), regard was not paid to what weight should be attached to the mother’s written evidence in any event, given that it had been tendered in the Appellant’s bundle. In addition to this, the judge said that the Appellant had been unable to show how he paid an active role in the child’s life and this may have been a harsher test than that called for, especially when the Appellant had explained that he wished to ensure that the child remained within discipline and did not get up to bad things which all too often had come to his attention in this country. The grant of permission also went on to say that the Section 55 best interests consideration had not been applied in this case.
9. Finally, there had been a material omission to carry out a thoroughgoing structured **Razgar** assessment, given that the Appellant had been in the UK for eleven years and was with a British child.

Submissions

10. At the hearing before me on 9th August 2018, Mr Adejumobi argued on behalf of the Appellant in a manner that suggested that he was re-arguing the entire case. His starting point ought to have been the grant of permission but he began with a very wide-ranging set of submissions that encapsulated the entirety of the evidence in the bundle, very often overlooking the fact that the judge had already reached a decision with respect to this evidence in her determination. He illustrated that the judge had not mentioned the fact that monetary payments were made when these payments appeared at pages 44 onwards to page 49, when it was claimed that the judge had not only referred to this but had explained that this was not credible, given that the Appellant “claims not to earn any money”. The representative also argued that the judge ought to have asked of the Appellant, why N C did not attend and why his mother did not attend before reaching an adverse credibility finding in respect of this. Given the evidence, he submitted, of N C in the letter of 18th July 2017 it was clear that the Appellant was someone who had “a fantastic relationship” with his child and that

“they have a special bond”. The judge, he submitted, ought to have given consideration to this evidence.

11. For her part, Mrs Pettersen submitted that the judge has dealt with all these matters at paragraph 8 of the determination, which is broken up into a series of subparagraphs, where she gives individualised consideration to the evidence, before concluding (at paragraph 9) that the Appellant does not satisfy the Immigration Rules.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.
13. Even though it is the case that the judge has come to firm findings of fact which were entirely open to her with respect to the evidence presented to her, and even though it is the case that the judge was entitled on that evidence presented to her, and even though it is the case that the judge was entitled on that evidence to conclude that the Appellant did not play “an active role in A’s upbringing for the reasons stated below”, what has been overlooked in the submissions before me is that thereafter the judge had to give consideration to two highly important matters.
14. First, there was the question of the Section 55 BCIA 2009 obligation to consider the “best interests of the child”. This is an obligation that cannot be overlooked. In the case of **JO (section 55 duty) Nigeria [2014] UKUT 00517**, it was established that the decision maker must be properly informed of the position of the child and that being properly informed and conducting a scrupulous analysis is a prerequisite of identifying the child’s best interests and then balancing them with other material considerations. I am aware that the judge does state (at paragraph 10) that A lives with his own mother and has always lived with his mother and there is no evidence that she is failing to show his welfare. Even so, however, insofar as there was evidence that the Appellant was in contact with his own child, a Section 55 analysis ought to have been considered in the context of that statutory obligation. It is also clear from **Mundeba [2013] UKUT 88** that the Section 55 enquiry requires an examination of whether there are any unmet needs of the child or any unmet needs.
15. In a case where there has been evidence of payments being made into the bank account of N C by the Appellant and there is confirmation by N C in her letter of 18th July 2017 that he buys him clothes, shoes, pampers, wipes and food, it was necessary to consider to what extent this evidence was correct. No finding appears to have been made in this respect.
16. Secondly, this is a case where the **Razgar** five-pronged approach ought to have been taken before deciding whether, in circumstances where the decision was in accordance with the law, the Appellant’s proportionality considerations fell away from the Appellant and in favour of immigration control.

18. That essential task, which is particularly called for in circumstances where an applicant does not meet the Immigration Rules and requires a consideration of his claim outside the Immigration Rules on the basis of freestanding Strasbourg jurisprudence, has not been undertaken in this case.

Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Foudy.

This appeal is allowed.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

8th September 2018