Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07044/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th October 2018	**On 24 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ADAMA [T]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Enuezie of Chancery West Law Solicitors
For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge M R Oliver (the judge) of the First-tier Tribunal (the FtT) promulgated on 27th July 2018.

2. The Appellant is a male citizen of the Ivory Coast born 10th August 1963. According to the Respondent's records he arrived in the UK in January 2000 and claimed asylum. He failed to attend an asylum interview and therefore his claim for international protection was refused on 18th January 2005.

3. The Appellant remained in the UK. He formed a relationship with a French citizen. They met in the UK in February 2000. They have a son, born in the UK on 3rd July 2001. He is a French citizen. The Appellant's relationship with his son's mother ended in 2005.

4. On 31st October 2013 the Appellant's representatives made further submissions contending that he would be at risk if returned to the Ivory Coast. On 7th March 2017 the Appellant, now without legal representation, made further submissions relying upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) and in particular making reference to his relationship with his son, and his private life.

The Respondent's Decision

5. The application for leave to remain in the UK was refused on 16th March 2018. In brief summary the Respondent did not accept that the Appellant would be at risk if returned to the Ivory Coast and therefore he was not entitled to asylum or humanitarian protection, and his return would not breach Article 3 of the 1950 Convention.

6. With reference to Article 8 the Respondent noted the Appellant claimed to have a parental relationship with his son. The Respondent accepted that the son is under 18 years of age, and had resided continuously in the UK for in excess of seven years. It was accepted that the Appellant, although he did not live with his son, undertook a role in his son's life.

7. The Respondent considered EX.1(a) and accepted that it would not be reasonable to expect the son to leave the UK. However, the Respondent did not accept that EX.1(a) was satisfied, finding at paragraph 68 of the refusal decision, "it is not considered that you have provided enough evidence to substantiate that you live together with your child as a family unit or that you have a genuine and subsisting relationship with your child".

8. The Respondent considered the Appellant's private life with reference to paragraph 276ADE(1) not accepting that the Appellant could satisfy any of the provisions therein.

9. The Respondent did not accept that there were any exceptional circumstances which would justify granting leave to remain pursuant to Article 8 outside the Immigration Rules.

The First-tier Tribunal Hearing

10. The Appellant appealed with reference to Article 8. There was no appeal against refusal of asylum or humanitarian protection, and it was not contended that Article 3 was engaged. It was noted that the Respondent had accepted that the Appellant played a role in his son's upbringing, but the Respondent had then made a contradictory finding, finding that there was no genuine and subsisting parental relationship between the Appellant and his son.

11. It was contended that the Appellant satisfied the Immigration Rules contained in Appendix FM, had a genuine and subsisting parental relationship with his son, and as the Respondent accepted it would not be reasonable to expect the son to leave the UK, the appeal should be allowed.

12. The judge heard oral evidence from the Appellant, and two other witnesses, [GT], a friend of the Appellant, and [ST], the Appellant's brother who has leave to remain in the UK.

13. The findings made by the judge are contained at paragraph 18. The judge found that the Appellant's claim to remain in the UK was based on his family relationship with his son, and found that the Appellant had no right to remain in respect of his private life.

14. The judge rejected the Appellant's claim to be his son's primary carer. The judge noted that the son had not given evidence but had gone on holiday to Paris. The judge also noted that the Appellant's former partner did not attend the hearing and doubted the claim that she was in hospital and noted she had only submitted a brief four line letter in support of the Appellant. The judge concluded;

> "While I accept that the Appellant has a real relationship with his son, it is in my judgment a relationship that can continue without his continued presence in the United Kingdom. His son can remain here. The Appellant has no right to remain in respect of his private life".

15. The judge dismissed the appeal on asylum grounds and human rights grounds.

The Application for Permission to Appeal

16. The Appellant applied for permission to appeal to the Upper Tribunal. The grounds are lengthy and will only be very briefly summarised here. The Appellant relied upon five grounds.

17. In the introduction to the grounds the Appellant contended that the only issue between the Appellant and Respondent is whether the Appellant has a genuine and subsisting parental relationship with his son. It is accepted that his son is under 18 years of age and a qualifying child by reason of having resided in the UK for in excess of seven years.

18. The Appellant's contention was that if he had a genuine and subsisting relationship with his son then the appeal would succeed under the Immigration Rules and with reference to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), but if he did not have a genuine and subsisting relationship then the appeal would fail.

19. The first ground contends that the judge erred by failing to consider section 117B(6) of the 2002 Act.

20. The second ground contends that the judge erred by failing to undertake any assessment of the best interests of the Appellant's son, and failed to take into account the views of the Appellant's son.

21. The third ground contends that the judge erred in misrepresenting the Appellant's claim, which was not that he was the primary carer of his son, but that he has direct access to his son and a genuine and subsisting parental relationship with him.

22. The fourth ground contends that the judge erred in failing to have regard to the Appellant's private life.

23. The fifth ground contends that the judge erred in failing to take into account relevant evidence, that being a witness statement from his former partner running to 27 paragraphs, and a witness statement from his son running to 28 paragraphs.

Permission to Appeal

24. Permission to appeal on Grounds 1, 2, 3 and 5 were granted by Judge Kelly on 24th August 2018 and I set out below, in part, the grant of permission;

> "2. Given that the Tribunal appears to have accepted that the Appellant has a genuine and subsisting parental relationship with his son [18] it is arguable that the failure to consider section 117B(6) of the Immigration, Asylum and Nationality Act 2002 adversely affected the outcome of the appeal (Ground 1). Permission to appeal on this and related grounds (2, 3 and 5) is accordingly granted.
>
> 3. However, whilst it is arguable that the Tribunal erred in not giving reasons for the conclusions stated in the final sentence of paragraph 18, it is not arguable that the matters advanced in Ground 4 would have sufficed to establish a private life claim in any event. Permission to appeal on the fourth ground is accordingly refused".

25. The Appellant renewed his application for permission to appeal in relation to Ground 4, and permission to appeal on that ground was granted by Upper Tribunal Judge Smith on 19th September 2018.

The Upper Tribunal Hearing – Error of Law

26. Ms Pal had not seen the grant of permission issued by Upper Tribunal Judge Smith and was provided with a copy. Ms Pal conceded that the judge had erred in law as contended in the grounds. I therefore did not need to hear from Mr Enuezie on that point.

27. I found that the judge had materially erred in law. The judge did not engage with the issues. There was no adequate consideration of whether the Appellant satisfied the requirements of R-LTRPT which contains the requirements for limited leave to remain as a parent. There was no consideration of EX.1(a) and no finding as to whether the Appellant has a genuine and subsisting parental relationship with his son. It was unclear

whether this was accepted by the judge when he made the finding that the Appellant had "a real relationship with his son".

28. The judge erred in law in failing to consider paragraph 276ADE(1), in particular subsection (vi) and in failing to consider section 117B of the 2002 Act.

29. For the reasons given above the decision of the FtT was set aside.

30. Having set aside the FtT decision I was invited by the representatives to re-make the decision without a further hearing, which I agreed was appropriate.

Re-making the Decision

31. No further evidence was called. I was asked to re-make the decision based upon the evidence that had been before the FtT.

32. For the avoidance of doubt I clarified with the representatives the evidence that was on the Tribunal file. This amounted to the Respondent's bundle with Annexes A–M, the Appellant's skeleton argument which is undated but which contains 65 paragraphs, the Appellant's bundle comprising 80 pages, and witness statements made by [ST] dated 2nd July 2018, [GT] dated 4th July 2018, [FD] dated 26th June 2018, [KT] dated 26th June 2018, and the Appellant dated 26th June 2018.

33. On behalf of the Appellant I was referred to paragraph 63 of the Respondent's refusal decision in which it was accepted that the Appellant played a role in his son's life. I was referred to paragraph 68 of that decision in which it was conceded that it would not be reasonable to expect the son to leave the UK. It was submitted that the issue to be decided was whether the Appellant had a genuine and subsisting parental relationship with his son, and I was asked to find that the evidence submitted proved that he did. I was asked to find that the judge in making a finding that the Appellant had "a real relationship with his son", in effect meant to conclude that this was a genuine and subsisting parental relationship.

34. I was asked to find that EX.1(a) was therefore satisfied, and there was no public interest in removing the Appellant from the UK.

35. Ms Pal submitted that the result of the appeal depended upon whether it was found that the Appellant had a genuine and subsisting relationship with his son.

36. I reserved my decision.

My Conclusions and Reasons

37. There has been no challenge on behalf of the Appellant to the conclusion by the FtT that the appeal cannot succeed with reference to asylum,

humanitarian protection or Article 3. The findings made by the FtT on those issues are preserved.

38. I am asked to consider this appeal with reference to Article 8 of the 1950 Convention. I find that Article 8 is engaged on the basis of the family life established between the Appellant and his son, and the Appellant's private life that he has established since his arrival in the UK in January 2000.

39. In considering Article 8 I adopt the balance sheet approach recommended at paragraph 83 of Hesham Ali v SSHD [2016] UKSC 60, and in so doing have regard to the guidance given at paragraphs 39 to 53.

40. The burden of proof lies on the Appellant to establish his personal circumstances in this country, and to establish why the decision to refuse his human rights claim interferes disproportionately in his private and family life rights in this country. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probabilities throughout.

41. I take into account the guidance at paragraph 48 of Agyarko [2017] UKSC 11 in that if it is found that an Appellant cannot satisfy the relevant test under the Immigration Rules but refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave may be granted outside the rules on the basis of exceptional circumstances.

42. In relation to the factual matrix, it is not in dispute that the Appellant is a citizen of the Ivory Coast. He arrived in the UK in January 2000 and has resided here since that date. I find that the Appellant had a relationship with a French citizen which ended sometime in 2005. He has a son from that relationship born in the UK on 3rd July 2001. The son has lived in the UK since birth and therefore has acquired considerably more than seven years' continuous residence. The Appellant's former partner and his son have permanent residence in the UK although neither are British citizens.

43. Although this is an appeal against refusal of a human rights claim, the appropriate starting point is to ascertain whether the Appellant can satisfy the relevant Immigration Rules.

44. Section R-LTRPT contains the requirements for limited leave to remain as a parent and is set out below;

> R-LTRPT.1.1 The requirements to be met for limited leave to remain as a parent are –
>
> (a) the applicant and the child must be in the UK;
>
> (b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and either
>
> (c) (i) the applicant must not fall for refusal under section S-LTR: Suitability leave to remain; and

(ii) the applicant meets all of the requirements of section ELTRPT: Eligibility for leave to remain as a parent, or

(d) (i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and

(ii) the applicant meets the requirements of paragraphs E-LTRPT.2.2–2.4. and E-LTRPT.3.1–3.2.; and

(iii) paragraph EX.1. applies.

45. The Appellant's case is that he satisfies E-LTRPT.2.2, 2.3, 2.4, and 3.1–3.2

46. I find that E-LTRPT.2.2 is satisfied because the applicant's son was under 18 years of age at the date of application, is living in the UK, is settled in the UK, and has lived in the UK continuously for at least the seven years immediately preceding the application and paragraph EX.1 applies.

47. I find that E-LTRPT.2.3(b) is satisfied because the son normally lives with his mother who is settled in the UK, and who is not the partner of the Appellant, and the Appellant is not eligible to apply for leave to remain as a partner.

48. I find that E-LTRPT.2.4 is satisfied. The Appellant does not have sole responsibility for his son although he did in fact at paragraph 19 of his further submissions dated 7th March 2017 claim to be the primary carer of his child from whom he was inseparable. The Appellant's case is based upon having direct access to his son as agreed with his son's mother with whom the son normally lives, and he has provided evidence that he is taking and intends to continue to take an active role in his son's upbringing.

49. The immigration status requirements are set out in E-LTRPT.3.1 and 3.2. The Appellant is not in the UK as a visitor or with valid leave granted for six months or less. He is not on immigration bail, and although he has no leave to remain, I find that EX.1 applies. The evidence to prove that the Appellant has direct access to his son and is taking and intends to continue to take an active role in his son's upbringing is contained in the Appellant's witness statement, and in the witness statements of his son and his son's mother. The witness statement of [FD] confirms that she separated from the Appellant in 2005. She describes the Appellant as a good father and confirms that in any matters involving their son, the Appellant has always played an active part in the decision making progress. They decided together which primary and secondary schools the son should attend. [FD] confirms that she has never taken any decision as to her son's future without involving the Appellant who has always shown a keen interest. The Appellant and his son have physical contact with each other four or five times a month and also have telephone contact. The Appellant takes his son to the mosque every Friday and enrolled him for Islamic classes. This evidence is confirmed by the Appellant's son.

50. In order to satisfy the Immigration Rules the Appellant must prove that EX.1(a) is satisfied which is set out below;

> EX.1. This paragraph applies if
>
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who –
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and
>
> (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK;

51. There is no dispute that the son is under 18, is in the UK, and has lived in the UK continuously for in excess of seven years.

52. I must decide whether the Appellant has a genuine and subsisting parental relationship with his son. I note the Respondent's guidance on this point issued on 22nd February 2018, and contained at pages 69–71 of the Appellant's bundle. I must consider whether the Appellant is playing a genuinely parental role in his son's life and he must have a subsisting role in personally providing at least an element of direct parental care to his son. The Appellant is not the primary carer of his son, and accepts that to be the case. The primary carer is the son's mother with whom he lives. There is no doubt that the Appellant and his son are biologically related, and I find that they regularly see one another. In addition to the evidence given by the Appellant, his son, and the son's mother, there is a letter from the Imam of the mosque attended by the Appellant, which confirms that the Appellant and his son attend the mosque together.

53. It is not the case that the Appellant has only established contact with his son recently. The evidence indicates that there has been regular physical contact following the separation of the Appellant from his son's mother.

54. The evidence confirms, on a balance of probability, that the Appellant and his son have a close relationship, frequent contact, and the Appellant does play an active role in his son's life. I am satisfied that the Appellant has a genuine and subsisting parental relationship with his son.

55. It is conceded by the Respondent at paragraph 68 of the refusal decision that it would not be reasonable to expect the son to leave the UK. That concession has not been withdrawn, and I therefore make a finding that it would not be reasonable to expect the son to leave the UK. In making that finding I have taken into account the guidance in MA (Pakistan) [2016] EWCA Civ 705 that in considering the question of reasonableness, I must focus not on the position of the child alone, but must have regard to the

wider public interest, including the immigration history of the Appellant. At paragraph 49 of MA (Pakistan) it is stated that when considering section 117B(6) the fact that a child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons, first because of its relevance to determining the nature and strength of the child's best interests, and second, because it establishes the starting point that leave should be granted unless there are powerful reasons to the contrary.

56. I also take into account the guidance in SR (subsisting parental relationship, s117B(6)) Pakistan [2018] UKUT 00334 (IAC) which confirms that the question of whether it would not be reasonable to expect a child to leave the UK does not necessarily require a consideration of whether the child will in fact or practice leave the UK. The issue to be considered is would it be reasonable "to expect" the child to leave the UK.

57. With reference to the Immigration Rules, so far as they relate to the requirements for leave to remain as a parent, I conclude that these rules are satisfied.

58. I consider paragraph 276ADE(1)(vi) in relation to the Appellant's private life. To succeed the Appellant must prove on a balance of probabilities that there are very significant obstacles to his integration into the Ivory Coast. On this point I follow the guidance in Treebhawon [2017] UKUT 00013 (IAC) in which it was found that mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are unlikely to satisfy the test of very significant obstacles in paragraph 276ADE of the Immigration Rules.

59. With reference to integration I follow the guidance in Kamara [2016] EWCA Civ 813 at paragraph 14 in which it is stated;

> "The idea of integration calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life".

60. The Appellant is 55 years of age. He has lived the greater part of his life in the Ivory Coast. He is a citizen of that country. He speaks the language. There are no relevant medical issues that could not be treated in the Ivory Coast. Although the Appellant has been absent from the Ivory Coast since 2000, I do not find that he has proved that there would be very significant obstacles to his integration into the Ivory Coast. The evidence that he has submitted does not discharge the burden of proof. The Appellant gave evidence to the FtT that he did not have relatives in the Ivory Coast but this was contradicted by his brother, who confirmed that they have siblings who remain in the Ivory Coast. There therefore would be some family support.

61. I have regard to the considerations contained in Section 117B of the 2002. Subsection (1) confirms that the maintenance of effective immigration control is in the public interest. I attach significant weight to this. Subsection (2) confirms that it is in the public interest that a person seeking leave to remain can speak English. The Appellant has not demonstrated his ability to speak English.

62. Subsection (3) confirms that it is in the public interest that a person seeking leave to remain is financially independent. The Appellant is not financially independent.

63. Subsections (4) and (5) confirm that little weight should be placed upon a private life established when a person has been in the UK unlawfully or with a precarious immigration status. The Appellant has only ever had a precarious immigration status. I must attach little weight to the private life that he has established.

64. Section 117B(6) is set out below;

> (6) 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.

65. The above is a similar test to that contained in EX.1(a). It has already been established that the Appellant has a genuine and subsisting parental relationship with his son who is a qualifying child and it would not be reasonable to expect the son to leave the United Kingdom. The Appellant is not liable to deportation. Therefore the public interest does not require his removal.

66. I find that if the Appellant was relying upon private life alone his appeal would be dismissed. That however is not the case. The main issue is his relationship with his son. I find it significant, when considering the public interest, that the Appellant satisfies the relevant Immigration Rules in relation to leave to remain as a parent. Even if those rules were not satisfied, the Appellant would satisfy the statute, that being section 117B(6).

67. Having conducted a balancing exercise, notwithstanding that there are matters adverse to the Appellant such as his inability to speak English, which no doubt hampers his integration, and his lack of financial independence, the fact that he satisfies the Immigration Rules, and section 117B(6) means that this appeal should be allowed as the Respondent's decision is disproportionate.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

There has been no request for anonymity and I see no need to make an anonymity direction.

Signed Date 17th October 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal I have considered whether to make a fee award. I make no fee award. The appeal has been allowed because of evidence considered by the Tribunal that was not before the initial decision maker.

Signed Date 17th October 2018

Deputy Upper Tribunal Judge M A Hall