Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03000/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 September 2019	**On 16 September 2019**

Before

Upper Tribunal Judge Pickup

Between

BA
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: In person, not legally represented
For the respondent: Mr C Avery, 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 direction. 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 appellant(s).

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Heatherington promulgated 18.4.19, dismissing his appeal against the decision of the Secretary of State, dated 2.2.17, to refuse his application made on 28.5.16 for Leave to

Remain on the basis of his family life, in particular his contact with his British citizen children.

2. First-tier Tribunal Judge Simpson granted permission to appeal on 16.7.18.

3. The matter first came before me on 12.6.19, resulting in the decision promulgated on 25.6.19.

4. There was no attendance at the error of law hearing by or on behalf of the appellant. Amongst various handwritten letters and submissions is a letter from him, dated 1.6.19, in which he expressed a lack of confidence to represent himself as a litigant in person in proceedings before the Upper Tribunal. He stated that he has been unable to afford any legal representation, though he would wish to be represented. Towards the end of his letter he effectively asked for the matter to be decided on the papers.

5. Whilst I did not consider it appropriate to deal with the matter "on the papers," I understood but regretted that the appellant felt unable to at least attend the hearing. It is the experience of the Upper Tribunal that many appellants represent themselves or appear unrepresented. The appellant should not feel intimidated or fearful of attending the tribunal and getting a fair hearing and in doing so can expect the tribunal judge to do all within the court's power to help him present his case fairly so that justice may be done.

6. His letter attached various new pieces of evidence which I did not consider at the error of law hearing, because at that stage I was only concerned with whether there was an error of law in the decision of the First-tier Tribunal. It follows that I could only consider the evidence that was before the First-tier tribunal, what happened there, and whether in the making of the decision the judge erred in law. Unless there is an error of law, there is no basis for the Upper Tribunal to interfere with the decision made. This is not, at this stage at least, a rehearing or second chance for the appellant to put his case. I should add that, for reason given in my decision, without the consent of the Family Court I declined to take into account the Family Court related documentation referred to by the appellant.

7. The appellant was a litigant in person at the First-tier Tribunal and attended the hearing without legal representation. He claimed that although he is separated from his former partner he sees his three British children regularly, though he had not seen them since 10.3.18. he claimed to have a Child Arrangements Order made by consent in January 2017.

8. In dismissing the appeal, Judge Heatherington concluded on the evidence that the appellant did not have a genuine and subsisting parental relationship with his children, neither played a genuinely parental role in their lives nor contributed to their lives, and any contact with them was no more than minimal.

9. In granting permission to appeal, Judge Simpson found it arguable that the judge erred in the article 8 assessment of the application for Leave to Remain as a parent of three minor British citizen children, his relationship with their mother having broken down.

10. For the reasons set out in my error of law decision and summarised below, I concluded that the failure of the First-tier Tribunal Judge to apply the Family Court Protocol to help establish the nature of the appellant's relationship with his three children. This was crucial to reaching a proper and fair assessment as to whether his parental relationship was genuine and subsisting. The judge had observed that there was some evidence from the Family Court but that it was incomplete. It was also suggested that there was no Cafcass report (although a number of Cafcass documents appear at section F of the appellant's evidence). Finally, there was no evidence of the consent of the Family Court for its proceedings to be disclosed.

11. The judge would have been aware of the Joint Protocol between the Family Court and the First-tier Tribunal and Upper Tribunal (IAC) and should have been mindful of the consequences in law of the disclosure of family proceedings involving children being disclosed in the absence of consent of the Family Court. The judge should also have been aware that consent to disclosure of the documents could and should have been sought from the Family Court. Unfortunately, the decision contained no reference to the Protocol whatsoever and no regard was had as to whether to instigate the agreed procedures provided for by the Protocol. The decision discloses that the judge had regard only at [14] of the decision as to whether to adjourn, but concluded that this would cause further delay, noting that the appellant had failed to comply with directions issued to help him prepare for the hearing and avoid the necessity to adjourn to produce further evidence. The judge concluded that, "either there is no evidence to support the claims he makes or, that the information that is present does not support his claims. In these circumstances there was no need to adjourn to obtain additional evidence. In my view it was in the interests of justice to proceed with the hearing." That decision was procedurally unfair to the appellant.

12. The strength of the error of law is indicated by the respondent's letter dated 10.9.18, to the effect that it did not oppose the application for permission to appeal 'and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing for the reasons given at paragraphs 2 (iii-v) of the grant of permission to appeal.' Those reasons are in essence the failure to invoke the Joint Protocol, as explained above.

13. Having set the decision aside, I invoked the Family Court Protocol with the result that in due course consent was give to disclosure of the latest Family Court documents and orders. I also directed that the continuation hearing should not take place until after receipt of the response from the Family Court. I also invited the appellant to attend and participate in the hearing so that he could update me as to the current situation with his children.

14. The Family Court consent order of 30.1.19 directed the mother to make the three children available for contact with the appellant every fourth weekend Saturday, with dates and times to be arranged between the parties. This included short visits to his flat, provided the children were in agreement. It was further ordered that the children may attend contact with the appellant for any further contact that may be agreed between the parties in advance.

15. The consent order followed two CAFCASS reports from September 2018 and January 2019. In summary, these indicated that whilst the children had differing concerns about how the appellant spoke to and treated them, they wanted to maintain contact with him and spoke of their hope of visits such as to the zoo, the cinema, or McDonalds. The final recommendation was in the same terms as the consent order referred to above.

16. In oral evidence at the hearing before me on 9.9.19, the appellant confirmed that he has been having regular contact with the children about every four weeks. He maintained that it was going well. His further documentation includes many photographs of him with the three children, the eldest of whom is now 11 years old, in various leisure or recreational activities. He said he had attended school to speak with the head teachers and had received copies of the school reports. He explained that the eldest had just started secondary school but he was still waiting for a response to his request to know which school, so that he could make contact with the school as a parent. In cross-examination by Mr Avery, he was able to speak of the eldest child's career ambitions. He said they children looked forward to seeing him and were looking forward to meeting his mother, their grandmother, when she visits from Nigeria soon. On the oral and documentary evidence it was clear that the appellant has continued contact with his children.

17. Mr Avery submitted that the contact was limited but deferred to the tribunal as to whether it amounted to a genuine and subsisting parental relationship. On the evidence, I was more than satisfied on the balance of probabilities that there is a genuine and subsisting parental relationship, demonstrated by the evidence and factors set out above, and for the reasons stated. In reaching that conclusion, I have taken account, in the round, of the other letters and many documents submitted by the appellant both to the First-tier Tribunal and to the Upper Tribunal, of which it is not necessary to list here.

18. The legal issue is that set out in s117B(6) of the 2002 Act, which provides that in the case of person who is not liable to deportation the public interest does not require his removal where he has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. It is common ground that each of the children are qualifying children as they are British citizens.

19. In KO (Nigeria) [2018] UKSC 53, the Supreme Court held that in the reasonableness assessment it is relevant to consider where the parents, apart from the relevant provisions, are expected to be, since it will normally be reasonable for the child to be with them. Whilst children are not to be blamed for the immigration history of a parent, the assessment must be made on the basis of the facts as they are in the real world. It is clear that outside section 117B of the Nationality, Immigration and Asylum Act 2002, the appellant has no basis to remain. However, their mother is settled in the UK and the children are themselves British citizens. It follows that it is not likely that the children would ever leave the UK.

20. Further, in JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) Rev 1, the Upper Tribunal held that "Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court or tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so," a decision recently endorsed by the Court of Appeal in Secretary of State for the Home Department v AB (Jamaica) & Anor [2019] EWCA Civ 661.

21. It follows that if the appellant's relationship with any or all of his British citizen children is genuine and subsisting, then despite his precarious immigration status and immigration history, he has a valid claim for Leave to Remain on the basis that the public interest in his removal to maintain immigration control is outweighed or neutralised by the effect of the s117B(6) reasonableness assessment.

22. On the facts of this case, and for the reasons already given, I have found the parental relationship genuine and subsisting, even if it is limited for the time being by the constraints of the Family Court's contact order. I am satisfied and it is abundantly clear that it would not be reasonable to expect these children to leave the UK. They are British citizens with rights and entitlements to enjoy all the benefits of life in the UK. I am also satisfied that their best interests pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009 are surely to remain living in the UK and to reside with their mother but to be able to continue contact with their father. It follows it would not be reasonable to expect them, or any of them, to leave the UK, even though that would never actually happened but is only a hypothesis. That results in a complete answer to the public interest in the proportionality balancing exercise between on the one hand maintaining immigration control to protect the well-being of the UK and on the other the family life rights of the appellant and his three British citizen children. It follows that the decision must be regarded as disproportionate, so that the appeal should be allowed.

Notice of Decision

23. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remake the decision by allowing the appeal on human rights grounds pursuant to article 8 ECHR.

I make no order for costs, there being no application for the same.

Signed *DMW Pickup*

Deputy Upper Tribunal Judge Pickup

Dated 9 September 2019