Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05457/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th March 2019	**On 24th June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

OD
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. Nyawanza, Genesis Law Associates Ltd
For the Respondent: Mr. Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. An anonymity order was made by First-tier Tribunal ("F*t*T") Judge Lodge and for the avoidance of any doubt, that order continues. OD is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

2. The appellant is a national of Zimbabwe. She arrived in the United Kingdom on 17th December 2000. The appellant has a son, "DPN" who was born in the UK on 3rd September 2003. DPN is a national of Zimbabwe. In May 2008, the appellant was arrested and shortly after, in July 2008, she made a claim for asylum. That claim was refused by the respondent on 24th July 2008 and an appeal against that decision was dismissed by the F*t*T on 17th September 2008. The appellant had exhausted her rights of appeal on 20th October 2008. In April 2009, the appellant made further submissions to the respondent, and by a decision dated 23rd February 2010, the respondent refused the application made by the appellant but treated the further submissions as a fresh claim. The appellant exercised a right of appeal against that decision, and her appeal was dismissed for the reasons set out in a decision promulgated on 20th April 2010. The appellant successfully appealed to the Upper Tribunal on human rights grounds, and that lead to a grant of discretionary leave to remain in the UK until 27th April 2014. On 24th April 2014, the appellant applied for further leave to remain on the basis of her continuing relationship with her son, DPN. That application was refused by the respondent on 11th March 2016. On 6th April 2016, the appellant sought to appeal that decision, but the appeal was determined to be 'out of time' by F*t*T Judge Farrin on 29th June 2016. A further decision refusing to extend the time for appealing, was made by F*t*T Judge Herlihy on 18th July 2016. On 13th March 2017, the appellant made a further application, on human rights grounds, for leave to remain on the basis of her continued relationship with her son DPN. That application was refused by the respondent for the reasons set out in a decision dated 21st March 2017 and gave rise to the appeal before F*t*T Judge Lodge. The appeal was dismissed by F*t*T Judge Lodge for the reasons set out in a decision promulgated on 9th April 2018 and it is that decision, that is the subject of the appeal before me.

3. The focus of the appellant's application for leave to remain in the UK and at the hearing of her appeal, was her relationship with DPN. The appellant

claimed to have a parental relationship with DPN. At the time of her application to the respondent, DPN was living with his father and in a letter from the appellant in support that application the appellant claimed that DPN lives with his father and stepmother and that she shares *"50% custody of [DPN]"*. The appellant claimed that in 2010, DPN was granted limited leave to remain in the UK as a dependent of a refugee and subsequently, on 28th April 2015, he was granted settlement. A copy of the residence permit issued to DPN confirming that he has indefinite leave to remain on the grounds of "refugee settlement" was provided in support of the application. The application was also supported *inter alia* by a letter from the appellant's ex-partner, DPN's father, who confirmed that the appellant is DPN's mother and that "..[*DPN*] *lives with me and he goes to his mum weekends.".* There was also a letter in support provided by DPN himself, in which he describes the arrangements as follows; *".. sometimes I see her on the weekend and every year she takes me on holiday, she also buys clothes for me...".* In the respondent's decision of 21 March 2017, the respondent accepted that DPN is under 18 years of age, and is living in the UK as a settled person after being granted ILR as a refugee, as the dependent of his stepmother, the partner of DPN's father. The respondent concluded that the appellant could not meet the requirements for leave to remain as a parent under the immigration rules, and that there are no exceptional circumstances to justify the grant of leave to remain on Article 8 grounds, outside of the immigration rules.

4. The focus of the appeal before F*t*T Judge Lodge was, as I say, upon the appellant's relationship with DPN. Neither the appellant's ex-partner, nor others that had provided evidence in support of the appellant's application, attended the hearing of the appeal. The Judge noted, at [8], the claim by the appellant that her ex-partner was not at the hearing as he had a hospital appointment, and that DPN had been living with her since April 2017. The Judge noted "*At the time of the application he was living with her ex-partner and she saw him at weekends. Now she lived with him fulltime and he went to his father's at weekends. She was not working now*

and that was why the arrangement had changed.". At [10], the Judge noted the appellant's evidence that she had signed DPN up to a GP nearby, but she had no other evidence to support that claim. The findings and conclusions of the F*t*T Judge are set out at paragraphs [13] to [27] of the decision.

5. The Judge first considered the claim by reference to the requirements of the immigration rules. The F*t*T Judge noted that at the time of the appellant's application and the respondent decision, DPN was living with his father and stepmother. The Judge noted, at [16], the appellant's evidence that up until April 2017 the appellant had informal access to her son and that he was living with her at weekends, and with his father during the week. The Judge noted the appellant's claim that since April 2017, DPN has lived with her during the week, and sees his father and stepmother, at weekends. The Judge refers, at [17], to the letters testifying to the continuing relationship between the appellant and her son. For the reasons set out at paragraph [18], the Judge rejected the explanation that the appellant's ex-partner was unable to attend the hearing because of a hospital appointment. The Judge concluded that he was satisfied *".. in the absence of any evidence to support the appellant's contention that he cannot attend the hearing that [the appellant's ex-partner] has simply decided not to support the appellant."*. In the circumstances the F*t*T Judge states he can *"attach very little weight to his evidence."*.

6. The Judge noted, at [19], that there was written evidence from DPN. The Judge states that he draws *".. No adverse inference from his failure to attend given his age.."*. Having noted that the other witnesses who have provided supporting letters had not attended the hearing, at paragraphs [20] and [21], the Judge concludes as follows.

> "20. The appellant' contention is that from April 2017 the appellant (sic) has been living with her during the week. I have no reliable documentary evidence that that is the case. I have nothing from [DPN's] school or GP or local authority. I have no official documentary

> evidence that [DPN] lives with the appellant or that she is playing any role in his life. I have been provided with no reliable documentary evidence as to the role the appellant has played or is playing in the school her son attends, and no evidence as to her being present at key events in his life e.g. religious events, birthdays etc.
>
> 21. In the circumstances I am not satisfied the appellant has established she meets E-LTRPR.2.4"

7. At paragraph [22] of the decision, the Judge concluded that he was not satisfied that the appellant has established that the requirements of paragraph EX.1.(a) are met. The Judge went on to conclude that there will be no very significant obstacles to the appellant's integration into her home country.

8. At paragraph [24] of the decision. the Judge states that he was not satisfied that s55 is applicable because *".. the appellant has not established she has any ongoing contact with her son [DPN] in any respect."*. The Judge states *".. I cannot therefore find, in the absence of reliable evidence, that her return to Zimbabwe would have a detrimental impact on [DPN]."*.

9. Having considered the Article 8 claim outside the rules, the F*t*T Judge was satisfied that having regard to the maintenance of effective immigration control, the decision to remove the appellant is lawful and proportionate. The appeal was therefore dismissed.

<u>The appeal before me</u>

10. Permission to appeal was granted by F*t*T Judge Parker on 18th May 2018. In doing so, F*t*T Judge Parker noted that in the grounds of appeal, the appellant claims that DPN had attended the hearing of the appeal, and if that is correct, that may potentially have undermined the findings of the F*t*T Judge. F*t*T Judge Parker noted that there are a number of arguable areas of law in the decision. The matter comes before me to determine whether the decision of the F*t*T Judge contains a material error of law, and if so, to remake the decision.

11. It was uncontroversial that the appellant does not have sole responsibility for DPN. On behalf of the appellant, Mr Nyawanza submits that a careful reading of paragraph [20] of the decision discloses that the Judge applied a higher standard of proof, in requiring the appellant to provide documentary evidence in support of her claim. He submits that the evidence before the F*t*T was such that the F*t*T Judge should have found that DPN was living with the appellant. DPN had made a statement dated 30th August 2017, that was at pages 12 to 13 of the appellant's bundle, and he had attended the hearing of the appeal. DPN confirms in his statement that he lives with his mother, and that he sees his father every weekend. In light of the fact that DPN had attended the hearing of the appeal, and was available to give evidence, it is unclear why the F*t*T Judge stated at [19] that he draws no adverse inference from DPN's failure to attend. The evidence of DPN was capable of corroborating the appellant's claim.

12. In reply, Mr Clarke submit that it was for the appellant to establish her Article 8 claim and the only evidence called at the hearing of the appeal, was the evidence of the appellant. He submits that the weight to be attached to the evidence of the appellant was a matter for the Judge, and that the Judge was clearly aware of the witness statement made by DPN. He submits that there was an absence of evidence supporting the assertions being made by the appellant. He submits that it was open to the F*t*T Judge to find that the appellant has not established she has any ongoing contact with her son DPN, in any respect. It follows that it was open to the F*t*T Judge to find that the requirements of the immigration rules cannot be met, and that the appellant's return to Zimbabwe would not have a detrimental impact on DPN, such that it would be contrary to his best interests.

Discussion

13. I accept, as Mr Clarke submits, that it is for an appellant to place before the respondent and the Tribunal, all material upon which the appellant

relied to suggest that the consequences of removal would interfere with the Article 8 rights of the family; R. (Kotecha) v SSHD [2011] EWHC 2070 (Admin).

14. The appeal was dismissed because there was a paucity of evidence regarding the arrangements for the care of DPN, and in particular, a paucity of evidence to support the claim that since April 2017, DPN has been living with the appellant and he has contact with his father and stepmother, at weekends. The Judge did not make an adverse credibility finding against the appellant, and although her claim that DPN has lived with her since April 2017 appears to have been unsupported by other evidence, that is not to say it cannot therefore be correct or reliable. It is to be noted that the grant of discretionary leave to remain made to the appellant previously, was on the basis of the appellant's relationship with DPN and her involvement in his life. The evidence of DPN, even as set out in the witness statement before the F*t*T, was capable of corroborating the appellant's account. There is an issue between the parties as to whether DPN had attended the hearing, and although the Judge cannot be criticised for referring to DPN's "*failure to attend given his age",* when it is clear that whether he attended or not, he was not called to give evidence, in my judgement that evidence was at least capable of supporting the claim made by the appellant and required careful consideration. It was in my judgement capable of impacting upon the conclusion as to whether DPN now lives with the appellant as she claims.

15. In my judgement, the failure to adequately address the evidence of DPN, whether or not he was called is material. If the F*t*T Judge had been satisfied from the evidence of the appellant and DPN, read together, that DPN now lives with the appellant, the Judge might well have concluded that the requirements of the immigration rules are met, and that the removal of the appellant would be contrary to his best interests. I remind myself that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of

law requiring the decision of the F*t*T to be set aside. The criterion to be applied is fairness and not reasonableness.

16. Reviewing the decision of F*t*T Judge Lodge as a whole, I have reached the conclusion that in failing to adequately address the evidence of DPN, the Judge reached a finding that was, for the reasons given by the Judge, irrational, such that there is a material error of law in the decision and it must be set aside.

17. I must then consider whether to remit the case to the F*t*T, or to re-make the decision myself. I am unable to resolve the issue as to whether DPN had attended the hearing of the appeal and was available to give evidence. The appellant maintains that having made a witness statement, he did attend the hearing. Mr Clarke submits that the information recorded by the Presenting Officer is that it was only the appellant that attended the hearing. There are plainly concerns as to the living arrangements and the arrangements for the care of DPN, and there will plainly be a need for the Tribunal to hear evidence and consider the consequences that flow from such findings that the Tribunal make. In my judgment, the appropriate course is to remit the matter to a newly constituted F*t*T for a fresh hearing.

Notice of Decision

18. The appeal is allowed, and the decision of F*t*T Judge Lodge is set aside.

19. The matter is remitted to the F*t*T for hearing afresh, with no findings preserved. The parties will be advised of a hearing date in due course

Signed Date 19th May 2019

Deputy Upper Tribunal Judge Mandalia