



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11671/2017

THE IMMIGRATION ACTS

Heard at Field House
On 4th January 2019

Decision & Reasons Promulgated
On 1st February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR PETER ASANTE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dhanji (Counsel)
For the Respondent: Mr S Walker (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Young-Harry, promulgated on 5th July 2018, following a hearing at Birmingham on 30th 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 citizen of Ghana, is a male, and was born on 10th February 1981. He appealed against the decision of the Respondent dated 20th September 2017 refusing his application for leave to remain in this country on the basis of his family and private life.

The Appellant's Claim

3. The essence of the Appellant's claim is that he is in a genuine and subsisting parental relationship with a British child, who has a right to remain in the United Kingdom, and who cannot go to Ghana with the Appellant. Furthermore, the Appellant also alleged that he would face very significant obstacles to integration on return to Ghana. The appeal was on Article 8 grounds only.

The Judge's Findings

4. The judge found that although the Appellant was not the biological father of the named British child, nevertheless "the Appellant plays the role of a father and has 'stepped into the shoes' of a parent." Furthermore, that "in the absence of any other father figure in the child's life" this was a case where "the Appellant plays the role of a father." He held that this was evidenced by the fact that the "Appellant is named on the child's birth certificate" and that "he regularly visits and spends time with the child." This time included also "taking the child to school and having overnight visits". The natural mother of the child was a Ms Fosuah, and she had at one time been in a relationship with the Appellant, but that relationship had broken down, and there had been a reluctance to undergo a DNA test to confirm the paternity of the child. This in the event, however, did not matter, because the judge had come to the conclusion that the Appellant enjoyed a genuine and subsisting relationship with the child, who was a British citizen. Indeed, the Appellant "regularly makes purchases for his child", and this was demonstrated by the "Asda receipts" (paragraph 21) that were produced at the hearing. In short, the judge was satisfied that "the Appellant plays an active role in the child's life thus there exists a parental relationship" (paragraph 22).
5. As against this, however, this was a case where the Appellant had entered the UK as a visitor in May 2011, and had then overstayed for almost seven years, such that the Appellant had demonstrated a "blatant disregard for immigration laws and his decision to remain in the UK without permission, carries significant weight in the balance" (paragraph 29). The Appellant had also developed his private life in this country at a time when "his leave has always been precarious" (paragraph 30).
6. However, there remained the position of the child, with whom the judge had accepted the Appellant had a genuine and subsisting parental relationship, but who also lived with a British citizen mother, and was a British citizen child herself. The judge noted that,

"On the evidence before me the child resides with the mother and has regular contact with the Appellant; it is likely she is in a safe, settled and stable environment with her mother. Given she is a British citizen, she is entitled to reside in the UK without let or hinderance" (paragraph 31).

The judge went on to say that,

"I find it would best serve her best interests to remain in the familiar settlement environment she is used to, under the care and guidance of her mother, while

enjoying regular contact, via modern communication methods and visits from the Appellant on his return” (paragraph 32).

7. The appeal was allowed.

Grounds of Application

8. The grounds of application state, that the judge having concluded, in relation to Section 117B(6) that this was a case where, the Appellant both had a genuine and parental relationship with his child, and a case where it would not be reasonable to expect the child to leave the United Kingdom, the appeal fell to be allowed. It was not open to the judge thereafter to factor in the element that, because the Appellant had been in the UK unlawfully, the public interest in immigration control, meant that his appeal should be refused.
9. On 19th November 2018, permission to appeal was granted on the basis that the established authorities such as **MA (Pakistan) [2016] EWCA Civ 705** made it clear that “there can be no doubt that Section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the subsection are satisfied, the public interest will not justify removal”.

Submissions

10. At the hearing before me on 4th January 2019, Mr Dhanji, appearing on behalf of the Appellant as his Counsel, relied upon the grounds of application. He also submitted that given what the judge had stated (at paragraph 33) the only option left for the judge was to have allowed the appeal. It was then made clear by the judge that,

“In relation to Section 117B(6), I accept the Appellant has a genuine and subsisting parental relationship with a qualifying child. Given my findings above, I find it would not be reasonable for the child to leave the UK. I make the same findings in relation to EX.1 of the Immigration Rules” (paragraph 33).

11. This being the judge’s finding, Mr Dhanji argued, the appeal should simply have been allowed, and the recent case of **KO (Nigeria)** by the Supreme Court does not affect materially the interpretation in this way of Section 117B(6).
12. For his part, Mr Walker submitted that if one has regard to the paragraph that followed paragraph 33, what the judge does there is to say that,

“I find the Appellant’s poor immigration history is a significant countervailing factor which outweighs the Appellant’s private life considerations ... The Appellant was invited to the UK as a visitor on the understanding that he would return once his leave ended; he failed to do so” (paragraph 34).

In this sense, therefore, submitted Mr Walker, the judge was correct to have dismissed the Appellant’s appeal. In short, paragraph 33 and paragraph 34 had to be read conjunctively to see why the judge had dismissed the appeal.

13. In reply, Mr Dhanji submitted that this was a case where the Appellant's child was a British citizen child, who had a British citizen mother, and the judge had found the Appellant himself to have a genuine and subsisting parental relationship with the child, and it was not open to him, having decided that under Section 117B(6), that the appeal should be allowed, that he should then proceed to dismiss it. Mr Dhanji drew strength for his submissions from the recent decision in **SR (subsisting parental relationship - s117B(6)) Pakistan [2018] UKUT 334**. Here, the Upper Tribunal had stated that,

"The question of whether it would not be reasonable to expect a child to leave the United Kingdom in Section 117B(6) of the 2002 Act does not necessarily require a consideration of whether the child will in fact or in practice leave the UK. Rather, it poses a straightforward question: would it be reasonable 'to expect' the child to leave the UK?" (see head note 2).

This made it clear, submitted Mr Dhanji, that if the question was posed in these terms, which it was by the judge, and if it was answered in the affirmative, then the appeal should have been allowed.

Error of Law

14. 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 and re-make the decision. My reasons are as follows. This is a case where the judge has found there to be a genuine and parental relationship with a British citizen child. It is also a case where the judge has found it to be not reasonable for the child to leave the UK (paragraph 33). In these circumstances, the requirements of the statutory provision in Section 117B(6) were satisfied, and treating that provision as a self-contained and autonomous provision, which is the way in which Parliament had stipulated it, the public interest consideration did not apply. That being so, the appeal should have been allowed.

Re-making the Decision

15. I have re-made the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. For the reasons I have given above, this appeal is allowed.

Notice of Decision

16. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed.
17. No anonymity direction is made.
18. This appeal is allowed.

Signed

Date

Deputy Upper Tribunal Judge Juss

24th January 2019