IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-005138

First-tier Tribunal No: HU/61415/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 31st of January 2025

Before

UPPER TRIBUNAL JUDGE LANDES
DEPUTY UPPER TRIBUNAL JUDGE HOSHI

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLANGOKE VICTOR ADELEYE

Respondent

Representation:
For the Appellant: Ms Everett, Senior Home Office Presenting Officer
For the Respondent: Mr Nasim, Counsel (instructed under the Direct Access Scheme)

Heard at Field House on 14 January 2025

DECISION AND REASONS

Background

1. Mr Adeleye is a citizen of Nigeria who entered the UK on 29 January 2011. He was last granted leave to remain until 29 June 2022 on the basis of his relationship with his daughter, a British citizen who is now almost 6 years' old. On 11 May 2022 he applied for further leave to remain as a parent. By decision of 18 August 2023, the Secretary of State ("SSHD") refused his application. The application was refused on the basis that the eligibility relationship requirement of immigration rules was not met. It was said that Mr Adeleye failed to meet E-LTRPT 2.4 of Appendix FM as he had failed upon request to provide sufficient evidence to show that he played an active role in his child's life. It was said that he did not qualify on the private life route and it was not considered that there were any exceptional circumstances.

2. Mr Adeleye appealed the refusal of his human rights claim. He was unrepresented and he asked for his appeal to be considered on the papers without a hearing. By a decision promulgated on 12 September 2024, Judge Plowright allowed his appeal.

3. Judge Plowright noted that in his application form Mr Adeleye had explained that while his daughter lived with her mother, he had a fatherly role and sent money for her upkeep [12]. He had not produced any documentary evidence at the date of the application to show he was taking an active role in his daughter's life, however the letter from his daughter's nursery now produced stated that he and his daughter's mother dropped off and collected the daughter every day and that Mr Adeleye was the second emergency contact [19]. The judge acknowledged the limited documentary evidence but noted that the respondent did not suggest that the letter did not genuinely reflect the role Mr Adeleye played, it was simply said that such was insufficient.

4. Judge Plowright concluded at [21] and [22] *"I have no reason to believe that the appellant does not drop off and collect his daughter from nursery, as stated in this letter. The fact that he does so is sufficient to show that he does play an active role in his daughter's life. I therefore find that the appellant does meet the requirement of E-LTRPT 2.4."*

5. SSHD has appealed, with permission granted by Judge Chowdhury in the First-Tier Tribunal.

The grounds

6. The grounds refer to E-LTRPT 2.4 "*The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing."*

7. The core of the grounds is that the judge erred in finding that part of the immigration rules to be met on the limited evidence presented.

8. It is averred that what was in issue was not the genuine nature of the one school letter submitted, but that the letter did not without other evidence show that Mr Adeleye was actively involved in his daughter's upbringing and had a parental relationship with her.

9. The grounds also averred that the appellant's private life should have been considered and that may have been of some benefit to the appellant's case. We note the point, but it is not relevant in the context of whether there was a material error in the decision; if there were any error in the judge's consideration of the appellant's private life (which was not specifically raised by him as an issue) then it would only benefit SSHD to overturn the decision on that basis.

Submissions at the hearing

10. Mr Nasim produced a rule 24 response/skeleton argument with attached documents on the morning of the hearing. Mr Nasim made clear that Mr Adeleye wanted him to produce the additional evidence, but the only documents he was seeking to rely on for the purpose of this error of law hearing was the

correspondence with the caseworker explaining the context of the production of the letter from the little girl's school.

11. Ms Everett explained that she did not object to the admission of the correspondence with the caseworker as it clearly explained the background to the case. She also did not object to an extension of time for service of the rule 24 response.

12. We extended time for service of the rule 24 response. Although it should have been served by 5 December 2024 and so was significantly out of time, the only point which needed to be raised by way of a rule 24 response, rather than a skeleton argument, was a legal point about the operation of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. It is understandable that Mr Adeleye, not being a lawyer, would not have grasped this potentially significant point and it was of assistance to the tribunal to consider it with the benefit of legal argument. It was a short point, Ms Everett was well able to deal with it, and it was in the interests of justice to permit the point to be raised.

13. In the rule 24 response/skeleton argument Mr Nasim pleaded as his primary position that the finding was not perverse or irrational and was open to the judge on the evidence. It was said that the judge had in mind that at the date of application Mr Adeleye had current leave based on his relationship with his daughter and that Mr Adeleye had simply followed the guidance provided by the caseworker. It was pleaded in the alternative that the error was not material because of the operation of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. Caselaw was referred to about the meaning of a genuine and subsisting parental relationship and that it was possible to have a genuine and subsisting parental relationship with a child without playing an active role in the child's upbringing.

14. At the hearing, Ms Everett submitted that SSHD had refused the application because it was felt the evidence did not support the view that Mr Adeleye played an active role in his child's life. It was understandable why Mr Adeleye might have thought that all he needed to do was to procure a document such as the one he procured, but that was not sufficient. It was a matter for the judge what weight to give to evidence, but the judge simply had not given reasons why the letter from the school was sufficient to demonstrate why Mr Adeleye took an active role in his daughter's life. Ms Everett agreed that a "genuine and subsisting parental relationship" was a different test, but she said it would be hard to make a finding on the limited evidence that there was such a parental relationship.

15. Mr Nasim submitted that it was important to appreciate the factual background. This was an extension application and the letter from the caseworker was very specific as to what was required. The judge had sufficient material to make the finding he did and it was not an irrational finding based on the evidence. Mr Adeleye had given details in his application form about the role he took in his daughter's upbringing.

16. Ms Everett responded that she appreciated that a "genuine and subsisting parental relationship" was a lower test. However, even bearing that in mind the letter from the school said *"their mother (name)….. and father Mr Goke Adeleye drop and collect (name) … each day. Mr Goke Adeleye (father) is the 2nd emergency contact on our system."* On the face of it that suggested that both

mother and father together collected the girl each day. That was not the seeing of a child in an unsupervised setting on a regular basis which case law suggested would certainly amount to a genuine and subsisting parental relationship.

Discussion and conclusions

17. To satisfy the immigration rules, Mr Adeleye had to prove on the balance of probabilities that he was taking and intended to continue to take an active role in his daughter's upbringing.

18. Although the reasons for refusal letter used the phrase *"you have failed … to provide sufficient evidence to show you play an active role in your child's life"*, the reference to failing to meet E-LTRPT 2.4 made it clear that the active role in the child's life referred to was an active role in their upbringing. The judge appreciated this as he explained at [15] *"The reason why the appellant's application was refused was because he had not provided evidence that he was taking and continues to take an active role in his daughter's upbringing"*.

19. Apart from the letter from the school there was very limited evidence. Mr Nasim referred to page 4 of the application form where in response to the question *"Provide details of the role you take in (name of child's) upbringing, including details of your parental responsibility or access arrangements",* Mr Adeleye wrote *"She lives with her mom, I am playing my fatherly role and sending money for her upkeep*." That did not include details of what "fatherly role" was played, beyond sending money. We understand Mr Nasim's point that SSHD had granted leave in the past and therefore the necessary relationship and role must have been accepted in the past, but the only evidence Judge Plowright had before him as to the nature of the role Mr Adeleye played in his daughter's life was that he provided some financial support, that he was the second emergency contact at school and that both he and the little girl's mother picked her up and collected her (the evidence being ambiguous as to whether they always did so together, and if not how often Mr Adeleye carried out this task alone). Whilst we understand that Mr Adeleye may have thought that all he needed to do was provide the letter the caseworker asked for, the caseworker did not say this, neither did they say that they were looking for evidence that he played an active role in his child's life. The email and letter suggest they were looking for specific evidence of contact. They pointed out that Mr Adeleye had provided Family Court proceedings without evidence that he had permission from the Family Court to disclose the same and that he should provide such permission, alternatively *"if you do not live with your child then please provide documentary evidence to confirm that you have contact with your child. This should be on official headed paper and be from your child's school, nursery, health visitor, GP or local authority. The letter should confirm what contact you have with your child, for example whether you have attended appointments with them and whether you are listed as one of their emergency contacts."*

20. Mr Nasim referred us to the case of SR (subsisting parental relationship – s117B (6) Pakistan) [2018] UKUT 334 (IAC). That case contrasted the two phrases "genuine and subsisting parental relationship" and an "active role in a child's upbringing." In that case, there was no evidence to support a conclusion that SR was taking an active role in his child A's upbringing. Whilst text messages showed that he regularly asked about A and wanted to know what A was doing, the Upper Tribunal concluded *"that is not by any standard sufficient to establish that SR took an active role in A's upbringing."* [25].

21. Against that background, Judge Plowright's task was to decide the specific issue SSHD had identified in the review, i.e. whether Mr Adeleye met the eligibility requirement of E-LTRPT 2.4. Judge Plowright found that dropping off and collecting his daughter from nursery was sufficient to satisfy the eligibility requirement, but that did not explain to the Secretary of State why that was sufficient; why being an emergency contact and dropping off and collecting the child from school, possibly with her mother and an unspecified number of times, even taken together with financial support, amounted to taking an active role in her upbringing. We consider Judge Chowdhury was right when granting permission to comment that "active involvement" typically involves more comprehensive involvement in the child's daily life and development. We consider that Ms Everett is right that Judge Plowright failed to provide adequate reasons for his conclusion.

22. We have considered whether the error is immaterial. It would be immaterial if the only conclusion on the evidence could be that Mr Adeleye had a genuine and subsisting parental relationship with his daughter. This is because section 117B (6) of the Nationality, Immigration and Asylum Act 2002 provides: "*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."

23. The appellant's daughter is a British citizen, so a qualifying child, and SSHD has conceded in the reasons for refusal letter that it would not be expected that the child would leave the UK, she would remain in the UK with her mother.

24. The Court of Appeal considered the meaning of genuine and subsisting parental relationship in the case of Secretary of State for the Home Department v AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661. The Court of Appeal approved the approach taken in R (RK) v Secretary of State for the Home Department (s 117B (6): "parental relationship") IJR [2016] UKUT 31 quoted by Mr Nasim. King LJ, in her judgment said at [109] (the references are to "genuine and substantial parental relationship" but this must be a typo given the context): "*In order to demonstrate a genuine and substantial parental relationship, it is common ground that it is not necessary for the absent parent to have parental responsibility and, in my judgement, it is hard to see how it can be said otherwise than that a parent has the necessary "genuine and substantial parental relationship" where that parent is seeing his or her child in an unsupervised setting on a regular basis, whether or not he has parental responsibility and whether or not by virtue of a court order. Equally, the existence of a court order permitting direct contact in favour of the absent parent is not conclusive evidence of the necessary parental relationship. It may be that a court would conclude that there is no "genuine and substantial parental relationship" where, for example, a parent has the benefit of a court order but does not, or only unreliably and infrequently, takes up his or her contact*."

25. Whilst regular contact by a parent with a child in an unsupervised setting certainly equates to a genuine and subsisting parental relationship, as Ms Everett pointed out, such evidence was not before the judge. The application form did not specify the level of contact and the letter from the school was ambiguous and could even be read to mean that both parents collected the child together (in

which event Mr Adeleye's contact would not have been in an unsupervised setting). We agree that in those circumstances, we cannot say that the only conclusion a rational tribunal could have come to would have been that Mr Adeleye enjoyed a genuine and subsisting parental relationship with his daughter.

26. Judge Plowright's decision must therefore be set aside. We bear in mind that the decision ultimately reached by the tribunal must itself be Article 8 compliant, and that Mr Adeleye, no doubt because he believed that all he needed to do was to produce the letter from the school, concentrated his efforts on explaining why he could not produce it any earlier, rather than explaining the relationship between himself and his daughter. We consider that in the circumstances Mr Adeleye has not had an opportunity to have his case considered properly before the First-Tier Tribunal and the appeal should be remitted to the First-Tier Tribunal to decide with no findings preserved. It is in the interests of justice and the consideration of the best interests of Mr Adeleye's daughter that the appeal be listed for an oral hearing so that Mr Adeleye has a proper opportunity to explain his case to the tribunal and to produce any supporting evidence he has. It would be helpful for Mr Adeleye to make a statement to be filed with the tribunal and served on SSHD, setting out his case in detail, explaining how often he says he sees his daughter, whether he does so unsupervised and specifically what role he says he plays in her life, exhibiting any supporting evidence he has (which of course could include letters from family or friends or his ex-partner even if they are not able to attend the hearing – though it may well assist him if they do attend to provide oral evidence). Of course, the First-Tier Tribunal may wish to make specific directions.

Notice of Decision

The judge's decision contains a material error of law and is set aside with no findings preserved.

The appeal is remitted to the First-Tier Tribunal to be decided by way of an oral hearing by a judge other than Judge Plowright.

A-R Landes

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 January 2025