Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11281/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 July 2017	**On 21 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR TAJUDEEN AJIBOLA OLANIYAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Shiraz Bhanji of Counsel instructed by Quintessence Solicitors
For the Respondent: Mr P Armstrong, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Nigerian national born on 8 October 1970. The appellant entered the United Kingdom illegally using a false passport on 14 December 2000. He has made a number of applications to remain in the United Kingdom based on

applications as the spouse of an EEA national exercising treaty rights in the United Kingdom. These applications were refused on 23 August 2011, 1 February 2012, and again on 25 April 2013. A further application on the same basis, i.e. as a family member of an EEA national, namely a spouse of a French citizen, Wuuri Ndiaye, was made on 11 January 2014. That further application was withdrawn by the appellant who stated that he would be making an application on the basis of involvement with a British child. On 21 July 2015 the appellant made an application for leave to remain in the United Kingdom on the basis of family life with Tyrone Olaniyah Smith-Olaniyan. On 28 August 2015 the respondent refused the appellant's application. The respondent decided that the appellant could not succeed under Appendix FM under the parent route as the appellant had not provided sufficient evidence that he was the biological father of Tyrone and also considered that the appellant could not succeed under paragraph 276ADE as it was not accepted that there would be very significant obstacles to his integration into Nigeria. The respondent also considered that there were no exceptional circumstances warranting a grant of leave outside the Immigration Rules.

The appeal to the First-tier Tribunal

2. The appellant appealed against the respondent's decision to the First-tier Tribunal. In a decision promulgated on 3 May 2017 First-tier Tribunal Judge Zahed dismissed the appellant's appeal. The judge found that the appellant was not the biological father of Tyrone. On the basis that the judge was not satisfied that the appellant was the biological father of a British child, and taking into account Section 117 of the Nationality, Immigration and Asylum Act 2002, the judge considered that any interference in the appellant's private life was proportionate to the maintenance of immigration control.

3. The appellant applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision. On 9 June 2017 First-tier Tribunal Judge Andrew granted the appellant permission to appeal.

The hearing before the Upper Tribunal

4. The grounds of appeal set out three distinct grounds. It is asserted that the judge erred by failing to consider Section 55 of the 2009 Borders, Citizenship and Immigration Act 2009. The judge should have been cognisant of the position of Tyrone as the appeal was argued on the basis of family life. It is asserted (without conceding that the appellant is not the biological father of the child) that whether or not the appellant is the biological father, the best interests of the child should have been considered. There was overwhelming evidence of a father/son relationship between the appellant and the child. The judge placed unduly a high premium on the DNA test. The existence of the father/son relationship was not in doubt and should have therefore warranted consideration of Section 55 by the judge. The child attended the hearing in support of the appellant's appeal, the child's mother's and grandmother's evidence and those of other persons unequivocally established that there is a father/son relationship between the appellant and his child. The judge did

not consider the psychological impact of not allowing the appellant to stay in the United Kingdom on a child who has always known him as his father.

5. Ground 2 asserts that the judge erred by failing to make a finding on the residence order presented in evidence before him. The judge ignored the order of a superior court in its entirety. It is asserted that by flagrantly ignoring the fact that if the court was not satisfied by credible evidence of identity of the appellant the court would not have made the order in the first place. The judge's action in not taking cognisance of the residence order issued by a court of competent jurisdiction was tantamount to judicial malfeasance.

6. Ground 3 asserts that the judge unduly and unreasonably placed emphasis on the mode of entry into the United Kingdom as if entry to the UK illegally is a bar to being granted leave to remain. The judge failed to direct his mind to the fact that the Home Office policy draws a distinction between illegal entrant and overstayer and the policy never provides that an illegal immigrant will not be eligible to be granted leave to remain in the United Kingdom. The judge placed undue emphasis on the omission of the appellant's name at the initial registration of the child's birth. By failing to make a decision on the residence order the judge has invariably discredited the residence order which formed the basis of the appellant's details being entered into the birth register.

7. In oral submissions Mr Bhanji submitted that the judge failed to consider evidence of the witnesses and failed to give any reasons as to why he rejected that evidence. With regard to Section 55 he submitted that the judge was required to consider the best interests of the child. He referred to the evidence that was before the First-tier Tribunal including evidence of photographs over a prolonged period of time, the description of each photograph, the evidence of the witnesses of the relationship, letters from the child's school, etc. He submitted that even if the appellant is not the biological father there is a relationship between him and Tyrone that is a parental relationship as the evidence demonstrated. He referred to the evidence of Tyrone's stepbrother and the other witnesses who all gave evidence that there was a subsisting genuine parental relationship. He referred to the residence order that was in the bundle and submitted that this is evidence that the appellant is the biological parent of Tyrone. He submitted that the judge did not pay any attention to the other evidence, such as the birth certificate which clearly records the appellant as the child's father. He asserted that the respondent has never questioned the validity of the documents. He argued that there is no obligation for the appellant to give DNA evidence and that there might be many reasons why he would be unable to provide it.

8. Mr Armstrong relied on the Rule 24 response and submitted that the judge had considered all the evidence and that the grounds of appeal are simply a disagreement with the findings of the judge. The Home Office had asked the appellant to produce DNA evidence. The appellant appears to have gone to great lengths to change documents to attempt to prove that he is the biological father. However, the appellant entered the UK on a false passport which demonstrates that

the appellant is prepared to falsify documents and therefore the judge was quite entitled in light of the appellant's background to find the documents did not carry sufficient weight. He submitted that it is for the appellant to demonstrate and discharge the burden of proof that he is the biological father of Tyrone. The appellant has been in the United Kingdom illegally for seventeen years. He has not produced any evidence of how he has been financially supporting himself or Tyrone. That must be illegally if it is from working in the United Kingdom. He submitted that the reluctance of the appellant to submit DNA evidence suggests that he is not the biological father of the appellant and the judge was perfectly entitled to make that finding. In response to a question that I raised Mr Armstrong accepted that the judge had not considered the relationship between the appellant and the child beyond whether or not the appellant was the biological father of Tyrone and has not considered, notwithstanding that he might not be the biological parent, whether or not a genuine and subsisting parental relationship might exist between them, but he submitted that there is little in the way of documentary evidence as to proof of that relationship.

9. Mr Bhanji in reply argued that the judge clearly considered Article 8 outside of the Rules but he failed to consider Section 117B(6). The judge clearly has not considered whether or not there is a genuine and subsisting parental relationship. He submitted that there was a considerable volume of evidence of the relationship.

Discussion

10. It is clear that the background to the appellant's application for leave to remain in the United Kingdom on the basis of his relationship with Tyrone does have a surprising and illogical history. The appellant made four applications between August 2011 and January 2014 on the basis of being the spouse of a non-EEA family member of a French national. These applications were made when Tyrone was aged between around 8 to 12 years. No application was made on the basis of his family life with Tyrone until 2015. Amendments were made to Tyrone's birth certificate and a residence order appears to have been sought. I agree with Mr Armstrong's submission that it would appear that whilst the appellant had a simple route available to establish that he was the biological father of Tyrone (i.e. a DNA test) he has gone to great lengths to have documents changed possibly in an attempt to prove that he is the biological father. Much emphasis in the grounds of appeal and in oral evidence was placed on the residence order that was before the First-tier Tribunal Judge. However, as I noted during the course of the hearing that residence order is not evidence that the appellant is Tyrone's biological father. It does not record who the applicant and the respondent to those proceedings are.

11. The judge set out the evidence from paragraphs 7 to 12. He recorded at paragraphs 8, 9 and 10 the oral evidence of the appellant, Ms Lisa-Gaye Smith (Tyrone's mother) and Mrs Maudlyn Blake. He dealt with the documentary evidence in respect of the birth certificate at paragraphs 11 and 12 of the decision.

12. The judge set out at paragraphs 14 – 17:

> "14. The appellant was given an opportunity to give DNA evidence in order to prove that he indeed is the biological father. However the appellant chose not to avail himself of that opportunity. Further no explanation had been given as to why it took 13 years to obtain amend the birth certificate to include the appellant as the father.
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> 15. I find that these amendments have been made in order for the appellant to make an application to remain in the UK as the biological father of a British child. I find that on the evidence before me that on a balance of probabilities that the appellant is not the biological father of the British child and thus he cannot succeed under human rights on this ground.
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> 16. I have given consideration to Section 117 of Nationality, Immigration and Asylum Act 2002 and in particular S.117B and S.117D which states:
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> ...
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> 17. I take into account that the appellant has been in the UK for 14 years unlawfully having come to the UK illegally on a false passport. I do not find that he has partner or is the biological father of a British child. The appellant has not been paying taxes and is a burden on the state. I find that any interference to the appellant's private life is proportionate to the maintenance of immigration control."

13. Despite setting out at paragraph 6 that all the documents in the bundle had been taken into account in reaching his decision the judge has not referred to the other documents that were presented and has not given any explanation as to why those documents were rejected as supporting the appellant's claim. The birth certificates were the only documents specifically referred to. The judge focussed solely on whether or not the appellant was the biological father of Tyrone. When considering Article 8 outside the Immigration Rules the judge failed to consider whether or not the appellant has a genuine and subsisting parental relationship with Tyrone. There was evidence before the Tribunal in support of the appellant's claim that there was a parental relationship between the appellant and Tyrone. Whilst the judge would have been entitled to conclude that there was not a genuine parental relationship, he has not considered that issue at all. As accepted by the Secretary of State the judge was required to consider, under Section 117B(6), whether or not there was a genuine and subsisting parental relationship when assessing proportionality of removal of the appellant from the United Kingdom.

14. There is no definition of parental relationship in s117. In **R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC)** the meaning of parental relationship in s117B(6) was considered. A helpful explanation of the factors that should be considered in assessing whether a person is in a parental relationship is set out from paragraphs 42 – 44:

> 42. Whether a person is in a "parental relationship" with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have "parental responsibility" in law for there to exist a "parental relationship," although whether or not that is the case will be a relevant factor. What is important is that the individual can establish that they have taken on the role that a "parent" usually plays in the life of their child.
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> 43. I agree with Mr Mandalia's formulation that, in effect, an individual must "step into the shoes of a parent" in order to establish a "parental relationship". If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a "parental relationship" with the child. It is perhaps obvious to state that "carers" are not *per se*"parents." A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example whilst the parents are at work) or even longer term (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a "parental relationship."
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> 44. If a non-biological parent ("third party") caring for a child claims such a relationship, its existence will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the child also. It is unlikely, in my judgment, that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life <u>as the child's parents</u> as in a case such as the present where the children and parents continue to live and function together as a family. It will be difficult, if not impossible, to say that a third party has "stepped into the shoes" of a parent.

15. It is clear that parental relationship extends beyond a biological parent. It was therefore incumbent upon the judge to make a finding as to whether or not Article 8 was engaged in respect of what was purported to be a parental relationship between Tyrone and the appellant. The failure to do so amounts to a material error of law.

16. I find that there is a material error of law in the First-tier Tribunal decision. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

17. I considered whether or not I could re-make the decision myself. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

18. I remit the case to the First-tier Tribunal for the case to be heard at the First-tier Tribunal at Hatton Cross before any judge other than Judge Zahed pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. A hearing will be fixed at the next available date.

19. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law. The appeal of the appellant is allowed. The case is remitted to the First-tier Tribunal for a de-novo hearing before any judge other than Judge Zahed.

Signed P M Ramshaw Date 21 August 2017

Deputy Upper Tribunal Judge Ramshaw