Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11237/2016

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 15 January 2018	**On 4 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SATURDAY IDADA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant:	Mr Kamran, International Immigration Advisory Services
For the Respondent:	Mr. Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria, born on 10.2.74. He entered the UK on 21.5.08 as a visitor with leave until 5.9.08. The Appellant then overstayed and made a false 14 year long residence application on 8.3.11 by paying an apparent employee of the Home Office £2000, which was refused on 14.4.11. He made an application for leave to remain on the basis of his private and family life on 15.2.16, due to the fact that his partner, C, has a British child and gave birth to a son by the Appellant on [ ] 2014. He appealed

to the First tier Tribunal against a decision made by the Respondent on 28.4.16, refusing him leave to remain in the United Kingdom.

2. The appeal came before First tier Tribunal Judge Beg for hearing on 18.9.17. In a decision promulgated on 26.9.16 she dismissed the appeal. An application for permission to appeal to the Upper Tribunal was granted on 3.11.17 on the basis that it was arguable that the Judge erred in her approach to the child, C, who is a British citizen and was thus a qualifying child under section 117D and EX1 of Appendix FM of the Rules and the Judge failed to consider this on the basis that she was not the biological child of the Appellant [18] and that the Judge further erred in failing to analyse whether the Appellant had established a genuine and subsisting relationship with C and whether it was reasonable to expect C to leave the United Kingdom.

Hearing

3. At the hearing before me, Mr Bates accepted that C could be a qualifying child in light of the Judge's acceptance at [29] that the Appellant had established a family life with his partner and the children, but he maintained the position that the issue is the reasonableness of expecting the children to leave the UK.

4. Mr Kamran submitted that, if the correct approach had been taken, the Appellant would have met the Rules *viz* EX1. He submitted that the Judge had erred in failing to consider the best interests of the children involved, one of whom was a British citizen. See [18]. Mr Kamran stated that the Appellant played an active part in caring for the children as his wife worked nights four days a week and that C. had never been to Nigeria.

5. In his submissions, Mr Bates stated that at [21] the Judge referred to *PD and others* [2016] UKUT 00108 and that *SF and others* [2017] UKUT 00120 (IAC) and [13] of the Appellant's representative's submissions relied on *SF* and the reference to the Home Office policy on Family Migration, August 2015 therein that it is not reasonable to expect a British child to leave the United Kingdom. In respect of the Home Office policy, he submitted that this does envisage a family split where there is a very poor immigration history. On the facts of this case it is clear from [15] of the decision that there has been significant deception given that the Appellant made a false 14 year long residency application and the Judge had been entitled to have regard to this, albeit he acknowledged that the Judge made no specific reference to the Home Office policy in her findings. However, she did at [27] find that temporary separation would not be disproportionate and thus it would not be contrary to the principle in *Zambrano*. Mr Bates submitted that family life had been formed in precarious circumstances; the Appellant has made a conscious effort to deceive; the Judge has considered all the relevant factors in substance

and looking at the factors that the Judge has considered, the fact she did not consider the reasonableness of C leaving the UK is not material.

6. There was no response on the part of Mr Kamran to these submissions.

My findings

7. It is clear from [13] of the Appellant's representative's submission that it was asserted that the refusal decision failed to engage with the position of C and that the relevant Home Office policy states that it is not reasonable to expect a British child to leave the United Kingdom. The test pursuant to EX1(a) is whether: (*i) the applicant has a genuine and subsisting parental relationship with"* the qualifying child. A "parental relationship", as distinct from "parent" is not defined in the Rules, however, 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 Upper Tribunal found that:

> *"1. It is not necessary for an individual to have "parental responsibility" in law for there to exist a parental relationship.*
>
> *2. Whether a person who is not a biological parent is in a "parental relationship" with a child for the purposes of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 depends on the individual circumstances and whether the role that individual plays establishes he or she has "stepped into the shoes" of a parent.*
>
> 3. *Applying that approach, apart from the situation of split families where relationships between parents have broken down and an actual or de facto step-parent exists, it will be unusual, but not impossible, for more than 2 individuals to have a "parental relationship" with a child. However, the relationships between a child and professional or voluntary carers or family friends are not "parental relationships".*

8. At [18] of the decision, the First tier Tribunal Judge rejected the contention made on the Appellant's behalf that the requirements of EX1(a) were met, on the basis that his son had not lived continuously in the UK for at least 7 years (which is not disputed) and because C is not his biological child and her mother is her primary carer. At [23] the Judge found that the Appellant looks after the children mostly at night when his partner is at work and takes them to sports activities (swimming and gymnastics regarding C:[10]) and at [29] that the Appellant has established family life with his partner and children.

9. However, the Judge failed to consider whether the Appellant has a parental relationship with C. I find, based on the evidence, the jurisprudence and the Judge's findings of fact set out above, that it is clearly arguable, as was accepted by Mr Bates on behalf of the Respondent, that the Appellant has stepped into the shoes of a parent in relation to C and that he does have a parental relationship with her. Thus the finding of fact that the Appellant is not the biological parent of C is not sufficiently reasoned or detailed so as to

find that the Appellant fails to meet the requirement of EX1(a) of Appendix FM. It follows that I find a material error of law in the decision of First tier Tribunal Beg.

10. In light of the fact that EX1(a) provides that if there is a genuine and subsisting relationship with a qualifying child, consideration then needs to be given to whether, taking into account their best interests as a primary consideration it would not be reasonable to expect the child to leave the UK, this aspect requires further consideration and determination, in light of the evidence.

Decision

11. I find a material error of law in the decision of First tier Tribunal Beg. The appeal is remitted to be re-heard in light of my directions below.

DIRECTIONS

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1. The appeal is remitted for a hearing before the First tier Tribunal, to be listed before a Judge other than First tier Tribunal Judge Beg.

2. The scope of the appeal is confined to:

   (i) whether, as a matter of fact, the Appellant has a genuine and subsisting parental relationship with C;

   (ii) if so, whether or not it would be reasonable to expect C to leave the UK, taking into account her best interests as a primary consideration.

3. If the Appellant wishes to rely upon any additional evidence this should be served in accordance with rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 on the Tribunal and the Home Office Presenting Officers Unit 5 working days before the re-listed hearing date.

4. The time estimate is 1 hour.

Rebecca Chapman
Deputy Upper Tribunal Judge Chapman

15 January 2018