Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13003/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 June 2019	**On 24 July 2019**

Before

THE RT. HON. LORD BOYD OF DUNCANSBY
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

S M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Kumi, Counsel
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision promulgated on 28 May 2019 the Upper Tribunal set aside the decision of the First-tier Tribunal and directed that the appeal would be reheard in the Upper Tribunal.

2. The Upper Tribunal has already made an anonymity direction. We have continued it in order to protect the interests of the appellant's minor child.

3. The appellant in this appeal is a citizen of Tanzania. He has resided in the United Kingdom since January 2008, when he entered with leave in order

to study. He extended his leave in the same category until May 2012. During this time he met a Lithuanian citizen with whom he formed a relationship. He applied for and was granted a residence card recognising his right of residence. However, his application for a permanent residence card was refused and his appeal against refusal dismissed. He became appeal rights exhausted on 9 January 2018. On 17 January 2018 he applied for indefinite leave to remain on the basis of ten years' continuous lawful residence.

4. The application was refused in a decision made on 30 May 2018, which is the decision now under appeal. In short, the main reason the appellant could not qualify under paragraph 276B of the Immigration Rules was that time spent in the United Kingdom as the family member of an EEA national did not count. Additionally, he had no leave when he made his application and he had not shown good reasons for failing to submit his application in time.

5. The application was deemed to be a human rights application and consideration was given to the appellant's right to private and family life under Article 8 of the Human Rights Convention. The appellant was not considered to be able to show he met any of the requirements of paragraph 276ADE(1) of the rules on private life grounds. In particular, he had not shown there were very significant obstacles to his reintegration in Tanzania.

6. The letter went on to explain that it was not considered the appellant had shown there were exceptional circumstances in his case to warrant a grant of leave outside the rules. It was acknowledged that the appellant may have established a subsisting parental relationship with his daughter, V, who was born in the United Kingdom on 2 October 2011. However, the appellant had not shown that V was still residing in the United Kingdom and he had provided a letter from his former partner stating their relationship had broken down. That letter was typed, had a photocopied signature attached and could not therefore be verified. The appellant had not submitted current documentary evidence showing that he played an active role in V's upbringing or that he was assisting her financially.

7. The First-tier Tribunal dismissed the appellant's appeal. It found the appellant did not qualify under the long residence rule, principally because he relied on time spent in the United Kingdom as the partner of an EEA national, which did not count (see TB (EEA national: leave to remain?) Nigeria [2007] UKAIT 00020). The appellant's ex-partner did not give evidence and the tribunal found the appellant to be untruthful and evasive in parts of his evidence. The tribunal found the appellant had two older children in Tanzania in addition to V. It was in V's best interests to continue her relationship with the appellant. He saw her once a month and had regular telephone contact with her.

8. The tribunal recognised that the public interest in maintaining immigration controls does not require a person's removal where they have a subsisting

parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom[1]. The tribunal found V was a 'qualifying child'. However, the evidence of the appellant's ex-partner's income suggested she might not be classified as exercising Treaty rights and could be asked to return to Lithuania. As such, the tribunal did not find it was unreasonable to expect V to leave the United Kingdom and "return" to Lithuania with her mother.

9. The appellant's appeal to the Upper Tribunal was based on the First-tier Tribunal's approach to section 117B(6) of the 2002 Act. Deputy Upper Tribunal Judge Monson found the First-tier Tribunal's decision contained a material error of law in that, when applying section 117B(6)(b), the tribunal had asked itself the wrong question. It was now clear from decisions such as SSHD v AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661 that the reasonableness question had to be answered even in the circumstances that there was no prospect of both parents leaving the United Kingdom. Judge Monson accepted the submission of Mr Kumi that the appellant's ex-partner was not liable to expulsion to Lithuania. Additionally, Judge Monson considered the First-tier Tribunal's finding in the appellant's favour that he had a genuine and subsisting relationship with V was "problematic" such that this issue also required to be reconsidered.

10. The First-tier Tribunal's decision was set aside to be remade in the Upper Tribunal. Directions were issued with Judge Monson's decision permitting the parties to file and serve further evidence relevant to the issues under section 117B(6). The appellant provided a short bundle of additional documents and some copies of his ex-partner's bank statements. Mr Melvin provided a skeleton argument.

11. We heard oral evidence from the appellant in English. His ex-partner was not present and did not give evidence. The appellant told us he has a good relationship with V and he continues to provide financial support for her upkeep by using his savings and borrowing from friends. He is not working because he is not permitted to work. He produced some recent photographs taken during his visits to V. The appellant was cross-examined by Mr Melvin about V's school, V's contact with her half-siblings in Tanzania and her musical tastes and sporting interests. The appellant said he sees V twice or more each month. He speaks to her every day by telephone. He told us that sometimes he collects V from school.

12. Mr Melvin relied on his skeleton argument, which cites AB (Jamaica) and also paragraph 41 of the Presidential decision of this tribunal in JG

[1] Section 117B of the Nationality, Immigration and Asylum Act 2002 reads as follows:

"…

(6) 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."

(s117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC). In paragraph 10 of his skeleton argument, Mr Melvin says,

> "The Home Office has yet to formally amend its policy in light of the recent caselaw which appears to favour a grant of leave in this appellant's appeal, providing evidence is provided that there is currently a subsisting parental relationship."

13. He maintained this stance in his closing submissions but he did not concede the other point about the subsisting parental relationship. He said he had concerns about the non-attendance of the child's mother and the fact the photographs which the appellant relied on were undated.

14. Mr Kumi relied on AB (Jamaica) and PG and asked us to find the appellant has a genuine and subsisting parental relationship with V. He did not pursue the appellant's case on the basis that he can meet the requirements of the Immigration Rules. In particular, he did not argue there were very significant obstacles to the appellant's reintegration in Tanzania.

15. We reserved out decision.

16. We have directed ourselves as follows. There is no threshold test for Article 8 to be engaged outside the rules. In R (on the application of Agyarko) v SSHD [2017] UKSC 11, the Supreme Court explained that the ultimate question in Article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved, applying a proportionality test. The rules and IDIs do not depart from that position and are compatible with Article 8. Appendix FM is said to reflect how the balance will be struck under Article 8 so that if an applicant fails to meet the rules, it should only be in genuinely exceptional circumstances that there would be a breach of article 8. In this context, 'exceptional' means circumstances in which refusal would result in unjustifiably harsh consequences for the individual so would not be proportionate.

17. The rules set out the Secretary of State's policy and, as such, must be given considerable weight (Hesham Ali v SSHD [2016] UKSC 60 at [46]).

18. The best interests of a child are a primary consideration for the tribunal but not necessarily a 'trump card' (ZH (Tanzania) v SSHD [2011] UKSC 4). In Zoumbas v SSHD [2013] UKSC 74 the Supreme Court reviewed the applicable principles and confirmed that it was right to take into account the fact a child is not British in assessing the weight to be given to best interests (see [24]). In particular, the child's best interests do not have the status of a paramount consideration and, although the best interests of the child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant.

19. This case turns on the outcome of the proportionality balancing exercise and, in particular, the impact of section 117B(6) on the public interest.

20. The appellant speaks English and is capable of being financially independent if permitted to work. However, his private life can only be given little weight because his residence in the United Kingdom has always been precarious and, latterly, has been unlawful.

21. The maintenance of immigration controls would usually carry preponderant weight in the balancing exercise but that must depend on the application of section 117B(6). In AB (Jamaica), Singh lJ agreed that, applying the subsection, the public interest has a narrow interpretation and, if the requirements of the subsection are met, no further examination of the public interest is necessary (see [18] to [22]).

22. In the light of the way the case was put to us in submissions, the key factual issue to be determined is whether the appellant currently enjoys a genuine and subsisting relationship with V. We did not find the appellant's evidence to be undermined by cross-examination. On the contrary, it showed us that the appellant has knowledge of V's schooling and tastes consistent with his holding a genuine parental interest in her. The photographs we were shown depict V in the company of the appellant on a number of separate occasions. The photographs are not imprinted with dates but they plainly show a child of V's age. They do not appear to us to have been artificially posed or contrived but, rather, show natural scenes of a young child enjoying the company of her father.

23. As far as the appellant's ex-partner's non-attendance is concerned, we note she has provided a further letter updating the letter provided in January confirming the role which the appellant plays in V's life. We were told the reason she did not attend was that she was "busy". Whilst this explanation was very vague and, when pressed by us, the appellant was unable to shed any further light on it, we do not see any reason to draw an adverse inference from her failure to attend given the fact the relationship between the appellant and V's mother has broken down.

24. On the evidence before us we find it is more probable than not that,

- The appellant is V's biological father;
- V resides lawfully in the United Kingdom with her mother;
- V's mother permits the appellant to have contact with V notwithstanding the breakdown of their relationship which, as far as we can tell, occurred around 2017;
- V is now 7 years and 8 months' old and attends primary school;
- V's mother is supportive of the appellant's contact with V, allowing face-to-face contact about twice a month and daily telephone contact;

- Occasionally, the appellant collects V from school and, occasionally, he is invited to his ex-partner's home for social gatherings;
- The appellant sometimes has unsupervised contact with V and sometimes V's mother or maternal aunt is present at the meetings;
- The appellant attends parents' evenings;
- The appellant provides some financial support for V when he is able to but this is more difficult now that he is not permitted to work;
- It is in V's best interests that she should continue to have a relationship with her father, which could not be maintained effectively by means of telephone or Skype calls.

25. Guidance was provided in AB (Jamaica) on the meaning of a genuine and subsisting parental relationship. Singh LJ approved the analysis of Judge Grubb in R (on the application of RK) v SSHD (s.117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC):

> "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."

26. Singh LJ also approved the following passage from Judge Plimmer's decision in SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC). She said,

> "39. There are likely to be many cases in which both parents play an important role in their child's life and therefore both have subsisting parental relationships with the child, even though the child resides with one parent and not the other. There are also cases where the nature and extent of contact and any break in contact is such that although there is contact, a subsisting parental relationship cannot be said to have been formed. Each case turns on its own facts."

27. Singh LJ went on to reject the interpretation applied by Judge Plimmer, concluding that the words of the section must simply be given their ordinary meaning and no further gloss should be put on them. The exercise is highly fact-sensitive.

28. King LJ agreed and, significantly for the purposes of this appeal, gave the following guidance:

> "109. 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."

29. On the basis of the findings of fact which we have made, we have no difficulty in concluding that the appellant has, giving the words their ordinary meaning, a genuine and subsisting parental relationship with V. He has been a constant presence in her life and lived with her mother during her early years. Despite the breakdown in that relationship, he continues to visit V regularly and he speaks to her daily. He takes an interest in her welfare and education, albeit the main decision-maker is likely to be her mother. From V's point of view, she would be aware that the appellant is her father and would value that relationship. All things being equal, the relationship is likely to deepen as she matures.

30. It is uncontroversial that V is a qualifying child because she has resided in the United Kingdom for more than seven years. We find section 117B(6)(a) applies.

31. Turning to the reasonableness test, provided for in subsection 117B(6)(b), we rely on Mr Melvin's concession that the respondent does not seek to argue that it is reasonable to expect a qualifying child to leave the United Kingdom.

32. We would add that we are entirely comfortable with that concession being made on the facts of this case. The appellant's immigration history has to be left out the equation and the sole focus is on the child (see KO (Nigeria) & Others v SSHD [2018] UKSC 53). V has only known life in the United Kingdom. She is, we understand, a Lithuanian citizen, and enjoys a right of residence in the United Kingdom while her mother chooses to exercise her right of free movement as a citizen of the EU. V is young but she is old enough to be aware of her surroundings and to have become used to her life and routines. She will have made friends and will have begun to pursue her interests, such as the music and sport we were told about. She is of mixed race and has an important interest in learning about and maintaining contact with her father's cultural roots, as well as those of her mother. Whilst she might have some understanding of the Lithuanian language and might have the ability to adapt to life in another country, we do not regard it as reasonable to uproot her at this stage of her life.

33. For all these reasons, we find that section 117B(6) answers the proportionality question. The decision under appeal represents a

disproportionate breach of the appellant's right to enjoy his private and family life in the United Kingdom and his appeal is allowed.

Notice of Decision

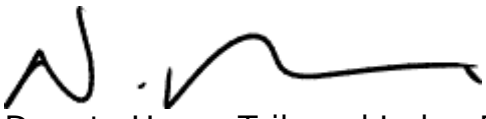
The decision of the First-tier Tribunal is set aside. The following decision is substituted:

The appeal is allowed on human rights grounds (Article 8).

Anonymity

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 11 July 2019



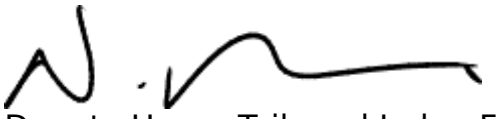
Deputy Upper Tribunal Judge Froom

Fee Award Note: this is **not** part of the decision.

In the light of our decision to re-make the decision in the appeal by allowing it, we have considered whether to make a fee award. However, we have decided not to make any fee award in view of the fact the appeal was allowed in large measure due to the oral evidence provide by the appellant and the decision-maker was entitled to reach the decision s/he reached on the limited information provided with the application.

We make no fee award.

Signed Date 3 July 2019



Deputy Upper Tribunal Judge Froom