Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03455/2020 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre Remotely by Microsoft Teams On 17 June 2021	**Decision & Reasons Promulgated On 29 June 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KEHINDE SOGBAMU

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr S Mustafa instructed by Waterhouse Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal: Kehinde Sogbamu (the appellant); the Secretary of State for the Home Department (the respondent).

Introduction

2. The appellant is a citizen of Nigeria who was born on 16 April 1986.

3. The appellant entered the United Kingdom on 8 March 2012 with entry clearance as a visitor. The appellant overstayed when his leave as a visitor expired. On 17 July 2019, the appellant was served with RED.0001.

4. On 14 November 2019, the appellant made an application for leave based upon his private and family life in the United Kingdom and under Art 8 of the ECHR.

5. The basis of that claim was his relationship with his daughter ("E"), a British Citizen who had been born on 13 October 2018 as a result of the appellant's relationship with "Ms B" who is a British Citizen. That latter relationship, which the appellant says began in the first few weeks he was in the UK, subsequently broke down. At the time of his application, the appellant was in the process of seeking a child arrangement order.

6. On 17 February 2020, the Secretary of State refused the appellant's application for leave as a parent under Appendix FM of the Immigration Rules (HC 395 as amended) and under Art 8 of the ECHR.

7. The appellant appealed to the First-tier Tribunal. In a decision sent on 21 December 2020, Judge N J Osborne allowed the appellant's appeal under Art 8 of the ECHR.

8. On 9 February 2021, the Secretary of State sought permission to appeal against that decision. Permission to appeal was initially refused by the First-tier Tribunal (Judge O'Garro) on 22 January 2021. However, the appellant's renewed application for permission made to the Upper Tribunal was granted by UTJ Pickup on 24 March 2021.

9. The appeal was listed for a remote hearing at the Cardiff Civil Justice Centre on 17 June 2021. I was based in the Cardiff CJC and Mr Whitwell, who represented the Secretary of State, and Mr Mustafa, who represented the appellant, joined the hearing remotely by Microsoft Teams.

The Judge's Decision

10. Before Judge Osborne, the central issue both under the Immigration Rules and in respect of Art 8 was whether, on the basis of the evidence, the appellant could establish that he had a "genuine and subsisting relationship" with E who is a qualified child by virtue of being a British Citizen, importantly for the purposes of the appeal, on the ground that the appellant's removal would breach Art 8 of the ECHR. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("NIA Act 2002") provides that:

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
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> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
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> (b) it would not be reasonable to expect the child to leave the United Kingdom".

11. It was common ground before Judge Osborne that if the appellant satisfied the requirements of s.117B(6) then his removal would be disproportionate and a breach of Art 8 of the ECHR. It was conceded by the Presenting Officer at the hearing that, if the appellant did indeed have a "genuine and subsisting parental relationship" with E, it would not be reasonable to expect E to leave the United Kingdom.

12. In his decision, Judge Osborne concluded that the appellant did have a "genuine and subsisting parental relationship" with E. The judge's reasons are set out at paras 11–14 of his decision as follows:

> "11. At the outset of the appeal hearing Miss Rushforth (Home Office Presenting Officer) confirmed that the Appellant meets the suitability requirements of the Immigration Rules. She further confirmed that the issues to be decided are:
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> (i) The Appellant's eligibility under the Immigration Rules.
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> (ii) Whether the Appellant has a genuine and subsisting relationship with his British citizen daughter, [E]. In the papers provided it is patent that [Ms B] ([E's] mother) accepts that immediately after [E's] birth the Appellant exercised contact with [E]. [Ms B] asserts that she encouraged and promoted that contact.
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> (iii) The Appellant and [Ms B] disagreed upon the reason contact stopped in March 2019. The Appellant states that [Ms B] stopped the Appellant's contact with [E] because instalments of periodical payments made by the Appellant to [Ms B] on behalf of [E] were persistently late.
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> [Ms B] refutes that assertion. She states that the Appellant simply stopped attending for contact. [Ms B] asserts that he is not genuinely interested in contact. She further asserts that his application for contact now is a mere ploy in an attempt to prevent his removal from the UK by the Respondent. Briefly, [Ms B] asserts that even if the Appellant is denied contact by the court he will continue to make applications and will continue to do all he can to establish some sort of private life with [E] but only to prevent his removal from the United Kingdom not because he wishes to have a relationship with [E].
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> 12. There have been fully contested proceedings before the Family Court sitting at Plymouth. There was a hearing before District Judge Eaton-Hart on 11 June 2020. The court ordered that the Appellant should have supervised contact at a contact centre paid for by him on alternate weeks. Contact was duly arranged. The Appellant has now exercised contact on 13 and 27 August 2020; 10 and 24 September 2020; and 8 and 22 October 2020. Since then the Appellant has not seen [E] due to the COVID-19 lockdown. Additional contact sessions have been arranged for 3 December and 17 December 2020 at the same contact centre. The Appellant has so far as he has been able, committed to the contact sessions that have been arranged. He has paid for those sessions. The Appellant lives in Bristol. He has travelled a considerable distance to exercise contact in the Plymouth area.
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> 13. On the relatively concise information which is presently before this Tribunal, I find that the Appellant has done all that can reasonably be expected of him to promote a relationship between himself and [E].

> 14. Although the Tribunal has not been provided with a specific date, there will shortly be a review of the contact position before the Family Proceedings Court in Plymouth. There is no information before this Tribunal to suggest that contact has been upsetting for [E] or that there has been any difficulty at all with it. On the evidence before the Tribunal therefore I find that the Appellant has and is pursuing a genuine and subsisting parental relationship with a child who is under the age of 18 years, is in the UK, and is a British citizen pursuant to EX.1.(a)".

13. At para 15, the judge went on to find that there was no evidence that the relationship between the appellant and E was not in E's best interests.

14. Having dealt with the issue of whether there was a "genuine and subsisting parental relationship" under the Rules, the judge went on to apply s.117B(6) in para 18 of his decision and concluded that the appellant's removal would breach Art 8 of the ECHR.

The Secretary of State's Grounds

15. The respondent relies upon two grounds. First, it is said that the judge erred in concluding there was a "genuine and subsisting parental relationship" between the appellant and E because he failed to resolve a material issue, namely the conflicting evidence of the appellant and Ms B as to why the appellant ceased contact with E in March 2019 as set out in para 11(iii) of the judge's decision. Secondly, it is said that there was no evidence that the appellant had "any input into the decisions" in his daughter's life, he was not the primary or secondary carer of his daughter and provided no financial support. That ground appears to assert that it was, therefore, unreasonable or irrational (though neither of those terms is used in the ground) to find that there was a "genuine and subsisting parental relationship" between the appellant and E.

The Submissions

16. During the oral submissions, I drew the representatives' attention to the decision of the Court of Appeal in SSHD v AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661 ("AB(Jamaica)") in which the court considered two issues: first, whether it is necessary in order to succeed under s.117B(6) to establish that the individual concerned plays an active role in the child's life; and secondly, the proper approach to establishing a "genuine and subsisting parental relationship", particularly in the context of a parent who only has direct or indirect contact with the child who lives with the other parent in the UK.

17. I will shortly return to this decision but, for the present, having drawn this decision to the attention of the representatives, Mr Whitwell indicated that he no longer relied upon ground 2 as the Court of Appeal had concluded that it was not necessary, in order to succeed under s.117B(6), to establish that the relevant parent played an active role in the child's upbringing. Instead, he relied exclusively upon ground 1.

18. In that regard, Mr Whitwell submitted that the judge had erred in law in reaching his positive finding under s.117B(6) without resolving the dispute in the evidence on the

material fact as to whether or not the appellant had ceased contact with E in March 2019 because he had been prevented from continuing contact by Ms B or because, as Ms B contended, because he simply stopped attending for contact and was not genuinely interested in pursuing a relationship with E.

19. Mr Whitwell submitted that Judge Osborne had, in effect, treated this case as one where merely establishing direct contact was sufficient to satisfy the requirement in s.117B(6) that there was a "genuine and subsisting parental relationship". That, Mr Whitwell submitted, was more akin to the approach in cases where an individual relied upon Art 8 on the basis that they wished to pursue contact proceedings in the UK as set out in the Court of Appeal's decision in Mohan v SSHD [2012] EWCA Civ 1363.

20. Mr Whitwell also referred to the bundle of documents submitted by the appellant's representatives for this hearing under a rule 15(2A) application. That bundle contains an updated Family Court Proceedings Order following a hearing on 16 April 2021 which varied the earlier order replacing direct contact between the appellant and E with limited indirect contact. Mr Whitwell also pointed to two reports from the Contact Centre following supervised contact sessions on 13 August 20203 and December 2020. Mr Whitwell accepted that the April 2021 court order postdated Judge Osborne's decision as, indeed, did the contact report for 3 December 2020, at least it postdated the hearing before Judge Osborne on 23 November 2020. Mr Whitwell acknowledged, therefore, that there were some difficulties in relying upon these documents at the error of law stage. However, he submitted that the earlier document relating to the contact session on 13 August 2020 did predate Judge Osborne's decision and should be admitted under Ladd v Marshall principles. However, Mr Whitwell accepted that he had no basis for asserting that this document had been in the possession of the appellant or his legal representatives (if any at the relevant time). But, he submitted, it might be relevant as Judge Osborne had observed in para 15 of his decision that there was no evidence concerning the continuing relationship not being in the best interests of E.

21. On behalf of the appellant, Mr Mustafa relied upon his skeleton argument which he filed with the UT on the morning of the hearing. First, he submitted that Judge Osborne had impliedly found in the appellant's favour on the disputed fact in para 11(iii). He accepted that Judge Osborne had not done so explicitly but it was sufficient that he had done so implicitly. He accepted that the motivation of the appellant in ceasing contact with E in March 2018 was relevant to the judge's assessment of whether there was a "genuine and subsisting parental relationship" with E. However, Mr Mustafa submitted, relying upon the matters set out in para 3(a)–(h) of his skeleton argument, that Judge Osborne had taken all relevant matters into account and given reasons for his conclusion that there was a "genuine and subsisting parental relationship" between the appellant and E. He relied on the following which the judge had found in the appellant's favour;

    (i) the appellant had exercised contact immediately after the child's birth;

(ii) the appellant had exercised contact with E on six occasions between August and December 2020 under supervision at a Contact Centre;

(iii) contact only stopped thereafter as a result of COVID-19;

(iv) the appellant was committed to further additional contacts;

(v) the appellant paid for the contact sessions;

(vi) the appellant travelled considerable distances to exercise contact at the Contact Centre; and

(vii) the appellant had done all that could reasonably be expected from him to promote his relationship with E.

22. As regards the appellant's bundle submitted for the UT hearing, Mr Mustafa indicated that he had no instructions as to how the documents had been obtained by his instructing solicitors or whether the earlier report from the Contact Centre had been in the possession of the appellant at the time of the FtT hearing.

23. Mr Mustafa submitted that the judge had, as a result, reached a sustainable finding that there was a "genuine and subsisting parental relationship" between the appellant and E and, in the light of the fact that the Presenting Officer had conceded that if that was the case then it would not be reasonable to expect E to leave the UK, the judge had been entitled to find that s.117B(6) applied and to allow the appeal under Art 8 of the ECHR.

Section 117B(6) and AB(Jamaica)

24. It was common ground in this appeal that the crucial issue under both the Immigration Rules relating to leave as a partner under Appendix FM, in particular R-LTRPT and s.117B(6) was whether the appellant had established that he had a "genuine and subsisting parental relationship" with E.

25. The proper approach to that phrase was examined by the Court of Appeal in AB (Jamaica). In that case, the Court of Appeal recognised that under s.117B(6), it was not necessary to establish that the individual played an active part in the child's upbringing or was directly concerned with their care. The Court of Appeal, rejected the contrary approach which had been accepted by the Upper Tribunal in SR (Subsisting Parental Relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC) where reliance had been placed upon the Court of Appeal's earlier decision in SSHD v VC (Sri Lanka) [2017] EWCA Civ 1967. Singh LJ (with whom King and Underhill LJJ agreed) concluded that the Court of Appeal in VC (Sri Lanka) was concerned with different provisions in para 339 of the Rules and that it would be wrong to transplant what was said about that provision into the differently worded s.117B(6) (see [94]–[97]). Singh LJ (at [98]) said this:

> "In my view, the words used in the Act with which we are now concerned are words of the ordinary English language and no further gloss should be put upon them. Their

> application will depend on an assessment by the relevant court or Tribunal of the facts of the particular case before it. The exercise is a highly fact-sensitive one".

26. On the facts of the AB (Jamaica) case, Singh LJ concluded that the Upper Tribunal could not reasonably have reached the conclusion that there was a "genuine and subsisting parental relationship" where the father had only "indirect contact" (direct contact was prohibited) and it was of a very limited kind, essentially he was permitted to communicate with his child only by post and that any letters, postcards or presents had to be sent to the address of a maternal grandparent and not to his address (see [100]). Singh LJ also relied on the fact that it was clear from the CAFCASS reports that direct contact was prohibited because of the father's history and conduct, for example domestic abuse and inappropriate comments on social media, and it was clear that the very limited contact was permitted was for the purpose of "contributing to [the child's] understanding of his dual heritage *identity* and not in order to maintain the *relationship* with his father" ([at [101]).

27. In her judgment, King LJ provided further guidance on the approach to establishing a "genuine and subsisting parental relationship" for the purposes of s.117B(6) in the context, particularly where direct contact or indirect contact was the linkage between the individual and the child concerned. In her judgment, inadvertently, King LJ referred to the statutory requirement as being one of a "genuine and *substantial* parental relationship". The statutory phrase is, of course, a "genuine and *subsisting* parental relationship". For the purposes of exposition, I have corrected the quotations from King LJ's judgment to the correct statutory phrase. Nothing in her reasoning turns upon the inadvertent substitution of the word "substantial" for "subsisting".

28. First, at [106], King LJ endorsed Singh LJ's view (at [90]) that whether there was a "genuine and subsisting parental relationship" would depend upon the assessment of the facts in any particular case and that "this type of evaluation is highly fact-specific".

29. Secondly, at [108] King LJ noted that:

> "The recognition of the importance to a child of contact with a parent with whom he is not living is also reflected in the terms of section 117B(6)(a)".

30. Thirdly, at [109]–[111], King LJ noted that it was not necessary for the absent parent to have "parental responsibility"; that a court order permitting direct contact was not conclusive evidence of the necessary parental relationship; and a court's limitation of contact to "indirect contact" may be relevant but that, it was by no means inevitable, that a "genuine and subsisting parental relationship" could not be established absent direct contact. King LJ said this:

> "109. In order to demonstrate a genuine and [subsisting] 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 [subsisting] 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 [subsisting] 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.
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> 110. So far as indirect contact is concerned, it should be borne in mind that the Family Court typically strives to promote regular, unsupervised, face to face contact between a child and his or her parent. If a court limits that contact to indirect contact only, that is because the court, in a decision making process in which the child's welfare is paramount (Children Act 1989, section 1) has decided that such a significant limitation on the parental relationship is in the best interests of the child in question and the reasons for such a decision having been reached by the judge will be highly relevant to the tribunal's consideration of section 117B(6)(a).
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> 111. Having said that, whilst perhaps more likely, it is by no means inevitable that a tribunal will conclude that a parent has no "genuine and [subsisting] parental relationship" absent direct contact. It may be that there has been a long gap in contact and that indirect contact marks a gentle re-introduction, or that a parent has to show (and is showing) commitment to indirect contact before direct contact can be introduced. Where however a Family Court has made a final order limiting contact to indirect contact, particularly when there is no provision for progression to direct contact, the tribunal should look closely at the reasons which led to the court making such a restrictive order."

Discussion

31. In my judgment, the Secretary of State cannot rely upon the material not before Judge Osborne but made available to the Upper Tribunal with a rule 15(2A) application at the hearing before me. The documents which postdate the hearing cannot assist to establish whether Judge Osborne erred in law in reaching his positive finding that there was a "genuine and subsisting parental relationship" between the appellant and E. Further, I see no basis upon which applying Ladd v Marshall principles the August 2020 report from the Contact Centre can be admissible given that, as Mr Whitwell candidly accepted, there is no evidence that this document was in the possession of the appellant or, if he had any at the relevant time, his legal representatives.

32. Although Judge Osborne was not referred to AB (Jamaica), the approach of the court sets out, and gives guidance upon, a determination of whether s.117B(6) applied in a situation where the appellant has contact with E, the qualifying child.

33. As the Court of Appeal made plain, that is essentially a factual matter which is "highly fact-specific". As Singh LJ recognised at [102] a court, and that includes the Upper Tribunal on appeal:

> "should not likely interfere with the conclusion of a lower court or Tribunal on what is essentially a mixed question of law and fact, as it involved the application of statutory language to the facts of this case".

34. Here, Judge Osborne ultimately reached a conclusion that there was a "genuine and subsisting parental relationship" between the appellant and E. Mr Mustafa, correctly

in my view, accepted that it was relevant in reaching that assessment to resolve the factual issue that was presented to Judge Osborne: whether the appellant stopped contact with E in March 2019 because, in effect, as Ms B set out in her witness statement in the Family Court Proceedings, the appellant was not interested in E and contact with her other than in order to pursue, more successfully, an immigration claim to remain in the UK, *or* whether the true position was that Ms B prevented the appellant's contact with E because he was not making the periodical payments required of him.

35. It may be that Mr Mustafa is correct that the judge, if it was clear to him that this was a material matter to resolve, resolved it implicitly (though not explicitly) in the appellant's favour. The difficulty is that the judge gave no reasons why he preferred the evidence of the appellant to that of Ms B on that point. It could be, given that the appellant gave oral evidence and Ms B's evidence was only in the form of a written statement, that the judge was impressed by the appellant's truthfulness and so accepted what he said. That is necessarily speculation given that the judge made no reference to resolving the dispute on this material matter.

36. The parties, in particular the losing party, is entitled to know the reasons why they have lost the case. That is just as applicable in an appeal where an appellant is successful as where the appeal is unsuccessful. The point was made by the Upper Tribunal in Budhathoki (reasons for decision) [2014] UKUT 00341 (IAC) (Haddon-Cave J and UTJ Coker). The judicial headnote is as follows:

> "It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost".

37. In my judgment, Judge Osborne's reasoning does not resolve a "key conflict in the evidence". The judge has, in effect, taken the appellant's involvement in direct contact on six occasions as, in itself, establishing that he has a "genuine and subsisting parental relationship". Reaching that conclusion, and in concluding at para 13 of his decision, that the appellant has done "all that can reasonably be expected of him to promote" the relationship between himself and E, the judge was required to give reasons why he did not accept the evidence of Ms B, but rather that of the appellant and that the appellant was "genuinely" engaging in contact proceedings in order to establish the requirement in s.117B(6)(a). The matters relied upon by Mr Mustafa in his submissions and in para 3 of his skeleton argument, which I set out above, were relevant and had to be applied bearing in mind what was said in AB(Jamaica). However, without a resolution of the conflict in the evidence about the appellant's motivation for engaging in direct contact with E, the judge gave inadequate reasons for his ultimate finding in relation to s.117B(6) and for allowing the appeal under Art 8 of the ECHR. That was a material error of law and his decision, as a result, is not sustainable.

Decision

38. For the above reasons, the decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 involved the making of an error of law. That decision cannot stand and is set aside.

39. It was accepted by both representatives that if that was my conclusion on the error of law issue, there needed to be a new evidential hearing and Mr Mustafa invited me to remit the appeal to the First-tier Tribunal. Mr Whitwell accepted that the appeal might well have to be remitted but he was neutral on that issue.

40. In my judgment, as a result of the error of law conclusion I have reached, none of the judge's findings can be preserved and there must be a rehearing of the appeal *de novo*. Having regard to para 7.2 of the Senior President's Practice Statement, and the nature and extent of the fact-finding required, the proper disposal of the appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge N J Osborne. None of the judge's findings are preserved.

Signed

Andrew Grubb

Judge of the Upper Tribunal
21 June 2021