



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/07812/2016

**THE IMMIGRATION ACTS**

Heard at HMCTS Employment Tribunals, Decision and Reasons Promulgated  
Liverpool

On 22 February 2018

On 27 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

LOA

(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr S Mohammad of International Immigration Advisory Services

For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

This appeal concerns a child. Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their families. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

## DECISION AND REASONS

- 1 The appellant, a national of Nigeria, appeals against the decision of the Judge of the First tier tribunal Fox, dated 3 March 2017, dismissing his appeal against the Respondent's decision of 4 March 2016 refusing his human rights claim.
- 2 The appellant made an application for further leave to remain on form FLR (FP) on or around 7 December 2015, for leave to remain under appendix FM/Article 8 grounds, to remain in the UK with his spouse, OMA, a Nigerian national with leave to remain in the UK as a refugee up to 2018. The appellant had last entered the United Kingdom on 8 June 2015 using a multi visit visa, valid from 26 March 2015 to 26 March 2016.
- 3 It is apparent that the appellant had visited the UK as a visitor on a number of previous occasions. Indeed, the application form states that the appellant had been in a relationship with OMA since August 2011, and had resided at the same address as her since 1 November 2013.
- 4 In the decision of 4 March 2016, the respondent refused the application for leave to remain on the grounds which were, in summary as follows:
  - (i) the appellant had used deception in his previous application for entry clearance, having stated that he intended to come to the UK to rest, visit historical places and do a little shopping for five days, and stating he had no friends or relatives in the UK, whereas representations accompanying the present application provided that he had been residing in the UK with his partner since 1 November 2013; the appellant had therefore used deception and had attempted to circumvent immigration laws, and his presence in the UK was not conducive to the public good because of his conduct, character, associations, or other reasons, making it undesirable to allow him to remain in the UK, and therefore did not meet the requirements of S - LTR .1 .6 in the suitability requirements of appendix FM;
  - (ii) although it was accepted that the appellant was in a relationship with OMA, and met the requirements LTRP .1 .1 (d) (iii) of Appendix FM, by reason of meeting the requirements of EX1, the appellant had entered the UK as a visitor, and therefore failed to meet the immigration status requirements of appendix FM as set out in E- LTRP. 2.1;
  - (iii) the appellant did not have a child in the UK;
  - (iv) regarding the appellant's private life in the UK, the appellant did not meet the suitability requirements (for the reasons previously set out) and in any event, did not mean requirements of paragraph 276ADE (1) (vi), on the basis that there were not very significant obstacles to his integrating into Life in Nigeria.

5 Also in March 2016 (but after the respondent's decision), OMA gave birth to a son, AMA. The appellant is named as the father of the child on the child's birth certificate.

6 At the hearing before the judge, the respondent took the position that the child 'may not be' that of the appellant [23]. It was observed that no DNA evidence had been produced and it was argued by the respondent that it should have been. The judge records the respondent's submission that the issue of the relationship between the appellant and AMA had been in dispute and known to him for some considerable period of time, but for my part, I cannot see how that is the case – given that the child was not born at the date of decision, and all that the refusal letter said, correctly, was that the appellant then had no child.

7 The findings of the judge included the following:

“18 ... I am satisfied that the appellant's intentions were less than honourable and devoid of reliability and truth. He clearly set about a practice and programme of deceiving the Entry Clearance officers. He cannot be accepted as a truthful and reliable witness as truth and fact.

19 ... When stating (*in his entry clearance application*) he had no friends in the United Kingdom he was clearly lying. It was all part of his master plan to receive so as to get access to the United Kingdom.

20 He continued to perpetrate his misrepresentations and falsehoods throughout his stay in United Kingdom. He married his wife on 16 October 2015. He made no attempt to notify the Home Office of his intentions to marry or vary the terms of his Leave to Enter. This was clear and intentional action to prolong his stay in United Kingdom and further his needs.

21 It is clear, on the evidence before me today that the Appellant used misrepresentation, falsehoods and declarations that were dishonest to obtain his visit visa. That undermines the legitimacy of his current stay.”

8 The judge further held: at [23] that it was for the appellant to prove that the birth certificate can be relied upon, Tanveer Ahmed followed; the failure to produce a DNA report may have an undermining impact upon his claim to be the father of the child; he was not satisfied that the appellant had a child; this claim was 'no more than another vehicle to perpetuate this claim'; at [28] that the appellant was not the father of 'this child', 'because of his propensity for deception'; 'were his deception, misrepresentation and lack of credibility not an issue I would be less inclined to consider that return to Nigeria would be reasonable'; at [38], that the appellant had not established that he had a child who was a 'British subject'; or was the father a qualifying child [39]; or had a genuine and subsisting relationship with a qualifying child [39]. It is thus clear that the judge's view of the appellant's use of deception significantly influenced his assessment of whether the appellant was in fact AMA's father.

- 9 At [30], the judge held that the child that the appellant claimed was his, was still young and would not miss the person who is claimed to be the father, while the appellant returned to Nigeria as to make a fresh and genuine application for settlement. Further: "There is no evidence before me today that would suggest the appellant and his spouse could not meet elsewhere in the world, if they choose to do so. I accept that she cannot return to Nigeria but her leave to remain expires in 2018. That is only a short time from now."
- 10 At [39] the judge held that "...little weight should be given to the claimed relationship between him and the child's mother as such a relationship was established when the appellant was in the United Kingdom with unlawful intentions i.e. to remain in the United Kingdom at all costs and having use the Visa system to gain access, unlawfully through the lack of genuine intention, to the UK."
- 11 The appeal was dismissed.
- 12 In an application for permission to appeal dated 17 March 2017, the appellant argues in his first ground that the judge had erred in law by failing to accept the birth certificate as genuine, and in referring to the case of *Tanveer Ahmed v SSHD* [2002] UKIAT 00439, which was said to be relevant only to documents issued overseas. The authenticity of the birth certificate should not have been doubted; if it had been accepted, issues other issues which have arisen, for example whether or not there was a family life between the child. The appellant also submitted a DNA report with the application for permission to appeal, post dating the judge's decision, but which was said to prove beyond any doubt that the appellant was the father of the child.
- 13 In a second ground, the appellant argues that the judge erred in failing to make any findings about the testimony of the appellant's wife, who had appeared as a witness and was cross-examined. Her evidence was vital to the issues in the appeal, for example corroborating evidence about the child's paternity.
- 14 Permission to appeal was granted by Judge of the First tier Tribunal Hodgkinson on 19 September 2017, finding the second ground arguable, but granting permission generally.
- 15 In a rule 24 response dated 30th October 2017, the respondent resisted the appeal, and argued that the British Nationality (Proof of Paternity) (Amendment) Regulations 2015 with effect from 10th September 2015, had the effect that the appellant being named on the birth certificate was not sufficient proof of paternity. Further, the DNA evidence referred to in the grounds had not been received by the respondent.
- 16 Upon reviewing the papers prior to the appeal hearing, I caused the following direction to be issued:
- “(i) At the hearing on 22.2.18 the parties are to address the Tribunal as to whether The British Nationality (Proof of Paternity) Regulations 2006 (as

amended ) have any relevance to the present appeal, given that such regulations are relevant under s.50(9A)(c) of the British Nationality Act 1981 for the purposes of defining who a child's father is for the purposes of that Act. However, a child born to the Appellant and a mother with limited leave to remain in the UK as a refugee would not be British in any event.

(ii) The parties are further to address the Tribunal as what law (whether UK or other law) is relevant to determine whether, under Appendix FM, the Appellant is to be treated as being the father of the child.

(iii) If the parties are able to produce one within the time frame, a short skeleton argument from both parties on these points would be beneficial to the Tribunal."

- 17 Before me, I heard from Mr S Mohammad for the appellant, and Mr Harrison for the respondent. Mr Muhammad relied upon his grounds of appeal, and it suggested that the DNA evidence before the tribunal was determinative of the paternity of AMA.
- 18 For his part, Mr Harrison excepted the judge had not made any reference to the evidence of the appellant's wife. He confirmed from the note on the respondent's file that she had given oral evidence. He accepted that the judge's failure to make any reference to the wife's evidence represented a material error of law, such evidence being relevant to the issue of the paternity of AMA.

### **Discussion**

- 19 The task before the judge was to determine whether the respondent's decision was unlawful under s.6 Human Rights Act 1998, on the grounds that refusing leave to remain would amount to a disproportionate and therefore unlawful interference with the appellant's family and private life, as protected under Article 8 ECHR.
- 20 The appellant claimed to be the father of AMA, and that he had a family life with that child. What law was relevant to the assessment of those assertions? Unfortunately, following my direction, neither party had sufficient opportunity to prepare any written argument as to the law relevant to how the issue of AMA's paternity was to be determined in these proceedings.
- 21 In his written case, the respondent sought to defend the judge's decision by reference to The British Nationality (Proof of Paternity) Regulations 2006, as amended ('the 2006 Regulations') I shall consider those regulations. They prescribe certain requirements as to proof of paternity *for the purpose of the British Nationality Act 1981* ('BNA 1981'). The regulations provide:

"2. For the purposes of section 50(9A)(c) of the British Nationality Act 1981, the prescribed requirement as to proof of paternity is that the person must satisfy the Secretary of State that he is the natural father of the child.

3. The Secretary of State may determine whether a person is the natural father of a child for the purpose of regulation 2, and for this purpose the Secretary of State may have regard to any evidence which he considers to be relevant, including, but not limited to –

- (a) DNA test reports;
- (b) court orders; and
- (c) birth certificates.”

22 It is appropriate to set out s.50(9A)(c) and (9B) of the BNA 1981:

(9A) For the purposes of this Act a child's father is –

(a) the husband, at the time of the child's birth, of the woman who gives birth to the child,

or

(b) where a person is treated as the father of the child under section 28 of the Human Fertilisation and Embryology Act 1990 or section 35 or 36 of the Human Fertilisation and Embryology Act 2008, that person, or

(ba) where a person is treated as a parent of the child under section 42 or 43 of the Human Fertilisation and Embryology Act 2008, that person, or

(c) where none of paragraphs (a) to (ba) applies, a person who satisfies prescribed requirements as to proof of paternity.

(9B) In subsection (9A)(c) “prescribed” means prescribed by regulations of the Secretary of State;

and the regulations –

(a) may confer a function (which may be a discretionary function) on the Secretary of State or another person,

(b) may make provision which applies generally or only in specified circumstances,

(c) may make different provision for different circumstances,

(d) must be made by statutory instrument, and

(e) shall be subject to annulment in pursuance of a resolution of either House of Parliament.”

23 It is clear that the provisions of BNA 1981 and the 2006 Regulations apply to issues of determination of British nationality. However, as AMA’s mother is a Nigerian national with limited leave to remain in the UK as a refugee, then if the appellant, a Nigerian national with limited leave to remain as a visitor, is AMA’s father, then AMA would not have been born British. The BNA 1981 and the 2006 Regulations do not therefore appear to have direct effect at the present time. However, it may at some point be possible for AMA to register as a British citizen under s.1 (3) British Nationality Act 1981, if OMA settles in the UK after five years leave to remain as a refugee. The Act, and the Regulations, would apply at that point.

24 However straight forward and common sense it may be to obtain DNA evidence to establish the paternity of a child, it is not clear to me as a matter of law what role DNA evidence should have in the determination of AMA’s paternity in the present case, at the present time, AMA not being British.

- 25 However, insofar as BNA 1981 and the 2006 Regulations shed any light at all on how that issue was to be determined, I find that the respondent's reliance on the 2006 Regulations in the rule 24 reply is misplaced. If AMA had any claim to be treated as British at birth, then the appellant should unquestionably have been treated as AMA's father, even in the absence of DNA evidence or even the inclusion of his name on AMA's birth certificate, because he was married to OMA at the time of AMA's birth; see BNA s.50(9A)(a) BNA 1981. The 2006 Regulations, prescribed under s.50(9A)(c) of the Act, would only be engaged if none of the provisions of s.50(9A)(a) to (ba) apply.
- 26 Further and in any event, the respondent often argues, as he does in the rule 24 reply in the present case, that under the 2006 Regulations, a father being named on a birth certificate is not sufficient proof of paternity. This amounts to a misdirection in law. The 2006 Regulations provide that the person must satisfy the Secretary of State that he is the natural father (Reg 2), and the Secretary of State *may have regard to any* evidence which he considers to be relevant, *including but not limited to* DNA test reports, court orders, and birth certificates. That scheme does not mandate that DNA evidence is to be provided. If the respondent treats the provisions of DNA evidence as mandatory, this is clearly a fettering of discretion and a misdirection in law.
- 27 In considering what other statutory provisions might apply when assessing the relationship between the appellant and AMA, it is to be noted that as well as AMA not presently being British, AMA has also not resided in the UK for seven or more years. He is thus not a qualified child for the purposes of S.117B(6) NIAA 2002. If he had been, it would have been a relevant question to ask whether the appellant had a genuine and subsisting parental relationship with AMA. As is apparent from R (on the application of RK) v SSHD (S117B(6); 'parental relationship') IJR [2016 ] UKUT 31 (IAC), it is not necessary for a person to be the biological parent of a child in order to have a parental relationship with a child for the purposes of s.117B(6) NIAA 2002, nor is it necessary for such person to have parental responsibility under the children act 1989 to have a parental relationship.
- 28 The appellant may however have parental responsibility for AMA under s.2 Children Act 1989, which provides that where a child's 'father' and 'mother' were married to each other at the time of his birth, they shall each have parental responsibility for the child. Whether the appellant has parental responsibility for AMA, is therefore dependent on whether he is to be treated as AMA father, for the purposes of Children Act 1989. However, the Children Act does not itself define 'father'.
- 29 Dealing with the appellant's grounds of appeal, I find that the judge did not treat the UK-issued birth certificate as non-genuine; rather, I find that I agree with the analysis of Judge Hodgkinson in the decision granting permission to appeal, that the judge did not find that the birth certificate was false; rather, he concludes it is not reliable evidence of the appellant's paternity.

- 30 It seems to me, however, that the judge erred in law in a number of respects when assessing the appellant's asserted relationship with AMA.
- 31 Firstly, the judge has not actually made any finding on the key issue; does the appellant have a family life with AMA? Even if the judge was of the view that the appellant had no child [28], and had not established he had a child who was a 'British subject' or had a genuine and subsisting relationship with a 'qualifying child' for the purposes of s.117B(6) NIAA 2002, the judge made no findings as to whether the appellant had family life with AMA. The finding that the appellant did not have a genuine and subsisting relationship with a qualifying child (a child who is British or been in the UK for 7 or more years) is not a complete answer to the question of whether the appellant had a genuine and subsisting relationship with AMA, who is not a qualifying child.
- 32 The notion of family life is an autonomous concept (*Marckx v. Belgium*, § 31). Consequently, whether or not "family life" exists is essentially a question of fact depending upon the real existence in practice of close personal ties (*Paradiso and Campanelli v. Italy* [GC], § 140). The Court will therefore look at de facto family ties, such as applicants living together, in the absence of any legal recognition of family life (*Johnston and Others v. Ireland*, § 56).
- 33 A child born of a marital relationship is ipso jure part of that "family" unit from the moment and by the very fact of his or her birth (*Berrehab v. the Netherlands*, § 21). Thus, there exists between the child and its parents a bond amounting to family life. In spite of the absence of a biological tie and of a parental relationship legally recognised by the respondent State, the Court found that there existed family life between the foster parents who had cared for a child on a temporary basis and the child in question, on account of the close personal ties between them, the role played by the adults vis-à-vis the child, and the time spent together (*Moretti and Benedetti v. Italy*, § 48; *Kopf and Liberda v. Austria*, § 37).
- 34 Secondly, in making his finding that the appellant was not AMA's father, the judge errs in failing to take relevant evidence into account: the evidence of OMA. She said in her witness statement that the appellant was the natural father of AMA, that they all lived together, and that the appellant was the main carer of AMA whilst she worked.
- 35 The judge fails to make any reference to the evidence of AMA. I therefore agree the appellant's second ground, and Mr Harrison, that the judge materially erred in law in the appeal, in failing to have regard to relevant evidence as to the relationship with the appellant had with AMA.
- 36 Thirdly, in light of my legal analysis above as to relevance of DNA evidence in the preset appeal, I find that the judge places too great a significance in the appeal at [23] and [38] as to absence of DNA evidence.



- 37 Fourthly, I find that the judge's assessment of the appellant's overall credibility, which influenced the judge's decision as to whether the appellant was AMA's father, was flawed. Although it seems entirely sustainable to find that the appellant had employed deception regarding his intentions, in his earlier entry clearance application, and had failed to mention that he had a relationship with OMA in the UK, I do not follow the judge's reasoning at [20] in which the judge suggested that the appellant made no attempt to notify the Home Office after arrival in the UK of his intention to marry, or to vary the terms of his leave to enter.
- 38 The appellant would have been required to register his marriage at a local registry office. The Registrar would have been required under s.24 of Immigration and Asylum Act 1999 to alert the Secretary of State if the Registrar reasonable grounds for suspecting that the marriage was a sham marriage. The appellant himself was not obliged to make an application to the Secretary State directly for permission to marry. One such scheme was abandoned long ago following *Baiai & Ors, R (On The Application of) v Secretary of State For The Home Department [2008] UKHL 53*. Further, whereas the judge suggested at the appellant had made no attempt to vary the terms of his leave to enter [20]; the appellant did just that, by making his application for further leave to remain, in December 2015, prior to the expiry of his leave to enter as a visit, resulting in the decision of 4 march 2016, under appeal in these proceedings.
- 39 Further, there are references within the judge's decision at [21], and [39], which suggests that the judge treated the appellant as being unlawfully present in United Kingdom. He is not. Although the appellant may have employed deception in his application for entry clearance, such entry clearance was granted validly. Upon the appellant applying for further leave to remain before the expiry of his limited leave to enter as a visitor, the respondent did not curtail the leave to enter, or cancel it, on the grounds of deception. The immigration decision of 4 March 2016 is effectively one of a refusal to vary leave to remain, such decision also amounting to a refusal of human rights claim, and thus appealable. The appellant presently has leave to remain under section 3C Immigration Act 1971, during the currency of this appeal. Thus, s.117B(4) NIAA 2002 did not require that little weight be attached to the relationship between the appellant and OMA, and the judge errs in so doing at [39].
- 40 The judge himself accepted that if credibility were not an issue, the judge would have been less inclined to consider that the appellant's return to Nigeria was reasonable [28].
- 41 The errors outlined above are in my view sufficient for me to set aside the judge's decision. Insofar as the issues I discuss at [37]-[39] are not contained within the appellant's grounds of appeal, Mr Harrison agreed with me at the hearing that such errors were *Robinson* obvious.

## Remaking

- 42 I am of the view that fresh findings of fact need to be made on all material matters, including whether or not the appellant is AMA's biological father.
- 43 I have not yet discussed the DNA evidence which was submitted with the application for permission to appeal, and its provision has formed no part in my decision that there are material errors of law in the judge's decision. However, now that the decision is set aside, such evidence can be taken into account by either the Upper Tribunal in re-making the decision, or by the First tier Tribunal, upon remittal.
- 44 However, having examined the report from AlphaBioLabs dated 16 March 2017, it is to be noted that whilst the report asserts that there is a probability of paternity as between the appellant and AMA of 99.9999%, the two page report does not contain any evidence as to the identities of the persons from whom tissue samples were taken. Thus the report, in its current form, does not establish that the appellant and AMA were the persons from whom the tissue samples were taken.
- 45 I am of the view that due to the extent of the findings of fact that need to be made in order to re-make the decision on appeal, it is appropriate to remit of this appeal to the First tier Tribunal. On such remittal, the appellant would be well advised to provide to the First tier Tribunal the relevant evidence regarding the identities of the persons from whom tissue samples were taken for the purposes of the AlphaBioLabs report.
- 46 I would also observe that it will be appropriate for the First tier Tribunal to approach this case on the understanding that the respondent has accepted in the decision letter that the requirements of LTRP .1.1 (d)(iii) are met, on the basis that the appellant has a relationship with OMA meeting the requirements of Ex1. I understand this to mean that the respondent accepts that the appellant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled, or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with partner continuing outside the UK.
- 47 This of itself does not mean that the appellant can satisfy the requirements of leave to remain under appendix FM, because, having arrived in the UK as a visitor, and having made his application for leave to remain during his extant leave to enter as a visitor, he does not meet the immigration status requirements and cannot meet requirements of Appendix FM at all, in relation to his relationship with OMA.
- 48 However, the respondent's concession as regards to there being insurmountable obstacles to family life continuing outside the UK may be relevant for the purposes of considering the appellant's appeal overall, and the proportionality of the respondent's decision generally.

### **Decision**

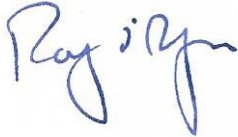
- 49 The decision involved the making of material errors of law.

I set aside the judge's decision.

I allow the appellant's appeal, to the extent that I remit the appeal to the First tier Tribunal for determination, in accordance with the legal analysis set out in this decision.

Signed:

Date: 26.6.18

A handwritten signature in blue ink, appearing to read 'P. O'Ryan', written in a cursive style.

Deputy Upper Tribunal Judge O'Ryan