Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06667/2018**

THE IMMIGRATION ACTS

Heard at Field House, London **Decision & Reasons Promulgated**
On 18th February 2019 **On 13th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

CHIMAX EMMANUEL ADINDU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C Nicholas, Counsel instructed by Jein Solicitors
For the Respondent: Miss J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge S Taylor promulgated on 13th November 2018 in which, following a hearing at Taylor House on 29th October 2018, the First-tier Tribunal Judge dismissed the Appellant's human rights appeal. At the appeal hearing before the Upper Tribunal today the Appellant has been represented by Miss Nicholas of Counsel and the Respondent has been represented by Miss Ishwerwood, a Senior Home Office Presenting Officer.

2. In the First-tier Tribunal Judge's decision the Judge noted that the Appellant had applied for leave to remain in the UK on the basis of his parental relationship with his daughter, IW. The Judge noted how in the

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Secretary of State's original refusal the Secretary of State had not accepted that the Appellant met the suitability requirements of the Immigration Rules, as he has failed to provide requested additional information and failed to provide supporting letters from the child's school, nursery, GP or health visitor or a document with a signature of ZW, the child's mother. The Judge noted that in the refusal the Secretary of State he had also found that the Appellant had failed to meet the eligibility requirements, as he had failed to demonstrate that he either had sole responsibility for the child, lived with the child or otherwise or had agreed direct access. The Respondent had considered paragraph EX.1. but found the paragraph did not apply as the Appellant had failed to provide sufficient evidence of a subsisting parental relationship with IW. The Secretary of State had previously found that the provisions of paragraph 276ADE were not met as there would not be very significant obstacles to the Appellant's integration to return to Nigeria.

3. First-tier Tribunal Judge S Taylor noted that that the Appellant was unrepresented at the appeal hearing.

4. In his findings at paragraph 13 the Judge properly firstly considered the application through the lens of the Immigration Rules. He considered the suitability requirements under paragraph S-LTR, in particular S-LTR.1.7. which the Judge noted was applied where an Appellant had failed without reasonable cause to comply with a requirement to provide information. The Judge stated that the Appellant had accepted that he had been asked to provide various documents as stated in the refusal notice, but had failed to produce them. The documentary evidence sought had been confirmation of the Appellant's relationship with his oldest child by way of a school, nursery, health visitor, GP or local authority letter. The judge upon examining the file found there was a letter from the GP submitted with a Notice of Appeal to the First-tier Tribunal, that was not included within the Appellant's bundle dated 27th February 2017. That letter merely stated that on one occasion the Appellant had attended the surgery with Miss ZW and the child. The Judge found that the letter did not state the Appellant attended the surgery on an ongoing basis, or that the Appellant had an ongoing relationship with the child. The Judge found that the letter was of limited evidential value in showing a subsisting parental relationship. The Judge found that at the time of the application and the decision the Appellant had not provided any documents in support of his claimed parental relationship, apart from one GP letter, despite being requested to do so. First-tier Tribunal Judge S Taylor found therefore that the application had been properly refused on the grounds of suitability under the Immigration Rules.

5. The Judge then went on at paragraph 14 not only to consider suitability requirements, but also the eligibility requirements of the Rules when looking at the Article 8 claim initially through the lens of the Immigration Rules. There the Judge found that the Appellant did not claim to fall into any of the required categories, sole responsibility of the child, or living with the child or having formal direct access to the child. It was said that the Appellant had not claimed that he lived with IW and indeed IW was

said to live in Biggin Hill in Kent and the Appellant lived with friends in East London, some 22 miles away. It was said that the child lived with her mother and grandmother and the Appellant's evidence stated he occasionally visited and took the child to school. It was said that the Appellant had not claimed that he had sole responsibility for the child and he had not claimed that he had direct access to the child by court order or any other means and therefore the Judge found that he was not able to meet the requirements for leave as a parent under paragraph E-LTRPT.2.3. and 2.4.

6. Thereafter in paragraph 15 the Judge noted that the Respondent had been correctly refused under grounds of suitability, which were a prerequisite for the consideration of EX.1., but in any event went on to consider the Appellant's claim to have a genuine subsisting relationship with his child IW, for the purposes of paragraph EX.1., thereby doing a "belt and braces" approach, so that all angles of the Appellant's appeal were properly considered by him. In that regard the judge found at paragraph 15 that there was very little documentary evidence of the relationship. The Appellant had submitted the child's birth certificate, on which he was named as the father. That was not disputed by the Secretary of State. The judge stated that the Appellant and Miss ZW had given evidence that the Appellant had taken the child to school, although the frequency of visits was found to be unclear from the evidence. It was found that the child had only started school in September 2018. The Judge found that the only supporting documentary evidence of the Appellant being with the child prior to going to school, was the one occasion when he attended the GP with the child, as stated in the GP letter dated February 2017.

7. The Judge found that in their written statements both the Appellant and Miss ZW had said that the Appellant took the child to school twice a week, but in oral evidence that was amended to once or twice a week and not every week. Miss ZW stated that the Appellant took the child to hospital appointments, but not always and there was no evidence the judge found as to why the child needed to go to hospital appointments and no hospital letter has been provided to state that the Appellant was in attendance. It was conceded that there were no school letters to show the Appellant picked up the child from school or took her to school as stated in oral evidence.

8. The Judge further found that the credibility of the oral evidence was also damaged by the distance the Appellant lived from the child. The Appellant's oral evidence was that he went to see IW by public transport from the Romford area of East London to Biggin Hill in Kent. On public transport this was said to be a journey of about two hours and the Appellant, the Judge found, claimed that he undertook the journey in time to take the child to school for 8.45 a.m. which would require him to leave by 6.30 a.m. Additionally he did not have the funds and would have to borrow the money for the fare. The judge found that the Appellant had accepted that if he did not take the child to school she would be taken by the grandmother and that therefore there was no necessity for him to leave home at 6.30 a.m. in order to undertake the journey. The Appellant's

credibility was found to have been damaged, as he could not remember that the week before the hearing was half-term and he did not take the child to school.

9. The Judge found specifically that on the evidence available he was not satisfied that the Appellant saw the child as often as claimed and was not satisfied that he took the child to school as often as claimed and there has been no supporting evidence submitted that he had any involvement with the upbringing of the child around the time of the decision, apart from one attendance at the GP. The judge was therefore not satisfied that the Appellant had a genuine and subsisting relationship with his child IW.

10. The judge further found that although the Appellant and Miss ZW refer to each other as partners, that the appeal before him was not on the basis of the Appellant having a relationship with Miss ZW and that there was insufficient evidence to establish that they were in a relationship for the purposes of the Immigration Rules.

11. In paragraph 17 the Judge then went on to consider the case of **Agyarko, R (on the application of) v Secretary of State for the Home Department [2017] UKSC 11** and whether or not there were any exceptional circumstances which would cause substantial difficulties or harshness for the Appellant outside of the Immigration Rules and found that there were any no such circumstances in this case. In paragraph 18 the Judge then went on to consider Section 117B of the Nationality, Immigration and Asylum Act 2002 and took into account the relevant public interest considerations applicable in all cases in which Article 8 is being considered.

Grounds of Appeal, skeleton argument and submissions

12. The Appellant now seeks to appeal against that decision for the reasons set out within the Grounds of Appeal. That document is a matter of public record and is not therefore repeated in its entirety here, but in summary it is argued that the Judge materially erred in law in dismissing the appeal on human rights grounds. It is said that the Appellant had explained why he did not stay with his partner or the child and that he did not apply for formal direct access to the child, as he had an agreement with his partner ZW for the access to be granted without the need to go to court. It is argued that the Judge concluded the Appellant's removal was in the public interest without considering the best interests relating to the child, in particular whether it would be reasonable to expect the child to live in another country. In that regard consideration is given as to whether or not it would be reasonable to expect IW to leave the UK within the Grounds of Appeal various cases dealing predominantly with whether or not it is reasonable to expect the child to leave the UK and consideration of the effect of the decision upon the family and the reasonableness of the decision to refuse.

13. It is further argued that the Judge did not consider Article 8 outside of the Rules and that Appendix FM and paragraph 276 of the Rules are not a

complete code and that there are no countervailing strong factors to outweigh the best interests of the child and that pursuant to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 where a person is not liable to deportation public interest does not require a person's removal where:-

(a) a person has a genuine, subsisting parental relationship with a qualifying child, (meaning in this case under Section 117D a person who has lived who is under the age of 18 and has lived in the UK for a continuous period of seven years or more) and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

It is argued that it would not be reasonable to expect IW to leave.

14. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 3rd January 2019. It was said that the Grounds of Appeal waste a lot of space setting out various authorities but fail to deal with the most recent Supreme Court decision of **KO (Nigeria) [2018] UKSC 53** which came out in October 2018. It was stated that the Appellant is a father and that that makes him a parent, but it was said by Judge Parkes that the fact that the Appellant is a father would make him a parent, but the Home Office's position now is it could be reasonable to expect a British citizen child to leave the UK. Judge Parkes found it was arguable despite the lack of analysis in the Grounds the judge erred in the approach to the nature of the relationship and failed to address the issue of proportionality in the Appellant's removal and reasonableness of expecting the child to leave with him, i.e. can family life reasonably be enjoyed abroad?

15. In addition I have also seen and fully considered the helpful skeleton argument from Miss Nicholas and taken account of both her and Miss Isherwood's oral submissions in reply.

16. Within the skeleton argument Miss Nicholas sets out reasons as to why it is said that documents were not available for the First-tier Tribunal and then sets out the statutory code under Section 117B and whether or not it was reasonable then to expect a child to leave the United Kingdom when they have been resident in the UK for more than seven years. It is argued that it is clear there is a qualifying child; the Appellant is not liable to deportation, has a genuine and subsisting parental relationship with the child and that it is not reasonable for the child to leave the UK. It is submitted that the issue to be determined is whether he has a genuine and subsisting parental relationship. In that regard the skeleton argument argues that evidence from the school could not be submitted because the child, IW, had only started school in September so the evidence was not yet available by the date of the request. It is said that it is unreasonable to expect a GP to be able to give evidence of an ongoing relationship. It is further argued that the Judge erred in enquiring of formal direct access to the child rather than accepting the evidence regarding the Appellant's own evidence regarding contact.

17. Miss Nicholas has also sought to produce today some further fresh evidence that was not before the First-tier Tribunal, in a supplemental bundle dated 15th February 2019. At this stage of this appeal I am simply considering whether there has been a material error of law and in considering that I have to consider the evidence as it was as at the date of the hearing before the First-tier Tribunal Judge.

<u>My findings on error of law and materiality</u>

18. In making his findings in this case Judge S Taylor in a very thorough determination has first quite properly considered the Appellant's application through the lens of the Immigration Rule, both in terms of suitability and the eligibility requirements, and has even gone on to consider whether or not paragraph EX.1. would have applied, if the suitability requirements had been met. The Judge went on to consider as part of that whether or not the Appellant did have a genuine and subsisting relationship with his child IW. The fact of father's name name being on the birth certificate does not itself establish that he has a genuine and subsisting relationship with his child for the purposes either of the Immigration Rules, Section 117B of the Nationality, Immigration and Asylum Act 2002 or for the purposes of Article 8 considered outside the Rules in general.

19. It is argued by Counsel on behalf of the Appellant that he was not represented at the time of the hearing and that had he been represented the Judge may have made a different decision. However, the fact that someone is unrepresented does not in itself render the proceedings unfair. The Appellant did not seek an adjournment in order to obtain representation.

20. Clearly the Judge having gone through the evidence before him has made findings, which in my judgment, were open to him, both in terms of the suitability and eligibility requirements. He has also made findings which were open to him in terms of whether there is a genuine and subsisting relationship between the Appellant and his daughter. The judge has considered the case outside of the Rules for the purposes of Article 8 and has considered Section 117B of the Nationality, Immigration and Asylum Act 2002.

21. In respect of the Appellant's main argument that it is not reasonable to expect the child either to leave the UK, to which the predominance of the skeleton argument and the Grounds of Appeal go to as well as the question raised by Judge Parkes is whether it would be reasonable expecting the child to leave with him. In that regard, under the Rules paragraph EX.1. would only apply anyway if the suitability requirements were met, which the judge was entitled to find were not met. Further, for the purposes of Section 117B(6), the subsection reads :

    "In the case of a person who is not liable to deportation the public interest does not require a person's removal where:-

(a) a 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.”

22. Judge Taylor gave very clear reasons as to why he did not accept the evidence that the Appellant had a genuine and subsisting parental relationship with his child. He found there was a lack of documentary evidence supporting the ongoing parental relationship and that the one document from a GP simply said that the Appellant had attended the surgery with Miss ZW and the child on one occasion and did not provide evidence of an ongoing relationship. The Judge went on to consider at paragraph 15 the discrepancies in the evidence regarding how often the Appellant took the child to school, the fact that there was no evidence to substantiate the need for him to take the child IW to hospital and the Judge also considered the Appellant’s credibility was damaged by the evidence of distance the Appellant lived from the child being 22 miles away, travelling by public transport from the Romford area of East London to Biggin Hill in Kent and that being a journey of approximately two hours, in circumstances where the Appellant had claimed that he would undertake the journey in time to take the child to school for 8.45 a.m. which would require him to leave by 6.30 a.m. In addition, the judge found that he did not have the funds and would have to borrow money for that, and that if he was not taking the child to school the grandmother would take her and there was no necessity for him to leave at 6.30 a.m. and borrow money to undertake the journey. He also noted that the Appellant could not remember the fact that the previous week had been half-term and that he had not taken the child to school. These were findings open to the Judge on the evidence before him.

23. The Judge had therefore given very clear reasons as to why he found that he was not satisfied the Appellant had a genuine and subsisting relationship with his child. The first limb of the test not being met, the Judge did not have to go on to consider if it was reasonable to expect the child to leave for the purposes of section 117B(6).

24. In those circumstances I find that the First-tier Tribunal Judge has made findings which were open to him and has properly considered the evidence and properly applied the law in this case. The Appellant’s appeal is dismissed.

Notice of Decision

The decision of First-tier Tribunal Judge Taylor does not contain a material error of law and is maintained.

The Appellant’s appeal is dismissed.

I do not make any anonymity direction in this case. No such direction was sought before the First-tier Tribunal and no such direction has been sought before me.

Signed

RFMcGinty

Deputy Upper Tribunal Judge McGinty