Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12119/2016**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 9th October 2017	**On 18th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

ID
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H Spencer-Bolton, Counsel
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Smith and Judge Shimmin made following a hearing at Bradford on 27th February 2017.

Background

2. The appellant is a citizen of Guinea born on 25th September 1993. He left Guinea in 2014 and travelled to Mali before going on to Calais in France. He claims to have arrived in the UK on 8th April 2016 and claimed asylum on 27th April 2016.

3. His partner is also a national of Guinea. She was forced, at the age of 16, to marry a man of 46 who already had two wives and was her deceased sister's husband. She was repeatedly raped and assaulted by him and her father threatened to kill her if she left him. She arrived in the UK on 22nd November 2011 and claimed asylum on 1st May 2012. On 4th December 2012 she was granted asylum and leave to remain in the UK for five years.

4. At the time of the hearing, his partner was pregnant with his second child. She also has a son, who arrived with her in the UK, who is her husband's child. The couple, who were childhood friends, were reunited in Calais in August 2015, when Ms F visited the appellant there, and C, their first child was born on 18th May 2016.

5. The panel accepted the evidence almost in its entirety. At paragraph 51 of the determination they said that they found Ms F to be wholly credible.

6. The appellant claimed that he would be at risk on return because he would be targeted by his partner's husband and father because of his relationship with her. The panel was satisfied that when the appellant expressed an interest in seeing her, he was threatened with being beaten to death because he was perceived by her husband to have had sexual relations with her and to have taken her virginity.

7. The panel had some concerns about the appellant's evidence in relation to his flight from Guinea and counted it against him that he did not claim asylum in France. However, at paragraph 61 they wrote:

> "61. Weighing all the evidence for what it is worth, and considering it cumulatively in the light of the challenges to it by the respondent we find that the appellant has proved to the required standard of reasonable likelihood that the facts he alleges are true."

8. The panel concluded however that the appellant's fear of his partner's husband and father did not bring him within the protection of the Refugee Convention and in any event, whilst they were not satisfied that there was a sufficiency of protection for them in Guinea, they did believe that he could reasonably relocate to an area of the country where the family had no connections with the police or the security services.

9. On that basis they dismissed the asylum appeal.

10. The panel then went on to consider the best interests of the children, both the appellant's stepson and his own child and they had specific regard to Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002.

11. The appellant's partner has a grant of refugee status in the UK until December 2017 and the panel said it would not be reasonable to expect her and the children to accompany the appellant if he was to be removed.

12. They considered whether the relationship was subsisting prior to the appellant's entry into the UK and said that whilst they accepted that he

had had a friendship with her in the past, he had had no contact with her for some time until she visited him in Calais and they decided that there was no subsisting relationship of any substance prior to April 2016.

13. At paragraph 89 the panel said:

> "C is the appellant's natural child. We accept that he has formed a bond with his father and the appellant shares equally with Ms F in C's upbringing. C is very young, aged under one year old, and if the appellant was to be removed his emotional needs would not be substantially affected because C is too young to really recognise his father."

14. However, they found that the relationship with M, the older child was stronger than that which M has with his biological father. It was in the best interests of the children to have secure loving parents living under the same roof, and they also noted that Ms F had very little family support in the UK and bringing up three children as a lone parent would be challenging for her.

15. Moreover the panel accepted that if the appellant was removed contact between him and C and his soon to be born child and with Ms F would effectively break down. Ms F did not have the financial means to travel to Guinea and would be in danger if she visited there. At best, if contact was to be maintained, it would be by means of telephone, video calls and letters and whilst M might appreciate such contact it would have no relevance to C.

16. Nevertheless the panel was not satisfied that there would be very significant obstacles to the appellant's integration into Guinea and having carried out a "balance sheet exercise" they came to the conclusion that the appellant had not satisfied them on his Article 8 claim, and they dismissed the appeal.

The Grounds of Application

17. The appellant sought permission to appeal on the grounds that the judges had failed to apply the appropriate test of compelling circumstances when assessing the appellant's Article 8 claim. They accepted that the contact between him and his children would effectively break down but failed to consider the severity of the interference with family life when conducting the balancing exercise. The effect of the decision would effectively extinguish family life rather than merely interfere with it.

18. It was also argued that the judges had failed to properly assess the evidence about the length of the relationship.

19. Permission to appeal was initially refused by Judge Pedro but, upon re-application, granted by Upper Tribunal Judge Kebede who said that it was arguable that the panel's finding as to the commencement of the appellant's relationship with his partner was inadequately reasoned and that the findings on Section 117B were incomplete.

Consideration of whether there is a material error of law

20. I am satisfied that the judges have erred for the following reasons.

21. First, the judges said in terms both that they accepted the appellant's partner's evidence in its entirety and that the core of the appellant's evidence in relation to what happened to him in Guinea was true.

22. It was their evidence that the couple had been friends since 2008 and, because the appellant knew of Ms F's difficult circumstances, he assisted her mother in arranging for her escape and sold his motorbike to provide her with funds. After she left he was threatened by her husband who believed that they had had a sexual relationship. When he arrived in Calais he managed to obtain her telephone number and contacted her and asked her to meet him there. They slept together and she became pregnant.

23. As Mr Diwnycz very frankly acknowledged, there is a tension between those positive findings and the panel's conclusions that the relationship only really began in April 2016, which remains unresolved.

24. It is difficult to see how the panel can reasonably have concluded that the relationship between this couple commenced in April 2016, when the appellant finally arrived in the UK, having accepted not only his evidence of historic friendship but also that they had conceived a child together some eight months earlier. The panel therefore approached their consideration of Article 8 through an incorrect prism.

25. Second, it is unclear whether the panel had in mind the correct test when deciding whether the appeal ought to be allowed outside the Immigration Rules, namely whether there are compelling circumstances such as to require a grant of leave.

26. The decision, so far as Article 8 is concerned, is set aside. There is no challenge to the asylum decision.

27. It was agreed between the parties that the decision could be re-made on the basis of the present evidence without the need for a further hearing.

Findings and Conclusions

28. At the date of the respondent's decision, and the date of the hearing before the original judges, the appellant could not meet the requirements of the Immigration Rules principally because he did not meet the definition of partner in relation to the financial requirements, in relation to paragraph EX.1 and in relation to the Rules governing leave to remain as the partner of a refugee.

29. All require the couple to have been living together in a relationship akin to a marriage or a civil partnership for two years or more. Whilst the relationship between the couple in this case is of longstanding, according to their own evidence, it only became a sexual relationship in August 2015

and therefore was not one akin to a marriage or civil partnership until that date.

30. However, I am required to consider matters as they are as at the date of this hearing. As at today's date, the relationship has subsisted for the required length of time.

31. The requirements set out in EX.1(b), are that the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

32. The fact of the partner's refugee status, absent any other evidence, is itself strongly indicative of the test being satisfied. No evidence has been adduced by the respondent, or argument made, to establish that the partner could return to Guinea whilst she has refugee leave here.

33. As the original panel acknowledged, the effect of this decision would be a complete severance of the relationship between the appellant, his partner and his children.

34. I am of course conscious that the appellant's partner's leave is about to be reviewed because the initial five year grant is about to come to an end.

35. At that point the respondent will no doubt decide whether the appellant's partner remains at risk and whether protection to her and the children ought to be extended. If she decides not to do so, on the basis that it would be safe, in her present circumstances to return, the argument that there would be insurmountable obstacles to family life with the appellant continuing in Guinea would fall away, and the requirements of paragraph EX(1) would not be met.

36. If the family could reasonably return to Guinea as a unit at that point, there would be no compelling reason why a grant of leave outside the Rules should be made.

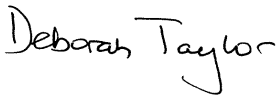
Notice of Decision

37. The original judge has erred in law. The decision is set aside. It is re-made as follows. The appellant's appeal is allowed.

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

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 their 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



Deputy Upper Tribunal Judge Taylor Date 15 October 2017