Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/23497/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 4th February 2019	**On 27th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

ABDOULAYE [N]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Hashmi instructed by Milestone Solicitors
For the Respondent: Mrs Pettersen, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Grant made following a hearing at Hatton Cross on 20th September 2018.

Background

2. The appellant is a citizen of Senegal born on 6th November 1975. He arrived in the UK in 2009. In 2016 he applied for leave to remain in the UK under the ten year parent route and was refused on 22nd September 2016 on the grounds that the

respondent was not satisfied that he was in a parental relationship with a qualifying child and did not meet any of the other requirements of the Immigration Rules.

3. The judge recorded that the appellant and his partner had separated for some of the year 2016. She said that the resumption of the relationship between the parties was a new matter and the Secretary of State did not consent to raising it at the hearing.

4. She did however accept that the appellant was in a genuine and subsisting parental relationship with his daughter. Nevertheless, she dismissed the appeal holding it to be proportionate for the appellant to return to make an application for entry clearance or for his partner and their daughter to live in Senegal with the appellant.

5. The appellant sought permission to appeal on the grounds that the judge had conducted a legally flawed consideration of paragraph EX.1 and in relation to Article 8 of the ECHR outside the Immigration Rules.

6. Permission to appeal was granted by Judge Povey on 25th October 2018.

7. Mrs Pettersen, for the respondent, accepted that the judge had erred in law and did not seek to argue that the decision should not be reversed.

Findings and Conclusions

8. At paragraph 14 the judge wrote:-

> "In human rights appeals I must consider the position as at the date of hearing. The appellant has a genuine and subsisting relationship with his daughter but she is not a qualifying child because she has not lived in the UK for more than seven years. She is 4 years old."

9. The appellant's daughter is however a British citizen and therefore not required to have lived in the UK for seven years. Accordingly paragraph EX.1 ought to have been applied.

10. Paragraph EX.1 states that this paragraph applies if:-

> "(a) (i) the applicant has a genuine and subsisting parental relationship with a child who –
>
> (aa) is under the age of 18 years or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and
>
> (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK."

11. Paragraph 117B of the 2002 Act sets out the public interest considerations in all cases concerning Article 8 of the ECHR.

12. The maintenance of effective immigration controls is in the public interest. The appellant does not have extant leave to remain in the UK.

13. So far as Section 117B(2) is concerned, he speaks fluent English and, in relation to 117B(3) is financially independent. Whilst he is not able to work his wife is a qualified staff nurse employed at the Sheffield Teaching Hospitals and earns a salary of £23,363 per year.

14. However his relationship with his wife should be given little weight since the evidence suggests that it was formed at a point when he had no leave to be in the UK.

15. The most relevant paragraph here is 117B(6) which mirrors the requirement set out in the Immigration Rules in relation to children.

16. It is not contested by the respondent that the appellant has a genuine and subsisting parental relationship with his British citizen daughter.

17. Mrs Pettersen accepted that the Home Office's own guidance cases such as this, not involving criminality, must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with his or her parent or primary carer.

18. It was not the Home Office's policy to argue that it would be proportionate to expect the appellant to return to Senegal to obtain entry clearance. In this case the suitability and eligibility and financial requirements were met and to do so would seriously disrupt family life in the UK.

19. In MA (Pakistan) [2016] EWCA Civ 705 the Court of Appeal held that first there has to be a careful assessment of the best interests of the child and then a decision has to be made whether any other public interests in play have the effect of displacing it. In cases not involving criminality strong reasons are required to depart following the child's best interests.

20. Mrs Pettersen did not seek to argue that any such strong reasons existed here.

21. Accordingly, the appellant meets the requirements of paragraph EX.1.

Notice of Decision

22. The original judge erred in law. Her decision is set aside. It is remade as follows. The appellant's appeal is allowed

No anonymity direction is made.

Deborah Taylor

Signed Date 23 February 2019

Deputy Upper Tribunal Judge Taylor