IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005191
First-tier Tribunal Nos:
HU/57681/2022
IA/10903/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

ROBERT HERBERT RICHARDS
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Bhachu, Counsel; instructed by Abraham Baron Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Heard at Field House on 18th March 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Elliott dismissing his appeal human rights appeal.

2. The Appellant applied for permission to appeal on three grounds and was granted permission to appeal by Upper Tribunal Judge Norton-Taylor in the following terms:

> "1. Three grounds of appeal are put forward: first, it is said the judge erred in respect of his consideration of s117B(6)(a) NIAA 2002; secondly, the judge failed to provide adequate reasons in respect of whether there would be very significant obstacles to reintegration; thirdly, the judge failed to undertake a comprehensive proportionality exercise.
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> 2. By a narrow margin, I am persuaded that permission should be granted on all grounds.
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> 3. The appellant should be under no illusions that the grounds will be made out following further scrutiny. The judge did make a number of findings in respect of the appellant's relationship with NS which pointed away from the existence of a genuine and subsisting parental relationship. The judge also noted the absence of evidence from the appellant in respect of a claimed lack of appropriate treatment for mental health conditions in Jamaica. Having said that, the conclusion on the parental relationship issue at para 77 arguably relied on the absence of direct care of NS and there was evidence to indicate a real lack of insight on the appellant's part as to his mental health problems, which in turn might have had an impact on a return to Jamaica.
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> 4. The appellant will be issued with standard directions and these must be complied with, with particular reference to the provision of a composite bundle, properly formatted".

3. Before me Ms Everett confirmed that the appellant was contested and that there was no Rule 24 response from the Respondent.

Findings

4. At the conclusion of the hearing I reserved my decision which I now give. I find that the decision demonstrates material errors of law, such that it should be set aside in its entirety.

5. In respect of Ground 1 and the headline that the judge erred in respect of consideration of Section 117B(6)(a) of the Nationality, Immigration and Asylum Act 2002, I find that the judge has erred as alleged in that the judge has conflated the analysis that should take place in respect of the assessment outside the Rules under the above provision of the 2002 Act. I note that the judge has analysed the position under the Rules and in doing so has recorded at paragraphs 55 through to 57 that the Appellant's child (hereafter referred to as "NS", adopting the same abbreviation used by the First-tier Tribunal) is the subject of a guardianship order which vests legal guardianship with the Appellant's sister, NS's aunt. The assessment under the Rules also notes that the Appellant and NS have contact with each other but that the evidence does not demonstrate that the Appellant plays any role in NS's upbringing beyond that contact. I note that the purpose and aim of the judge's assessment is as stated at paragraph 54 to assess whether the Appellant has been taking and intends to continue to take an active role in NS's upbringing. The judge finds that the Appellant's role in NS's upbringing does not extend beyond contact whilst at the same time noting that the Appellant's guardian ("Ms Richards") describes the relationship between the Appellant and NS as "close and at time emotionally intense" but that this was insufficient to indicate an active role in the child's upbringing. It is for this reason that the judge concludes that Ms Richards has sole responsibility for making the important decision in NS's life and the

Appellant has not played an active role in his upbringing for the purposes of the Immigration Rules. For those reasons the assessment under the Rules in respect of Appendix FM and paragraph EX.1. specifically, fails.

6. Thereafter the judge turns to his assessment of the child and the relationship between the Appellant and NS once more from paragraph 69 onwards. However in the course of doing so the judge correctly notes the hypothetical question of whether or not it is reasonable to expect the child to leave the UK but then in gauging whether or not there is a parental relationship, the judge wrongly gives mention of two conflicting decisions, firstly the decision of *AB (Jamaica) v Secretary of State for the Home Department* [2019] EWCA Civ 661 on the one hand, and then *Secretary of State for the Home Department v VC (Sri Lanka)* [2017] EWCA Civ 1967, on the other. Thus in the course of assessing whether or not the person, in this case the Appellant, has a "genuine and subsisting relationship with a qualifying child", the judge notes the decision of *AB (Jamaica)*, which correctly mentions at [92]-[92] that a parent does not need to show there is an element of direct parental care in order to establish that there is a genuine and subsisting relationship between themselves and the relevant child. I pause to remind myself of that passage from Lord Justice Singh's judgment:

> 92. As is apparent from that passage, on the facts of that case, UTJ Plimmer was satisfied that SR was providing an element of "direct parental care". The issue of law which arises before this Court now is whether such an element is an essential requirement of there being a "genuine and subsisting parental relationship" for the purpose of section 117B(6)(a). At paras. 36-37 UTJ Plimmer considered that such an element is required in this context. For that proposition she relied upon the judgment of McFarlane LJ in *Secretary of State for the Home Department v VC (Sri Lanka)* [2017] EWCA Civ 1967, in particular at paras. 42-43. In order to assess whether that understanding of the law is correct I must therefore go to the underlying judgment of McFarlane LJ in the case of *VC (Sri Lanka)*.
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> 93. In that case McFarlane LJ said, at paras. 42-43:
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> > "42. For the reasons put forward by Mr Cornwell, it was, in my view, not possible for the circumstances of this case to come within the requirements of paragraph 399(a) of the Rules. On the basis of the Court of Appeal's analysis of the family history, [VC] had played only a minimal role in the care of his children and, even when living at the family home, he had on a regular basis rendered himself unable to act as a parent as a result of heavy drinking and abusive behaviour. By the time of the Secretary of State's decision to deport him, any vestiges of a 'parental relationship' with the children had long fallen away and had reduced to their genetic relationship coupled with the most limited level of direct contact which was intended to cease altogether on adoption. Mr Cornwell is correct to stress the words 'genuine', 'subsisting' and 'parental' within paragraph 399(a). Each of those words denotes a separate and essential element in the quality of relationship that is required to establish a 'very compelling justification' [per Elias LJ in *AJ (Zimbabwe)*] that might mark the parent/child relationship in the instant case as being out of the ordinary.

> 43. Although, as I have explained, [VC's] case falls, as it were, at the first hurdle in that it was not possible on the facts as they were at the time of the decision to hold that he had a 'genuine and subsisting parental relationship', I am also persuaded that the Appellant is correct in submitting that for paragraph 399(a) to apply the 'parent' must have a 'subsisting' role in personally providing at least some element of direct parental care to the child. The phrase in paragraph 399(a)(ii)(b) which required that 'there is no other family member who is able to care for the child in the UK' strongly indicates that the focus of the exception established in paragraph 399(a) is upon the loss, by deportation, of a parent who is providing, or is able to provide, 'care for the child'. This provision is to be construed on the basis that it applies to a category of exceptional cases where the weight of public policy in favour of the default position of deportation of a foreign criminal will not apply. To hold otherwise, and to accept Ms Jegarajah's submission that her client comes within the exception simply because he has some limited, non-caring contact with his child would enable very many foreign criminals to be included in this exception."

94. I respectfully disagree with UTJ Plimmer that those passages could simply be transplanted to the context of section 117B(6)(a). First, it is clear that what McFarlane LJ was considering was the different context of deportation of foreign criminals. That explains the reference to a "very compelling justification" at the end of para. 42 and also the last sentence of para. 43 in his judgment.

95. Secondly, and even more importantly, the language and structure of para. 399(a) of the Immigration Rules which were under consideration by McFarlane LJ in *VC (Sri Lanka)* are different from the language and structure of section 117B(6)(a). The relevant passage was set out in full at para. 16 in the judgment of McFarlane LJ and needs to be reproduced here. There he said:

> "Finally, the relevant parts of paragraph 399 provided:
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> 'this paragraph applies where paragraph 398(b) … applies if:
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> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
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> i. the child is a British Citizen, or
>
> ii the child has lived in the UK continuously for at least 7 years immediately preceding the date of the immigration decision;
>
> and in either case
>
> (a) it would not be reasonable to expect the child to leave the UK; and
>
> (b) there is no other family member who is able to care for the child in the UK;"

96. In my view, it is clear that the provisions of para. 399 in that case included, as an essential element, that there was "no other family member who is able to care for the child in the UK". That led McFarlane LJ to interpret the provision as a whole to require "at least some element of direct parental care to the child." In my view, it would not be right to give the same interpretation to the very different language of section 117B(6)(a).

97. I note that, in *RK* UTJ Grubb did not add this gloss to the meaning of "parental relationship". In my view, UTJ Plimmer was right to derive assistance from what UTJ Grubb had said when she quoted para. 42 of his judgment in her judgment in *SR (Pakistan)*. However, in my view where she then fell into error was in the subsequent passage, where she considered, at paras. 36-37 of her judgment, that the interpretation given by McFarlane LJ to para. 399 of the Immigration Rules in *VC (Sri Lanka)* also applies to the interpretation of section 117B(6)(a). In my respectful view, that interpretation would be wrong and should not be followed.

7. Ms Bhachu's chief complaint is that the assessment made here by the judge is the direct opposite in that the judge has assessed whether or not there is an element of direct care between the Appellant and child. Had this been the only paragraph that the judge inserted in terms of authority which preceded his assessment I would not have found any merit in the ground at all, however given that the following paragraph of the judgment reveals in its last sentence the judge's reliance upon *Secretary of State for the Home Department v VC (Sri Lanka)*, which is authority for the fact that a person can only demonstrate a genuine and subsisting role if there is an element of direct personal care for the child in question, the mere mention of both decisions particularly the superseded decision in *VC (Sri Lanka)* coming after that of *AB (Jamaica)*, (which distinguished the position in *VC (Sri Lanka)* in any event) coupled with the assessment made at paragraph 77 of the judge's decision, leads me to find that the judge has conflated the approach that should have been applied in that notwithstanding the judge stated the latter correct case first, the judge then went on to also state the former superseded case in the second instance before proceeding to their analysis. The analysis in question, itself is materially flawed, as the judge states as follows at paragraph 77 "Although he has contact with NS, I am not satisfied that the appellant in fact provides any direct care for him. His contact is supervised and I find in those circumstances care is in reality provided by Ms Richards, not by the appellant". Thus it does appear that the judge's assessment of whether or not there is a genuine and subsisting relationship at least in part is contingent upon whether or not there was any direct care provided for the child by the Appellant, and given that *VC (Sri Lanka)* is distinguished in that it applies in respect to paragraph 399 of the Immigration Rules and deportation appeals, as opposed to human rights appeals under Section 117B(6)(a) in respect of non-criminals and qualifying children and the need to demonstrate a genuine and subsisting relationship, and in particular given that the judge may not have appreciated the distinction between the purpose of the Rules and Appendix FM which is geared towards whether or not an applicant has evidence that they have either sole parental responsibility for the child; or access rights to the child as well as evidence that they are taking and intend to continue to take an active role in the child's upbringing; contrasted with merely having a genuine and subsisting parental relationship with the child which does not require any direct element of care, it does appear that the judge has carried over the purpose and intent of the Rules in assessing the much lower threshold required of

demonstrating a genuine and subsisting relationship with a qualifying child outside the Rules under Section 117B(6)(a). To that end I agree with Judge Norton-Taylor's decision in granting permission in that the parental relationship issue and its assessment at paragraph 77 did rely upon the absence of direct care of NS and therefore I find that Ground 1 has been established and a material error of law demonstrated.

8. Ms Everett conceded that Grounds 1 and 3 stand and fall together, but in any event for the sake of completeness I note that in undertaking the proportionality assessment it is correct as argued by Ms Bhachu that the judge has begun consideration of NS's best interests at paragraph 69 in that the judge prays in aid the UK court order which the judge states would presumably have heard evidence on the issue and decided where NS's best interests lie in terms of care and supervision, and then reasonably and rightly stated that NS's best interests do lie with remaining under the care of his aunt, but at the same time the judge has not gone on to assess the disruption that will occur in NS being deprived of the contact between himself and the Appellant which the judge accepted was evident before him and which would require assessment before one could conclusively determine that the Appellant's removal to Jamaica would not have any impact upon the best interests of NS, notwithstanding that he remains in the care of his aunt, that being the status quo which could not be disrupted by any human rights proceedings in any event. Therefore I do find that Ground 3 is also established and a material error demonstrated on the face of the decision.

9. Finally, turning to Ground 2 and the assessment of whether or not adequate reasons have been provided in respect of very significant obstacles to reintegrating in Jamaica in respect of Appendix Private Life and Immigration Rule PL 5.1., I find that the judge has also strayed into error in respect of this ground in that the judge has failed to note that the medical evidence did indicate that there was a lack of insight by the Appellant into his own mental health problems and having regard to the fact that the Appellant has not had a relationship with his father owing to that difficulty, and given that there is no challenge to the Appellant's mental health difficulties, indeed he was treated as a vulnerable witness by the judge, I find that the judge has failed to also assess whether or not it is likely on balance that the relationship between the father could be re-established notwithstanding that those mental health difficulties prevail and persist. Added to that, I also find that the judge has not assessed the length of residence that the Appellant has enjoyed in the UK (albeit that at the time of decision the Appellant had not passed the twenty year threshold, and therefore at that time the length of residence may not have been so pronounced, or of immediate importance, however the Appellant was approaching the twenty year threshold at the time of the hearing before the First-tier Tribunal, and therefore that considerable length of residence at nineteen years and nine months, at least warranted some consideration). Therefore I find that the very significant obstacles reasoning is incomplete and therefore inadequate in respect of these two issues which go to whether or not it would be possible for the Appellant to be enough of an insider and to have a reasonable opportunity to operate on a day-to-day basis in that society and build up relationships given the estranged relationship with his father, his mental health difficulties, and his considerable length of residence in the UK, applying *Secretary of State for the Home Department v Kamara* [2016] EWCA Civ 813.

10. I therefore find that the First-tier Tribunal has materially erred for the reasons given above.

Notice of Decision

11. The Appellant's appeal is allowed.

12. The appeal is to be remitted to the First-tier Tribunal to be heard by any judge other than First-tier Tribunal Judge Elliott.

P. Saini

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 April 2024