Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04299/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 13 October 2015	**On 29 October 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THOMAS WAMBUA

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss L Beats, of Bruce Short, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Kenya, born on 22 December 1984. He applied on 29 September 2014 for leave to remain in the UK on the basis of his family and private life.

2. A letter by the respondent dated 14 January 2015 explains why that application is refused in terms of the Immigration Rules. The respondent's decision in that respect is not in dispute. Further proceedings are taken only under Article 8 of the ECHR, outside the Rules.

3. The refusal letter acknowledges that the appellant has a child aged 3 who has lived in the UK all her life. The child lives with the appellant's former partner, a citizen of the Czech Republic. (The child is not a citizen of the UK, and is not a "qualifying child" for purposes of part 5A of the 2002 Act.) The refusal letter considers whether there are exceptional circumstances which might require the grant of leave outside the Rules, but finds none, because the appellant would be going to Kenya with the child.

4. The respondent did not maintain that reason for refusing the application in the First-tier Tribunal. The possibility was not canvassed there. It was agreed in the UT that the case has proceeded throughout on the mutual assumption that there is no realistic likelihood of the appellant and his child moving together to Kenya. It has not been suggested that he has ever contemplated that course.

5. The facts which emerged in the FtT were that the appellant's relationship with the mother of the child broke down some 6 months after the child was born. However, contact is maintained on a weekly or fortnightly basis by informal agreement (not in terms of any written arrangement or after resort to the courts). The child's mother is married to a Gambian national, and expecting his child.

6. First-tier Tribunal Judge Gillespie dismissed the appellant's appeal by determination promulgated on 21 May 2015.

7. The appellant has permission to appeal to the Upper Tribunal on the grounds that the First-tier Tribunal erred:

   1 At paragraph 30 when assessing the best interests of the child:

   (i) In assessing the best interests of the child the FTT has erred in law by failing to exercise anxious scrutiny, in particular by placing reliance on the appellant's ex-partner's newly established family unit with her husband and unborn child. There was no evidence led at the hearing from Miss Kadlecova, as she was not in attendance, although a statement was lodged. Further there was no evidence or statement in evidence from her husband, Lamin Gibba. Therefore there was no assessment possible of the family relationship between the child, Tiami, and her stepfather and therefore it was not open to the FTT to assume her best interests would be placed in this environment when no evidence was led in relation to this. Further no assessment was made of the impact on Tiami of the removal of her father given the current contact enjoyed.

   (ii) … the FTT erred in law by failing to conduct a careful appraisal of the child's circumstances and the extent to which her welfare would be better served by allowing the appellant to remain in this country, thereby making it possible for the child to continue to develop a proper relationship with her father who is actively involved with her upbringing. It was accepted by the FTT at paragraph 30 that he was actively involved through informal

contact. The FTT did not give sufficient consideration to what was in the child's best interests or give her welfare the degree of importance it ought to have received in terms of the impact the loss of her father would have on her.

2 The FTT has erred in law at paragraph 34:

(i) By failing to recognise that family life cannot be continued by the occasional visit, email or skype (see *Mansoor v Secretary of State for the Home Department [2011] EWHC 832 (Admin)* at paragraph 16 per Blake J). It is accepted at paragraph 30 that the appellant is 'actively involved in her life through informal contact'. … the FTT erred in law by failing to assess the impact on the child's welfare of direct contact becoming indirect contact. Further of the contact being sporadic compared to the current contact which it was accepted takes place on an informal basis.

(ii) Further FTT at paragraph 34 states that contact can be maintained through electronic communication and 'occasional visits, perhaps annually'. It goes on to state that FTT were 'satisfied her co-operation can be secured' to facilitate such visits. … the FTT erred in law as no evidence was led on this point in Miss Kadlecova's statement and the only evidence available to the court, as detailed in paragraph 31, was from the appellant who, when asked, advised the court he had on such assurance. It is submitted that no assessment, apart from at paragraph 30, has been made of the impact of removing her father on Tiami's welfare or what considerations were taken account of.

3 The FTT has erred in law at paragraph 35:

(i) The FTT erred by referring to the appellant's removal as a 'fair balance between competing interests' and refers to the public interest in the maintenance of a fair and effective immigration policy. … those competing interests are not elaborated on or explained and that the evidence before the FTT was that the appellant had never breached Immigration Rules or overstayed on any of his previous student visas. … therefore it is not clear what those competing interests were when there was no adverse immigration history and clear evidence of a subsisting parental relationship with his daughter.

4 The FTT has erred at paragraph 33:

(i) By finding that the status of Miss Kadlecova is unclear. There was evidence submitted in the Second Inventory of Productions lodged with the court in the form of payslips of her previous employment and a letter confirming her current employment (At D of Second Inventory of Productions). … these documents illustrated she was exercising Treaty rights as a worker in terms of the EEA Regulations 2006 and therefore had the right to reside in the UK.

8. On 4 August 2015 First-tier Tribunal Judge Andrew granted permission, on the view that arguably insufficient consideration had been given to the best interests of the child, bearing in mind that regular direct contact would not continue.

9. In a Rule 24 response the respondent says that the judge identified all relevant circumstances regarding the relationship between father and daughter, noting that residence of mother and child was contingent on mother continuing to exercise her treaty rights in the UK, not being settled here, and that it would be perverse for the appellant to be granted discretionary leave in the UK outside the Rules on the precarious basis of his daughter's and her mother's residence, the judge having noted that they are both nationals of the Czech Republic.

10. In submissions Miss Beats said that the judge went wrong in finding that the child's best interests would be served in the new family unit, when there had been no oral evidence from the mother, only a written statement, and no evidence at all from her husband. There was no reason to assume that the situation would be in the child's best interests. It was accepted that the appellant has regular contact. No consideration was given to the replacement of ongoing direct contact with a relationship which would be indirect and sporadic. There had been no evidence that the child's mother would co-operate in respect of the child visiting Kenya.

11. I observed that the determination was not specific about whether it contemplated that contact would be by way of the child visiting Kenya, or only by the way of the appellant travelling to the UK. The latter seemed to be the more realistic possibility.

12. Miss Beats further submitted that there had been evidence of the child's mother being in employment, i.e. that she was exercising treaty rights at the time of the hearing, and that she had lived here for some years. Rather than the position being unclear, the gist of the evidence was that mother and child were likely to remain in the UK. Based on the best interests of the child in having an ongoing relationship with the appellant, the determination should be reversed.

13. Mrs O'Brien relied upon the Rule 24 response. She pointed out that everyone concerned in the case (appellant, child, child's mother, her husband) lacks settled status in the UK. The evidence was not there to show that the child's mother has consistently exercised treaty rights or that she could expect to be able to remain in the UK in the longer term. There was no evidence that she had obtained a residence card or that her husband was likely to be able to remain. Given the paucity of evidence, the judge was not wrong to find the position unclear. The judge plainly knew that the child was currently living with her mother, who has always been her primary carer, and with her husband. There was nothing irrational in inferring that the situation was likely to continue and was in the child's best interests. There was nothing to suggest to the contrary. The realistic outcome was that the appellant's departure from the UK

would result in weekly or fortnightly contact being replaced by contact on perhaps an annual basis.

14. Mrs O'Brien accepted my observation that there is a presumption that it is in the best interests of a child to have ongoing contact with both parents, and that regular and direct contact must be presumed to be more beneficial than contact which is mainly indirect and only intermittently direct. She said that the judge sensibly found that the appellant, who is well educated, would be able to afford to return to the UK to engage in contact. Finally, she submitted that although this may not have been a case with only one possible outcome, there was no error in the judge's assessment of the proportionality balance.

15. In reply, Miss Beats submitted that the child's mother had been in and out of employment but at the hearing she was employed again and there was nothing to suggest that would not continue, although she was pregnant. The evidence was also that she and her partner had applied for residence cards. The judge carried out no real consideration of the impact on the child of reduced contact. Miss Beats also accepted that this was not a case with only one possible outcome, but maintained her submission that the judge's assessment was legally flawed and should be reversed.

16. I reserved my determination.

17. Another judge might have inferred that mother and child, more likely than not, would continue to reside in the UK. However, their status is precarious rather than assured, which would have had to be taken into account. The point in my view was finely balanced. There is no legal error in the finding that it is *unclear* whether the child's mother will be able to satisfy the provisions of the regulations on which her status is contingent.

18. It was for the appellant to place before the tribunal the evidence to support any findings he sought. The judge had to reach his assessment on the evidence he had. On that evidence, there was nothing to suggest that the child's residence in a family unit with her mother and her mother's husband was in any way adverse to her interests. It was a situation accepted by the appellant and he has not suggested that there was anything at all wrong with it, or that it should not continue, wherever he is to reside. This aspect of the grounds is rather fruitless.

19. The judge did not fall into an error of the type described in *Mansoor*. He recorded the submission at paragraph 31 that indirect contact would continue, and he accepted that such contact would be maintained, but he did not consider that to be the equivalent of direct contact. The more important conclusion is that he held that occasional visits might continue, perhaps annually and that the child's mother would co-operate. On the state of the evidence, there could be no other reasonable inference than that she would co-operate with such contact in the UK. The possibility of contact in Kenya was not explored in the First-tier Tribunal and it is clear

enough that it is the possibility of contact in the UK which the judge had in mind.

20. The judge did not have to say anything further about the public interest in the maintenance of effective immigration control. That is well established by the case law, and confirmed by part 5A of the 2002 Act, section 117B (1).

21. The best interests of a child are a primary but not an over-riding consideration. The appellant's departure from the UK would diminish but not end direct contact between them. There was nothing to show that there would be any seriously adverse effect upon her if she saw less of her father to the extent the judge found. The obvious factors in the balance were on the one hand the public interest in maintaining the Rules, and on the other diminished but not extinguished contact between father and child. The determination makes it quite plain that is what the judge had in mind. Particularly given the immigration status of all parties, he was entitled to strike the balance as he did.

22. The appellant has failed to identify any error on a point of law which might justify setting aside the determination. It shall stand.

23. No anonymity order has been requested or made.

Upper Tribunal Judge Macleman

15 October 2015