IAC-BH-JLS-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32778/2014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Decision & Reasons Promulgated**
On 26 January 2016	**On 12 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

TAC
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Khan, Legal Representative of EU Migration Services
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I consider anonymity to be appropriate in this appeal as it covers the best interests of a minor who is a British citizen. Accordingly I make the following direction:

DIRECTION REGARDING ANONYMITY – RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction

applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the sake of consistency and to avoid confusion, I shall continue to refer to the parties as they were before the First-tier Tribunal. At the initial hearing of this appeal before the First-tier Tribunal on 17 August 2015 I reached the conclusion that the decision of the First-tier Tribunal contained errors on points of law for the reasons given in my decision sent out on 11 September 2015 which I now repeat below also setting out the background to the appeal:

"**Background**

1. On 25th June 2015 Judge of the First-tier Tribunal Shimmin gave permission to the respondent to appeal against the decision of Judge of the First-tier Tribunal A J Parker in which he allowed the appeal, under the Immigration Rules and on human rights grounds under Article 8, against the decision of the respondent on 14th July 2014 to refuse asylum, humanitarian and human rights protection to the appellant, a citizen of Zimbabwe.

2. It should be noted that this appeal arises from the respondent's rejection on 14 July 2014 of submissions by representatives on 18th December 2010 making asylum and human rights claims. Although the appeal bears the designation "IA" it should, more properly, have been classified as an asylum appeal.

3. In the grounds of application the respondent took issue with the judge's conclusions about the application of Appendix FM and paragraph 276ADE of the Immigration Rules and the Article 8 claim generally. No issue was taken with the judge's rejection of the appellant's claim to be a refugee or to be entitled to humanitarian protection or at risk of infringement of his rights under Articles 2 and 3 of the 1950 Convention. The grounds contend that the judge erred in making favourable conclusions about the alleged cohabitation of the appellant with his partner, Ms S H. In particular it is submitted that the judge failed to give adequate reasons for finding that Ms SH was credible and failed to take into consideration negative credibility findings made by the Tribunal in a decision of Judge (then Adjudicator) Telford sent out on 27th September 2002. In particular the judge failed to resolve a significant difference in the date of the commencement of cohabitation given by the appellant and that by Ms SH. It is also suggested that the judge failed to apply the relevant burden and standard of proof.

4. Judge Shimmin gave permission on the basis that all of the above points were arguable.

Error on a Point of Law

5. I heard submissions from both representatives after which I concluded that the decision showed an error on a point of law although only in relation to the judge's conclusions about the application of the Immigration Rules and Article 8. The submissions made in respect of the application and my reasons for reaching the conclusions now follow.

6. Mr Khan indicated that the appellant had submitted a response to the grounds of application but was unable to provide me with a copy. The response is not included in the bundle of documents submitted by representatives on 3rd August 2015. Mr Khan confirmed that the appellant did not take issue with the dismissal of the asylum and Articles 2 and 3 claims.

7. He proceeded on the basis that the judge's findings in relation to family life issues could stand. He drew my attention to paragraphs 12 and 16 of the decision in which the judge refers to the appellant's partnership with Ms SH and also the reasoning for accepting the relationship as set out in paragraph 26. He also thought that the judge's conclusions about letters from the appellant's daughter's mother were adequately reasoned in paragraph 28. He believed the conclusion in paragraph 30 about the relationship between the appellant, his claimed partner and the appellant's child was also one open to the judge for the reasons given.

8. Mr McVeety confirmed that the respondent relied on the grounds. He asserted that the judge had not given any material consideration to the application of the Immigration Rules. He drew attention to the conflicting evidence in paragraph 29 about the appellant's claimed relationship with his daughter which was directly contradictory to the positive findings made in relation to the issue. Reasons for dismissing those matters had not been given. Mr McVeety also drew attention to the conflict between paragraphs 31 and 32 of the decision. In the former the judge reached the conclusion that the appellant could succeed under the parent route in Appendix FM yet, in the latter, he dealt with Article 8 on the basis of the welfare of the child. No adequate reasons had been given for the conclusion under the Rules.

9. Mr Khan concluded by indicating that, if an error was found ,he believed that the issues relating to family life should be dealt with in the Upper Tribunal. He also stressed that he believed the judge was not in error in making positive credibility findings in the absence of documentary support.

10. Whilst I am satisfied that the decision dismissing the refugee and humanitarian protection claims can stand, this being conceded by Mr Khan, the judge's handling of the appeal under the Immigration Rules and on Article 8 grounds outside them is confused and inadequately reasoned.

11. As to credibility issues the judge acknowledges, throughout the decision, inadequacies in the evidence of the appellant and Ms SH. For example relating to the date of commencement of the relationship. However the judge gives no reason for accepting the parties' other evidence despite the significant inconsistency. Further, in relation to letters from the appellant's daughter's mother he acknowledges that signatures might be different and cannot explain why the mother produced an old passport considerably predating the letters. Whilst the judge reaches the conclusion that he cannot make a finding of fraud or falsehood in relation to the letters he does not explain why they should not be regarded as unreliable applying the guidance set out in *Tanveer Ahmed* [2002] UKIAT 00439. Nor does the judge give reasons for his conclusion that the appellant exercises "quality contact" with his daughter when there is no evidence that he is

known to the school or the general practitioner to whom the appellant had written.

12. Against the background of inadequate reasoning the judge reaches the conclusion that, under the provisions of paragraph E-LTRPT.2.4(a), the appellant can succeed because of his relationship with both his partner and his child. However, the judge applies no analysis of the relevant rules in Appendix FM. For example, the judge does not consider whether the application falls for refusal under S-LTR or meets all of the requirements of paragraphs E-LTRP.2.2-2.4 and 3.1. Nor is there any consideration of the application of EX.1 in conjunction with the other Rules. The judge's consideration of Article 8 family life issues taking into consideration the best interests of the child is also flawed because of the failure to consider the provisions in Section 117B of the 2002 Act (as amended) and the issue of whether or not it would be reasonable to expect the child to leave the United Kingdom.

13. For the reasons I have given the decision therefore shows errors on points of law in relation to the judge's findings of fact and consideration of the application of the Immigration Rules and human rights outside them."

3. At the resumed hearing the appellant gave evidence adopting, as evidence-in-chief, his statement which commences on Page 2 of the supplementary bundle submitted by representatives on 15 January 2016. In this the appellant confirms the details of his daughter, Ms TC born on the 5th November 2007 as a result of his relationship with his ex-partner, Ms KS, who is a British citizen. They have joint parental responsibility for his daughter also a British citizen, making major decisions regarding her upbringing.

4. The Appellant also claims to have established a genuine and private family life with his partner, Ms SH, a British citizen born on 12 January 1990 with whom he has been living since 16 June 2012.

5. As far as his background is concerned he states that he came to the United Kingdom on 19 January 2002 and claimed asylum. However the claim was refused on 24th April 2002 and his subsequent appeal against that decision was dismissed. He made a human rights claim on 21 August 2003 and was given six months leave to enter expiring on the 2nd December 2005.

6. In oral evidence the appellant claimed that his relationship with his partner and his child has strengthened. He would like to marry his partner but states he is not permitted by the respondent to do so at present. So far as his daughter is concerned, he attends parents evenings and other events at his daughter's school. He buys her clothes and toys. He draws attention to the school report on his daughter dated July 2014 and copies of the test report relating to his daughter. There are also copies of orders and receipts for books purchased for his daughter in 2015. On page 14 is a letter from his daughter's GP in which there is confirmation of receipt of his daughter's birth certificate naming him as the father and acknowledging his contact details to be used by the practice. His daughter is not stated to have any significant clinical diagnoses, allergies or dietary requirements. The letter is dated 22 April 2015. There are also clothing receipts for children's clothes bearing the

appellant's name. On pages 26 to 29 inclusive of the supplementary bundle are also photographs of the appellant, his daughter and partner.

7. The appellant asserted that his daughter could not follow him to Zimbabwe as her mother would not allow it and there would be risks to her living in the country. He points out that his daughter is now eight years of age and is settled and established in the United Kingdom.

8. During cross-examination the appellant pointed out that his daughter's school contacts him when she goes on trips so that he knows what is going on. His daughter's mother is also contacted. He conceded that he has no documentation from the school to confirm they contact him but emphasised that they have done so. He indicated that his former partner and mother of his child had not attended to give evidence but drew attention to a letter from her of 29 July 2015 which sets out, in detail, the arrangements for his contact with his daughter which is as follows:

    (i) Saturday from 11am to Sunday 2pm during school term time;

    (ii) School holidays have to be arranged days before;

    (iii) All visits and activities are supervised by the appellant's mother at her house in Nottingham.

9. The remainder of the letter confirms that access on the basis set out above has been exercised and Ms KS says that the appellant is a "good dad" to his daughter and "I cannot stop his having time with his daughter".

10. The appellant stated that his former partner was not present at the hearing to give evidence as he had only learned of the hearing date in the previous week. He explained that the arrangement had always been for him to see his daughter at his mother's house as his former partner trusts this arrangement.

11. The appellant was asked why he had previously made errors in the dates given about his relationship with his present partner. He said there was a misunderstanding but he had moved to her house on the 16th June 2012. His present partner is a support worker in Nottingham dealing with people with learning disabilities.

12. During re-examination the appellant indicated that those attending the previous hearing in the First-tier Tribunal were his partner's mother and his partner. His mother did not attend on that occasion because of her work schedule. At that time he had not thought it was necessary for his mother to attend. He also pointed out that his former partner has another child and thus found it difficult to attend a hearing.

13. Ms SH then gave evidence adopting, as evidence-in-chief, the content of her statement which commences on page 4 of the supplementary bundle. In this she confirms that she has been living with the appellant in the same house since 16 June 2012 in a relationship akin to marriage. She refers to written personal letters she supplied to confirm her relationship. She did not think that these had been considered by the respondent. She stated that, because of her partner's uncertain immigration status, it was not possible for him to register with utility providers and he

had not been able to open a bank account. She drew attention to the fact that the First-tier Judge had given reasons for regarding their relationship as genuine.

14. Ms SH also asserted that the appellant has a strong relationship with his daughter in respect of whom he takes major decisions about her upbringing in conjunction with his former partner.

15. In oral evidence at the hearing Ms SH stated that her partner maintains regular contact with his daughter and had spoken to her GP about her. She stated that she goes to the appellant's mother's house when his daughter visits. They have also taken his daughter out to visit the appellant's sister. She tries to follow a parental role with her partner's daughter. She believes that, if the appellant is removed, this would break up their relationship. She could not live in Zimbabwe particularly since she is about to complete her qualification as a social worker. She wants to marry the appellant and continue her relationship with him here.

16. During cross-examination Ms SH confirmed that she has no health problems. When asked what decisions the appellant made about his daughter she said that he is concerned with her schooling and attends parents' evenings. He is concerned about her medical health. He has bought her books and clothes and speaks to her on the phone almost daily. She pointed out that the appellant's daughter had moved school and he had adopted a similar approach at her previous school.

17. Ms SH said that her mother had not attended the hearing but drew attention to the hand-written letter from her mother dated 26 January 2016 in which she explains why she could not attend the hearing because of personal commitments and points out that she had attended the last Tribunal hearing when a statement was presented to confirm the relationship between the appellant and his daughter. She believes it is a sincere relationship. Ms SH said that a relationship with the appellant and her own career were important and she wanted to achieve these things together. She believes that the culture and lifestyle in Zimbabwe would be different for them and the appellant would lose his close relationship with his daughter.

Submissions

18. Mr McVeety first made submissions about the appellant's child's interests. He helpfully indicated that he accepted that the appellant's child could not go to Zimbabwe and that if the requirements set out in paragraph E-LTRPT2.4 were met on the basis that access rights had been shown and if the appellant had also shown that he would continue to take an active interest in his child, the appeal could be allowed.

19. As to the partnership claim Mr McVeety submitted that there was a lack of evidence of cohabitation and there had been previous confusion over dates. If such a relationships was shown then the provisions of paragraph EX.1.(b) would be relevant applying the "insurmountable obstacles" test. He questioned whether there were any obstacles that could not be overcome. Whilst it might be economically worse for the appellant and his partner to live in Zimbabwe that would not be such an obstacle. Further, as far as private life was concerned under paragraph 276ADE, the appellant could reintegrate into Zimbabwean society. He questioned whether there were any

compelling circumstances in the appeal justifying consideration of human rights issues outside the Rules.

20. Mr Khan relied on his written submissions. He expressed a view that the appellant could succeed under E-LTRPT2.4. He emphasised that the appellant took an active role in the upbringing of his child supported by the evidence of the appellant's partner.

21. My attention was drawn to the Upper Tribunal decision in *JA (Meaning of "access rights") India [2015] UKUT 225 (IAC)* summarised in Mr Khan's submission. That decision indicates that, whether or not an appellant will be able to show that he is taking and intends to continue to take an active role in his child's upbringing as required by E-LTRPT.2.4(A)(i), would depend upon the evidence rather than the nature of "access rights". In this respect he believed that the appellant's evidence combined with that his partner was sufficient to meet this burden.

22. As to the claimed partnership Mr Khan asserted that this is genuine, the parties having given consistent evidence now about their first meeting. He regarded Ms SH's need to complete her qualification and the difficulties of living in Zimbabwe as insurmountable obstacles to the continuation of the relationship applying the test set out in EX.2.. He also contended that, in accordance with paragraph 276ADE, the appellant should not be forced to live in the Zimbabwean culture having been in the United Kingdom since 2002.

Conclusions

23. In immigration appeals the burden of proof is on the appellant and the standard of proof is a balance of probabilities. I consider the evidence as at the date of hearing.

24. Mr McVeety has helpfully narrowed down the issues in this appeal in relation to the child and partnership issues. I deal, first, with the ability or otherwise of the appellant to meet the specific requirements of a parent of a British child set out in E-LTRPT.2.4 which stated at the date of the respondent's decision on 14 July 2014:

> "E-LTRPT.2.4
>
> (a) The applicant must provide evidence that they have either:
>
> (i) sole parental responsibility for the child; or
>
> (ii) access rights to the child; and
>
> (b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

25. I am satisfied, on a balance of probabilities, that the appellant has shown that he can meet the above provisions. My reasons for that conclusion follow.

26. Although it would have been preferable if the mother of the appellant's child had attended the hearing in person, there is a letter from the child's mother dated 29 July 2015 setting out very precise details of arrangements for contact between the appellant and his daughter along with a hand-written letter from the appellant's

partner's mother to confirm the ongoing nature of the partnership. Most importantly, I have heard the evidence of the appellant's partner, Ms SH, which, I accept, confirms the implementation of the arrangements set out in the letter from the appellant's former partner.

27. Whilst I accept that there has been some inconsistency in the past evidence of the appellant about the date of commencement of his partnership, I do not regard that as so significant as to require me to find the evidence of the relationship between the appellant and his daughter as unreliable and to dismiss the documentary evidence. I also take into consideration, in reaching my conclusions on this issue, the photographic evidence of purchases for the benefit of the child and, particularly, the correspondence from the GP confirming that the appellant is registered as a contact point in the case of medical emergency. Putting all of this evidence together I regard it as sufficient to meet the civil standard of proof to show that the appellant has an arrangement for and exercises access to his British child.

28. Additionally I must consider whether the appellant has also shown that, apart from the contact which he is already exercising, he intends to continue take an active role in his child's upbringing. I reach the conclusion that he does. Ms SH has confirmed in oral evidence that the appellant has exercised access, speaks to his daughter on the phone every day and takes an active interest in her education. Further Ms KS has said, in her letter, that the appellant "has always been proactive in [his daughter's] education often doing homework and educational activities with her on weekends". It is also clear that, as it has been necessary for the appellant's daughter to move to different schools in the last two years because of her mother's personal difficulties, the appellant has ensured that his daughter has access to educational material and assists her in her learning. Ms KS wants the appellant to have even more involvement in his daughter's education in the future.

29. For the reasons I have given I am satisfied that the appellant meets the requirements of limited leave to remain as a parent as set out in E-LTRPT particularly E-LTRPT.2.4. On this basis the appeal can be allowed.

30. As I am able to allow the appeal on the basis of the appellant's parental relationship with his child it is unnecessary for me to consider the partnership aspect to the matter. Nevertheless, for completeness,I should point out that I am satisfied having heard the evidence of Ms SH that the parties are in a genuine relationship. As previously indicated, I do not regard the previous inconsistencies in evidence about dates as significant and am able to rely upon the oral evidence of the partnership given before me. Thus, the test set out in EX.1.(b) is relevant. I have to consider whether there are insurmountable obstacles to family life with the partner continuing outside the UK. Insurmountable obstacles is defined in EX.2. as "very significant difficulties" which cannot be overcome or would entail very serious hardship for the applicant or their partner.

31. Bearing in mind that the respondent has accepted before me that the appellant's British citizen child, with whom he has a parental relationship, could not go to Zimbabwe and bearing in mind that I am satisfied that the appellant is entitled to leave because of that relationship I conclude that an insurmountable obstacle is created to the applicant going to Zimbabwe to enjoy his family life with his partner there. Further, I have to bear in mind that further obstacles exist in the form of the

appellant's partner's need to complete her professional qualifications and adapt to life in a different community. Thus, I am satisfied that the appellant is also entitled to leave as a partner.

32. As I am satisfied that the appellant is entitled to leave under the Immigration Rules on the basis of his relationship with his British child and British partner I allow the appeal on immigration grounds.

Decision

33. The decision of the First-tier Tribunal to dismiss the appellant's asylum and humanitarian protection claims shall stand.

34. The decision of the First-tier Tribunal in relation to the appellant's claim under the Immigration Rules contains errors on points of law. I remake that decision and allow it on immigration grounds.

Fee Award

As no fee was payable in this case I make no fees award.

Signed Date

Deputy Upper Tribunal Judge Garratt