



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14827/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21 June 2018

Decision & Reasons Promulgated
On 28 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

DENO [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel instructed by A & A Solicitors LLP

For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge Oliver promulgated on 27 November of 2017. The appellant is a Jamaican national, born on 14 August 1975, who has been in the United Kingdom since 2002. He has a daughter, [K], born on 9 February of 2009.
2. The appellant's immigration history is decidedly unattractive. He entered the United Kingdom as a visitor on 6 February 2002, and his leave expired on 2 August

2002. On 4 March 2010, he applied for indefinite leave to remain, which was refused on 1 September 2010. He was served with a removal notice on 13 January 2011, and his appeal from this was dismissed on 17 June 2011. His appeal rights were exhausted on 20 July 2013. There were then judicial review proceedings and the Secretary of State agreed to reconsider.

3. On 27 June 2014, the appellant applied for leave to remain, disclosing that he had applied for contact with his daughter. This was refused, there were further judicial review proceedings, and further reconsideration by the Secretary of State. The decision under appeal was eventually made on 27 May 2016. The judge records this at paragraph [3] noting that under the parent route in Appendix FM the appellant passed the suitability test but failed the eligibility test as he was in the United Kingdom in breach of immigration laws. Under the parent route, he did not have direct access to the child, being restricted to monthly written correspondence and occasional gifts. EX.1 was said not to apply because he did not have a genuine, subsisting relationship with his daughter, a British national who did not have to leave the United Kingdom.
4. The judge records a brief summary of appellant's evidence at paragraphs [5] to [7] of the decision, but rather unhelpfully does not set out those parts which he accepts and those which he rejects. There are no findings of fact as such, nor a finding that the totality of the appellant's evidence has been accepted wholesale. As Mr Karim, for the appellant, very fairly points out, the factual basis on which the judge purported to determine the appeal is far from clear.
5. Placing that deficit to one side for present purposes, the judge's conclusions are set out at paragraph [11]:

“He has no partner to consider under Appendix FM and his appeal rests almost exclusively on his claimed relationship with his child. She is British and there is no question of her having to leave the United Kingdom. Under the Rules the appellant does not meet the eligibility test because he does not have direct access and is present in the United Kingdom in breach of Immigration Rules. The final question for me is to balance her best interests under Section 55 against the public interest in his removal in the interests of the maintenance of fair but firm immigration. I have little if any evidence that he plays any significant role in his child's life and evidence that he has a very poor immigration history having played the system time and again for his personal advantage. I have no hesitation in finding that the public interest prevails.”
6. Permission to appeal was granted by First-tier Tribunal Judge Murray on 19 April 2018. This was principally by reference to Section 117B(vi) of the Nationality, Immigration and Asylum Act of 2002 and EX.1. The grounds of appeal were settled by Mr Karim, who has supplemented them in clear and focussed oral submissions.
7. Section 117B(vi) reads as follows (with emphasis added):

“In a case of a person who is not liable to deportation the public interest does not require the person's removal where:

- (a) The person has a genuine and subsisting parental relationship with a qualifying child and
- (b) It would not be reasonable to expect the child to leave the United Kingdom.”
8. Mr Karim submits that the judge failed to engage with the provisions of this section and address whether, in the fact-specific circumstances of this case, the indirect contact undeniably exercised by the appellant constituted, or was capable of constituting a “genuine and subsisting parental relationship”. Whilst in the paragraph quoted above, the judge makes a finding that the appellant “does not play any significant role in his daughter’s life” this finding does not (whether directly or by implication) address or resolve whether he has “a genuine and subsisting parental relationship” with her.
9. Mr Karim, in his grounds, cites **JA (meaning of “access rights”) India [2015] UKUT 225 (IAC)**. I have particular regard to paragraph 12 which reads:
- I accept that a parent who has “access rights” because he or she has a court order may not necessarily be taking “an active role in the child’s upbringing” but whether or not that is the case will depend on the evidence. It is not uncommon for a parent with a “spend time with” order to lose touch with a child entirely whilst a parent with an “otherwise spend time with” (i.e. “indirect” access) order may use it to take an active role in the child’s life; indeed, Immigration Tribunals have for years accepted the principle that a parent separated by thousands of miles from a child might yet exercise “sole responsibility” for the child’s upbringing. In the present case, it was not correct for the respondent and the judge simply to conclude, by reference only to the nature of the access court order, that a parent who is not actually having face to face access with his child cannot, by definition, be taking an active role in a child’s life.
10. There was some evidence before the First-tier Tribunal that the mother of the child may have been obstructive. Mr Karim has taken me to excerpts from the appellant’s witness statement and from the documentation attached to that. But, as I have already stated, there are no findings on the part of the First-tier Tribunal Judge as to the appellant’s credibility, the nature and extent of any obstruction on the part of the child’s mother, or whether the prospect of the nature and regularity of contact changing in the years ahead. Each and all of those matters merited investigation, and the judge failed to deal with them.
11. Although the judge makes reference to the best interests of the child by citing Section 55 of the Borders, Citizenship and Immigration Act 2009, his analysis in paragraph [11] goes no further than seeking to balance the daughter’s best interests against the public interest in the appellant’s removal. A fuller and more sophisticated consideration was required. The judge does not address whether the best interests would be served by overcoming the objections of her mother (if any be found) and increasing the extent of her contact with her father. There would be no prospect of enhanced interaction with the appellant were he to be returned to Jamaica, and this aspect of the case is not evaluated at all by the judge. Further the judge’s assertion in paragraph 11 that “I have little, if any, evidence that [the

appellant] plays any significant role in his child's life", is made in isolation and not by reference to the appellant's evidence that he has been frustrated by the child's mother from forming or developing a stronger paternal bond. It may be that the judge did not find the assertions of obstruction to be cogent or convincing, but as the judge made no findings, the parties are none the wiser.

12. For each and all of the foregoing reasons, the decision is unsatisfactory and must be set aside. The reader is left with the impression that the judge has not grappled with the facts nor with the law. The implication is that the judge considers that the appellant is using his daughter as a last ditch ruse to remain in the country when every other avenue has failed. This may well be the case and the appellant must be under any illusion that a rehearing will lead to a positive resolution. He is however, entitled, to have the matter determined by clear findings of fact based on a proper scrutiny of the case and the application of relevant principles of law.
13. As the judge's decision is so fundamentally flawed, it cannot be remade in the Upper Tribunal, nor can any aspect of it be preserved. It must be remitted to the First-tier Tribunal to be determined *de novo*.

Notice of Decision

1. The decision of the First-tier Tribunal is set aside;
2. Matter remitted to the First-tier Tribunal to be heard afresh by a judge other than Judge Oliver.
3. No findings of fact are preserved

Signed *Mark Hill*

Date

27 June 2018

Deputy Upper Tribunal Judge Hill QC