Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14870/2016**

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 22nd August 2018	**On 8th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR ISMAIL CEM DEMIRKAYA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representation
For the Respondent: Mr C Howells, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant born on 16th March 1978 is a citizen of Turkey. The Appellant had made application for further leave to remain in the United Kingdom in 2013. His application had been refused by the Respondent on 20th May 2016.

2. The Appellant appealed that decision and his appeal was heard by Judge of the First-tier Tribunal Widdup sitting at Hatton Cross on 11th August and 22nd September 2017. The judge allowed the Appellant's appeal under the Immigration Rules.

3. The Respondent had made application for permission to appeal. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison on 16th March 2018. It was said that it was arguable the judge had misdirected himself by failing to give adequate reasons why he found there was a genuine and subsisting relationship between the Appellant and his daughter. Directions were issued before the Upper Tribunal to firstly decide whether an error of law had been made and the matter came before me in accordance with those directions.

Submissions on Behalf of the Respondent

4. Mr Howells raised submissions in line with the Home Office application for grounds to appeal. It was submitted the judge did not have sufficient reasons for concluding there was a genuine and sufficient subsisting relationship and it was further an error of law for the judge to have found that the daughter was British. In that respect it was said that the judge had speculated on that matter. It was noted that the judge had given weight to a purported witness statement which was only on the Appellant's phone at the hearing with the author of the report not being present. There were further conflicts within the evidence referred to me in those submissions.

Submissions on Behalf of the Appellant

5. The Appellant was unrepresented. In order to assist him in terms of submissions I referred him to the matters raised by the Home Office. The Respondent said that the letter that he wrote on 1st November 2013 to the Home Office was truthful. He confirmed that his witness, namely his ex-partner had attended the first date of the appeal hearing but did not attend on the second date. He suggested that potentially the barrister had said that she did not need to attend. He said that he had attended himself as his lawyer wanted too much money.

6. At the conclusion I reserved my decision to consider the documents and submissions raised. I now provide my decision with reasons.

Decision and Reasons

7. The judge had noted at paragraph 1 that the Appellant had first arrived in the United Kingdom and claimed asylum. His asylum claim was appeal rights exhausted by September 2005. Thereafter he had made various applications prior to being granted discretionary leave to remain on the basis of family life with his partner Ms A, an EEA citizen (Spanish). That leave expired on 26th November 2013 and the appeal before the judge was the refusal of his application made on 13th November 2013 for further leave to remain. The Respondent's refusal was based upon evidence of the breakdown of that relationship with Ms A and the lack of evidence that he continued to have a genuine and subsisting relationship with the child of that relationship.

8. Paragraph 2 of the judge's decision indicates that the Appellant had thereafter presented further evidence in support of his right to remain in

the UK, but that was in respect of a different feature namely his claimed relationship with a Ms C. At the initial hearing date on 11th August 2017 the judge had been presented with an adjournment application to allow the Appellant to essentially advance three further claims; firstly a retained right of residence under EEA Regulations deriving from his former relationship with Ms A, issues allegedly arising under the Ankara Agreement and potentially issues arising from contact with his son by Ms C.

9. Initially the judge had declined the adjournment request but kept that decision under review and as noted at paragraph 18 had agreed to adjourn the case part-heard until 22nd September to give the Appellant the opportunity to file a full witness statement from Ms A, file his own witness statement and present any documents that he relied upon. The Appellant had therefore been given sufficient time, even at that late stage to present all the evidence he sought to rely upon in respect of any or all of the matters that he had raised.

10. The judge at paragraphs 19 to 39 had in summary form noted the evidence provided in this case. He had correctly identified at paragraph 41 that essentially there was no application under the EEA Regulations or the Ankara Agreement, and the summary of evidence disclosed that in any event there was no evidence in support of those matters even if they were before the judge on appeal. Essentially, the appeal rested on the basis of family life.

11. In that respect the core of that which the Appellant claimed rested on his alleged genuine and subsisting relationship with his daughter by Ms A and a son by a Ms C.

12. The judge had identified at paragraphs 48 to 49 the lack of evidence to demonstrate any family life with his son by Ms C and at paragraph 50 the fact that he had no family life with a partner. The judge was entitled to reach those decisions. Essentially therefore the judge was focused on whether the Appellant had a family life with his daughter by Ms A and whether, if it existed, the question of whether an interference with that family life was proportionate to the legitimate aim.

13. The judge had correctly, firstly considered, whether the Appellant met the requirements of the Immigration Rules in this respect.

14. The evidence available to the judge in respect of his family life with his daughter by Ms A was, despite the passage of time in the adjourned part-heard hearing, limited. Essentially, that which was available to the judge could be summarised as follows:

    (a) Letter from the Appellant dated 1st November 2013 stating that he split from Ms A in 2011 and whilst initially he had seen his daughter (born 2009) he had been stopped from seeing her.

    (b) Appellant's witness statement (undated) within the Appellant's bundle stating his daughter had dual Spanish/British nationality and that he

was involved in her upbringing and regularly financially supported his daughter through Ms A.

(c) Copy daughter's Spanish passport and her birth certificate.

(d) Unsigned witness statement from Ms A received on 11th August 2017 and containing blank spaces.

(e) A signed copy of that witness statement seen by the judge on the Appellant's mobile phone on 22nd August 2017.

15. The judge concluded from the evidence available that the Appellant met the requirements of Appendix FM EX.1.(a) as he had a genuine and subsisting relationship with his daughter. The judge had further noted at paragraph 74 however that the crucial question to succeed under EX.1 in this case was whether she was a British citizen. He gave reasons at paragraphs 74 to 75 why he found that to be the case and therefore found all aspects of EX.1 met and allowed the appeal under Appendix FM of the Rules.

16. The judge was required to give adequate reasons for concluding there was a genuine and subsisting relationship and that the daughter was a British citizen and therefore the Appellant fulfilled the requirements of EX.1. Within the decision the judge had noted what was absent from the body of evidence available to assist him in reaching a decision. He did not have any independent evidence concerning the relationship between the Appellant and his daughter such as school, medical or other individuals providing any form of witness or documentary evidence. Ms A had never given evidence, although she appeared at the first hearing on 11th August 2017. She did not appear at the renewed hearing date on 22nd September 2017. The Appellant had not produced as directed a signed witness statement from her and the draft witness statement produced in August 2017 had not been signed by her in hard copy but only, it would appear, on the Appellant's mobile phone on 22nd September 2017 but on a time when she was not present.

17. Further, there appeared inconsistencies between the date when the parties separated. The Appellant had claimed that to be 2011 and by 2013 (when he wrote his letter to the Home Office) he had been stopped having contact with his daughter by Ms A. Her draft witness statement however suggested the relationship ended in 2013 but had kept in regular contact for the sake of the daughter with no suggest that she had prevented the Appellant having contact at any stage.

18. In terms of nationality the daughter's passport had been produced (issued in 2009 and expired in 2011) and that was a Spanish passport. No other passport or identity document had been produced. The Appellant and Ms A had both described the daughter as having dual Spanish/British nationality in statements. The judge had noted at paragraph 74 the Appellant's oral evidence that his daughter was a British citizen (no reference to dual nationality) and that the Appellant had based his

assertion for that fact upon the fact that his daughter be born in the UK. Therefore, the judge had at paragraph 75 said as follows,

> "It would also appear that she had lived in the UK since 2006 or earlier. If she had been exercising treaty rights for long enough to obtain permanent residence rights her daughter would be British. I find therefore that the Appellant's evidence of this is credible and I accept that the daughter does have British citizenship".

19. The core issues for the judge to determine in light of his finding that the Appellant was entitled to remain under EX.1.(a) was whether he had a genuine and subsisting relationship with his daughter, whether she was a British citizen (given she had not lived in the UK for seven years at the date of application), and whether it could be reasonable to expect her to leave the UK.

20. In respect of the first two questions the judge was presented with little or no independent evidence and further presented with conflicting evidence from the Appellant and his ex-partner. He was missing key and one would have thought easily obtainable documentary evidence, (particularly given the time allowed to the Appellant) and the absence of the mother as a key witness. In all the circumstances the reasons given by the judge in respect of the first question were not adequately set out. In respect of the second question the conclusion reached by the judge was based to a large, if not exclusive extent, on speculation rather than evidence.

21. The lack of adequate reasoning in a case of this nature, when set alongside the ample opportunity given to obtain evidence, does mean that a material error of law was made by the inadequacy of the reasoning provided by the judge such that the decision is unsafe and does require to be made afresh.

Notice of Decision

22. I find that a material error of law was made by the judge in this case and I set aside the decision of the First-tier Tribunal and direct that a fresh decision should be made in the First-tier Tribunal.

No anonymity direction is made.

Signed J. Lever Date 1/10/2018

Deputy Upper Tribunal Judge Lever