Upper Tribunal
(Immigration and Asylum Chamber)
Appeal Number: HU/24178/2016

Tribunals Service
Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Bradford IAC	**Decision Promulgated**
On 25th April 2018	**On 01st May 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

THM
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of South Africa born in 1983. He appeals with permission the 2nd May 2017 decision of First-tier Tribunal Moxon to dismiss his human rights appeal.

Anonymity Order

2. This appeal concerns a British child. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst

others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Background and Matters in Issue

3. The Appellant, it is accepted, has lived in the United Kingdom since 2006 when he was given leave to enter as a working holidaymaker. His leave expired in March 2008 and he overstayed. In 2012 he applied for leave to remain as the spouse of a British national, CM. It was granted so that he had valid leave until the 27th September 2015. He was subsequently granted a further period of leave, on a discretionary basis, until March 2016. This was because although his marriage to CM had ended, he was pursuing proceedings in the Family Court so that he could retain contact with his daughter. N. N is a British national who was born in April 2013. On the 16th March 2016 he made a further application for leave. This was refused on the 3rd October 2016 and it is that decision that is the subject of this appeal.

4. The Respondent refused to grant limited leave because the Appellant had failed to provide any up to date evidence from the Family Court, or a sworn statement from CM that he was continuing to see N. He had failed to provide "compelling evidence" that he was pursuing matters in the Family Court. He therefore failed to meet the relevant requirements of Appendix FM in relation to 'leave to remain as a parent'. In the absence of evidence that the Appellant had a family life in the UK the Respondent refused to consider the matter under Article 8. Furthermore the application fell to be refused on 'suitability' grounds because in October 2014 the Appellant had been convicted of assault occasioning actual bodily harm and attempting to pervert the course of justice and had been sentenced to ten months in prison: the refusal to grant leave was therefore conducive to the public good.

5. When the matter came before the First-tier Tribunal, therefore, the matters in issue were as follows:

    i) Could the Appellant meet the requirements under Appendix FM? In particular:

        - was it "conducive to the public good" that leave be refused because of the conviction, having regard to law and policy?

        - was he able to satisfy E-LTRPT.2.4(a)(ii) that he had "direct access" to N, or E-LTRPT.2.4 (b) that he was taking, or intended to continue to take, an "active role" in her upbringing".

    ii) Was Article 8 engaged? In particular:

        - did the Appellant enjoy a family life with N?

- would refusing him leave interfere with that right?

iii) If the answer to the questions in (ii) was affirmative, could the Respondent show the interference to be justified?

In assessing the question of proportionality the Tribunal was bound to consider the public interest factors set out at s117B of the Nationality, Immigration and Asylum Act 2002. For the purposes of this appeal the most pertinent of these was s117B(6), which required the Tribunal to consider whether there was a genuine and subsisting parental relationship with N, and whether it would be reasonable to expect her to leave the UK. In the assessment of reasonableness the Tribunal was obliged to weigh the public interest as expressed at s117B (1)-(5) and in this case, the matter of the conviction.

6. The Tribunal found against the Appellant on the matter of 'suitability'. The circumstances of his conviction were that in 2014 he had assaulted his then wife CM, including by putting his hands around her neck and attempting to strangle her. The Tribunal noted that in his live evidence the Appellant had sought to minimise the seriousness of the assault by omitting to mention that he had had tried to strangle his wife. He had told the Tribunal that he had hit her. This effort to mislead the Tribunal cast significant doubts over the assertion that he had been rehabilitated and was remorseful, notwithstanding the positive indications in that regard arising from his guilty plea, his completion of a Domestic Violence Perpetrator Programme (DVPP) and the fact that CAFCASS and the family court had latterly been satisfied that he should be permitted to see his daughter.

7. That finding meant that the Appellant could not hope to succeed under the Appendix FM 'leave to remain as a partner' route.

8. The Tribunal therefore turned to consider whether the Appellant enjoys a "genuine parental relationship" with his daughter. The evidence he had produced in the way of court orders and CAFCASS reports were now of "some age". There was no independent evidence to corroborate his claim that he ever gave CM money towards his daughter's upkeep. CM had written two letters herself to confirm that the Appellant spends time with their daughter but these were undated and not supported by any up to date additional material from the parties' respective solicitors. Those letters that there were from the lawyers, detailing contact, were again of "some age". One of the court orders had specified that if the child were to be permitted to stay with the Appellant he would have to provide a written agreement (presumably from the landlord) and photographs of the house. These had not been produced and the Tribunal inferred from that that she had not in fact stayed with him. The Appellant had provided no

reasonable explanation of why he had moved to Bradford when his daughter and CM live in Lincolnshire. CM did not attend the hearing and there was no reasonable explanation why. The weight to be attached to her letters in support was therefore reduced. At the same paragraph the Tribunal states that it cannot be satisfied that the letter was reliable. The Appellant had produced various train tickets to support his claim that he had been to Lincolnshire to visit his daughter but these were "not determinative". He had also produced photographs of himself with a young mixed race girl who appeared to be the same age as his daughter but these were not determinative. The Tribunal only had the Appellant's word for it that these pictures showed him and his daughter and "not another young female". The Appellant had submitted the accounts of an ISA that he said he had started to save for his daughter's first car but this could have been set up simply to pursue this application. Taking all of this together the Tribunal could not be satisfied that there was a genuine and subsisting relationship and the appeal was thereby dismissed.

9. The Appellant, who is unrepresented, sought permission to appeal on the grounds that he had not understood what he was required to produce by way of evidence. He protests that he does have a genuine parental relationship with N and that given the chance he could have produced evidence of the same. He believes that she has the right to have a father.

10. Permission was granted by First-tier Tribunal Judge EB Grant who considered it arguable that there was procedural unfairness in respect of the photographs. The Tribunal rejects the evidence that the girl shown was the Appellant's daughter but it is not clear why and moreover the point was not put to the Appellant. Further Judge Grant considered it arguable that the Judge had erred in failing to consider relevant caselaw, in particular JA (meaning of 'access rights') India [2015] UKUT 00225 (IAC).

11. Before me Mr Diwnycz accepted that both the potential errors identified by Judge Grant were made out and that the matter should be remitted.

Error of Law

The Photographs

12. The Appellant had produced a large bundle of photographs. All depict what appears to be the same mixed-race girl at various stages of her life. In many she is shown with the Appellant. There are pictures of the Appellant and the child a petting-zoo. He is showing her sheep; she appears to be about 2 years old. In some they are eating together or he is holding her. Others show him pushing her on swings, taking her swimming, her at the fairground, in a park, eating pizza, at home playing with toys, playing pinball, driving what appears to be a tractor, and in a ball park. It is apparent from the child's

clothing, development and hairstyles that these were all taken on different occasions. In one she is wearing a red football shirt with her name written on the back.

13. What the determination says about these photographs, and in particular the one showing the personalised football shirt, is that they are "not determinative". I note that this phrase appears twice in paragraph 46, also in relation to the train tickets produce showing travel between Bradford and Lincolnshire as recently as two weeks before the Tribunal hearing. It is of course the case that the evidence does not have to be "determinative" to attract weight. The Tribunal goes on to say that it only has the Appellant's word for it that this is his daughter as opposed to "another young female". Mr Diwnycz was as puzzled by that reasoning as I was. It was not apparent from the determination that the HOPO on the day had challenged the Appellant's evidence that this was in fact his daughter. If the Tribunal rejected that evidence it had to give some reasons as opposed to simply suggesting that it *might* be another random child.

The Evidence of Relationship

14. The Appellant had *inter alia* produced the following evidence of contact with his daughter:

- Seven Court Orders made by the Family Court in Lincoln between October 2014 and March 2016 showing that the Appellant had attended every hearing in respect of his daughter, and that he had co-operated with the previous orders as to indirect contact and the requests of CAFCASS

- The last order on file, dated 8th March 2016, was made by District Judge Cooper. It records that the Appellant had completed the DVPP course and that the parties had reached agreement that the child would remain living with her mother but would have direct contact with her father. Judge Cooper records CM's consent to N staying overnight with her father in Bradford, subject to his consent and understanding that this would need to be at N's pace and CM being satisfied as to the suitability of his accommodation. The Order further records that the Appellant shall not bring N into contact with any new partner without CM's consent. CM expressly consents for the child having contact with the Appellant's friends.

- A CAFCASS report written for the family court on 8th February 2016

- A handwritten letter purporting to be from CM stating that N sees her dad regularly and "absolutely loves"

staying with him every few months when she is "very well looked after and spoilt rotten" by him

- The photographs (see above)

- A number of train tickets showing journeys made between Bradford and Boston, Lincolnshire

- A number of letters from CM's solicitors confirming that items he had sent to the child had been passed on, and enclosing photographs and updates about N's progress.

15. Having directed itself to that evidence the Tribunal concluded, at paragraph 51:

> "Taking all of the evidence into account, particularly the adverse credibility findings and the lack of compelling evidence of the Appellant's continuing involvement in his daughter's life, I am not satisfied that he has such involvement. I am not satisfied that he has any or any intention to play an active role in her life and I find that his assertions to the contrary are a fabrication to seek unmeritorious leave to remain in the UK".

The adverse credibility findings were, as I understand it, the Appellant's attempt to minimise the severity of the assault on his former wife.

16. What concerned Judge Grant, and Mr Diwnycz, about that reasoning was that the Tribunal had failed to take into account the guidance in JA (India) in respect of the assessment of family relationships and what the term "access rights" might include. In that decision Upper Tribunal Judge C Lane had held that term to include 'indirect' access such as letters and presents – evidenced as having occurred in this case from the letters of the family solicitors.

17. What concerns me is altogether more fundamental. This was a case where the Appellant had already been granted limited leave to remain because he was pursuing the case before the Family Courts to be permitted to see his daughter. All of the evidence that there was pointed one way: that he had been taking an active interest, that access had been limited, at least until he completed the DVPP, to "indirect" access, but since at least March 2016 he had been permitted to have direct access to his daughter, with the express consent of CM. The primary reason given for rejecting the Appellant's contention that this arrangement continued to the present day was that the last court order was of "some age". True it was over a year old at the date of the hearing, but it was evident from the face of the order that there was at that stage no further need for involvement from the court, since the parties had reached agreement

as to the dates, times and conditions attached to the Appellant's direct contact with N. There is no requirement in the rules that any order be dated within a certain period of the decision. It would be an odd and impractical requirement if persons in the position of this Appellant were required to return to the Family Court seeking 'up to date' orders simply for the benefit of this Tribunal. Apart from anything else it would place an unreasonable burden on that Court.

18. Weight is classically a matter for the fact-finding Tribunal, and on appeal it would normally be the case that perversity would need to be established in order to interfere with conclusions as to weight. That is a high test. It is one that I find, in the absence of any logical reasons why the evidence adduced by the Appellant was rejected, to be met. Even discounting the unsworn and undated letter from CM the Appellant had supported his evidence that he had continued to see N with the photographs and very up to date train tickets which are rejected for no other reason than that they are "not determinative". The import of the First-tier Tribunal's conclusion is that this Appellant, having diligently pursued the case through the family courts for two years has not bothered to see his daughter at all, but has spent alternate weekends travelling to Boston by train, and taking pictures with another child, all to make it look like he has. In the absence of any countervailing evidence, or any indication that he is lying about the visits, I am bound to find that this was not a conclusion within the range of reasonable responses.

The Re-Making

19. Given the nature and extent of the fact finding required I find, with the consent of the parties, that the most appropriate disposal would be for this matter to be remitted to a First-tier Tribunal other than Judge Moxon. The matters in issue remain those matters set out at my paragraph 5 above.

20. I note that in his application for permission to appeal the appellant submitted further evidence including a letter from the Accommodation Manager at his flats confirming that the Appellant has the landlord's permission for his daughter to stay there and that the manager, Mr Jonathan Leonard, has seen the child in the building, and met her, on several occasions. That evidence is formally admitted. I note that the Appellant undertook to copy, file and serve a new bundle of evidence upon the Tribunal and Respondent.

Decisions

21. The decision of the First-tier Tribunal is set aside for error of law.

22. The decision in the appeal will be remade following a fresh hearing in the First-tier Tribunal.

23. There is an order for anonymity.

Upper Tribunal Judge Bruce
25th April 2018